

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

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**CO-PROSECUTORS' RESPONSE TO CASE 002/01 APPEALS**

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## I. INTRODUCTION

1. This appeal response concerns the conviction of two of the most senior leaders of the Khmer Rouge for crimes committed against millions of Cambodians. The Appellants, Nuon Chea, “Brother Number Two”, and Khieu Samphan, former DK Head of State, were leading members of the inner decision-making circle of the Khmer Rouge throughout the three years, eight months and 20 days that the DK regime terrorised the country.

2. The Co-Investigating Judges investigated the allegations for three years before issuing an indictment on 15 September 2010, charging Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith, with genocide, crimes against humanity, and war crimes. Before the commencement of the trial, the Chamber found Ieng Thirith unfit to stand trial and eventually released her from custody. Concerned with the advanced age of the victims and the Appellants, and cognisant of the immense breadth and complexity of the case, the Chamber ordered that the charges be severed and adjudicated in separate sequential proceedings. Ieng Sary died before the trial ended.

3. This is the Co-Prosecutors’ response to the Appellants’ appeals of the Judgment issued following the first trial proceeding (“Case 002/01”), Nuon Chea and Khieu Samphan appeal their convictions for the crimes against humanity of persecution, extermination (including murder), and other inhumane acts (comprising forced transfer, enforced disappearances and attacks against human dignity) associated with the expulsion of Phnom Penh’s population following the capture of the city on 17 April 1975, a second forced transfer of the population between rural areas in the first years of the regime, and the massacre of former soldiers and officials of the Khmer Republic government at Tuol Po Chrey in late April 1975.<sup>1</sup> Given the enormity, gravity and brutality of these crimes the Chamber sentenced both Appellants to life imprisonment.

4. In coming to its Judgment, the Chamber examined the evidence in detail in a thorough and fair process. The Appellants were represented by able teams of Cambodian and International lawyers of their choosing, paid for by the ECCC. Over the course of 214 trial days an immense amount of evidence and voluminous submissions were presented in the case. The transcripts of the proceedings totaled approximately 25,000 pages, and 5824 documents were admitted into evidence, including thousands of contemporaneous documents from the DK period. The Chamber heard 92 witnesses, including numerous former Khmer Rouge cadres, expert witnesses,

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<sup>1</sup> Judgment, paras 940-942, 1053-1054.

and foreigners who were eyewitnesses to the events, and admitted 1,124 written statements and transcripts<sup>2</sup>. Both Khieu Samphan and Nuon Chea were allowed to comment on the case and both did so extensively in the opening statements, closing oral submissions, and during the course of proceedings. Nuon Chea further availed himself of the opportunity to give limited testimony in his own defence.

5. Together, Nuon Chea and Khieu Samphan have asserted over 370 grounds of appeal,<sup>3</sup> in a combined 480 pages of briefs,<sup>4</sup> but have failed to substantiate a single error that could invalidate the Judgment or occasion a miscarriage of justice. Their Appeals are replete with arguments that are misleading and mischaracterise either the Chamber's findings or the evidence upon which it relied, or set forth arguments rich in hyperbole, but devoid of substance.

6. The lack of any meritorious arguments is perhaps best revealed in Nuon Chea's final plea.<sup>5</sup> Nuon Chea, who supervised S-21 during its most deadly period, asks this Chamber to allow him to use "torture-tainted" evidence, which he says is "critical to his defence" in Case 002/02.<sup>6</sup> He seeks to justify the mass killings and other crimes committed by his cruel and paranoid regime using statements forced from victims through beatings, degradation, starvation, and electrocution. Nuon Chea's resort to manifestly unreliable "torture-tainted evidence" is a testament to the lack of any real evidence to support his claims. Adopting his argument that the law should allow those who inflict torture to use the "confessions" they coerce from their victims to justify extrajudicial killings would encourage torture. His thesis is legally specious and morally bankrupt.

7. The Appellants seek full acquittals, but fail entirely to fulfill their burden of demonstrating error that merits reversal of their convictions. For the reasons discussed below, the Co-Prosecutors respectfully request that this Chamber affirm the convictions and life sentences.

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<sup>2</sup> Judgment, para. 32.

<sup>3</sup> See NC Notice; KS Notice.

<sup>4</sup> NC Appeal; KS Appeal. This figure is an estimate of the number of appeal grounds, as Khieu Samphan filed an appeal brief not correlated in any way to his Notice of Appeal. The estimate is made by counting each paragraph in his notice as a single ground of appeal, although some paragraphs appear to contain multiple complaints.

<sup>5</sup> NC Appeal, paras 706-722.

<sup>6</sup> NC Appeal para. 722.

## II. STANDARD OF REVIEW

### A. The SCC set forth the correct standard of review on appeal

8. The SCC correctly set forth the standard of review on appeal at the ECCC in the *Duch* Appeal Judgment. Nuon Chea challenges this standard, arguing that the SCC may assess the Chamber's factual findings in a trial judgment *de novo*.<sup>7</sup>

9. It is well-established that departure from a previous decision should only occur in exceptional circumstances and only after “the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts”.<sup>8</sup> A party seeking a departure from a previous determination has the burden of demonstrating that there are cogent reasons that justify such a departure.<sup>9</sup> Cogent reasons include situations where a previous decision was made “on the basis of a wrong legal principle” or given *per incuriam*, that is, “wrongly decided, usually because the judge or judges were ill-informed about the applicable law”.<sup>10</sup> Nuon Chea fails to provide cogent reasons for the SCC to depart from the holding in the *Duch* Appeal Judgment setting forth the standard of review on appeal.<sup>11</sup>

10. Contrary to Nuon Chea's contention, in the *Duch* Appeal Judgment the SCC did consider Cambodian criminal procedure. However, applying Article 12(1) of the ECCC Agreement, the SCC determined that the procedure applied in Cambodian courts cannot be applied without modification to the very different appeal process established by the ECCC Agreement and ECCC Law.<sup>12</sup> The SCC thereafter correctly determined that it may seek guidance “in procedural rules established at the international level, including their interpretation by relevant international judicial bodies”.<sup>13</sup> Nuon Chea's alternative interpretation of the ECCC Agreement does not constitute cogent reasons that would justify a departure from the SCC's determination in the *Duch* Appeal Judgment.

11. Nuon Chea's assertion that the trial proceedings at the ECCC differ significantly from cases

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<sup>7</sup> NC Appeal, para. 6. While Khieu Samphan does not make specific arguments in support of this issue, the arguments raised throughout his appeal brief in practice invite the SCC to conduct a review *de novo* with respect to alleged errors of fact. See, e.g., KS Appeal, paras 120-645. Arguments on this basis should be summarily dismissed.

<sup>8</sup> See *Dorđević* AJ, para. 23, citing *Aleksovski* AJ, para. 109.

See *Dorđević* AJ, para. 23, citing, *inter alia*, *Krajišnik* AJ, para. 655; *Galić* AJ, para. 117.

<sup>10</sup> See *Dorđević* AJ, para. 23, citing *Aleksovski* AJ, para. 108.

<sup>11</sup> See *Dorđević* AJ, paras 23-24.

<sup>12</sup> See *Duch* AJ, paras 12-13.

<sup>13</sup> See *Duch* AJ, para. 13.

before other international criminal tribunals so as to preclude any reason to give deference to Chamber factual findings is unsupported and unreasonable.<sup>14</sup> It is typical for cases where leaders are accused of mass crimes for courts to admit massive amounts of documentary and out-of-court witness evidence. This does not change the fact that the Chamber's Judges have the advantage of observing witnesses who testify at trial in person and are best positioned to assess their reliability and credibility.<sup>15</sup> Nowhere does Nuon Chea demonstrate how the SCC decided on the basis of a wrong legal principle or that the SCC Judges were ill-informed about the applicable law. Accordingly, Nuon Chea's arguments in this regard should be dismissed.

### **B. Standard of review on appeal**

12. Both the Internal Rules and the standard articulated by the SCC in the *Duch* Appeal Judgment leave no doubt as to the applicable standard of appellate review in the instant case. Specifically, Internal Rule 104(1) provides that the SCC shall decide an appeal against a judgment on two grounds, namely an error on a question of law that invalidates the judgment or an error of fact which has occasioned a miscarriage of justice.

13. In this Response, the Co-Prosecutors have not addressed the many arguments which the Appellants have incorporated by reference from other filings. This is because international jurisprudence had consistently prohibited the practice, which was seen as circumventing page limits for appellate filings.<sup>16</sup> In view of the decision rendered by the SCC three days before the Co-Prosecutors' response on appeal was due,<sup>17</sup> the Co-Prosecutors' respectfully request that they be granted the right to be heard on Appellants' arguments incorporated by reference, should the

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<sup>14</sup> Indeed, the *ad hoc* and other international criminal tribunals are characterised by their own complex nature and have also relied heavily on documentary evidence and transcripts of prior testimony, similar to Case 002/01.

<sup>15</sup> See *Duch* AJ, para. 17, citing *Kupreškić* AJ, paras 30, 32. See also *Lubanga* AJ, para. 26; *Furundžija* AJ, para. 37.

<sup>16</sup> See *Mladić* Decision on Appeal, para. 14 ("The Appeals Chamber will not engage in a *de novo* review of the submissions contained in these filings and will confine its analysis to the arguments advanced by Mladić in the Appeal"); *Šainović* Decision on Appeal, para. 18 ("The Appeals Chamber is also concerned that permitting such broad reference would effectively allow Pavković to circumvent the word limit established for his appellant's brief"); *Galić* AJ, para. 250 ("the Appeals Chamber will not look at the Defence Notice of Appeal or at Judge Nieto-Navia's Dissent when Galić tries to incorporate arguments by reference to them; the arguments should have been made in the appeal"); *Lubanga* Judgment on Appeal of PTC Decision, para. 29 ("The arguments of a participant to an appeal must be fully contained within that participant's filing in relation to that particular appeal. The filing must, in itself, enable the Appeals Chamber to understand the position of the participant on the appeal, without requiring reference to arguments made by that participant elsewhere. The practice followed by the appellant in this appeal could also lead, in reality, to a circumvention of the page limits that are stipulated in the Regulations of the Court"); *Sesay* AJ, para. 44).

<sup>17</sup> **F23/1** Decision on Co-Prosecutors' Request for Page and Time Extensions to Respond to the Defence Appeals of the Case 002/01 Judgment, 21 April 2015, para. 9.

SCC wish to address any of these arguments on its merits and consider it is in the interests of justice to hear the Co-Prosecutors views on the issue.

*i. Errors of law*

14. In the *Duch* Appeal Judgment, the SCC determined that errors of law may be alleged against a conviction or acquittal. When a party raises such an allegation, the SCC, as the final arbiter of the law applicable before the ECCC, is bound to determine whether an alleged error of law was in fact committed on a substantive or procedural issue.<sup>18</sup> The SCC will review the Chamber's findings on questions of law to determine whether they are correct, not merely whether they are reasonable.<sup>19</sup> This standard of correctness means that the SCC decides whether the Chamber established the content of the applicable legal norms based in the appropriate sources of law and by employing rules of interpretation pertinent to those sources of law.<sup>20</sup> It must also assess whether the result reached is precise and unambiguous.<sup>21</sup>

15. The appellate powers of the SCC are exercised within the limits of the issues appealed.<sup>22</sup> Appellants alleging an error of law must identify the alleged error, present arguments in support of the allegation, and explain how the error invalidates the trial judgment.<sup>23</sup> However, the burden of proof on appeal is not absolute with regards to errors of law. Even if the party's arguments are insufficient to support the contention of an error of law, the SCC may find other reasons and come to the same conclusion, holding that there is an error of law.<sup>24</sup> In order to make a determination as to the issue on appeal, the SCC also reviews those legal findings of the Chamber which constitute necessary predicates for the impugned decision.<sup>25</sup> In exceptional circumstances, the SCC may raise questions *ex proprio motu* or hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgment but is nevertheless of general significance to the ECCC's jurisprudence.<sup>26</sup>

16. Where the SCC finds an error of law in a trial judgment arising from the application of the

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<sup>18</sup> *Duch* AJ, para. 14, citing *Krnojelac* AJ, para. 10.

<sup>19</sup> *Ibid.* See also *Lubanga* AJ, para. 18.

<sup>20</sup> *Ibid.* para. 14.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* para. 15.

<sup>23</sup> *Ibid.* citing Internal Rule 105(3). See also *Karemera* AJ, para. 14, citing *Ndindiliyimana* AJ, para. 8; *Ndahimana* AJ, para. 7; *Mugenzi* AJ, para. 11; *Dorđević* AJ, para. 13.

<sup>24</sup> *Ibid.* citing *Boškoski* AJ, para. 10.

<sup>25</sup> *Duch* AJ, para. 15.

<sup>26</sup> *Ibid.* citing *Galić* AJ, para. 6.

wrong legal standard by the Chamber, the SCC must determine the correct legal standard and review the relevant factual findings of the Chamber.<sup>27</sup> In doing so, the SCC not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced on the relevant standard of proof as to the factual finding challenged by a party, before that finding is confirmed on appeal.<sup>28</sup> The SCC may amend a decision of the Chamber only if it identifies an error of law “invalidating the judgment or decision”.<sup>29</sup> Consequently, not every error of law justifies a reversal or revision of a decision by the Chamber.<sup>30</sup> Decisions of the SCC are final and binding on all parties in the case.<sup>31</sup>

*ii. Errors of fact*

17. Similar to errors of law, an error of fact may be alleged against a conviction or acquittal.<sup>32</sup> The SCC applies the standard of reasonableness in reviewing an impugned finding of fact, not whether the finding is correct.<sup>33</sup> In determining whether or not a Chamber’s finding of fact was one that no reasonable trier of fact could have reached, the SCC “will not lightly disturb findings of fact by a Trial Chamber”.<sup>34</sup> The SCC agreed with the approach to the factual findings of the Chamber as articulated by the ICTY Appeals Chamber, finding that:

Pursuant to the jurisprudence of the [ICTY], the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of evidence is “*wholly erroneous*” may the Appeals Chamber substitute its own finding for that of the Trial Chamber.

[...].

The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness’ testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points.

<sup>27</sup> *Ibid.* para. 16. See also *Blaškić* AJ, para. 15.

<sup>28</sup> *Ibid.* citing *Blagojević* AJ, para. 8. See also *Blaškić* AJ, para. 15.

<sup>29</sup> *Ibid.* citing Internal Rule 104(1)(a).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Duch* AJ, para. 17.

<sup>33</sup> *Ibid.* *Ngirabatware* AJ, para. 10; *Lubanga* AJ, para. 27.

<sup>34</sup> *Ibid.* citing *Furundžija* AJ, para. 37. See also *Ngirabatware* AJ, para. 10; *Lubanga* AJ, paras 22, 24, 27; *Taylor* AJ, para. 26.



This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion [...].<sup>35</sup>

18. Considering that the guilt of the accused must be established at trial beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice must be evaluated in the context of what the appellant seeks to demonstrate.<sup>36</sup> An appeal against a conviction must show that the Chamber's factual errors create a reasonable doubt as to an accused's guilt.<sup>37</sup>

19. Irrespective of which party alleges an error of fact, only those facts occasioning a miscarriage of justice may result in the SCC overturning the Chamber's judgment in whole or in part.<sup>38</sup> A miscarriage of justice is defined as "[a] grossly unfair outcome in judicial proceedings".<sup>39</sup> For the error of fact to be one that occasioned a miscarriage of justice, it must have been "critical to the verdict reached".<sup>40</sup> A party must demonstrate how the error of fact has actually occasioned a miscarriage of justice.<sup>41</sup>

20. On appeal, a party may not just repeat arguments that were unsuccessful at trial, unless the party can demonstrate that the Chamber's rejection of these arguments constituted such an error as to warrant the intervention of the SCC.<sup>42</sup> Arguments of a party which do not have the potential to cause the impugned decision to be revised or reversed may be immediately dismissed by the SCC and need not be considered on the merits.<sup>43</sup> In order for the SCC to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the trial judgment to which the challenge(s) is being made.<sup>44</sup> The SCC further "cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".<sup>45</sup> The SCC has inherent discretion in selecting which submissions merit a detailed reasoned opinion in

<sup>35</sup> *Duch* AJ, para. 17, citing *Kupreškić* AJ, paras 30, 32. See also *Lubanga* AJ, para. 26; *Furundžija* AJ, para. 37.

<sup>36</sup> *Ibid.* para. 17.

<sup>37</sup> *Ibid.*

<sup>38</sup> Internal Rule 104(1); *Duch* AJ, para. 19. See also *Karemera* AJ, para. 16, citing *Ndindiliyimana* AJ, para. 10; *Ndahimana* AJ, para. 9; *Mugenzi* AJ, para. 13; *Dorđević* AJ, para. 14.

<sup>39</sup> *Duch* AJ, para. 19, citing Internal Rule 110(4).

<sup>40</sup> *Ibid.* citing *Kupreškić* AJ, para. 29.

<sup>41</sup> *Ibid.* para. 19. See also *Karemera* AJ, para. 16, citing *Krstić* AJ, para. 40 (references omitted); *Mugenzi* AJ, para. 14; *Gatete* AJ, para. 10; *Hategekimana* AJ, para. 9; *Dorđević* AJ, para. 16.

<sup>42</sup> *Ibid.* para. 20. See also *Karemera* AJ, para. 17, citing *Ndindiliyimana* AJ, para. 12; *Ndahimana* AJ, para. 11; *Mugenzi* AJ, para. 15; *Dorđević* AJ, para. 20.

<sup>43</sup> *Ibid.* See also *Ngirabatware* AJ, para. 11; *Karemera* AJ, para. 17, citing *Ndindiliyimana* AJ, para. 12; *Ndahimana* AJ, para. 11; *Mugenzi* AJ, para. 15; *Gatete* AJ, para. 11; *Dorđević* AJ, para. 20; *Lubanga* AJ, para. 30.

<sup>44</sup> *Ibid.* See also Article 4(e) Practice Direction on the Filing of Documents before the ECCC, ECCC/01/2007/Rev.8.

<sup>45</sup> *Ibid.* citing *Stakić* AJ, para. 12.

writing.<sup>46</sup> The SCC may dismiss arguments that are evidently unfounded without providing detailed reasoning.<sup>47</sup>

### III. VALIDITY OF THE INTERNAL RULES AND FORESEEABILITY

#### A. The Chamber correctly upheld the validity of the Internal Rules (NC Ground 2)

21. The Chamber's decision to apply the Internal Rules during the trial proceedings was both correct and reasonable. The Chamber found that the ECCC's constitutive instruments did not prohibit the adoption of Internal Rules as it was necessary and appropriate that the Cambodian criminal procedure be "specifically adapted to the requirements of complex international criminal trials".<sup>48</sup> The SCC has previously approved of the stated purposes of the Internal Rules to "consolidate applicable Cambodian procedure for proceedings before the ECCC and ... *to adopt additional rules* where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards".<sup>49</sup> Earlier in Case 002, the PTC also upheld the validity and constitutionality of the Internal Rules.<sup>50</sup>

22. The adoption of procedural rules by judges of internationalised tribunals, such as the ECCC,<sup>51</sup> is a proper exercise of the inherent powers of such courts to regulate their own process,<sup>52</sup> and is an important attribute of judicial independence.<sup>53</sup> In particular, the reasoning of

<sup>46</sup> *Ibid.* See also *Ngirabatware* AJ, para. 12, citing *Karemera* AJ, para. 18; *Bizimungu* AJ, para. 13; *Ndindilyimana* AJ, para. 13; *Perišić* AJ, para. 12.

<sup>47</sup> *Ibid.*

<sup>48</sup> **E51/I14** Decision on Nuon Chea's Preliminary Objection alleging the Unconstitutional Character of the ECCC Internal Rules, 8 August 2011, para. 7.

<sup>49</sup> *Duch* AJ, para. 13, fn. 31 (emphasis added).

<sup>50</sup> **D55/I/8** Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, paras 14-15; **A190/I/16** Written Version of the Oral Decision on Application by the Co-Lawyers for the Civil Parties Concerning Oral Submissions, 4 December 2008, para. 2; **D55/I/13** Decision on Civil Party Co-Lawyers' Joint Request for Reconsideration, 25 February 2009.

<sup>51</sup> **CF001-C5/45** Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav *alias* Duch, 4 December 2007, paras 18-22.

<sup>52</sup> *Kanyabashi* Decision on Jurisdiction – Shahabudeen Dissent, pp. 15, 17; P. Gaeta, "Inherent powers of international courts and tribunals" in L. C. Vohrah *et al.* (eds.) *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Martinus Nijhoff, 2003), pp. 358 (fn. 16), 369; Chester Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007), pp. 61, 63; Manley O. Hudson, *The Permanent Court of International Justice, 1920-1972* (Macmillan, 1943), p. 89; J. H. Ralston, *The Law and Procedure of International Tribunals* (Stanford University Press, 1926), p. 197, para. 356; S. Rosenne *The Law and Practice of the International Court* (Martinus Nijhoff, 1985), p. 584.

<sup>53</sup> P. Gaeta, "Inherent powers of international courts and tribunals" in L. C. Vohrah *et al.* (eds.) *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Casesse* (Martinus Nijhoff, 2003), p. 367 ("a general

the Chamber that the adoption of the Internal Rules was “not prohibited”<sup>54</sup> by its constitutive instrument is entirely consistent with the principle of international law that inherent powers of international tribunals may only be removed by express provision of the constitutive instrument.<sup>55</sup>

23. Nuon Chea’s first argument, that the adoption of Internal Rules is not contemplated by the ECCC Law and is inconsistent with the UN/RGC Agreement,<sup>56</sup> particularly without express provisions to that effect<sup>57</sup> is thus directly contrary to the prior reasoning of the SCC, PTC and international jurisprudence on the issue. His second argument rests on the incorrect assumption that the application of the Internal Rules contravenes the conditions under which Art. 12 of the UN/RGC Agreement would permit recourse to “procedural rules established at the international level”.<sup>58</sup> The Chamber’s impugned reference to supplementation of Cambodian procedure where “necessary and appropriate” merely describes the consolidation function of the Internal Rules – an aspect of the exercise of its inherent powers – without which a complex international criminal trial would be entirely impracticable. Nuon Chea himself has previously acknowledged that “the adoption of additional rules is appropriate where existing Cambodian procedures fail to address a particular matter”.<sup>59</sup> Settled jurisprudence establishes that the “unique circumstances” of the ECCC require a “self-contained regime of procedural law.”<sup>60</sup>

24. Nuon Chea’s final claim that the Internal Rules violate the fair trial rights provisions of the ICCPR is patently false and self-serving.<sup>61</sup> Contrary to his claims that he suffered prejudice from limited rights of immediate appeal,<sup>62</sup> the Rules relating to the extent of this right in fact *surpass* the rights available to him under domestic Cambodian law.<sup>63</sup> Among many other examples, more

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*principle has gradually taken shape in international law, whereby international judicial bodies may exercise those powers that prove necessary for guaranteeing the sound administration of justice and protecting their judicial nature.”* (Emphasis in original).

<sup>54</sup> NC Appeal, para. 16.

<sup>55</sup> *Rio Grande Irrigation and Land Company Ltd (Great Britain v. United States)*, 28 November 1923, (2006) VI R.I.A.A. 131, p. 136; *Heathrow Airport User Charges (United States v. United Kingdom)*, Decision No. 23 (Supplementary decisions and clarifications), 1 November 1993, (2006) XXIV R.I.A.A. 335, p. 353, para. 2.26.

<sup>56</sup> NC Appeal, para. 15.

<sup>57</sup> NC Appeal, para. 16.

<sup>58</sup> NC Appeal, para. 16.

<sup>59</sup> **D55/I/1** Nuon Chea’s Appeal Against Order Refusing Request for Annulment, 25 February 2008, para. 10.

<sup>60</sup> *Ibid.* para. 14.

<sup>61</sup> NC Appeal, para. 16.

<sup>62</sup> NC Appeal, para. 17.

<sup>63</sup> CrimCCPC, Art. 385 (“If the court issues an interlocutory judgment before sentencing, an appeal is admissible immediately if the judgment terminates the proceedings. Otherwise, an interlocutory judgment can only be

extensive rights were granted to Nuon Chea in relation to his right to respond to a final submission under the Internal Rules than they would have been under Cambodian law.<sup>64</sup> He further enjoys access to a legal aid scheme covering the costs of both national and foreign co-lawyers<sup>65</sup> and a well-resourced defence team. The legal support provided far outstrips that available to defendants before the domestic courts and exceeds applicable international standards.<sup>66</sup> This is just one of many examples where Nuon Chea ignores Cambodian procedure and argues for international standards contradicting his position that Cambodian procedure should be consistently applied to a trial of the complexity of Case 002/01.

25. Consequently, Nuon Chea's argument that the Judgment is invalid "in full"<sup>67</sup> because of the "pervasive"<sup>68</sup> nature of legal errors arising from the purported constitutional invalidity of the Internal Rules is unsubstantiated. He has provided no compelling reason for this Chamber to depart from the well-settled jurisprudence on this issue generally or in relation to particular provisions.

#### **B. The relevant law was accessible and foreseeable (KS paras 99-107)**

26. Khieu Samphan's arguments regarding accessibility and foreseeability<sup>69</sup> misapprehend the nature of those requirements. The Appeals Chamber in *Hadžihasanović* held that foreseeability requires that an accused "be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision."<sup>70</sup> The crimes that Khieu Samphan was convicted of are some of the gravest known; he cannot seriously contend that he did not understand that his conduct was criminal in the sense generally understood. And his reliance on the "specific provision[s]" of the Cambodian Penal Code is clearly misplaced in light of *Hadžihasanović*. As to accessibility, the SCC held in the *Duch* Appeal Judgment that "laws

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submitted to the Court of Appeal for examination together with the judgment on the merits."). Cf. Internal Rule 105(4).

<sup>64</sup> **D390/1/2/4** Decision on Ieng Sary's Appeal Against the Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010.

<sup>65</sup> Internal Rule 81(3).

<sup>66</sup> See Human Rights Committee, General Comment No. 32, "Article 14: Right to equality before courts and tribunals and to a fair trial", U.N. Doc. CCPR/C/GC/32 (2007), Section V, paras 37-38 ("it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.") (Emphasis added).

<sup>67</sup> NC Appeal, para. 17.

<sup>68</sup> NC Appeal, para. 17.

<sup>69</sup> KS Appeal, paras 99-107.

<sup>70</sup> *Hadžihasanović* Command Responsibility Decision, para. 34.

based on a custom or general principles can be relied on as sufficiently available to the accused.”<sup>71</sup> Thus, while it may not have been necessary for the Chamber to consider Khieu Samphan’s high-ranking position in finding that the law was accessible to him, it clearly was not error for it to do so.<sup>72</sup>

#### IV. INDEPENDENCE AND IMPARTIALITY OF THE CHAMBER

##### A. The Chamber acted without bias or partiality in Case 002/01 (NC Grounds 3-4; KS paras 41-49)

27. Both Appellants assert that their right to be tried by an impartial tribunal was violated.<sup>73</sup> They rest these assertions on what they claim are erroneous judicial decisions and factual findings, and on public statements by former International Judge Silvia Cartwright. These sections of both Appellants’ briefs are rich in hyperbole but devoid of substance. In general, the Appellants content themselves with a sweeping generalisation followed by an example or two,<sup>74</sup> in the apparent belief that it is the task of the SCC to further substantiate their arguments if it can. As a result, the Appellants’ allegations fall far short of demonstrating the consistent pattern of error that would be required to rebut the strong presumption of judicial impartiality. Indeed, they fall short of demonstrating any error at all.

##### *i. Judges at the ECCC enjoy a strong presumption of impartiality*

28. The SCC has previously held that judges at the ECCC enjoy a strong presumption of impartiality deriving from the qualifications for their appointment and their oath of office.<sup>75</sup> A party seeking to displace this presumption has a high burden.<sup>76</sup> “[R]eliable and sufficient evidence” is required to rebut the presumption; “sweeping or abstract allegations that are neither

<sup>71</sup> *Duch* AJ, para. 96.

<sup>72</sup> Khieu Samphan refers to other errors he has alleged elsewhere in his Appeal as support for this ground. These arguments are irrelevant to the issues of foreseeability and accessibility. To the extent they are relevant to other grounds of appeal, they are addressed in the appropriate section of this Response.

<sup>73</sup> NC Appeal, paras 41-53; KS Appeal, paras 41-49.

<sup>74</sup> NC Appeal, paras 43-46, fns 105-109; KS Appeal, paras 41-49 and fns 103-118.

<sup>75</sup> **Special SC02(01) 1/4** Decision on Ieng Thirith’s Application to Disqualify Judge Som Sereyvuth for Lack of Independence, 3 June 2011, para. 10 (adopting the approach of the Chamber in **E55/4** Decision on Ieng Thirith, Nuon Chea and Ieng Sary’s Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony, 25 March 2011, paras 11-12).

<sup>76</sup> **Special SC02(01) 1/4** Decision on Ieng Thirith’s Application to Disqualify Judge Som Sereyvuth for Lack of Independence, 3 June 2011, para. 10. See *Karemera* AJ, para. 24; *Hategekimana* AJ, para. 16; *Renzaho* AJ, para. 23; *Akayesu* AJ, paras 91-92, 100; and *Furundžija* AJ, paras 196-197.

substantiated nor detailed” do not suffice.<sup>77</sup>

29. When bias is alleged on the basis of the content of judicial decisions, “[e]rror, if any, on a point of law is insufficient; what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts.”<sup>78</sup> The ICTY Bureau held that while it “would not rule out entirely the possibility that decisions rendered by a Judge or Chamber by themselves could suffice to establish actual bias, *it would be a truly extraordinary case in which they would.*”<sup>79</sup>

ii. *The judicial decisions relied on by the Appellants to demonstrate bias fall far short of the threshold required to rebut the presumption of judicial impartiality*

30. The scattered examples of “erroneous” decisions and factual findings mustered by the Appellants in no way evidence the “truly extraordinary case” that would be required for the SCC to find bias on the part of the Chamber. Nuon Chea’s arguments are limited to three paragraphs and five footnotes setting forth examples of alleged factual and legal findings that he says are so unreasonable as to evidence bias.<sup>80</sup> In fact, these examples are not errors at all.<sup>81</sup> Even were these arguments well-founded, this handful of examples would be manifestly insufficient to rebut the presumption of judicial impartiality and establish bias. Nuon Chea’s subsequent statement that “*all of the errors of fact alleged in this Appeal ... are so unreasonable that they could not have been the product of impartial fact-finding or analysis*”<sup>82</sup> is as unfounded as it is hyperbolic.

31. Khieu Samphan’s arguments are equally unsubstantiated. He cobbles together a handful of examples of what he says are evidence of bias: comments made by Ieng Sary’s counsel about unequal treatment of parties’ objections;<sup>83</sup> Judge Lavergne’s “aggressive” questioning of three

<sup>77</sup> Karemera AJ, para. 24; Hategekimana AJ, para. 16; Renzaho AJ, para. 23; Akayesu AJ, paras 91-92, 100; Furundžija AJ, paras 196-197.

<sup>78</sup> Bagosora Disqualification Decision, para. 10.

<sup>79</sup> Blagojević Rule 15(B) Decision, para. 14 (emphasis added). Cited with approval in Bagosora Disqualification Decision, para. 10.

<sup>80</sup> NC Appeal, paras 43-45; fns 105-109.

<sup>81</sup> Regarding NC Appeal fn. 105 (summarising and cross-referencing his Ground 206), see *infra*, XVII.A.i (Oudong); regarding NC Appeal, fn. 106 (summarising and cross-referencing his Grounds 191-192), see *infra*, X.B.; regarding NC Appeal fn. 108 (summarising and cross-referencing a portion of his argument regarding Grounds 193-195), see *infra*, X.C.; regarding NC Appeal fn. 109 (summarising and cross-referencing his Ground 173), see *infra*, IX.E.

<sup>82</sup> NC Appeal, para. 46.

<sup>83</sup> KS Appeal, para. 41. The claims made by Ieng Sary’s counsel are entirely unsubstantiated and inconclusive. Khieu Samphan’s reference to them accordingly does not articulate an abuse of discretion by the Chamber: “We also

witnesses;<sup>84</sup> the Chamber's decisions regarding admission of a number of documents;<sup>85</sup> failure to correctly assess memory issues and contradictions related to three witnesses;<sup>86</sup> and ignoring exculpatory evidence from one witness.<sup>87</sup> Khieu Samphan also string-cites 26 paragraphs of the Judgment without further argument as the sole substantiation for two very broad allegations of misrepresentation by the Chamber.<sup>88</sup> Not once in this section does Khieu Samphan properly articulate an alleged error. Not once does he explain how the Chamber's actions in any of his examples were so unfair or unreasonable as to constitute an abuse of discretion.

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get a sense that sometimes, when objections are made, there's no real deliberation. There is just a quick decision, either by the President or some of the Judges, but not all of the Judges, of the Bench. And it would appear, lately, that virtually every single objection from the Prosecution gets sustained, every single objection from the Defence gets overruled. The other day, I won an objection. I was almost shocked." E1/114.1 Michael Karnavas, T. 17 August 2012, p. 80.

<sup>84</sup> KS Appeal, para. 41. Judge Lavergne's questioning of the first witness cited (Kim Vun) was an entirely appropriate enquiry into the basis for a conclusion offered by the witness in his testimony. E1/112.1 Kim Vun, T. 22 August 2012, p. 68. His questions to So Socheat were intended to address genuinely puzzling aspects of her testimony, such as what she could have learned about her husband's employment from her one-year-old daughter or why her husband turned to her, a cook, as a source of intelligence about events throughout Cambodia. E1/205.1 T. 11 June 2013, pp. 7, 20-21, 33-34. It is difficult even to determine why his questioning of the third witness, Philippe Jullian-Gaufres, is cited for this proposition. E1/194.1 T. 21 May 2013, pp.78-80. The fact that these were the best three examples Khieu Samphan was able to muster of Judge Lavergne's "aggressive" questioning is testament to the fairness of the Chamber's questions to witnesses. None of these questions even approaches error, much less error demonstrating bias. The judges are entitled to ask questions and obtain responses from witnesses and character witnesses, even more so when the testimony appears to lack credibility.

<sup>85</sup> KS Appeal, para. 42. For example, Khieu Samphan criticises the Chamber's decision to grant an OCP motion to admit a recording of a lecture given by Philip Short while at the same time (and by the same decision) denying Nuon Chea's motion to admit an article regarding Philip Short's research methods. Khieu Samphan does not explain why this decision was so unfair or unreasonable as to constitute an abuse of discretion, nor does he articulate what prejudice he suffered. Nor does he explain how this error (if it is an error) would demonstrate bias. In any case, the Chamber has a large discretionary power in admitting and assessing the probative value of the evidence. Regarding Khieu Samphan's contention that his motion E220 (for the admission of E220.1) was ignored by the Chamber, see the e-mail from the Chamber's Senior Legal Officer dated 17 June 2013 and the attachment thereto ("Annex IV"). Both documents are attached as authorities.

<sup>86</sup> KS Appeal, para. 43. Khieu Samphan does not specify what contradictions or other factors the Chamber should have taken into account with respect to these three witnesses, nor does he explain how that should have, in his view, changed the Chamber's factual findings, nor does he articulate the prejudice that he suffered as a result of the Chamber's alleged failures, nor does he demonstrate how any of this occasioned a miscarriage of justice. He does not even attempt to argue how the Chamber's alleged failings demonstrate bias; the reader is left with the impression that it is his argument that any failure to correctly assess evidence is necessarily a demonstration of bias. This profoundly misunderstands the applicable law.

<sup>87</sup> KS Appeal, para. 43. Khieu Samphan cites to a single page of transcript in support of this contention. He does not identify the evidence he says is exculpatory, does not explain how the Chamber failed to consider it, does not articulate how the Chamber should have considered it or how it would have, in his view, affected its findings if it had.

<sup>88</sup> KS Appeal, paras 44-45. These two sentences fail to articulate any comprehensible argument that the Chamber committed error, much less that any error constituted evidence of bias.

iii. *Judge Cartwright's comments at the Aspen Institute do not demonstrate bias on her part or on the part of her Cambodian colleagues*

32. Both Appellants also claim that certain comments made by Judge Cartwright while speaking on a panel at the Aspen Institute in November 2013 demonstrate bias on her part and on the part of the National Judges.<sup>89</sup> Nuon Chea's discussion ignores the fact that Judge Cartwright's comments were made after all of the evidence in Case 002/01 had been heard, after Closing Briefs had been filed, and after Closing Statements had been made.<sup>90</sup> In other words, Nuon Chea attempts to argue that Judge Cartwright had made her mind up *before* hearing evidence by citing statements she made *after* hearing evidence.

33. Nuon Chea alleges that Judge Cartwright's bias is demonstrated in particular by two of her statements regarding the targeting of the intelligentsia and the targeting of Khmer Republic soldiers, and he boldly claims that there is no such evidence on the record.<sup>91</sup> Contrary to Nuon Chea's submissions, the Judgment contains extensive citations to evidence regarding the targeting of teachers<sup>92</sup> and lengthy sections citing copious evidence related to the targeting of former Khmer Republic soldiers and officials.<sup>93</sup> Judge Cartwright's comments do not show pre-judgment; but rather a clear understanding of the evidence she had just heard in Case 002/01.

34. In any event, the Chamber's formal articulation of its factual findings on these issues is set out in the Judgment, is subject to appeal, and is in fact being appealed by Nuon Chea. The issue is whether these comments, in light of the extensive evidence on the record regarding the treatment of teachers and Khmer Republic soldiers, are so unreasonable as to demonstrate that Judge Cartwright did not bring an impartial mind to the proceedings. This they clearly are not.

35. Nuon Chea attempts to mislead the SCC with two more of Judge Cartwright's quotes, one related to potential accused being handed over to the ECCC "on a platter" and one regarding trials of "tyrants." In context, her comment about potential accused being handed over "on a

<sup>89</sup> NC Appeal, paras 49-53; KS Appeal, para. 48. Nuon Chea sets out his arguments at length; Khieu Samphan simply adopts the arguments of Nuon Chea from a previous filing.

<sup>90</sup> Judgment, para. 8.

<sup>91</sup> NC Appeal, paras 49-50. Nuon Chea's characterisation of Judge Cartwright's comment regarding the intelligentsia is misleading, as he implies that she made this comment in the context of a discussion of the facts of Case 002/01. In fact, these comments related to lack of trained judges and lawyers in Cambodia. F2/1 Second Request to Consider Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01, 2 September 2014, para. 4.

<sup>92</sup> Judgment, fn. 1533 (*citing E3/4719*); para. 514, fn. 1541 (*citing* testimony of Pech Srey Phal on 5 December 2012 and *E3/4590*); fn. 1944 (*citing E3/2310*); para. 622; fn. 2136 (*citing E3/2066*); fn. 2579 (*citing E3/4103*); fn. 2643 (*citing E3/3472 & E3/3559*).

<sup>93</sup> Judgment, paras 120-127, 814-834 and footnotes thereto.



platter” was an expression of frustration with the limited mandate of the ECCC and was quickly followed by the comment, “So it’s certainly not, as I said before, a perfect model.”<sup>94</sup> The thrust of her comment about the trial of tyrants was not that the purpose of such trials is to humiliate tyrants, but rather that the purpose of such trials is to deter the commission of mass atrocity crimes,<sup>95</sup> a purpose that is, of course, perfectly legitimate and laudable, and that can logically only be furthered by the fair and proper application of the law. Even the few words that Nuon Chea cherry-picks from this lengthy interview can support his position only when misrepresented and deprived of context.

36. Nuon Chea also relies on Judge Cartwright’s comments to allege bias against the National Judges.<sup>96</sup> However, this matter has already been thoroughly argued<sup>97</sup> and thoughtfully resolved.<sup>98</sup> After examining this issue at considerable length, the Special Panel of the Trial Chamber concluded that these comments provided no basis to conclude that the National Judges were unable to fulfil their duty of impartiality.<sup>99</sup> There is no reason for the SCC to depart from the Special Panel’s sensible resolution of this issue.

**B. The Chamber reasonably exercised its discretion in deciding not to summons Heng Samrin as a witness (NC Grounds 5-6)**

37. Nuon Chea’s appeal of the Chamber’s decision not to summons Heng Samrin to testify should be dismissed. The decision fell well within the discretion of the Chamber, and Nuon Chea has failed to show any legal error. He has not even attempted to show that the Chamber had the power to compel this reluctant witness to testify, particularly surprising considering Nuon Chea’s claim that such testimony would have been self-incriminatory, and never addresses the issue of parliamentary immunity guaranteed by the Cambodian constitution.

38. Nuon Chea also fails to show that the error he alleges would invalidate the Judgment. His arguments rest on the false premise that Heng Samrin’s testimony would have been both unique

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<sup>94</sup> NC Second Request for Additional Evidence on Appeal, para. 4. (Full cite for Table of Authorities: “F2/1 Second Request to Consider Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01, 2 September 2014.”).

<sup>95</sup> NC Second Request for Additional Evidence on Appeal, para. 4.

<sup>96</sup> NC Appeal, para. 52.

<sup>97</sup> E314/6 Nuon Chea Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara, 29 September 2014, paras 53-60; E314/9 Co-Prosecutors’ Response to Nuon Chea’s Disqualification Application, 10 October 2014, paras 20-27.

<sup>98</sup> E314/12 Decision on Applications for the Disqualification of Trial Chamber Judges, 14 November 2014; E314/12/1 Reasons for Decision on Application for Disqualification, 30 January 2015, paras 28-32, 116-120.

<sup>99</sup> E314/12/1 Reasons for Decision on Application for Disqualification, 30 January 2015, para. 117.

and exonerating. As set forth below, Heng Samrin's testimony could not have made a difference in the Chamber's determination of Nuon Chea's guilt, but rather would only have provided further support for that Judgment.

- i. The majority's reasons for declining to summons Heng Samrin were a balanced, deliberative and proper exercise of discretion*

39. The bulk of Nuon Chea's argument is a critique of the Final Witness Decision in which no required consensus was reached, but the majority of the Chamber concluded that Heng Samrin should not be summonsed to testify.<sup>100</sup> Nuon Chea paints the majority's reasoning as a dishonest mischaracterisation of the evidence.<sup>101</sup> To the contrary, the majority's reasoning is a balanced assessment of the importance of a witness whose testimony was clearly relevant but certainly not indispensable and where legal obstacles made a summons extremely problematic and very likely futile.

40. The majority carefully analysed the importance of Heng Samrin's evidence. They accepted the potential relevance of his testimony to Case 002/01,<sup>102</sup> and assessed his likely evidence regarding military structures, the evacuation from Phnom Penh,<sup>103</sup> the 20 May 1975 meeting,<sup>104</sup> and the meaning of instructions given by Nuon Chea at that meeting.<sup>105</sup> Having done so, they concluded that "the Nuon Chea Defence overstates [Heng Samrin]'s significance as a potential witness."<sup>106</sup> This conclusion was reasonable. The majority particularly relied on the fact that notes of Heng Samrin's interview with Ben Kiernan were already in evidence and that these notes "sufficiently and reliably demonstrate[d]" the most important facts that Nuon Chea would seek to establish through Heng Samrin's testimony.<sup>107</sup>

41. Nuon Chea engages in gross hyperbole regarding the importance of this one witness. His resort to misrepresentations, such as "Heng Samrin is to the evacuation of Phnom Penh what Duch is to S-21" and that "no living person is more directly, personally responsible for the

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<sup>100</sup> NC Appeal, paras 58-75. See **E312** TC Final Decision on Witnesses, Experts, and Civil Parties to be Heard in Case 002/01, 7 August 2014 ("Final Witness Decision"), paras 87-98.

<sup>101</sup> NC Appeal, para. 61.

<sup>102</sup> Final Witness Decision, para. 96.

<sup>103</sup> Final Witness Decision, para. 93.

<sup>104</sup> Final Witness Decision, para. 94.

<sup>105</sup> Final Witness Decision, paras 95-96.

<sup>106</sup> Final Witness Decision, para. 93.

<sup>107</sup> Final Witness Decision, para. 98. The Judgment cited Kiernan's interviews of Heng Samrin and Chea Sim (**E3/1568**) six times.

evacuation of Phnom Penh”,<sup>108</sup> simply confirm that the entire premise of his argument – that the testimony would have been both unique and exonerating – lacks substance. His claims are contradicted by Nuon Chea’s own admission that it was he and the other Party Centre leaders – not the Division and Regiment Commanders – who planned and ordered the expulsion of the population from Cambodian cities.

42. Nuon Chea’s claim that Heng Samrin was “the senior-most military officer still living” who participated in the evacuation of Phnom Penh,<sup>109</sup> disregards the fact that two other military commanders with the same rank testified at trial regarding the capture and evacuation of Phnom Penh: (i) Meas Voeun, a Regiment Commander in Southwest Zone Division 1;<sup>110</sup> and (ii) Ung Ren, a Regiment Commander of Special Zone Division 14.<sup>111</sup> Exactly like Heng Samrin, both witnesses were “two rungs below” their Zone Secretary, reporting to and receiving orders from their Division Commander, who in turn reported to the Zone leader. However, contrary to Nuon Chea’s contention that he viewed such evidence as critical, when Meas Voeun testified, Nuon Chea’s counsel asked no questions about the orders given for expelling the population of Phnom Penh.<sup>112</sup> Moreover, contrary to his assertion that Heng Samrin was “certain to have first-hand knowledge of the orders issued from the very top of the zone military,”<sup>113</sup> in his interview with Kiernan, Heng Samrin said that he was not present at the early April 1975 meeting with the Centre at which the plan to attack and evacuate Phnom Penh was conveyed to Division Commanders.<sup>114</sup>

43. After determining that Nuon Chea had overstated the importance of Heng Samrin’s evidence, the majority next assessed the practical difficulties likely to arise in seeking to obtain his testimony. They considered the ICIJ’s conclusion that Heng Samrin had “refused to testify” during the pre-trial phase, and reasonably concluded that a refusal to cooperate with one organ of the ECCC evidenced an intent not to cooperate with the institution.<sup>115</sup> Citing the ICIJ’s conclusion that “implementing coercive measures is fraught with significant practical difficulties” and the PTC’s belief that the invocation of parliamentary immunity was “likely,” the

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<sup>108</sup> NC Appeal, para. 62.

<sup>109</sup> NC Appeal, para. 59.

<sup>110</sup> **E1/129.1** Meas Voeun, T. 3 October 2012, pp. 89-90, 109-110.

<sup>111</sup> **E1/157.1** Ung Ren, T. 9 January 2013, pp. 33-34.

<sup>112</sup> **E1/131.1** Meas Voeun, T. 8 October 2012, p. 85 and **E1/132.1** Meas Voeun, T. 9 October 2012, pp. 31-32.

<sup>113</sup> NC Appeal, para. 59.

<sup>114</sup> **E3/1568** Heng Samrin Statement, ENG 00651879.

<sup>115</sup> Final Witness Decision, para. 97.

majority then reasonably found that there were “significant practical difficulties with obtaining testimony from [Heng Samrin]” and that issuing a summons would likely cause “difficult and probably protracted questions” to arise.<sup>116</sup>

44. Nowhere in his appeal does Nuon Chea challenge the majority’s conclusion that Heng Samrin was unwilling to testify voluntarily or attempt to explain what mechanism was available for the Chamber to compel a member of Parliament to testify.<sup>117</sup> To date, no witness has been compelled to testify at the ECCC, let alone a sitting government leader.<sup>118</sup> Nuon Chea’s own counsel have publicly taken the position that the Chamber does not even have authority to compel defence lawyers to attend trial proceedings.<sup>119</sup> It is incongruous to argue that the Chamber lacks authority to enforce an order that counsel appointed and paid by the ECCC attend proceedings but could compel the President of the National Assembly to do so. The Nuon Chea appeal fails to demonstrate that the Chamber had any effective mechanism to compel the attendance of Heng Samrin, or that the constitutional guarantee of parliamentary immunity would not apply.

45. The majority’s approach was consistent with international practice. The ICTY, ICTR, and SCSL have held that subpoenas “should not be issued lightly”<sup>120</sup> and are to be “used sparingly.”<sup>121</sup> These tribunals have refused requests to subpoena officials or ex-officials such as Tony Blair and Gerhard Schroeder,<sup>122</sup> Rwandan President Paul Kagame,<sup>123</sup> Sierra Leone President Ahmad Tejan Kabbah,<sup>124</sup> Bill Clinton,<sup>125</sup> and Kofi Annan<sup>126</sup> because the relevance and

<sup>116</sup> Final Witness Decision, paras 90-91, 103.

<sup>117</sup> Internal Rule 35(1)(b) provides that the ECCC “may sanction or refer to the appropriate authorities” any person who “without just excuse, fails to comply with an order to attend, or produce documents or other evidence before the Co-Investigating Judges or the Chambers.” No sanction is defined in the Rules.

<sup>118</sup> Heng Samrin was not the only witness whose attendance and testimony at trial posed potential difficulties. The Chamber denied the Co-Prosecutors’ request to compel testimony from a Civil Party who had direct inculpatory evidence against both Nuon Chea and Khieu Samphan. **E286** Co-Prosecutors’ Request for the Recall of Civil Party Sar Sarin, 20 May 2013; **E293** Trial Chamber Memorandum, 28 June 2013, para. 13; **E1/227.1** T. 23 July 2013, pp. 8-42, 67. The Chamber also concluded that it was unable to hear evidence from Ben Kiernan because “in reality the ECCC has few practical means at its disposal to compel the attendance of an uncooperative expert.” Final Witness Decision, fn. 101.

<sup>119</sup> “Chamber, defence face off on boycott,” *The Phnom Penh Post*, 4 November 2014, <http://www.phnompenhpost.com/national/chamber-dcfence-facc-boycott> (accessed 17 March 2015).

<sup>120</sup> *Halilović* Subpoena Decision, para. 6 (citation omitted); *Bagosora* Subpoena Decision, para. 5.

<sup>121</sup> *Norman Kabbah* Subpoena Decision, para. 10.

<sup>122</sup> *Milošević Blair and Schröder* Decision.

<sup>123</sup> *Karemera* Subpoena Decision.

<sup>124</sup> *Norman Kabbah* Subpoena Decision. A subsequent motion for the issuance of a subpoena to Dr. Tejan Kabbah, by then the ex-President of Sierra Leone, in another case was granted on 30 June 2008. *Sesay Kabbah* Subpoena Decision.

necessity for their testimony was not established to the requisite standard.

46. Consistent with international practice, the majority in this case considered whether the information that Nuon Chea proposed to adduce through Heng Samrin was obtainable through other means,<sup>127</sup> and found that it was, both through the Kiernan interview and through other witnesses.<sup>128</sup> Also consistent with international jurisprudence, the majority then assessed not only “the usefulness of the information to the applicant but ... *its overall necessity* in ensuring that the trial is informed and fair”<sup>129</sup> and concluded, “Given that *we are not persuaded that such testimony is actually needed*, we are not prepared to issue a summons.”<sup>130</sup> Trial chambers are vested with discretion on ruling on requests for subpoenas “to ensure that the compulsive mechanism of the subpoena is not abused.”<sup>131</sup> In this case, the majority properly exercised this discretion.

47. While the minority opinion demonstrates that reasonable minds could differ on whether the Chamber should have attempted a summons, that opinion also recognised that parliamentary immunity could be invoked to prevent enforcement. More importantly to these appeal proceedings, the minority opinion only found that the witness was “*prima facie* relevant and could assist the Chamber in ascertaining the truth,”<sup>132</sup> and made no finding that the testimony would be exonerating.

*ii. In addition to failing to show error, Nuon Chea has failed to establish prejudice from Heng Samrin’s absence at trial*

48. Nuon Chea has failed to show any prejudice from the decision not to summons Heng Samrin that could invalidate the Judgment. In what the majority opinion justifiably suspected were insincere trial tactics, Nuon Chea claimed that he wanted to call Heng Samrin – a person he accuses of being an enemy who was secretly plotting to sabotage his and Pol Pot’s regime – as his sole character witness. While he claims that Heng Samrin could testify regarding the

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<sup>125</sup> *Karadžić* Clinton Subpoena Decision.

<sup>126</sup> *Bagosora* UN Officials Subpoena Decision.

<sup>127</sup> *See Halilović* Subpoena, para. 7.

<sup>128</sup> Final Witness Decision, paras 93-96.

<sup>129</sup> *See Halilović* Subpoena, para. 7 (emphasis added).

<sup>130</sup> Final Witness Decision, para. 96 (emphasis added).

<sup>131</sup> *See Halilović* Subpoena, para. 6.

<sup>132</sup> Final Witness Decision, para. 108.

“genuine nature of his dedication to the Cambodian socialist revolution,”<sup>133</sup> Nuon Chea has never explained how evidence of such dedication would cast doubt on his convictions. To the contrary, evidence Nuon Chea was dedicated to the Khmer Rouge revolution only further confirms his responsibility as a senior leader for the crimes committed by that regime.

49. The primary evidence that Nuon Chea identifies as potentially favorable to his defence is a statement Heng Samrin made to Kiernan regarding a meeting held on 20 to 25 May 1975 – a month after the expulsion of the population of Phnom Penh and the massacre of Lon Nol soldiers and officials at Tuol Po Chrey – at which Pol Pot and Nuon Chea provided instructions to cadres on the Party’s plans. Kiernan had interviewed four other sources regarding that meeting, three of whom stated that the subjects discussed by Pol Pot and Nuon Chea included the execution of leaders or soldiers of the Lon Nol regime.<sup>134</sup> In contrast to those other witnesses, Heng Samrin told Kiernan that Nuon Chea used the word *komchat*, rather than *komtec* (smash) or kill.<sup>135</sup> Kiernan referred to *komchat* as a euphemism meaning either “scatter” or “remove from the framework”.<sup>136</sup> Stephen Heder testified that “*komchat*” means to “get rid of” or “eliminate.”<sup>137</sup>

50. It would be wholly unreasonable to conclude that the issue of whether Nuon Chea used the word “smash” or “scatter” in one speech in late May 1975 could invalidate the Judgment. This meeting took place almost one month *after* the executions at Tuol Po Chrey. By that time, organised executions of high-ranking officers of the former regime had been carried out, and the surviving soldiers and civil servants had already been “removed from the framework” and “scattered” to rural areas around the country with the rest of the urban population. Under these circumstances, it would be reasonable for the Chamber to consider instructions given at the 20-25 May 1975 meetings to pertain to the Lon Nol soldiers and personnel who were still alive and to have little probative value or relevance to the executions that had already taken place at Tuol Po Chrey and during the forcible transfer of the Phnom Penh population.

51. The evidence that was most pertinent to the Tuol Po Chrey executions was the evidence relating to the period on and immediately following 17 April 1975, such as: (i) Ieng Sary’s

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<sup>133</sup> **E236/5/1** Request to Summon TCW-223 as a Character Witnesses on Behalf of Nuon Chea, ENG 00889103.

<sup>134</sup> **E3/1593** Ben Kiernan, *The Pol Pot Regime*, ENG 00678522-23. (The other sources interviewed by Kiernan on this subject were Chea Sim, Sin Song, Kun Chhay and Mat Ly).

<sup>135</sup> **E3/1593** Ben Kiernan, *The Pol Pot Regime*, ENG 00678523; **E3/1568** Heng Samrin Statement, 2 December 1991, ENG 00651884.

<sup>136</sup> **E3/1593** Ben Kiernan, *The Pol Pot Regime*, ENG 00678523.

<sup>137</sup> **E1/224.1** Stephen Heder, T. 16 July 2013, p. 105.

admission that a decision to kill higher-ranking soldiers and officials of the Lon Nol regime was made on or around the 20<sup>th</sup> of April 1975;<sup>138</sup> (ii) the statement of the military commander who was detaining Lon Nol officials at the Ministry of Information in Phnom Penh on 17 April 1975 that the fate of prisoners would be decided by the “top political and governmental leaders” who would arrive later;<sup>139</sup> and (iii) the evidence of similarly organised mass killings of Lon Nol officers by Khmer Rouge cadres in every region of the country that ensued in the weeks following 17 April 1975 (discussed in detail in, *infra* IX.B).

52. The testimony of Heng Samrin regarding the instructions of Nuon Chea at the 20-25 May 1975 meeting thus cannot be considered exculpatory evidence that would have made a difference in the determination of Nuon Chea’s guilt. The majority correctly concluded that the evidence could not exonerate Nuon Chea in regards to the executions of Lon Nol officers at Tuol Po Chrey, which took place one month earlier, and that it was therefore not essential to hear testimony from Heng Samrin on this issue. In reaching its judgment on the killing of Lon Nol officers at Tuol Po Chrey, the Chamber did not rely on the words used in Nuon Chea’s speech at a May 1975 meeting of Khmer Rouge officials. Therefore the failure to hear the testimony of one witness who recalls Nuon Chea using the word “*komchat*” rather than “smash” or “kill” at that meeting could not invalidate the Judgment, particularly when Kiernan’s notes reflecting Heng Samrin’s recollection were already admitted into evidence.<sup>140</sup>

53. Nuon Chea has thus fails to identify any facts that Heng Samrin would testify to that could have led to an acquittal on any charge. To the contrary, if one closely examines his anticipated evidence, it is clear that if Heng Samrin had testified he would have contradicted the defence case and his testimony would have only added additional proof of Nuon Chea’s guilt.<sup>141</sup>

<sup>138</sup> **E3/89** Stephen Heder Interview with Ieng Sary, ENG 00417606; **E3/532** Stephen Heder Interview with Ieng Sary, ENG 00003665 (“this decision to kill so many people was not made beforehand, but after 17 April, maybe around 20 April, when it was decided to do whatever had to be done in order to make it impossible for them to stage a counter-revolutionary comeback”).

<sup>139</sup> **E236/1/4/3.1** Sydney Schanberg, *Cambodia Diary*, ENG 00898278; **E1/201.1** Sydney Schanberg, T. 5 June 2013, p. 47; **E3/51** Jon Swain Diary, London Times, 11 May 1975, ENG 00003278.

<sup>140</sup> The Judgment did cite Kiernan’s interviews of Heng Samrin and Chea Sim (**E3/1568**) six times in relation to other subjects where it corroborated other evidence heard by the Chamber.

<sup>141</sup> In Heng Samrin’s interview (**E3/1568**), he described in detail how it was Nuon Chea, not Pol Pot, who took the lead in instructing the Party cadres on the plans to be implemented (ENG 00651883-84), and that their instructions included killing those accused of being Vietnamese or KGB spies, such as CPK cadres who studied in Vietnam (ENG 00651884-85), “screening out internal agents in the party” (ENG 00651899), removing all Vietnamese from the country (ENG 00651884), the *permanent* evacuation of the cities and division of the population into “full rights” citizens and “deportees” (ENG 00651880-81), and that monks were a “special class” that had to be “wiped out” (ENG 00651883). Heng Samrin also contradicts the Defence claim that purges were justified because Sao Phim was

54. Nuon Chea relies on the above arguments regarding the refusal to summons Heng Samrin to substantiate Ground 5 of this appeal, alleging that Nuon Chea’s right to an impartial tribunal was violated by “the inability of the National judges to disregard their experiences during Democratic Kampuchea.”<sup>142</sup> However, the arguments Nuon Chea made regarding Heng Samrin clearly have nothing to do with any Judge’s personal experiences during Democratic Kampuchea. They also cite two further documents – a book written by a former ICIJ<sup>143</sup> and an interview given by a journalist after the judgment was announced<sup>144</sup> – neither of which is on the case file<sup>145</sup> – and again fail to point out anything in either document that has anything to do with the personal experiences of judges during Democratic Kampuchea.

**C. The Chamber correctly exercised its discretion with respect to post-1979 evidence (NC Ground 8)**

55. Nuon Chea faults the Chamber for what he says was its “systematic refusal to allow questions during testimony which concerned the role of the PRK or the Vietnamese in Cambodia after 1979.”<sup>146</sup> Nuon Chea makes a broad generalisation that he purports to substantiate with a few examples, which often show the opposite of what he claims. His first example<sup>147</sup> is illustrative. Nuon Chea focusses on a brief portion of the transcript<sup>148</sup> to make it appear as though the Chamber precluded him from deducing relevant evidence. In context, it is clear the Chamber only precluded a broad and speculative question of negligible relevance or probative value.<sup>149</sup> After the Chamber ruled on this matter, Nuon Chea’s counsel asked a more focused question and adduced evidence consistent with his case.<sup>150</sup> After hearing the witness’s response,

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plotting against the Centre leaders, stating that even after the Centre’s purge of the East Zone had begun, Phim “still believed” in Pol Pot (ENG 00651899).

<sup>142</sup> NC Notice, Ground 5.

<sup>143</sup> NC Appeal, para. 56.

<sup>144</sup> NC Appeal, para. 57.

<sup>145</sup> Nuon Chea has filed Rule 87(4) motions to the SCC seeking the admission of the book by Marcel Lemonde and the testimony of journalist Thet Sambath. The OCP has responded and as of this date, no decision has been issued.

<sup>146</sup> NC Appeal, para. 76.

<sup>147</sup> NC Appeal, fn. 185, citing E1/94.1 David Chandler, T. 23 July 2012, pp. 72-75.

<sup>148</sup> Nuon Chea directs the SCC to pages 72-75 of E1/94.1. A fair presentation of the events he relies on requires a review of pages 72-83.

<sup>149</sup> E1/94.1 David Chandler, T. 23 July 2012, pp. 72-73 (“[C]ould you elaborate a little bit on the political colouring of the party that took over power after 1979 and how that political colouring may have dominated the dominant narrative that we have been discussing?”).

<sup>150</sup> E1/94.1 David Chandler, T. 23 July 2012, pp. 76-81 (“[W]e can make a supposition that as the Vietnamese obviously went through many of the materials at S-21 and probably other materials, so we don’t know this for sure, they took out some materials that did not seem to them to meet their interests at the time.”).



Nuon Chea's counsel said "I think we've, for now at least, from our side, heard enough about that topic".<sup>151</sup>

56. Many of the citations relied on by Nuon Chea relate to the K-5 construction carried out along the Thai border from 1984 to 1988, which the Chamber held to be irrelevant to Case 002/01.<sup>152</sup> Nuon Chea has not explained how this amounted to an abuse of discretion. A trial chamber enjoys considerable discretion in setting the parameters of questioning,<sup>153</sup> and the right to "cross-examination" is not absolute.<sup>154</sup> In the interest of brevity, the Co-Prosecutors will not examine each of Nuon Chea's examples in similar detail. Nuon Chea fails to substantiate his claim of a pattern of excluding relevant post-1979 evidence to his detriment. Rather, the Chamber correctly examined the proposed areas of inquiry for relevance, reliability, and probative value. Notably, Nuon Chea does not even attempt to show how any restriction on his questioning about post-1979 events could invalidate the Judgment.

## V. RIGHT TO PRESENT A DEFENCE

### A. It was within the Chamber's discretion not to summons witnesses (NC Ground 7)

57. The Chamber did not abuse its discretion in refusing to summons other witnesses requested by Nuon Chea. Nuon Chea fails to establish any legal error in those decisions, or that the testimony of those witnesses would have made a difference in the verdict.

58. *Ouk Bunchhoeun*: Nuon Chea's appeal fails to demonstrate any reason to believe that the witness's testimony would have been exonerating.<sup>155</sup> The majority of judges correctly concluded that the proposed evidence from this witness was either not relevant to Case 002/01 or would not "materially assist" Nuon Chea, and given the "difficult practical reality of enforcing" any summons on the witness, declined to issue one.<sup>156</sup> Nuon Chea has failed to provide any explanation of how what he calls the "rebellion" of East Zone cadres in 1978 is relevant to the

<sup>151</sup> E1/94.1 David Chandler, T. 23 July 2012, pp. 81-83. This followed the witness responding that he was not able to further speculate about possible Vietnamese document culling.

<sup>152</sup> NC Appeal, fn. 186 (all citations).

<sup>153</sup> *Rukundo* AJ, paras 133, 147. See also *Kanyarukiga* AJ, para. 187.

<sup>154</sup> *Prlić* Transcript Decision, para. 52, citing *Prosecutor v. Martić*, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 16 September 2006, para. 12. See *supra*, V.C (Discretion to manage questioning), VI.C (Cross-examination).

<sup>155</sup> NC Appeal, para. 82.

<sup>156</sup> Final Witness Decision, paras 90-91, 100-103 (noting that the written interviews were in evidence and could be relied upon by the Defence without "call[ing] the statement maker to confirm the interview notes").

forced transfers of civilians or the 1975 Tuol Po Chrey executions of Lon Nol soldiers and officials. Ouk Bunchhoeun told Ben Kiernan that the rumours of a “coup” against Pol Pot “came from people arrested who were forced to say it,” and said: “I don’t believe any stories about rebellions in the Pol Pot period.”<sup>157</sup>

59. Nuon Chea wrongly claims Ouk Bunchhoeun’s testimony would have been exonerating in regards to the CPK policy towards Khmer Republic officials and soldiers. In fact, this witness told Stephen Heder that the CPK leadership issued a policy in April 1975 to “[wipe] out all elements in the Lon Nol regime,” specifying that: “[w]ith respect to civilian local administrators, they would be purged from sub-district level to upper echelon. Regarding soldiers, they would be swept clean from 2<sup>nd</sup> lieutenants up to generals.”<sup>158</sup>

60. Rob Lemkin: The Co-Prosecutors have previously responded to Nuon Chea’s arguments regarding this witness.<sup>159</sup> This Chamber recently decided to make inquiries to Mr. Lemkin about his video footage,<sup>160</sup> and the Co-Prosecutors will make further submissions on this matter when that process is completed.

61. Pre-1975 Conditions: The Chamber heard evidence on the conditions in Phnom Penh prior to 17 April 1975 throughout the trial. The Judgment contains an entire section titled *Refugee Conditions and Food Shortages in Phnom Penh*, in which the Chamber found that the city’s population had increased “to an estimated 2 to 2.5 million in April 1975” due to the “influx of refugees,” cited a USAID report on the limited rice supplies and concluded that by 1975 the food situation in Phnom Penh was “very poor.”<sup>161</sup> The Chamber rejected Nuon Chea’s defence that the forced movement was justified by those food shortages because: (i) the evacuation was for “military, economic, and ideological reasons;”<sup>162</sup> (ii) the CPK had a policy and established practice of moving people to rural areas from all captured cities and towns, irrespective of food

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<sup>157</sup> **E3/432** Ouk Bunchhoeun Statement, 30 September 1980, ENG 00542187. In the same interview he described Nuon Chea’s responsibility for the purge of East Zone military commander Chan Chakrey, noting that “Nuon Chea had been after Chakrey for a long time.”

<sup>158</sup> **E3/387** Ouk Bunchhoeun Statement, 7 August 1990, ENG 00350205.

<sup>159</sup> See **F2/2** Co-Prosecutors’ Response to Nuon Chea Defence 1<sup>st</sup> & 2<sup>nd</sup> Requests to Obtain and Consider Additional Evidence, 16 September 2014, paras 7-9, 14-16.

<sup>160</sup> **F2/4/3** Interim Decision on Part of Nuon Chea’s 1<sup>st</sup> Request to Obtain and Consider Additional Evidence, 1 April 2015, paras 24-25.

<sup>161</sup> Judgment, paras 157-158, 160, 537 (finding that there were “severe food shortages” and “dire” living conditions in Phnom Penh between 1970 and 1975).

<sup>162</sup> Judgment, paras 534, 542, 146.

conditions;<sup>163</sup> (iii) the “implausibility of the claim that it was easier to evacuate the population to the country rather than bring food to the city;”<sup>164</sup> and (iv) the evacuation was not “proportional,” because most residents of Phnom Penh were displaced for the entire 3½ year duration of the Khmer Rouge regime.<sup>165</sup> Since the Chamber found that food shortages were neither the CPK leaders’ motivation nor a lawful justification for the evacuation, the hearing of additional witnesses on food shortages [REDACTED] [REDACTED]<sup>166</sup> [REDACTED] could not have changed the verdict.<sup>167</sup>

62. *Khmer Republic Policy Witnesses*: On the final day of evidence hearings, Nuon Chea announced that he was filing a request to call 110 additional witnesses relating to the CPK policy targeting Khmer Republic officials and soldiers.<sup>168</sup> This request was untimely, coming over one year after the Chamber first indicated that it intended to admit written statements of non-testifying witnesses for evidence of crimes and CPK policies, except to the extent such statements contained evidence of acts and conduct of the Accused.<sup>169</sup> Moreover, the 110 proposed witnesses were not exculpatory, but instead were all witnesses who had provided inculpatory evidence regarding the persecution and killings of Khmer Republic officials and soldiers whose statements had been cited either in the Closing Order or filings of the Co-Prosecutors.<sup>170</sup> Having already heard at least 25 witnesses on this subject,<sup>171</sup> and facing a request

<sup>163</sup> Judgment, paras 104-112, 146, 170, 534, 541-543. Nuon Chea’s own counsel, in closing arguments, conceded that “the population of Phnom Penh would have been moved into cooperatives whether or not a food crisis existed.” **E1/233.1** T. 24 October 2013, pp. 79-80.

<sup>164</sup> Judgment, paras 539-540 (*citing* testimony of Philip Short that it would be “easier to feed a static population rather than millions of people streaming out of the city in all directions”).

<sup>165</sup> Judgment, paras 450, 519, 550.

<sup>166</sup>

<sup>167</sup> Final Witness Decision, paras 31-33.

<sup>168</sup> **E1/227.1** T. 23 July 2013, pp. 51-60.

<sup>169</sup> **E96/7** Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012, paras 21-22.

<sup>170</sup> **E291/2** Nuon Chea Request to Summons Witnesses in Respect of Alleged Policy of Targeting Khmer Republic Officials, 25 July 2013, paras 5-7.

<sup>171</sup> **E291/2** Nuon Chea Request to Summons Witnesses in Respect of Alleged Policy of Targeting Khmer Republic Officials, 25 July 2013, para. 8; **E291/2.1** Nuon Chea Annex A, Witnesses Who Have Already Appeared Before the Chamber, ENG 00941401; **E1/227.1** T. 23 July 2013, p. 57.

that would have delayed the completion of the trial by at least a year, the Chamber did not abuse its discretion in denying this request.<sup>172</sup>

**B. Appellants had the ability to present a defence (NC grounds 13-14; KS, para. 23)**

63. Nuon Chea fails to substantiate his allegation that the Chamber “imposed an extremely stringent legal scheme” for the admission of documents into evidence.<sup>173</sup> According to Internal Rule 80(3), the Chamber may order the parties to file a list of exhibits they intend to offer in the case, containing a brief description of their nature and contents. Nuon Chea’s reliance on Cambodian law is inapposite, in view of the magnitude and scope of the trial proceedings and the sheer size of the material that was admitted as evidence. It is within the Chamber’s discretion to manage these proceedings,<sup>174</sup> and it properly relied on the Internal Rules in doing so.

64. Moreover, the Chamber in fact adopted a flexible approach in applying the Internal Rules and allowed parties to admit into evidence material that was available before the start of the trial, but not on a party’s Rule 80 list, provided that it “relate[d] closely to material already before the Chamber and where the interests of justice require the sources to be evaluated together, where the proposed evidence is exculpatory and requires evaluation to avoid a miscarriage of justice, or where the other parties do not object to the evidence.”<sup>175</sup> Nuon Chea benefitted from this flexibility, putting forth documents not on his Rule 80 list, which were admitted by the Chamber under Rule 87(4).<sup>176</sup>

65. Similarly, Nuon Chea’s conclusion that the Chamber “set a near-absolute prohibition on the admission of documents tendered by the Defence into evidence”<sup>177</sup> is entirely misleading. Nuon Chea was in fact granted the opportunity to submit Rule 80(3) document lists on three different occasions,<sup>178</sup> but refused to do so.<sup>179</sup> Nuon Chea’s fails to point to a single instance where a

<sup>172</sup> **E1/227.1** T. 23 July 2013, pp. 67-68.

<sup>173</sup> NC Appeal, para. 88. See also NC Appeal, paras 89-100.

<sup>174</sup> Internal Rule 80(3).

<sup>175</sup> **E276/2** Response to the Internal Rule 87(4) Requests of the Co-Prosecutors, Nuon Chea, and Khieu Samphan (E236/4/1, E265, E276, E276/1), 10 April 2013, para. 3; **E190** TC Decision Concerning New Documents and Other Related Issues, 30 April 2012, paras 32, 36.

<sup>176</sup> See, e.g., **E276/2** Response to the Internal Rule 87(4) Requests of the Co-Prosecutors, Nuon Chea, and Khieu Samphan (E236/4/1, E265, E276, E276/1), 10 April 2013, para. 5; **E190** TC Decision Concerning New Documents and Other Related Issues, 30 April 2012, para. 37.

<sup>177</sup> NC Appeal, para. 100.

<sup>178</sup> **E9** TC Order to File Material in Preparation for Trial, 17 January 2011; **E1/4.1** T. 27 June 2011, p. 25; **E131/1** Witness lists for early trial segments, deadline for filing of admissibility challenges to documents and exhibits, and response to Motion E109/5, 25 October 2011, p. 1.

rejection of his request to admit a relevant and exculpatory document caused him to be prejudiced. His contention that the Chamber erroneously maintained this approach with respect to Rule 80(3) documents used for the impeachment of witnesses is without merit.<sup>180</sup> The Chamber applied this approach to all parties alike.

66. Khieu Samphan's allegation that the Chamber's approach to admission of evidence violated his "rights to [an] adversarial debate"<sup>181</sup> is only supported by reference to submissions at trial,<sup>182</sup> without demonstrating how the Chamber erred in rejecting them. Contrary to his suggestion, Khieu Samphan was provided numerous and extensive opportunities to challenge the admission of documents at "admissibility hearings,"<sup>183</sup> and argue the probative value of documents at "key documentary hearings."<sup>184</sup>

### **C. The Chamber exercised its discretion in managing the questioning of witnesses (NC Ground 18, KS para. 31)**

67. Nuon Chea's contention that the Chamber improperly imposed "rigid and inadequate time limits" for his examination of witnesses and that he was allocated only a third as much time as the Co-Prosecutors<sup>185</sup> is misleading. The Chamber generally allocated equal time to the combined defence teams and the combination of the Co-Prosecutors and Civil Party lawyers. As the Co-Prosecutors had to cover the criminal responsibility of both Appellants and the Appellants' "cross-examination" interests generally overlapped, this allocation was reasonable

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<sup>179</sup> **E9/26** TC Notice of Joinder in Ieng Sary's Initial Submissions Regarding Documents to be Relied Upon at Trial & Additional Submissions Regarding New Documents, 19 April 2011; **E109/3** Observations Regarding Documents Considered Relevant to the Early Segments of the Trial, 22 July 2011; **E131/1/9** Objections, Observations, and Notifications Regarding Various Documents to be put before the Trial Chamber 14 November 2011.

<sup>180</sup> NC Appeal, para. 101.

<sup>181</sup> KS Appeal, para. 23.

<sup>182</sup> KS Appeal, para. 23, *citing* **E275/2/1/4** SCC Decision on Request by Defence for Khieu Samphan for Immediate Stay of Proceedings, 18 October 2013. See *Mladić* Decision on Appeal, para. 14; *Šainović* Decision on Appeal, para. 18; *Galić* AJ, para. 250; *Lubanga* Judgment on Appeal of PTC Decision, para. 29. Nonetheless, if the Supreme Court considers this prior pleading, it is requested that further submissions, in addition to the brief submission provided, be invited on these issues.

<sup>183</sup> Admissibility Hearings (12 days): (1) *Historical Background*, 16-19 January 2012, **E1/27.1**, **E1/28.1**, **E1/29.1**, **E1/30.1**; (2) *Administrative and Communication Structures*, 16 February 2012, **E1/42.1**, **E1/43.1**, **E1/44.1**, **E1/45.1**; (3) *Administrative and Communication Structures and Roles and Functions of the Accused*, 12-15 March 2012, **E1/46.1**, **E1/47.1**, **E1/48.1**, **E1/49.1**; (4) *Tuol Po Chrey and Forced Movements of the Population*, 21 January 2013, **E1/161.1**; (5) *Role of Accused*, 30-31 January 2013, **E1/167.1**, **E1/168.1**.

<sup>184</sup> Key Document Hearings (10 days): (1) *Historical Background*, 13-15 February 2012, **E1/42.1**, **E1/43.1**, **E1/44.1**; (2) *Structure of Democratic Kampuchea*, 10 October 2012, **E1/133.1**; (3) *Tuol Po Chrey, Forced Movement of the Population and other topics*, 22-24 January 2013, **E1/162.1**, **E1/163.1**, **E1/164.1**; (4) *Role of the Accused and Joint Criminal Enterprise*, 24-27 June 2013, **E1/211.1**, **E1/212.1**, **E1/213.1**, **E1/214.1**.

<sup>184</sup> NC Appeal, para. 105.

<sup>185</sup> NC Appeal, para. 105.

and was well within the Chamber's discretion. It is common practice at the other *ad hoc* tribunals to allocate the same combined time to the defence teams as granted to the prosecutor when it comes to multi-accused cases.<sup>186</sup> In two-accused and three-accused cases, each commonly receives 33% and 50% as much time as the prosecution.<sup>187</sup> Nuon Chea's examples of the questioning of Duch and Sum Chea demonstrate that he used 38%<sup>188</sup> and 100%<sup>189</sup> of the Co-Prosecutors question time respectively, more than he would receive at the other *ad hoc* tribunals. Moreover, the Chamber showed flexibility in allowing Nuon Chea to question 14 witnesses for equal, to or significantly more than, 50% of the time used by the Co-Prosecutors and Civil Parties combined.<sup>190</sup>

68. Similarly, Khieu Samphan was not prevented from "fully examining certain witnesses"<sup>191</sup> due to the Chamber's rulings prohibiting certain questions.<sup>192</sup> Rather, the Chamber was simply

<sup>186</sup> For example, in *Prlić*, the ICTY Appeals Chamber upheld the Trial Chamber's decision to allocate to each of the six Defence counsels one sixth of the time allocated to the Prosecution. See *Prlić* Decision on Joint Defence Interlocutory Appeal. Moreover, in several multiple-accused cases, trial chambers have also determined that the time for cross-examination of a witness should not exceed the time allotted for the examination in chief of that witness. See *Martić* Guidelines Decision, Annex A, para. 11: "In the interest of ensuring fair and expeditious conduct of the trial proceedings, the parties are requested to adhere to the principle that the time for cross-examination of a witness should not exceed the time allotted for the examination-in-chief of that witness, unless there are particular circumstances requiring that the cross-examination be extended". See also *Jelisić* 7 September 1999 Trial Transcript, p. 1063; *Krajišnik* 23 April 2004 Trial Transcript, p. 2652, where the Trial Chamber indicated as a guideline that the cross-examination of witnesses should take approximately 60 percent of the time allocated for the examination-in-chief; *Milošević* Third Order on Use of Time, p. 1, where the judges ordered that 60 percent of the time allocated to the Accused to present his case-in-chief would be allocated to the Prosecution for cross-examination during the Defence case.

<sup>187</sup> *Martić* Guidelines Decision, Annex A, para. 11; *Jelisić* . 7 September 1999 Trial Transcript, p. 1063; *Krajišnik* 23 April 2004 Trial Transcript, p. 2652; *Milošević* Third Order on Use of Time, p. 1.

<sup>188</sup> Nuon Chea does not demonstrate how the Chamber's time allocation resulted in an error and how the time limitation invalidated the verdict. Nuon Chea used approximately 11 hours and 7 minutes to question Duch, whilst the Co-Prosecutors and the Civil Parties combined used 34 hours and 34 minutes. This is in accordance with international standard. See Written Records of Proceedings of 19-20, 26-29 March, 2-5, and 9-10 April 2012, **E1/51, E1/52, E1/53, E1/54, E1/55, E1/56, E1/57, E1/58, E1/59, E1/60, E1/61, and E1/62.**

<sup>189</sup> Nuon Chea used approximately 1 hour and 54 minutes to question Sum Chea, whilst the Co-Prosecutors and Civil Parties used 2 hours and 34 minutes. See **E1/140** Written Record of Proceedings, 5 November 2012, p. 2.

<sup>190</sup> For example, the Nuon Chea Defence used approximately 236 minutes to question Khiev En (TCW-320), whilst the Co-Prosecutors and Civil Parties combined used 228 minutes. Similarly, the Nuon Chea Defence used 355 minutes to question Youk Chhan (TCW-793), whilst the Co-Prosecutors and Civil Parties used 237. The written records of the following 12 witnesses show a similar tendency: Lay Bony (TCCP-64), Sum Chea (TCW-690), Pe Chuy Chip Se (TCW-507), Kham Phan alias Phan (TCW-307), Denise Affonço (TCCP-1), Chuon Thi (TCW-126), Ung Chhat (TCW-752), Lim Sat (TCW-389), Philip Short (TCE-65), Ieng Phan (TCW-253), and Lev Lam (TCW-386). See Written Record of Proceedings of Hearing Days and Trial Transcripts: **E1/37.1** Youk Chhang, T. 01 February 2012, pp. 4-99, pp. 100-124. **E1/38.1** Youk Chhang, T. 02 February 2012, pp. 5-59, 61-113. **E1/39.1** Youk Chhang T. 06 February 2012, pp. 2-108. **E1/127, E1/128, E1/137, E1/138, E1/140, E1/143, E1/144, E1/151, E1/152, E1/153, E1/154, E1/183, E1/185, E1/186, E1/187, E1/188, E1/189, E1/190, E1/191, E1/192, E1/193, and E1/216.**

<sup>191</sup> KS Appeal, para. 31.

<sup>192</sup> KS Appeal, fn. 76.

managing the trial by ensuring that questions put to the witnesses were not irrelevant,<sup>193</sup> speculative,<sup>194</sup> or repetitive,<sup>195</sup> and ensuring that the proper procedures were followed when presenting documents to witnesses.<sup>196</sup> Indeed, Khieu Samphan used equal or significantly more time questioning 15 witnesses than is usually allocated at the *ad hoc* tribunals.<sup>197</sup> Khieu Samphan's assertion of "inappropriate and exacerbated interventionism" by the Chamber during the testimony of Phy Phuon is equally unsubstantiated.<sup>198</sup> On two occasions, the President simply interrupted Phy Phuon from answering so the Chamber could hear and rule on an objection by the Co-Prosecutors.<sup>199</sup> On two other occasions, the President requested Phy Phuon not to answer a question as it invited speculation,<sup>200</sup> and another as it was intended to intimidate the witness.<sup>201</sup> Finally Khieu Samphan's allegation that the President suggested to Phy Phuon how he could have answered questions posed, occurred *after* the conclusion of questioning and therefore did not affect Phy Phuon's responses.<sup>202</sup>

69. Khieu Samphan also asserts that the Chamber erred by "technically manag[ing] speech time by deactivating the Defence's microphone when the Chamber was not pleased with the Defence's submissions."<sup>203</sup> However, in each of these instance the Chamber: (i) prevented the Defence from pursuing arguments that were in relation to questions not addressed to them;<sup>204</sup> (ii)

<sup>193</sup> E1/100.1 T. 1 August 2012, pp. 30-31.

<sup>194</sup> E1/100.1 T. 1 August 2012, p. 36; E1/101.1 T. 2 August 2012, pp. 39-41.

<sup>195</sup> E1/101.1 T. 2 August 2012, pp. 17-18.

<sup>196</sup> E1/31.1 T. 24 January 2012, pp. 44-45; E1/59.1, T. 4 April 2012, pp. 39-43; E1/73.1 T. 17 May 2012, pp. 75-76 (The Defence sought to refer to a statement by a witness who was scheduled to be heard later on in the proceedings); E1/33.1 T. 25 January 2012, pp. 15-17; E1/166 T. 29 January 2013, pp. 49-51 (The Defence sought to refer to evidence that was not on the case file and for which no Rule 87(4) request was filed).

<sup>197</sup> For example, the Khieu Samphan Defence used approximately 117 minutes to question Ros Suy (TCW-570), whilst the Co-Prosecutors and Civil Parties combined used 122. The written records of the following 14 witnesses show a similar tendency: Vanthan Dara Peou (TCW-766), Chao Ny (TCCP-187), Philip Short (TCE-65), Philippe Jullian-Gaufres (TCW-277), Prum Sou (TCW-548), Chao Sockon (TCW-84), Chan Sophean (TCCP-7), Nou Hoan (TCCP-100), Soeun Sovandy (TCCP-145), Sydney Schanberg (TCW-624), Sok Roeu (TCW-665), and Leng Chhoeung (TCW-384). *See* Written Record of Proceedings of Hearing Days and Trial Transcripts: E1/31.1 Vanthan Dara Peou, T. 23 January 2012, pp. 63-98, E1/32.1 Vanthan Dara Peou, T. 24 January 2012, pp. 2-30, 43-62, 72-98, E1/33.1 Vanthan Dara Peou, T. 25 January 2012, pp. 36-67, E1/196, E1/189, E1/190, E1/191, E1/192, E1/184, E1/189, E1/190, E1/191, E1/192, E1/194, E1/195, E1/198, E1/199, E1/200, E1/201, E1/202, E1/203, E1/208.

<sup>198</sup> KS Appeal, fn. 77.

<sup>199</sup> E1/99.1 Phy Phuon, T. 31 July 2012, pp. 94-95; E1/100.1 Phy Phuon, T. 1 August 2012, pp. 30-31.

<sup>200</sup> E1/100.1 Phy Phuon, T. 1 August 2012, pp. 36-37.

<sup>201</sup> E1/100.1 Phy Phuon, T. 1 August 2012, p. 54.

<sup>202</sup> E1/101.1 Phy Phuon, T. 2 August 2012, p. 31.

<sup>203</sup> KS Appeal, para. 32.

<sup>204</sup> E1/146.1 T. 23 November 2012, pp. 95-96.

prevented repetitive questions;<sup>205</sup> or issues already ruled upon;<sup>206</sup> and (iii) generally ensured that the trial progressed fairly and expeditiously.<sup>207</sup>

**D. The Chamber did not err in setting deadlines and page limits for the Closing Briefs (NC Ground 19, KS para. 23)**

70. Contrary to Appellants' contention,<sup>208</sup> the Chamber's allocation of page limits for their Closing Briefs was fair, reasonable and within its discretion. Specifically, the Appellants were granted 250 pages combined (125 each), more than was granted to the Co-Prosecutors (225 pages),<sup>209</sup> who bear the burden of establishing the Appellants' criminal liability. Moreover, Khieu Samphan's argument that the page limit was "unacceptable" is disingenuous, given that he did not take up the Chamber's suggestion that the parties use endnotes (which would not count towards the page limit), rather than footnotes, thereby rejecting the opportunity to submit a longer brief. The Appellants were given further opportunity to argue their case during the closing submissions. Nuon Chea argued his case for over 11 hours (approximately 285 pages of transcripts).<sup>210</sup> Khieu Samphan argued for about 9 ¾ hours (263 pages of transcription).<sup>211</sup> No prejudice was therefore occasioned.

71. Nuon Chea's reliance on submissions in his Closing Brief in support of his contention that the Chamber failed to reason its decision to reject calling certain witnesses does not meet the burden of review on appeal and is an attempt to impermissibly expand the page limit of his appeal.<sup>212</sup> Contrary to his contention,<sup>213</sup> the Chamber is under no obligation to articulate every step of its reasoning in reaching a decision on the credibility of witnesses.<sup>214</sup> The fact that the Judgment does not explicitly refer to each of Nuon Chea's submissions does not mean that they

<sup>205</sup> E1/79.1 T. 31 May 2012, pp. 90-92.

<sup>206</sup> E1/91.1 T. 18 July 2012, pp. 6-9.

<sup>207</sup> E1/218.1 T. 4 July 2013, pp. 106-108.

<sup>208</sup> NC Appeal, paras 107-109; KS Appeal, para. 23.

<sup>209</sup> E163/5/4 Further Notification of Modalities for Closing Briefs, 26 November 2012; E288/1/1 Schedule for the Final Document and Other Hearings in Case 002/01, for the Questioning of the Accused and Response to Motions E263 and E288/1, 17 June 2013, para. 10; E1/227.1 T. 23 July 2013, p. 71. Further, "[t]he quality and effectiveness of an appellant's brief are not contingent on the length of the submissions, but on the cogency and clarity of the arguments presented." *Hartmann* Decision on Word Limit, para. 24.

<sup>210</sup> E1/232 Written Record of Proceeding 22 October 2013, p. 2; E1/233 Written Record of Proceeding 24 October 2013, p. 2; E1/237 Written Record of Proceeding 31 October 2013, p. 2.

<sup>211</sup> E1/234 Written Record of Proceeding 25 October 2013, p. 2; E1/235 Written Record of Proceeding 28 October 2013, p. 2; E1/237 Written Record of Proceeding 31 October 2013, p. 2.

<sup>212</sup> NC Appeal, para. 110.

<sup>213</sup> NC Appeal, paras 110-111.

<sup>214</sup> *Duch* AJ, para. 17, citing *Kupreškić* AJ, paras 30, 32. See also *Lubanga* AJ, para. 26; *Furundžija* AJ, para. 37.



were not appropriately considered.<sup>215</sup> Moreover, Nuon Chea has not demonstrated that the failure to consider these submissions could have invalidated the Judgment or occasioned a miscarriage of justice.

72. Khieu Samphan relies on three examples where Judge Lavergne allegedly violated procedural rules imposed upon parties to support his contention that the Chamber erred by applying unpredictable rules in the conduct of the proceedings<sup>216</sup> with regard to the admission of documents<sup>217</sup> and the filing of responses.<sup>218</sup> Khieu Samphan fails to appreciate that the Chamber is not considered a party and he fails to demonstrate how he was prejudiced as a result of these three examples. Khieu Samphan further fails to demonstrate how the use of a previously rejected piece of evidence that was ultimately used in the Judgment created “a situation of procedural uncertainty.”<sup>219</sup> The SCC has stated that “a court is not bound by its own case management decisions and may therefore reconsider them as long as doing so does not run against the interests of justice.”<sup>220</sup> Khieu Samphan has not demonstrated that the Chamber’s reconsideration led to a miscarriage of justice.

**E. The Chamber provided reasoned decisions and did not infringe upon the Appellants’ right to legal certainty (NC Grounds 20-21, KS paras 21, 35-38)**

73. Nuon Chea’s reliance on submissions in his Closing Brief in support of his contention that the Chamber failed to reason its decision to reject calling certain witnesses does not meet the burden of review on appeal and is an attempt to impermissibly expand the page limit of his appeal.<sup>221</sup> Contrary to his contention,<sup>222</sup> the Chamber is under no obligation to articulate every step of its reasoning in reaching a decision on the credibility of witnesses.<sup>223</sup> The fact that the Chamber did not explicitly refer to each submission by Nuon Chea in the Judgment does not mean that the submissions were not appropriately considered.<sup>224</sup> Moreover, Nuon Chea has not

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<sup>215</sup> NC Appeal, para. 111.

<sup>216</sup> KS Appeal, para. 35.

<sup>217</sup> KS Appeal, para. 37-38.

<sup>218</sup> KS Appeal, para. 35.

<sup>219</sup> KS Appeal, para. 37.

<sup>220</sup> E284/2/1/2 SCC Decision on Co-Prosecutors’ Request for Clarification, 26 June 2013, para. 8.

<sup>221</sup> NC Appeal, para. 110.

<sup>222</sup> NC Appeal, paras 110-111.

<sup>223</sup> *Duch* AJ, para. 17, citing *Kupreškić* AJ, paras 30, 32. See also *Lubanga* AJ, para. 26; *Furundžija* AJ, para. 37.

<sup>224</sup> NC Appeal, para. 111.

demonstrated that the failure to consider these submissions could have invalidated the verdict or occasioned a miscarriage of justice.

74. Khieu Samphan relies on three examples where Judge Lavergne allegedly violated procedural rules imposed upon parties to support his contention that the Chamber erred by applying unpredictable rules in the conduct of the proceedings<sup>225</sup> with regard to the admission of documents<sup>226</sup> and the filing of responses.<sup>227</sup> Khieu Samphan fails to appreciate that the Chamber is not considered a party and he fails to demonstrate how he was prejudiced as a result of these three examples. Khieu Samphan further fails to demonstrate how the use of a previously rejected piece of evidence that was ultimately used in the Judgment created “a situation of procedural uncertainty.”<sup>228</sup> The SCC has stated that “a court is not bound by its own case management decisions and may therefore reconsider them as long as doing so does not run against the interests of justice.”<sup>229</sup> Khieu Samphan has not demonstrated that the Chamber’s reconsideration led to a miscarriage of justice.

75. Similarly,<sup>230</sup> the Chamber clearly and consistently advised parties on multiple occasions that documents assigned an E3 number were considered put before the Chamber and “subjected to examination.”<sup>231</sup> Khieu Samphan’s reliance on the Chamber’s assignment of E3 numbers to all documents cited in the footnotes to the Closing Order, despite these documents not yet being subjected to examination,<sup>232</sup> is without merit. In this instance, the Chamber exceptionally considered that there was a presumption that these documents were relevant and reliable, as the

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<sup>225</sup> KS Appeal, para. 35.

<sup>226</sup> KS Appeal, para. 37-38.

<sup>227</sup> KS Appeal, para. 35.

<sup>228</sup> KS Appeal, para. 37.

<sup>229</sup> **E284/2/1/2** SCC Decision on Co-Prosecutors' Request for Clarification, 26 June 2013, para. 8.

<sup>230</sup> KS Appeal, para. 21.

<sup>231</sup> Internal Rules 87(2)-(3); **E159** TC Scheduling of oral hearing on documents (16-19 January 2012), 11 January 2012, para. 5; **E178/1** Requests by the Khieu Samphan Defence to Clarify the Status of Certain E3 Documents (E178) and its Motion E167, 11 April 2012, para. 2; **E96/7** TC Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and other Documents before the Trial Chamber, 20 June 2012, para. 17; **E246/1** Response to Motions E246 and E185/1/1 and other sundry requests concerning documents and deadlines, 13 February 2013, para. 2; **E190** TC Decision Concerning New Documents and Other Related Issues, 30 April 2012, paras 17-18.

<sup>232</sup> KS Appeal, para. 36; **E178/1** Requests by the Khieu Samphan Defence to Clarify the Status of Certain E3 Documents (E178) and its Motion E167, 11 April 2012, para. 3; **E185** TC Decision on Objections to Documents Proposed to be put before the Chamber on the Co-Prosecutors’ annexes A1-A5 and to Documents cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, 9 April 2012, para. 2.

CIJ's had assessed all documents placed on the Case File.<sup>233</sup> The parties were afforded numerous opportunities to rebut this presumption.<sup>234</sup> Following the respective document hearings, the Chamber clearly advised parties which documents cited in the Closing Order were considered to have been put before the Chamber *and* subjected to examination.<sup>235</sup>

76. Khieu Samphan alleges the Chamber erred by relying on a document that was not subjected to an adversarial hearing.<sup>236</sup> In fact, Khieu Samphan objected to the document,<sup>237</sup> which was overruled.<sup>238</sup> The fact that this document was not assigned an E3 number appears to be an administrative oversight and did not violate Khieu Samphan's right to legal certainty. Finally, Khieu Samphan fails to substantiate his allegation that the Chamber erred by restricting the parties' right to file replies to motion responses.<sup>239</sup> The policy was intended to "safeguard the efficiency of proceedings (through the reduction of decision run-times, where considered necessary in the interests of justice)" and to ensure that replies that are "considered unlikely to materially assist it in its disposition of the issues in question" are not filed.<sup>240</sup> Khieu Samphan

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<sup>233</sup> **E1/34.1** T. 26 January 2012, pp. 85-88; **E162** Trial Chamber response to portions of E114, E1141/1, E131/1/9, E131/6, E136 and E158, 31 January 2012, para. 3; **E185** TC Decision on Objections to Documents Proposed to be put before the Chamber on the Co-Prosecutors' Annexes A1-A5 and to Documents cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, 9 April 2012, para. 2.

<sup>234</sup> **E159** TC Scheduling of oral hearing on documents (16-19 January 2012), paras 6-7; **E170** TC Scheduling of oral hearing on documents (13-16 February 2012), 9 February 2012, para. 5; Key Document hearings: **E1/27.11** T. 6 January 2012; **E1/42.11** T. 6 February 2012. See also **E178/1** Requests by the Khieu Samphan Defence to Clarify the Status of Certain E3 Documents (E178) and its Motion E167, 11 April 2012, para. 3; **E185** TC Decision on Objections to Documents Proposed to be put before the Chamber on the Co-Prosecutors' Annexes A1-A5 and to Documents cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, 9 April 2012, para. 3; **E96/7** TC Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and other Documents before the Trial Chamber, 20 June 2012, para. 28; **E223/2** Forthcoming document hearings and response to Lead Co-Lawyers' memorandum concerning the Trial Chamber's request to identify Civil Party applications for use at trial (E208/4) and Khieu Samphan Defence request to revise corroborative evidence lists (E223), 19 October 2012, paras 1, 5; **E246/1** TC Response to Motions E246 and E185/1/1 and other sundry requests concerning documents and deadlines, 13 February 2013, paras 1-2; *Cf.* KS Appeal, para. 36.

<sup>235</sup> **E185** TC Decision on Objections to Documents Proposed to be put before the Chamber on the Co-Prosecutors' Annexes A1-A5 and to Documents cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, 9 April 2012, paras 23, 31; *Cf.* KS Appeal, para. 21.

<sup>236</sup> KS Appeal, para. 36, *citing* Judgment, fn. 2514.

<sup>237</sup> **E1/167.1** T. 30 January 2013, pp. 90-91.

<sup>238</sup> **E1/168.1** T. 31 January 2013, p. 2; *contra* KS Appeal, para. 36.

<sup>239</sup> KS Appeal, para. 35. Practice Direction on Filing, Article 8.4 ("A reply to a response shall only be permitted where there is to be no oral argument on the request, and such reply shall be filed within 5 calendar days of notification of the response to which the participant is replying").

<sup>240</sup> **E64** Trial Chamber directive regarding responses, replies to responses and filing in one language only under exceptional circumstances (Articles 7.2, 8.3 and 8.4 of the amended ECCC Practice Direction on Filing of Documents), p. 1 ("It follows that replies to responses are contemplated only in relation to matters subject to adversarial argument, and as an alternative to oral argument following a determination that the latter is not

has not demonstrated that this change created uncertainty nor that he suffered any prejudice as a result thereof.

**F. Khieu Samphan had adequate time & facilities to prepare his defence (KS para. 20)**

77. Khieu Samphan argues that he was not given adequate time and facilities for the preparation of his defence,<sup>241</sup> improperly referencing a prior submission<sup>242</sup> and providing two examples.<sup>243</sup> In the first example, Khieu Samphan argues that the admission of hundreds of witness statements by the Chamber in August 2013 gave him no time to properly review or respond in his closing arguments.<sup>244</sup> In fact, Khieu Samphan had possession of these documents from at least the time the Closing Order was issued on 15 September 2010. Further, the Co-Prosecutors had filed a request to admit these documents over two years earlier, on 19 April 2011.<sup>245</sup> In the second example, Khieu Samphan complains that he was denied adequate time and facilities to undertake a detailed review of the Co-Prosecutors' Closing Brief, as it was filed in English only.<sup>246</sup> English is one of the working languages of the court and two of Khieu Samphan's lead lawyers, Kong Sam Onn and Anta Guissé have indicated they are fluent therein.<sup>247</sup>

**VI. PROBATIVE VALUE OF THE EVIDENCE**

**A. It was within the Chamber's discretion to deny Nuon Chea's requests for further investigations (NC Grounds 9-10)**

*i. Introduction*

78. It is well established that trial chambers enjoy considerable discretion to manage the trial proceedings.<sup>248</sup> To successfully challenge a discretionary decision, a party must demonstrate that

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envisaged"). **E126** Trial Chamber's disposition of Motions E91/2, E95/7, E99/1/1, E100/4/1, E101/3, E114/2, E119 and response to general direction on replies, p. 2.

<sup>241</sup> KS Appeal, para. 20.

<sup>242</sup> **E275/2/1/4** SCC Decision on Request by Defence for Khieu Samphan for Immediate Stay of Proceedings, 18 October 2013.

<sup>243</sup> KS Appeal, para. 20.

<sup>244</sup> KS Appeal, para. 20.

<sup>245</sup> **E9/31** Co-Prosecutors' Rule 80(3) Trial Document List, 19 April 2011, paras 1, 19-2; **E9/31.11** Annex 11 – CF1 Trial Transcripts *incorporating* **E9/31.12** Annex 12 – Witness Statements; **E9/31.13** Annex 13 – Complaints; **E9/32** Civil Party Lead Co-Lawyers' Lists of Documents and Exhibits (Annexes 7 and 8), 19 April 2011, para. 13.

<sup>246</sup> KS Appeal, para. 20.

<sup>247</sup> **E163/5/1/15** SCC Decision, fn. 15, *citing* Foreign Co-Lawyer Application Form for Anta Guissé; **E163/5/1/15** Decision, fn. 18, *citing* Cambodian Co-Lawyer Application Form for Kong Sam Onn.

<sup>248</sup> See, e.g., *Šešelj* Continuation Decision, para. 34; *Setako* AJ, para. 19; *Mladić* Decision on Disclosure Methods, para. 21.

the trial chamber committed a discernible error, resulting in prejudice to that party.<sup>249</sup> A trial chamber's discretionary decision should only be overturned where it is found to be: (i) based on an incorrect interpretation of the governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Chamber's discretion.<sup>250</sup> In reviewing discretionary decisions, the question is therefore not whether the appeals chamber agrees with the impugned decision, but whether the trial chamber reasonably exercised its discretion in reaching that decision.<sup>251</sup>

*ii. Requests for investigations*

79. Pursuant to Internal Rule 87(3) the Chamber may reject evidence that it considers, *inter alia*, irrelevant to the determination of the truth of the charges, unsuitable to prove the facts it purports to prove, intended or likely to unduly prolong proceedings or frivolous. Nuon Chea contends that the Chamber erred by limiting his opportunities for investigation at the trial stage.<sup>252</sup> He merely asserts that the Chamber did not reason its decisions rejecting his requests.<sup>253</sup> Nuon Chea fails to point to any specific issues the Chamber omitted to address or explain how this omission invalidated its decisions rejecting his requests, or to demonstrate an abuse of discretion.<sup>254</sup>

80. Further, Nuon Chea fails to establish that he suffered any prejudice. Contrary to his contention,<sup>255</sup> the Chamber provided sufficient safeguards throughout trial to ensure that Nuon Chea would be able to adduce evidence necessary to ascertain the truth, to examine witnesses and to rebut the evidence and allegations against him.<sup>256</sup> Nuon Chea's complaints about the CIJ's decisions rejecting his requests for further investigations were heard by the PTC. Internal Rule 76(6) precludes him from raising the issue again before the SCC.

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<sup>249</sup> *Šešelj* Continuation Decision, para. 34; *Setako* AJ, para. 19.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Mladić* Decision on Disclosure Methods, para. 22.

<sup>252</sup> NC Appeal, paras 133-134. Nuon Chea's reference to submissions unsuccessfully raised at trial should be summarily dismissed. See II.B (Standard of Review). See also **E88/2** Co-Prosecutors' Response to Nuon Chea First Consolidated Request for Additional Investigations, 3 June 2011.

<sup>253</sup> NC Appeal, para. 134.

<sup>254</sup> *Krajišnik* AJ, para. 142.

<sup>255</sup> NC Appeal, para. 134.

<sup>256</sup> See *supra*, V.C (Questioning of witnesses); *infra*, VI.C-D, F (Probative value of the evidence).

**B. The Chamber correctly permitted witnesses to review their prior statements before testifying (NC Grounds 15-16)**

81. Nuon Chea fails to demonstrate that the Chamber committed any discernible error by allowing witnesses to view their prior statements before testifying nor does he establish that he suffered prejudice as a result.<sup>257</sup> His entire argument is premised on a misrepresentation of the Chamber's ruling regarding the use of prior witness statements. Specifically, the Chamber did not permit the Co-Prosecutors to "examine witnesses by reading witnesses the content of these statements in order to seek confirmation of their accuracy", as Nuon Chea alleges.<sup>258</sup> Instead, the Chamber, "in the interests of ensuring the expeditiousness of proceedings" established that:

it has recently commenced the questioning of each witness by asking whether the witness is familiar with the statement they gave before the [OCIJ] and whether this represents an accurate statement of their evidence. Where the witness indicates that s/he does recall their statement and that its contents as recorded in the OCIJ written record are true, parties shall not repeatedly request the witness to confirm this fact or otherwise attempt to force the witness to merely repeat the contents of that statement. The parties should instead focus their efforts on other questions (for instance, on matters beyond the contents of the statement) or in posing specific challenges to the credibility of the statement or the witness' evidence.<sup>259</sup>

82. Contrary to Nuon Chea's suggestion, the Chamber's reasoning was far from "almost non-existent".<sup>260</sup> It closely mirrors the practice of other international and *ad hoc* tribunals, none of which preclude witnesses from viewing their prior statements before testifying. As Nuon Chea concedes,<sup>261</sup> international jurisprudence in fact endorses the practice of providing witnesses with their prior statements before testifying for exactly the same reasons the Chamber did in this case; it assists witnesses in refreshing their memories and saves valuable time. The *Bemba*, *Katanga* and *Lubanga* ICC Trial Chambers all allowed for witnesses to review their prior statements before testifying,<sup>262</sup> finding that doing so would help the Trial Chamber to "establish the truth" and "greater efficiency may be achieved".<sup>263</sup> Similarly, the other *ad hoc* tribunals have also

<sup>257</sup> NC Appeal, paras 135-147.

<sup>258</sup> See NC Appeal, para. 135.

<sup>259</sup> E201/2 TC Memorandum to the Parties, "Notice to Parties Regarding Revised Modalities of Questioning and Response to Co-Prosecutors' Request for clarification regarding the use of documents during witness testimony (E201)," 13 June 2012, ENG 00814570.

<sup>260</sup> NC Appeal, para. 136.

<sup>261</sup> NC Appeal, para. 141.

<sup>262</sup> See *Bemba* Witness Preparation Decision, paras 21-25; *Katanga* Registry Procedures Decision, paras 17-18; *Lubanga* Decision on Witness Proofing, paras 50, 55.

<sup>263</sup> *Lubanga* Decision on Witness Proofing, para. 50.

accepted the practice of showing witnesses their prior statements before testifying.<sup>264</sup>

83. Moreover, Nuon Chea fails to articulate how the practice of allowing witnesses to view their prior statements before testifying caused him any prejudice.<sup>265</sup> The Chamber indicated that it would “consider all irregularities in the witnesses’ interviews held during the investigation phase as well as all discrepancies between these interviews and their testimony at trial, when determining the probative value and weight to be accorded to the evidence before it”.<sup>266</sup> Nuon Chea does not point to any situation whereby the Chamber erroneously relied on evidence derived from the witness having confirmed the content of his/her prior statement, or, for that matter, cite to any specific instance at all.<sup>267</sup> Jurisprudence regarding the use of leading questions in “direct examination” is inapposite, as a party suggesting an answer to its own witness is very different from a trial chamber asking witnesses to confirm a prior sworn statement.<sup>268</sup>

**C. It is within the Chamber’s discretion to manage the scope of the questioning (NC Grounds 11-12)**

84. Nuon Chea’s arguments regarding the Chamber’s restriction of the Defence’s ability to “cross-examine” witnesses are without merit. A trial chamber enjoys considerable discretion in setting the parameters of questioning<sup>269</sup> and the right to “cross-examination” is not absolute.<sup>270</sup> Nuon Chea was given a fair opportunity to question witnesses and contest their evidence, in accordance with the rules and practices of this Court. The examples he cites are unpersuasive. First, he refers to arguments presented at trial, without demonstrating how the Chamber erred.<sup>271</sup> Regarding the second example,<sup>272</sup> defence counsel admitted that he asked this witness the same

<sup>264</sup> The ICTR Appeals Chamber found that the Trial Chamber acted within its discretion when it allowed witnesses to be shown their prior statements before testifying and noted that “a practice of witness proofing has developed and has been accepted in various cases”. *Karempera* AC Decision on Witness Proofing, paras 8-9, citing the *Gacumbitsi* AJ, para. 74. See also *Karempera* AC Decision on Witness Proofing, para. 10, referring to the *Simba, Bagosora, Rwamakuba, Milutinović, Limaj, Blagojević, and Krstić* cases, which either implicitly or explicitly condoned the practice of witness proofing; *Karempera* TC Witness Proofing Decision, 15 December 2006, para. 15.

<sup>265</sup> See NC Appeal, para. 147.

<sup>266</sup> **E251** TC Decision on Defence Requests Concerning Irregularities Alleged to have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 7 December 2012 (“Decision on Alleged Irregularities”), para. 26.

<sup>267</sup> Decision on Alleged Irregularities para. 28.

<sup>268</sup> NC Appeal, fn. 354.

<sup>269</sup> *Rukundo* AJ, paras 133, 147. See also *Kanyarukiga* AJ, para. 42.

<sup>270</sup> *Prlić* Transcript Decision, para. 52, citing *Prosecutor v. Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić, 16 September 2006, para. 12.

<sup>271</sup> NC Appeal, para. 149.

<sup>272</sup> NC Appeal, para. 150, citing **E1/191** T. 8 May 2013, pp. 101-103.

question “over and over again”, because he did not get “an answer which is convincing”.<sup>273</sup> Accordingly, this does not concern a situation whereby the Defence was denied the opportunity to “cross-examine” the witness; the Defence simply did not like the answers to its questions.

85. During the questioning of Youk Chhang,<sup>274</sup> the Defence was similarly advised to avoid repeatedly asking the same question,<sup>275</sup> and was eventually told by the Chamber that they had the evidence needed.<sup>276</sup> The fact that the Defence thereafter used techniques other than repetitive questions to elicit further evidence simply confirms the efficiency and fairness of the Chamber’s trial management.<sup>277</sup> Nuon Chea has failed to demonstrate that the Chamber committed a discernible error and failed to establish any prejudice as a result.

#### **D. The Chamber correctly relied upon statements and transcripts (NC Ground 32)**

##### *i. Out-of-court written statements*

86. In accordance with the Internal Rules, the Chamber admitted into evidence various statements and transcripts.<sup>278</sup> The admission of such statements was fully within the discretion of the Chamber and served to fulfill its duty to search for the truth and to ensure that the proceedings were both expeditious and fair.<sup>279</sup> The Chamber correctly set forth the standard with respect to the admission and evaluation of the statements and transcripts. It held that “[a]bsent the opportunity for examination, the Chamber excluded statements going to proof of the acts and conduct of the Accused as alleged in the Closing Order”.<sup>280</sup> Nuon Chea’s contention that the Chamber articulated the wrong standard and incorrectly applied the standard to its assessment of

<sup>273</sup> E1/191.1 Philip Short, T. 8 May 2013, p. 102.

<sup>274</sup> E1/38.1 Youk Chhang, T. 2 February 2012, p. 103.

<sup>275</sup> E1/38.1 Youk Chhang, T. 2 February 2012, p. 103.

<sup>276</sup> E1/38.1 Youk Chhang, T. 2 February 2012, pp. 111-112.

<sup>277</sup> E1/39.1 Youk Chhang, T. 6 February 2012, p. 77. The Co-Prosecutors observe that the “numerous” other examples referenced in footnote 378 of Nuon Chea’s appeal brief equally fall short. When questioning Duch, the Defence was not prevented from “cross-examining” the witness, but was prevented from soliciting evidence on the basis of confessions made under torture, and the Defence conceded that it had already gotten the answers it was looking for (E1/58.1 Duch, T. 3 April 2012, pp. 83-85). Lastly, with respect to Witness Suong Sikoeun, the Chamber curtailed the Defence’s questioning, given that it went to matters it considered irrelevant to the trial at hand (E1/108.1 Suong Sikoeun, T. 15 August 2012, p. 44). Internal Rule 87(3)(a) is very clear in this regard; the Chamber may reject evidence it deems “irrelevant or repetitious”.

<sup>278</sup> See Judgment, paras 31, 33.

<sup>279</sup> Article 33(new) of the Establishment Law provides that The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious”.

<sup>280</sup> Judgment, para. 31.



the evidence is without merit.<sup>281</sup> Beyond repeating and incorporating by reference arguments that were unsuccessful at trial,<sup>282</sup> Nuon Chea does not establish how the Chamber's rejection of his arguments constituted an error warranting the intervention of the SCC.<sup>283</sup>

87. Nuon Chea's claim that the Chamber's decision was poorly reasoned "beyond its cursory finding that the limitations urged by the Defence do not constitute internationally recognized procedural rules" is both wrong and misleading.<sup>284</sup> The Chamber explicitly set forth: (i) the correct legal framework;<sup>285</sup> (ii) the factors in favour of admitting statements and transcripts in place of oral testimony;<sup>286</sup> (iii) the requirement that all proposed evidence must be *prima facie* relevant and reliable and otherwise satisfy the requirements of Rule 87(3);<sup>287</sup> and (iv) the heightened admissibility requirements pursuant to Rule 87(4) with respect to new evidence.<sup>288</sup> The Chamber further emphasised that "the absence of oral testimony and opportunity for confrontation are relevant considerations in assessing what, if any, probative value and weight may be accorded to statements or transcripts admitted in place of oral testimony."<sup>289</sup> Nuon Chea's arguments fail to establish that the Chamber abused its discretion in admitting statements and transcripts, nor how the alleged error invalidates the verdict or has occasioned a miscarriage of justice.

*ii. The Chamber's application of the standard*

88. Contrary to Nuon Chea's contention,<sup>290</sup> the Chamber correctly applied the facts to the standard it articulated. A reasonable trier of fact is not obliged to articulate every step of its reasoning.<sup>291</sup> It is presumed that a trial chamber assessed and weighed all evidence presented, as

<sup>281</sup> See NC Appeal, paras 154-165.

<sup>282</sup> NC Appeal, paras 155-162. See also *supra*, II.B (Standard of Review); See *Mladić* Decision on Appeal, para. 14; *Šainović* Decision on Appeal, para. 18; *Galić* AJ, para. 250; *Lubanga* Judgment on Appeal of PTC Decision, para. 29.

<sup>283</sup> See *Karadžić* Decision on Motion to Dismiss, para. 13, citing *Hadžihasanović* AJ, para. 46.

<sup>284</sup> NC Appeal, para. 157.

<sup>285</sup> **E299** TC Decision on Objections to the Admissibility of Witness, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, 15 August 2013 ("Decision on Admissibility Objections"), para. 17.

<sup>286</sup> Decision on Admissibility Objections, para. 18.

<sup>287</sup> Decision on Admissibility Objections, para. 20.

<sup>288</sup> Decision on Admissibility Objections, para. 22.

<sup>289</sup> Decision on Admissibility Objections, para. 19.

<sup>290</sup> See NC Appeal, para. 163.

<sup>291</sup> See *Karemera* AJ, para. 415, citing *Ntabakuze* AJ, para. 161; *Kanyarukiga* AJ, para. 114.

long as there is no indication that any particular piece of evidence was completely disregarded.<sup>292</sup> The Chamber stated that it would take into account the out-of-court nature of the evidence in its assessment of the weight to be accorded thereto.<sup>293</sup> It is therefore presumed that the Chamber did so in the Judgment when referring to this type of evidence.

89. Nuon Chea's specific examples of where the Chamber allegedly erred by relying on out-of-court statements fail to establish any error. Nuon Chea tries to isolate the evidence upon which the Chamber relied to show that it acted unreasonably when relying on individual accounts,<sup>294</sup> but subsequently contradicts himself by conceding that the Chamber relied on other evidence in support of its findings, noting only that he disagrees with its evaluation of the evidence.<sup>295</sup> Beyond disagreeing with the Chamber's findings, Nuon Chea has not identified any error in the Chamber's consideration of the evidence.<sup>296</sup> When assessing the relevance and credibility of the evidence, the Chamber should analyse particular evidence in light of the entire body of evidence adduced, rather than adopting a piecemeal approach.<sup>297</sup>

90. Lastly, Nuon Chea's allegation that the Chamber relied on statements without consideration of the circumstances under which they are created is simply untrue. The Chamber explicitly provided that "[a]bsent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence".<sup>298</sup>

#### **E. The Chamber correctly assessed hearsay evidence (NC Ground 32)**

91. Nuon Chea fails to establish how the Chamber abused its discretion in considering hearsay evidence, and fails to articulate a reasoned argument as to how this alleged error invalidates the verdict or occasions a miscarriage of justice.<sup>299</sup> Both the Internal Rules and Cambodian Law

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<sup>292</sup> See *Karemera* AJ, para. 415, citing *Ntabakuze* AJ, fn. 357; *Bagosora* AJ, fn. 625; *Kalimanzira* AJ, para. 195; *Karera* AJ, para. 20.

<sup>293</sup> See Judgment, para. 31.

<sup>294</sup> See NC Appeal, para. 163.

<sup>295</sup> See NC Appeal, para. 163, fn. 421 ("[w]hile the Trial Chamber cited other supposed evidence of Party policy, this evidence was manifestly inadequate).

<sup>296</sup> Cf. *Karemera* AJ, paras 206, 325, 459.

<sup>297</sup> *Lubanga* AJ, para. 22; *Ntagerura* AJ, para. 174. See also *Ngirabatware* AJ, paras 202, 208; *Taylor* AJ, para. 55. *Martić* AJ, para. 233.

<sup>298</sup> Judgment, para. 34.

<sup>299</sup> See NC Appeal, paras 166-171.

endorse the general principle of free appreciation of evidence,<sup>300</sup> and international procedural rules fully endorse the Chamber's discretion to cautiously consider and rely on hearsay evidence.<sup>301</sup> As noted above, the Chamber explicitly provided that "[a]bsent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence" and it is presumed that the Chamber considered the hearsay nature of such evidence before relying upon it.<sup>302</sup>

92. Nuon Chea's examples of errors by the Chamber regarding its assessment of hearsay evidence are misleading. Indeed, Nuon Chea's example of the "worst abuse of the [hearsay] evidence"<sup>303</sup> mischaracterises the Chamber's findings, as the Chamber did not rely "solely" on expert Philip Short's hearsay evidence (Short's evidence was based on interviews with "several villagers and other sources")<sup>304</sup> to find that Khmer Republic soldiers were executed in Oudong in 1974. Rather, the Chamber explicitly relied on a number of different sources in reaching the impugned finding, including Khmer Rouge documents, a speech by Khieu Samphan and the testimony of other witnesses.<sup>305</sup> Moreover, the Defence questioned Short on this very issue.<sup>306</sup> Merely stating that testimony is hearsay does not render it unreliable.<sup>307</sup>

93. The remainder of Nuon Chea's examples are equally without merit. The Chamber was under no obligation to "acknowledge" the hearsay nature of the evidence it relied on,<sup>308</sup> particularly when that is self-evident. The Chamber's findings about the evacuation of Phnom Penh were corroborated by a multitude of different types of evidence, both hearsay and non-hearsay.<sup>309</sup>

#### **F. The Chamber correctly assessed probative value of fact witnesses (NC Ground 33)**

94. As Nuon Chea acknowledges, the Chamber is entitled to rely on any evidence it deems to

<sup>300</sup> See Rule 87(1); CCrimP, art. 321; **D162/4** Order on the Investigative Request to Seek Exculpatory Evidence in the SMD, 19 June 2009, para. 6 (upheld on appeal. See **D164/4/3** Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009).

<sup>301</sup> See, e.g., *Munyakazi* AJ, para. 77, citing *Kalimanzira* AJ, para. 96; *Karera* AJ, para. 39; *Nahimana* AJ, para. 831.

<sup>302</sup> See *supra*, VI.D (Reliance on statements and transcripts), referring to *Ntabakuze* AJ, fn. 357; *Bagosora* AJ, fn. 625; *Kalimanzira* AJ, para. 195; *Karera* AJ, para. 20.

<sup>303</sup> See NC Appeal, para. 170.

<sup>304</sup> Judgment, para. 124.

<sup>305</sup> See Judgment, paras 124-127, fns 358-369.

<sup>306</sup> **E1/191.1** Philip Short, T. 8 May 2013, pp. 94-101.

<sup>307</sup> See *Nahimana* AJ, paras 215, 509, 831 (the ICTR Appeals Chamber recalled that it is settled jurisprudence that hearsay evidence is admissible as long as it is of probative value and noted that it is for the appellant to demonstrate that no reasonable trier of fact could have taken this evidence into account because it was second-degree hearsay evidence).

<sup>308</sup> See NC Appeal, para. 171.

<sup>309</sup> Judgment, fns 1386-1408.

have probative value and it may accept a witness's testimony only in part if it considers other parts of his or her evidence not reliable or credible.<sup>310</sup> It is within the discretion of the Chamber to evaluate inconsistencies in the evidence, to consider whether the evidence, taken as a whole, is reliable and credible, and to accept or reject fundamental features of the evidence.<sup>311</sup> It is well-established that a trial chamber can rely on a single witness to support a finding.<sup>312</sup> An appeals chamber should defer to the judgment of a trial chamber on issues of credibility<sup>313</sup> and should find an error of fact only when it is demonstrated that no reasonable trier of fact could have made the impugned finding.

*i. Inconsistent and unreliable testimony*

95. Contrary to Nuon Chea's submission, the Accused's right to a reasoned opinion does not ordinarily demand a detailed analysis of the credibility of particular witnesses.<sup>314</sup> It is well established that the Chamber can decide which witness's testimony to prefer without articulating every step of its reasoning.<sup>315</sup> Nuon Chea's examples concerning the evidence of Duch and Phy Phoun<sup>316</sup> do not demonstrate that the Chamber exceeded the scope of its discretion in relying on portions of a witness's testimony, while finding other parts unreliable. All of the examples cited to by Nuon Chea concern findings that: (i) were corroborated by other evidence;<sup>317</sup> and/or (ii) constituted evidence of which the witnesses would have personal, contemporaneous knowledge.<sup>318</sup> Nuon Chea does not demonstrate how the Chamber erred by relying on these witnesses' evidence, nor how the Chamber's reliance on portions of these witnesses' testimony invalidates the verdict.<sup>319</sup>

<sup>310</sup> *Karemera* AJ, para. 468, citing *Kajelijeli* AJ, para. 167.

<sup>311</sup> *Setako* AJ, para. 31.

<sup>312</sup> *Nahimana* AJ, para. 949.

<sup>313</sup> See *supra*, II.B (Standard of Review).

<sup>314</sup> *Karemera* AJ at para. 230, citing *Kajelijeli* AJ, para. 60.

<sup>315</sup> *Karera* AJ, para. 19.

<sup>316</sup> See NC Appeal, fns 463, 472.

<sup>317</sup> See Judgment, fns 307, 326, 328-332, 334-338, 419, 426, 615, 772, 962, 1032-1033, 1040-1041, 1384-1385, 1467, 1498, 1547, 1599, 1720, 1760, 1873, 1923, 1926, 1931, 1937, 2528, 2542, 2643.

<sup>318</sup> See Judgment, fns 307, 311, 327, 329-330, 333-336, 338, 419-425, 772, 962, 1032-1033, 1040-1041, 1384-1385, 1467, 1484, 1547, 1599, 1926, 2334, 2528, 2643.

<sup>319</sup> Indeed, for most of the examples cited by Nuon Chea, the Chamber relied on additional circumstantial evidence to support its findings. The Co-Prosecutors' have addressed Nuon Chea's arguments regarding the inconsistencies in the evidence of witnesses with respect to Tuol Po Chrey elsewhere in its response. See *infra*, XII (Tuol Po Chrey).

ii. *Reliance on Stephen Heder's and François Ponchaud's testimony*

96. Nuon Chea similarly fails to demonstrate how the Chamber's reliance on the first-hand evidence of Witnesses Stephen Heder and François Ponchaud was unreasonable or invalidates the verdict.<sup>320</sup> Nuon Chea's attempt to separate out parts of Heder's and Ponchaud's evidence and mischaracterise the Chamber's reliance thereon fails to establish any error. The vast majority of the examples cited to by Nuon Chea concern findings that: (i) were corroborated by other evidence, in addition to Heder's and Ponchaud's evidence;<sup>321</sup> and/or (ii) constituted evidence of which the witnesses would have personal, contemporaneous knowledge.<sup>322</sup>

iii. *Reliance on Nuon Chea's testimony*

97. Contrary to Nuon Chea's assertion, the Chamber correctly assessed his testimony. The dissenting opinion in the *Katanga* Trial Judgment upon which Nuon Chea relies to suggest that the Chamber could only have rejected his evidence "if deemed implausible beyond a reasonable doubt", does not adopt that standard.<sup>323</sup> Rather, the dissent merely noted that an Accused's evidence, like that of any other witness, should be evaluated according to the applicable standard of proof and to the extent it creates a reasonable doubt as to the truth of the charges, it cannot be ignored.<sup>324</sup> Nuon Chea's limited testimony created no reasonable doubt.

98. The sole "exculpatory" testimony cited by Nuon Chea in his appeal is his testimony that "he was required to seek the approval of Zone Secretaries even to travel within their territory."<sup>325</sup> Even if this were true, it is of little to no relevance. Nuon Chea does not attempt to explain how this evidence could possibly create a reasonable doubt as to guilt for the first and second forced transfers or for the massacre at Tuol Po Chrey.<sup>326</sup> The Chamber's obligation was only to apply the same rules of assessment to Nuon Chea's evidence as it would to any other witness.<sup>327</sup> Specifically, a chamber shall decide what weight to give to any evidence and in the case of conflicting testimony, which witness's testimony to prefer, without necessarily articulating every

<sup>320</sup> See NC Appeal, paras 180-182.

<sup>321</sup> See Judgment, fns 307, 309, 318, 324, 335, 340, 479, 523, 629, 635, 637-638, 644, 646, 649, 665, 680, 962, 1412, 1547, 1788, 1833, 1836, 2516, 2529, 2571, 2574, 2643, 2653-2654.

<sup>322</sup> See Judgment, fns 294-295, 631, 646, 962, 1408, 1412, 1547, 1788.

<sup>323</sup> See NC Appeal, para. 183, *citing Katanga* Minority Opinion, paras 168-169.

<sup>324</sup> *Katanga* Minority Opinion, paras 168-169.

<sup>325</sup> NC Appeal, fn. 492.

<sup>326</sup> Notably, Nuon Chea's closing brief only mentions this testimony in passing to support Ieng Sary's claim that zone secretaries were autonomous. See NC Appeal, para. 183.

<sup>327</sup> See *Karera* AJ, para. 19.

step of its reasoning.<sup>328</sup> Contrary to Nuon Chea's contention, the Chamber was under no obligation to justify why it rejected parts of his evidence, while relying on others.<sup>329</sup>

**G. The Chamber correctly assessed the probative value of Civil Party impact statements (NC Ground 34)**

99. Nuon Chea's arguments regarding the Chamber's reliance on Civil Party impact testimony and statements of suffering are disingenuous. They distort the Chamber's ruling and deliberately ignore the procedural history regarding this issue.<sup>330</sup>

100. The Chamber heard oral arguments on the issue of whether the Co-Prosecutors and the Defence had the right to question the Civil Parties while they provided their statements of suffering. The Co-Prosecutors made 10 submissions regarding this issue, emphasising, *inter alia*, that: (i) "Civil Parties should be questioned on all issues of relevance to the case"; (ii) evidence related to suffering and the occurrence of the crimes was "inextricably linked"; (iii) the Civil Parties to be heard were victims of the forced movements whose evidence would go to the heart of the trial; (iv) the Defence had to be provided the opportunity to challenge such evidence; (v) "both the Prosecution and the Defence have been proceeding on the basis that full examination would take place"; and (vi) the duty of the Chamber to ascertain the truth mandated that Civil Parties providing victim impact statements be treated the same way as previous Civil Parties who had testified.<sup>331</sup>

101. Counsel for Nuon Chea then responded: "I don't think I would ever be saying this in a court of law, but I think I agree with all 10 submissions from the Prosecution. ... So, we fully concur with the submissions of the Prosecution".<sup>332</sup> Counsel for Khieu Samphan also concurred with the Co-Prosecutors' position.<sup>333</sup> Following the conclusion of the parties' arguments, the Chamber rendered an oral decision on 21 May 2013, stating that: "there has been mutual consent amongst all the parties, and the Chamber decides that the parties may question the Civil Parties on relevant factual issues subject to the time limitations already announced".<sup>334</sup>

102. Nuon Chea's contention that the Chamber should have excluded Civil Party impact

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<sup>328</sup> *Karera* AJ, para. 19.

<sup>329</sup> See *Ngirabatware* AJ, para. 97; *Karera* AJ, para. 21.

<sup>330</sup> See NC Appeal, paras 187-193.

<sup>331</sup> **E1/193.1** T. 20 May 2013, pp. 105-107.

<sup>332</sup> **E1/193.1** T. 20 May 2013, p. 108.

<sup>333</sup> **E1/193.1** T. 20 May 2013, pp. 108-109.

<sup>334</sup> **E1/194.1** T. 21 May 2013, p. 119.

testimony in its entirety from the Chamber's consideration of the substance of the allegations<sup>335</sup> is thus completely contrary to the position he took at trial. A party cannot complain on appeal that the Chamber erred by adopting a procedure they never objected to, and in fact, urged the Chamber to adopt at the time. Moreover, contrary to his contention that he was misled, Nuon Chea's counsel himself posed questions to the victims outside the scope of their statements of suffering on issues relevant to Appellants' guilt in Case 002/01, including regarding facts pertaining to the targeting of Lon Nol soldiers.<sup>336</sup> Nuon Chea's counsel was even granted additional time to continue his "cross-examination" of a Civil Party.<sup>337</sup>

103. Nuon Chea's references to domestic and international practice where victim impact statements are given before sentencing but only *after* the determination of guilt are entirely irrelevant.<sup>338</sup> Here the statements were made during the trial proceedings, *before* the determination of the Appellants' guilt, and all parties understood that elements of the statements relevant to guilt could be considered by the Chamber in its determination of guilt.

#### **H. The Chamber reasonably relied on expert evidence and secondary sources (NC Grounds 30-31)**

##### *i. The Chamber's assessment of expert evidence*

104. Nuon Chea's argument that the Chamber erred in law by "routinely relying on expert[s] as direct evidence in support of factual findings in dispute between the parties"<sup>339</sup> is without merit. It is well-established that expert witnesses are afforded significant latitude to offer opinions within their expertise. Contrary to what Nuon Chea appears to suggest, expert opinions need not be based on first-hand knowledge or experience;<sup>340</sup> hearsay evidence from an expert witness is admissible as long as it is probative.<sup>341</sup>

<sup>335</sup> See NC Appeal, para. 187.

<sup>336</sup> See, e.g., **E1/197.1** T. 27 May 2013, pp. 92-100; **E1/198.1** T. 29 May 2013, pp. 33-37; **E1/199.1** T. 30 May 2013, pp. 29-33, 112-115; **E1/200.1** T. 4 June 2013, pp. 39-48.

<sup>337</sup> **E1/97.1** T. 27 May 2013, pp. 97-98, 100.

<sup>338</sup> NC Appeal, para. 188.

<sup>339</sup> See NC Appeal, para. 208.

<sup>340</sup> See *Bagosora* AJ, para. 225, citing *Renzaho* AJ, para. 287; *Nahimana* AJ, para. 198; *Semanza* AJ, para. 303.

<sup>341</sup> See *Bagosora* AJ, para. 226, citing *Nahimana* AJ, para. 509. See also *Nahimana* AJ, para. 831. Moreover, the vast majority of examples include references to findings that: (i) do not invalidate the verdict (NC Appeal, fns 562-568, 570-571); (ii) are corroborated by other evidence (NC Appeal, fns 563, 566-567, 570-574, 576); (iii) mischaracterise the Chamber's finding (NC Appeal, fns 566 (the Chamber specified that this was Short's view, rather than base a finding thereon), 569 (the Chamber in fact rejected the expert's evidence)).

*ii. The Chamber's reliance on secondary sources*

105. Likewise, Nuon Chea fails to demonstrate how the Chamber's reliance on reports or the academic work of various authors was unreasonable, invalidated the judgment or occasioned a miscarriage of justice. He simply cites paragraphs in the Judgment, without providing any explanation regarding their relevance to the verdict, how the Chamber abused its discretion by relying on this evidence or how he was prejudiced by the Chamber's reliance thereon.<sup>342</sup>

106. Lastly, it is for the Chamber to decide whether an individual can be considered as an expert witness.<sup>343</sup> Just as any other evidence presented, it is for the Chamber to assess the reliability and probative value of the expert evidence.<sup>344</sup> Additionally, the Chamber provided in the Judgment that "[a]bsent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence".<sup>345</sup> It is therefore presumed that the Chamber applied this standard throughout the Judgment.<sup>346</sup> Nuon Chea himself frequently submitted into evidence and asked both the Chamber and now the SCC, to consider secondary sources. Other than disagreeing with the Chamber's citations to secondary sources, Nuon Chea does nothing to demonstrate how the Chamber abused its discretion.

**I. Khieu Samphan fails to demonstrate that the Chamber erred in its assessment of the evidence (paras 23-32, 109-119, 468)**

*i. Arguments warranting summary dismissal*

107. Khieu Samphan submits that the Chamber erred in law in its reliance on and evaluation of the following categories of evidence: (i) contradictory evidence; (ii) accomplice evidence; (iii) hearsay evidence; (iv) written declarations or statements; and (v) expert evidence.<sup>347</sup> Khieu Samphan further alleges, without any support, that the Chamber erred in its application of the

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<sup>342</sup> See NC Appeal, paras 201-211. Nuon Chea's examples are misleading and do not lend support to his contention that the Chamber abused its discretion. Specifically, all of the examples include references to findings that: (i) do not invalidate the verdict (See Judgment, fns 318, 352, 1562, 1730, 1737, 1754, 1761, 1790, 1853, 1856, 1918, 1944); (ii) are corroborated by other evidence (See Judgment, fns 307, 318, 340, 352, 356, 1562, 1599, 1730, 1754, 1761, 1790, 1853, 1856, 1918, 1944); and/ or (iii) mischaracterises the Chamber's finding (See Judgment, fn. 1754 (this reference is corroborated by Nuon Chea's own testimony).

<sup>343</sup> *Simba AJ*, para. 174.

<sup>344</sup> *Simba AJ*, para. 174.

<sup>345</sup> Judgment, para. 34.

<sup>346</sup> See *supra*, VI.D (Admission of statements and transcripts). See also *Ntabakuze AJ*, fn. 357; *Bagosora AJ*, fn. 625; *Kalimanzira AJ*, para. 195; *Karera AJ*, para. 20.

<sup>347</sup> See KS Appeal, paras 114-118. Khieu Samphan also generally alleges that the Chamber erred in the standard it used for evaluating evidence. KS Appeal, paras 110-113.



burden of proof.<sup>348</sup> Khieu Samphan fails to support any of his arguments, but refers simply to “concrete examples” that are to be found “elsewhere”.<sup>349</sup> In order for the SCC to assess his arguments on appeal, Khieu Samphan should have provided precise references to the relevant transcript pages, or paragraphs in the Judgment to which the challenge is made.<sup>350</sup> Khieu Samphan’s general arguments amount to mere assertions without demonstrating how the Chamber erred and should thus be disregarded.<sup>351</sup> Additionally, Khieu Samphan fails to establish how any of the alleged errors invalidate the verdict or occasion a miscarriage of justice.<sup>352</sup>

*ii. Arguments addressed elsewhere in Khieu Samphan’s Appeal*

108. To the extent that Khieu Samphan relies on arguments elsewhere in his Appeal in support of his contention that the Chamber erred in its assessment of the evidence, they too are without merit. Specifically, Khieu Samphan alleges that the Chamber erred in law by: (i) limiting opportunities for investigations at trial;<sup>353</sup> (ii) relying on expert witnesses;<sup>354</sup> (iii) providing witnesses with their prior statements before their testimony;<sup>355</sup> (iv) giving witnesses documents of which they had no contemporaneous knowledge;<sup>356</sup> (v) denying the Defence’s requests for the production of the original documents and information relating to their chain of custody;<sup>357</sup> (vi) preferring written over oral evidence;<sup>358</sup> (vii) relying on Civil Party declarations when considering the impact of the Accused’s crimes;<sup>359</sup> and (viii) preventing the Accused from “cross-examining” witnesses<sup>360</sup> or objecting.<sup>361</sup>

109. Many of Khieu Samphan’s complaints are general and obscure but seem to overlap with

<sup>348</sup> KS Appeal, paras 109-110.

<sup>349</sup> KS Appeal, fns 228, 230-231, 238, 240-241, 244-245, 247.

<sup>350</sup> See *supra*, II.B (Standard of Review). See also *Karemera* AJ, para. 18; *Ndindiliyimana*. AJ, para. 13; *Ndahimana* AJ, para. 12; *Mugenzi* AJ, para. 16; *Dorđević* AJ, para. 20.

<sup>351</sup> See *supra*, II.B (Standard of Review). Cf. *Karemera* AJ, para. 40 (the ICTR Appeals Chamber found that Ngirumpatse failed to demonstrate an error on the part of the Trial Chamber, given that he “simply refer[ed] to other aspects of his appeal in support of his general allegations regarding the exclusion of exculpatory and Defence evidence”).

<sup>352</sup> See *supra*, II.B (Standard of Review).

<sup>353</sup> KS Appeal, para. 25.

<sup>354</sup> KS Appeal, para. 24.

<sup>355</sup> KS Appeal, para. 26.

<sup>356</sup> KS Appeal, para. 27.

<sup>357</sup> KS Appeal, para. 28.

<sup>358</sup> KS Appeal, paras 23, 29, 36, 468.

<sup>359</sup> KS Appeal, para. 30.

<sup>360</sup> KS Appeal, para. 31.

<sup>361</sup> KS Appeal, para. 32.

Nuon Chea's grounds of appeal on matters to which the Co-Prosecutors have responded above.<sup>362</sup> Khieu Samphan's arguments to support his complaints do not identify how any of the alleged errors invalidate the verdict or occasion a miscarriage of justice.<sup>363</sup> It is impossible for the Prosecution to further respond to such non-specific complaints.

110. One specific complaint raised by Khieu Samphan concerns the Chamber's alleged error in allowing witnesses to view documents previously shown to them during the CIJ's investigation of which they had no contemporaneous knowledge.<sup>364</sup> Khieu Samphan claims this could lead to witnesses impermissibly speculating but does not cite any rule or jurisprudence prohibiting a witness from being shown a document for which they did not have contemporaneous knowledge, cite any specific example where a witness did "speculate," point to where in the Judgment the Chamber relied on such speculation or demonstrate any prejudice.

## VII. SCOPE OF TRIAL AND SEVERANCE OF CASE 002/01

### A. Reliance on facts outside the temporal jurisdiction (NC Ground 23, KS paras 9-10)

111. The Appellants submit that the Chamber erred when it relied on facts concerning events before 17 April 1975 to convict him for planning, ordering, instigating, and aiding and abetting crimes.<sup>365</sup> They base their argument entirely on the *Nahimana et al.* Appeal Judgment, where the ICTR Appeals Chamber interprets the temporal jurisdiction of that court.<sup>366</sup> However, a close analysis of *Nahimana et al.* shows that it is fully supportive of the Chamber's approach in this case. In that case, the ICTR Appeals Chamber considered whether the temporal jurisdiction in the ICTR Statute – from 1 January 1994 through 31 December 1994 – meant only that the crimes had to be committed during that time period, or whether in addition it required that all acts establishing the accused's responsibility for the crime had to be within that time frame.<sup>367</sup>

112. The Appeals Chamber found that this question was not addressed by the plain language of the ICTR Statute,<sup>368</sup> and therefore could only be resolved by determining the *intent* of the

<sup>362</sup> See *supra*, VI.B-H (Probative value of the evidence)

<sup>363</sup> KS Appeal, paras 23-32. See also *supra*, II.B (Standard of Review).

<sup>364</sup> KS Appeal, para. 27.

<sup>365</sup> NC Appeal, para. 627; KS Appeal, paras 9-10.

<sup>366</sup> NC Appeal, paras 628-29, *citing Nahimana AJ*, paras 299-314. See also KS Appeal, para. 9.

<sup>367</sup> *Nahimana AJ*, para. 310.

<sup>368</sup> Article 7 of the ICTR Statute provides that "the temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994," and Article 1 of the ICTR

Security Council when it adopted the Statute.<sup>369</sup> The judgment noted that it was originally proposed that the ICTR's jurisdiction start from 6 April 1994, the date of the beginning of the killings and ensuing genocide, but that the date had been "expanded backwards" to include preparatory acts that had occurred before April 1994.<sup>370</sup> The Appeals Chamber noted that Rwanda voted against the Resolution establishing the tribunal in part because the 1 January 1994 starting date did not allow for the consideration of acts of planning and preparation that had occurred even earlier.<sup>371</sup> The Appeals Chamber found that the history of the adoption "clearly indicates that it was the intention of the framers of the Statute that the Tribunal should have jurisdiction to convict an accused only where all of the elements required to be shown in order to establish his guilt were present in 1994."<sup>372</sup>

113. The intent of the drafters of the ECCC Statute was demonstrably different. Analysis of the ECCC Statute and the history of its adoption reveals that the intent was to limit the ECCC's temporal jurisdiction to crimes that occurred during the DK regime, but not to restrict the consideration of acts of planning, ordering, instigating, or aiding and abetting that occurred *before* that time period. In contrast to the ICTR where the temporal jurisdiction begins over three months before killings began, the dates of the ECCC's temporal jurisdiction are pegged to the precise dates the Khmer Rouge gained and lost power. The ECCC's jurisdiction begins the very day that the Khmer Rouge captured Phnom Penh and began to forcibly expel millions of Cambodians from urban areas.

114. The Group of Experts appointed by the U.N. Secretary General recommended that the UN establish an *ad hoc* international tribunal to try Khmer Rouge officials for human rights abuses committed from 17 April 1975 to 7 January 1979,<sup>373</sup> which "precisely correspond[ed] to the period of Khmer Rouge rule."<sup>374</sup> The experts noted that "[t]he atrocities committed from 1975 to

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Statute says that the Tribunal "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed ... between 1 January 1994 and 31 December 1994".

<sup>369</sup> *Nahimana* AJ, para. 311.

<sup>370</sup> *Nahimana* AJ, paras 311-312.

<sup>371</sup> *Nahimana* AJ, para. 311.

<sup>372</sup> *Nahimana* AJ, para. 313.

<sup>373</sup> Report of UNSG Kofi Annan, attaching the Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, 18 February 1999 (hereinafter "Experts' Report").

<sup>374</sup> Ciorciari, para. 12 (p. 2).

1979 ... resulted from the deliberate policies of the Communist Party of Kampuchea.”<sup>375</sup>

115. Further evidence of the drafters’ intent is the fact that both the Agreement and the Establishment Law state that the purpose of the ECCC was to bring to trial “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes”. It is crystal clear that a massive crime such as the expulsion of millions of people from Phnom Penh could not occur without plans and orders in place. While limiting the court’s jurisdiction to criminal conduct that occurred on or after 17 April 1975 would capture the criminal responsibility of lower-level direct perpetrators who committed crimes, it would provide impunity for those senior leaders and individuals most responsible for planning, instigating and ordering the crimes. No one could reasonably understand such a limitation was intended by a tribunal established to try senior leaders of the regime, and in five years of litigation in this case, no one has put forth such an unreasonable interpretation.<sup>376</sup>

116. Nuon Chea complains that the Judgment’s reliance on meetings in June 1974 and April 1975 to convict him of the crimes committed at Tuol Po Chrey violated his right to be notified of the charges.<sup>377</sup> He fails explain how the lack of mention of these specific meetings in connection

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<sup>375</sup> Experts’ Report, para. 15. *See also* para. 16 (“[T]he regime launched a uniquely thorough revolution whereby all pre-existing economic, social and cultural institutions were abolished, all foreign influences were expunged and the entire population was transformed into a collective workforce”).

<sup>376</sup> In this regard it is noteworthy that the Appellants raise this temporal jurisdictional argument on appeal for the first time, despite Internal Rule 89(1), which states that all jurisdictional objections are inadmissible unless made within 30 days of the Closing Order. The defence in this case made no such temporal jurisdiction objection as part of their Rule 89 Objections, even though the Closing Order expressly relied on pre-April 1975 conduct of the Accused (see, *e.g.*, paras 1154, 1157-58, 1193). In addition, at trial the defence repeatedly pressed for consideration of pre-17 April 1975 for all purposes, and never objected to the Prosecution’s reliance on such evidence. *See* Opening Statement of Nuon Chea, 22 November 2011 (focusing almost exclusively on pre-April 1975 events, in particular the CPK leaders’ June 1974 decision to evacuate all key cities); trial phase on historical background from 5 Dec 2011 to 15 Feb 2012 (only trial segment on which an Accused gave testimony); arguments of 16 Jan 2012 (concerning admissibility of documents cited in historical background section of Closing Order; neither accused objected to admission of these documents); trial proceedings of 13-15 Feb 2012 (Co-Prosecutors presented key documents from pre-April 1975 period and was clear about purposes of these documents); trial proceedings on 15 Feb 2012 (Nuon Chea defence makes oral motion for TC to hear even more evidence on pre-April 1975 period, stating that “what is very relevant when considering the facts of this case is to study and more properly discuss what happened in Cambodia in the years between 1970 and 1975” (E1/44.1, pp. 83-85); 16 March 2012 (Nuon Chea defence files written motion to hear additional evidence on historical context (E182)); 19 March 2012 (speech of Nuon Chea regarding importance of pre-April 1975 period); Closing statements of counsel of both accused (emphasising the importance of the pre-April 1975 events, arguing that they are at the “very heart of this trial” (E1/234.1, pp. 56-57, and 59)). The failure of the Defence to raise the issue of temporal jurisdiction before the appeal deprived the Chamber of the opportunity to base its decision on acts of planning, ordering, instigating, and aiding and abetting that also continued to occur after 17 April 1975, proven by both direct evidence as well as inferences drawn from pre-17 April 1975 events.

<sup>377</sup> NC Appeal, paras 636-638.

with Tuol Po Chrey impaired his ability to defend the charges.<sup>378</sup> Accordingly, this appeal complaint should be summarily dismissed. In addition, his argument misapprehends the level of detail required in a charging instrument: material facts underlying a charge are required to be set out, but the evidence by which the material facts are to be proven is not.<sup>379</sup> The Closing Order put Nuon Chea on notice that it was alleged that the CPK adopted a policy of targeting former Khmer Republic soldiers “from the early stages of CPK control over certain parts of the territory before 1975”.<sup>380</sup>

#### **B. The Chamber correctly assessed Nuon Chea’s role at S-21 (NC Ground 27)**

117. Nuon Chea concedes that any alleged error regarding the Chamber’s findings concerning his role at S-21 would not invalidate the Judgment or cause a miscarriage of justice.<sup>381</sup> His arguments should be summarily dismissed on this basis alone.

118. While the Chamber expressly refrained from determining Nuon Chea’s responsibility for crimes occurring at S-21,<sup>382</sup> it properly considered evidence concerning Nuon Chea’s knowledge of S-21 and his role in this security centre,<sup>383</sup> given its relevance to his role in the DK regime and participation in a JCE that involved eliminating enemies of the CPK. Such evidence included not just Duch’s testimony that he reported to and received instructions from Nuon Chea, but also testimony of a bodyguard who carried messages between Duch and Nuon Chea, twenty-three S-21 confessions containing annotations indicating they were sent to Nuon Chea and Nuon Chea’s admission that he read many confessions and used them for training purposes.<sup>384</sup>

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<sup>378</sup> *Nahimana* AJ, paras 326-327. Nuon Chea acknowledges that the meetings were mentioned in the Closing Order in connection with the forced expulsion from Phnom Penh. NC Appeal, para. 637.

<sup>379</sup> *Nahimana* AJ, para. 322 “...the Prosecutor must state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proved ... whether or not a fact is considered “material” depends on the nature of the Prosecution’s case” See also *Kvočka* AJ, paras 27-28; *Furundžija* AJ, para 61.

<sup>380</sup> Closing Order, para. 205.

<sup>381</sup> NC Appeal, para. 212.

<sup>382</sup> Judgment, para. 346.

<sup>383</sup> Judgment, paras 343-345.

<sup>384</sup> Judgment, paras 343, 345. Those 23 confessions bore annotations such as “Sent to Brother Nuon,” and were separate from the confessions identified by Duch as bearing Nuon Chea’s handwriting.

**C. The Chamber did not establish the existence of a CPK forced marriage policy  
(NC Ground 28)**

119. Contrary to Nuon Chea's assertion,<sup>385</sup> the Chamber did not establish the existence of a CPK *forced* marriage policy, but only of a CPK *regulation* of marriage policy, citing both evidence of marriages arranged by *Angkar* but not forced and some evidence of arranged and involuntary marriages.<sup>386</sup> The Judgment specifies in footnote 287 that the parties could lead evidence in relation to all five policies, but that the existence of three of those policies, including the regulation of marriage, was examined for background purposes only.<sup>387</sup> Consequently any error of law in this regard could not invalidate the Judgment.<sup>388</sup> There is also no finding in the Judgment that would be determinative of Nuon Chea's criminal liability for forced marriage in Case 002/02. Nuon Chea misrepresents the evidence cited in the Judgment by confusing once again the concepts of arranged marriages and forced marriages and inaccurately claiming that there is only "evidence of six arranged marriages".<sup>389</sup> In fact, the Judgment cites nine sources in relation to forced marriages and eight other sources establishing the arrangement of marriages.<sup>390</sup>

**D. The Chamber did not make findings about the amount of deaths during the DK era  
(NC Ground 29)**

120. Nuon Chea alleges that by finding that there were between 1.5 and 2 million excess deaths during the DK era, the Chamber violated his right to fair notice of the charges and to confront the evidence against him.<sup>391</sup> However, a plain reading of the Judgment shows that the Chamber does not make any finding as to how many deaths occurred during the DK era.<sup>392</sup> In a section entitled "General Overview: 17 April 1975 – 6 January 1979", the Chamber provides context by discussing the evidence on the number of deaths during the DK. The Chamber acknowledges the range of opinion but made no finding on the specific number of deaths that occurred.<sup>393</sup> Nuon Chea fails to demonstrate how the Chamber's discussion of the evidence influenced the verdict

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<sup>385</sup> NC Appeal, para. 219.

<sup>386</sup> Judgment, paras 103, 128-130.

<sup>387</sup> Judgment, para. 103, fn. 287 referring to **E284** TC Decision on Severance and **E141** TC Response to Issues Raised by Parties, 18 November 2011, p. 2.

<sup>388</sup> Contrary to what Nuon Chea suggests in NC Appeal, para. 217.

<sup>389</sup> NC Appeal, para. 218.

<sup>390</sup> Judgment, paras 128-129, fns 371 (3 sources), 372 (3 sources), 373 (3 sources) and 374 (8 sources).

<sup>391</sup> NC Notice, ground 29; NC Appeal, para. 223.

<sup>392</sup> Judgment, para. 174.

<sup>393</sup> Judgment, para. 174.

on the crimes charged in Case 002/01– namely the First and Second Forced Transfers and the massacre at Tuol Po Chrey. The Judgment in Case 002/01 does not find that Nuon Chea is responsible for killing 1.5-2 million people. Nuon Chea shows no error of fact and no prejudice from the discussion of the evidence of the number of deaths occasioning a miscarriage of justice.

#### **E. Severance (KS paras 11-18, 636-641)**

121. Khieu Samphan advances a series of complaints, which could be understood as appeal grounds arising from the severance process in Case 002/01. He alleges that the severance resulted in excesses of temporal<sup>394</sup> and subject-matter jurisdiction,<sup>395</sup> both as errors of law and fact;<sup>396</sup> violations of his right to be informed of the charges against him;<sup>397</sup> violations of his right to legal certainty concerning the scope of the trial<sup>398</sup> and the fate of residual charges against him;<sup>399</sup> and errors of law arising from the improper management of documentary<sup>400</sup> and testimonial evidence,<sup>401</sup> errors which additionally violated his rights to legal certainty, to time and facilities necessary to prepare his defence and to be heard.<sup>402</sup> He attempts to supplement his reasoning<sup>403</sup> by incorporating the content of a prior 30-page immediate appeal and addendum that this Chamber found inadmissible in 2013.<sup>404</sup> At that time, Khieu Samphan failed to demonstrate that any consequences of severance – couched in near-identical terms to the instant Appeal<sup>405</sup> – warranted the remedy of termination of proceedings for abuse of process.<sup>406</sup> His current arguments on appeal equally fail to satisfy the applicable standard of review.<sup>407</sup>

122. The nature and consequences of the severance process have attracted considerable scrutiny

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<sup>394</sup> KS Appeal, para. 11.

<sup>395</sup> KS Appeal, para. 12.

<sup>396</sup> KS Appeal, paras 11-12.

<sup>397</sup> KS Appeal, paras 13-14.

<sup>398</sup> KS Appeal, para. 14.

<sup>399</sup> KS Appeal, para. 15.

<sup>400</sup> KS Appeal, para. 16.

<sup>401</sup> KS Appeal, para. 17.

<sup>402</sup> KS Appeal, para. 18.

<sup>403</sup> See, *inter alia*, KS Appeal, para. 12, fn. 16, para. 14, fn. 27, para. 16, fn. 34, para. 17, fn. 37.

<sup>404</sup> **E275/2/1/4** Decision on request by Defence for Khieu Samphan for immediate stay of proceedings, 18 October 2013. See *Mladić* Decision on Appeal, para. 14; *Šainović* Decision on Appeal, para. 18; *Galić* AJ, para. 250; *Lubanga* Judgment on Appeal of PTC Decision, para. 29.

<sup>405</sup> **E275/2/1/1** Urgent request by the Defence team of Mr Khieu Samphan for an immediate stay of proceedings, 7 August 2013, paras 19-101.

<sup>406</sup> **E275/2/1/4** Decision on request by Defence for Khieu Samphan for immediate stay of proceedings, 18 October 2013, paras 7-8.

<sup>407</sup> See *supra*, II.B (Standard of Review).

in appeals before the SCC.<sup>408</sup> This Chamber has already held that severance “formally remains a trial management tool,”<sup>409</sup> and the modalities of its implementation are properly subject to the higher standard of review appropriate to the exercise of judicial discretion.<sup>410</sup> Khieu Samphan never joined the other parties’ appeals<sup>411</sup> of the Chamber’s decisions on severance in Case 002/01, limiting himself to an eleventh-hour demand for an unconditional stay of proceedings<sup>412</sup> and an appeal of the scope of Case 002/02.<sup>413</sup> Khieu Samphan’s position on severance was “not clearly or consistently elaborated” in his prior submissions.<sup>414</sup> After a series of appeals, the SCC upheld the specific implementation of severance in Case 002/01, through the exercise of its corrective jurisdiction and after consideration of its legal and practical implications.<sup>415</sup> The Chamber later characterised this decision as confirming “that concerns of judicial predictability and certainty in relation to Case 002 as a whole were unfounded in relation to the severance in Case 002/01”.<sup>416</sup>

123. Khieu Samphan first alleges that, as a consequence of the severance, the Chamber erred in law and fact and exceeded its temporal jurisdiction in its assessment of the Phase II Population Movement.<sup>417</sup> The temporal jurisdiction for a case is defined by the applicable law<sup>418</sup> and the “entirety of charges” in the Closing Order,<sup>419</sup> and is not bounded by the contours of severance. The SCC has held that “the limits of criminal action that seises the court are determined by the factual allegations set out in an indictment”.<sup>420</sup> The time period over which the Chamber is *competent* is conceptually distinct from what the Chamber describes as “the period *at issue* in

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<sup>408</sup> **E163/5/1/13; E284/4/8; E301/9/1/1/3.**

<sup>409</sup> **E284/4/8**, para. 63, fn. 180.

<sup>410</sup> See *supra*, II.B (Standard of Review).

<sup>411</sup> **E124/2** Co-Prosecutors’ Request for Reconsideration of “Severance Order pursuant to Internal Rule 89ter”, 3 October 2011; **E163** Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/1, 27 January 2012; **E163/5/1/1** Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II; **E284/2/1** Co-Prosecutors’ First Severance Appeal; **E284/4/1** Nuon Chea Severance Appeal.

<sup>412</sup> **E275/2/1/1** Urgent request by the Defence team of Mr Khieu Samphan for an immediate stay of proceedings, 7 August 2013.

<sup>413</sup> **E301/9/1/1**, 5 May 2014.

<sup>414</sup> **E284** Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, fn. 168, *referring to* Khieu Samphan’s views on the proceedings in Case 002.

<sup>415</sup> **E284/4/8**, Disposition.

<sup>416</sup> **E301/9/1**, para. 24.

<sup>417</sup> KS Appeal, para. 11. See also KS Appeal, paras 636-641.

<sup>418</sup> Judgment, para. 12.

<sup>419</sup> See, *e.g.*, Internal Rule 89ter.

<sup>420</sup> **E301/9/1/1/3**, para. 18.



Case 002/01.”<sup>421</sup> Findings surrounding the 1975-1977 period fall within the temporal and subject-matter scope of jurisdiction of the Chamber.<sup>422</sup> The Closing Order states that the policy of movement of the population was “*implemented ... from the latter part of 1975 until sometime in 1977 (Phase 2).*”<sup>423</sup> The Closing Order and the Judgment are consistent in finding the extension of Phase II Population Movement into 1977.<sup>424</sup>

124. Khieu Samphan then alleges that the Chamber exceeded its subject-matter jurisdiction by making findings on the scope of the common purpose of the JCE with reference to “evidence which was in itself outside the scope of Case 002/01 (collectivisation, cooperatives, class struggle, policy towards enemies, forced labour, re-education)”<sup>425</sup> or forced marriages.<sup>426</sup> Khieu Samphan’s reasoning, which refers to his prior submissions,<sup>427</sup> seems to rest on the premise that the Chamber was *not competent* to examine policy evidence apart from material concerned with the forced movement charges at issue in Case 002/01. This is counterfactual. The Chamber maintained throughout trial that the existence of *all five policies* was at issue in Case 002/01, even though only two (forced movement and the targeting of former Khmer Republic officials) were the subject of the charges being examined in Case 002/01.<sup>428</sup> In the subsequent section of his Appeal, Khieu Samphan himself refers to a series of statements of the Chamber demonstrating that the existence of a policy to regulate marriage is distinct from implementing that policy through forced marriages and clarifying how Case 002/01 will be managed in this

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<sup>421</sup> Judgment, para. 169.

<sup>422</sup> **D427** Closing Order, 15 September 2010, paras 18-32, 156-159, 163.

<sup>423</sup> **D427** Closing Order, 15 September 2010, para. 163 (emphasis added).

<sup>424</sup> See, e.g. Judgment, para. 169 (“Between 17 April 1975 and December 1977, the temporal period at issue in Case 002/01”).

<sup>425</sup> KS Appeal, para. 12.

<sup>426</sup> KS Appeal, para. 47.

<sup>427</sup> KS Appeal, para. 12, *referring to E275/2/1/1* Urgent request by the Defence team of Mr Khieu Samphan for an immediate stay of proceedings, 7 August 2013.

<sup>428</sup> Judgment, paras 47, 103. See, e.g., **E1/211.1** T. 24 June 2013, p. 91 (“Judge Cartwright: The Chamber has always indicated that the - that evidence could be led as to the existence of all five policies”); **E124/7.3** TC Amended List of paragraphs and portions of the Closing Order relevant to Case 002/01, 8 October 2012, ENG 00852356, includes paragraphs 156 to 159 of the Closing Order in relation to Factual Findings of JCE. Paragraph 157 specifically states that: “To achieve this common purpose, the CPK leaders *inter alia* designed and implemented the five following policies: - The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another; -The establishment and operation of cooperatives and worksites; - The reeducation of “bad-elements” and killing of “enemies”, both inside and outside the Party ranks; - The targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families; and - The regulation of marriage.” Previous Lists of paragraphs and portions of the Closing Order relevant to Case 002/01 **E124/7.1** and **E124/7.2** similarly include the same paragraphs 156 to 159.

regard.<sup>429</sup>

125. Contrary to Khieu Samphan's assertions concerning the fate of the remaining charges in Case 002, the Chamber did not exclude any from the Closing Order by severing the case.<sup>430</sup> As the SCC has indicated, "The reduction of charges does not lead to the termination thereof".<sup>431</sup> The charges not yet adjudicated remain subject to a provisional stay of proceedings by order of the SCC.<sup>432</sup> The adoption of Rule 89*ter* by the Plenary in January 2015 now provides a transparent mechanism to consider dismissing charges which were excluded from trial, which grants accused the right to be heard and ensures respect for the principle of *ne bis in idem*.<sup>433</sup>

## VIII. CHAPEAU ELEMENTS OF CRIMES AGAINST HUMANITY

### A. Crimes against humanity do not require proof of a nexus with an armed conflict (NC Ground 45; KS paras 52-54, 333)

126. Contrary to the Appellants' contention,<sup>434</sup> the Chamber properly relied on a wide variety of sources and correctly concluded that customary international law did not require a nexus with an armed conflict for a conviction for crimes against humanity in 1975.<sup>435</sup> The Chamber's determination that CCL 10 is direct evidence of customary international law is supported by the NMT Tribunal's own characterisation of itself as an "international tribunal" that "administers international law."<sup>436</sup> The view of CCL 10 as international law is further demonstrated by the conclusions of the ICTY,<sup>437</sup> the ECCC PTC in the present case,<sup>438</sup> and numerous international law scholars.<sup>439</sup>

127. Rather than setting out his argument in the Appeal Briefs, Khieu Samphan references a

<sup>429</sup> KS Appeal, para. 14, fns 22-26.

<sup>430</sup> **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, Annex, pp. 72-74, fn. 272.

<sup>431</sup> **E284/4/8** para. 63.

<sup>432</sup> **E301/9/1/1/3** 29 July 2014, paras 89-90 and Disposition.

<sup>433</sup> Internal Rule 89*ter*. See also **E301/9/1/1/3**, para. 34.

<sup>434</sup> NC Appeal, paras 467-473; KS Appeal, paras 52-54, 333.

<sup>435</sup> See **E95/8** Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26 October 2011 ("Decision on Nexus"), paras 10-30.

<sup>436</sup> *Flick* Case, p. 14.

<sup>437</sup> See, e.g., *Tadić* AC Jurisdiction Decision, para. 140; *Kupreškić* TJ, para. 541 (indicating that CCL 10 was one of the international instruments "laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law").

<sup>438</sup> See **D97/15/9** PTC Decision on the Appeals Against the Co-Investigative Judges' Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 57. *But see* **D427/1/30** PTC Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011.

<sup>439</sup> See, e.g., Robert Woetzel, *The Nuremberg Trials in International Law* (1960), pp. 219-220, 224.

filing he made to the Chamber and Nuon Chea relies on both arguments he made at trial and an appeal brief filed by Ieng Sary which he incorporates by reference.<sup>440</sup> As these arguments are not in their Appeal Briefs, they should be summarily dismissed.<sup>441</sup> Nuon Chea further relies on a memorandum from the U.S. State Department<sup>442</sup> which recommended that “*as a matter of policy* the US should not prosecute a crime against humanity” without a nexus to an armed conflict.<sup>443</sup> There would be no need for such a policy had the State Department not understood that there was no nexus requirement in CCL 10.<sup>444</sup> Despite this memorandum, the U.S. subsequently prosecuted crimes against humanity *absent* a nexus in two NMT cases.<sup>445</sup>

128. Similarly, contrary to Nuon Chea’s assertion,<sup>446</sup> the *Tadić* Appeals Chamber considered and analysed CCL 10, the Genocide Convention, and the Apartheid Convention to conclude that the IMT nexus requirement was particular to that tribunal.<sup>447</sup> The *Tadić* Trial Chamber had considered the text and context of the Nuremberg Charter, the *Einsatzgruppen* Case, and the opinions of several eminent scholars to reach the same conclusion.<sup>448</sup> The Chamber in the present case relied on *Tadić* as only one among a half-dozen sources in support of its conclusion that the Nuremberg Charter’s nexus requirement was not reflective of custom at the time.<sup>449</sup>

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<sup>440</sup> NC Appeal, para. 468, citing **E95/9** Response to the Co-Prosecutors’ Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 22 July 2011; **E95/8/1/1** Ieng Sary’s Appeal Against the Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 25 November 2011. Notably, the SCC dismissed as inadmissible Ieng Sary’s appeal. See **E95/8/1/4** Decision on Ieng Sary’s Appeal Against Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 19 March 2012, p. 5.

<sup>441</sup> See *Mladić* Decision on Appeal, para. 14; *Šainović* Decision on Appeal, para. 18; *Galić* AJ, para. 250; *Lubanga* Judgment on Appeal of PTC Decision, para. 29. The Co-Prosecutors’ request the right to respond and make written submissions on this matter, should the SCC wish to consider arguments incorporated by reference from other documents.

<sup>442</sup> NC Appeal, para. 471, quoting Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), p. 235.

<sup>443</sup> Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), p. 235, quoting Memorandum from Petersen to Taylor, 4 March 1947 (emphasis added).

<sup>444</sup> Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), p. 235, quoting Memorandum from Petersen to Taylor, 4 March 1947.

<sup>445</sup> Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), p. 235, citing *Flick* Indictment; *Ministries* Indictment.

<sup>446</sup> NC Appeal, paras 470-469, quoting Decision on Nexus, fn. 54. See also *Tadić* AC Jurisdiction Decision, para. 140.

<sup>447</sup> *Tadić* AC Jurisdiction Decision, para. 140.

<sup>448</sup> *Tadić* AC Jurisdiction Decision, paras 78-81.

<sup>449</sup> Decision on Nexus, fn. 54. See also NC Appeal, para. 470.

**B. Crimes against Humanity do not require proof of a State policy (NC Ground 46; KS para. 56)**

129. Both Appellants<sup>450</sup> challenge the Chamber's determination that a State plan or policy was not an independent legal element of crimes against humanity in 1975.<sup>451</sup> Nuon Chea improperly relies on arguments from his Closing Brief<sup>452</sup> and attempts to invoke the principle of *in dubio pro reo*.<sup>453</sup> However, *in dubio pro reo* is primarily understood as a principle relevant to findings of *fact* and not "a principle for the interpretation of ... substantive criminal law."<sup>454</sup>

130. Khieu Samphan criticises the Chamber for considering jurisprudence from the *ad hoc* tribunals in reaching its determination that no "State plan or policy" requirement existed for crimes against humanity during the jurisdictional period of the ECCC, on the basis that the jurisprudence is "subsequent to the alleged criminal conduct".<sup>455</sup> However, he then cites more recent jurisprudence of the ICC in support of his argument that a State plan or policy was a requirement.<sup>456</sup> Khieu Samphan's reliance on ICC jurisprudence and the Rome Statute to establish customary international law is wholly misplaced.<sup>457</sup> First, the ICC statute does not limit crimes against humanity charges to situations where the attack on the civilian population was a result of a state policy, rather the statute refers to "state *or organizational* policy."<sup>458</sup> Second, the ICC Statute was a negotiated agreement between state parties and "was not intended to codify existing customary rules".<sup>459</sup>

131. Equally unpersuasive are Khieu Samphan's claims that the NMT judgments cited by the

<sup>450</sup> NC Appeal, para. 474; KS Appeal, para. 56.

<sup>451</sup> Judgment, para. 181, citing *Blaškić* AJ, *Kunarac* AJ, *Gacumbitsi* AJ, *Sesay* AJ, *Justice* Judgment, *Eichmann* Judgment, *Menten* Judgment, *Einsatzgruppen* Judgment, *Flick* Judgment, *Medical* Judgment, *Milch* Judgment, *RuSHA* Judgment, *High Command* Judgment, *Hostage* Judgment, *Ministries* Judgment, *Farben* Judgment.

<sup>452</sup> *Karemara* AJ, para. 111, citing *Haraqija* AJ, para. 26; *Brđanin* AJ, para. 35. Should this Chamber choose to consider arguments outside of the Appellants closing Brief, the Co-Prosecutors request that they be given the right to respond.

<sup>453</sup> NC Appeal, para. 474.

<sup>454</sup> *Stakić* TJ, para. 416. See also *Renzaho* AJ, para. 474 (*in dubio pro reo* described as "a corollary to the presumption of innocence"); *Limaj* AJ, Schomburg Opinion, paras 16-18; Antonio Cassese, *International Criminal Law* (2003), p. 157; Co-Prosecutors' Consolidated Reply to Defence Responses to Co-Prosecutor's Requests to Recharacterise Charges in the Indictment and to Exclude the Nexus Requirement for an Armed Conflict to Prove Crimes Against Humanity, 11 August 2011, para. 70; Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 15 June 2011, paras 28-32.

<sup>455</sup> KS Appeal, para. 56.

<sup>456</sup> KS Appeal, para. 56, fn. 134.

<sup>457</sup> KS Appeal, para. 56.

<sup>458</sup> ICC Statute Article 7(2)(a).

<sup>459</sup> *Orić* AJ Separate Opinion, para. 20 (quoting Antonio Cassese, *International Criminal Law* (Oxford, 2nd ed., 2008) p. 172). See also Rome Statute, Article 10.

Chamber actually indicate that the crimes were committed “in furtherance of a Nazi State policy”.<sup>460</sup> Khieu Samphan fails to appreciate the distinction between a judgment including factual descriptions of what happened, which may be relevant to other matters such as establishing the widespread or systematic nature of an attack,<sup>461</sup> and findings on the elements of a crime. While Khieu Samphan asserts that Article 6 of the IMT Charter contains a State plan or policy requirement for crimes against humanity, the actual language shows no such requirement.<sup>462</sup> Khieu Samphan’s additional arguments exclusively rely on arguments of other parties in other filings.<sup>463</sup>

**C. The Chamber correctly found that a widespread and systematic attack on discriminatory grounds occurred (NC Ground 47)**

132. The Chamber correctly found that the New People constituted a political group and that they were discriminated against.<sup>464</sup> Accordingly, Nuon Chea’s submission that no attack existed on political grounds against the feudalists and capitalists and the New People is without merit.<sup>465</sup> Similarly, the Chamber reasonably concluded that there existed a widespread and systematic attack against political opponents.<sup>466</sup> Contrary to Nuon Chea’s contention,<sup>467</sup> the Judgment is replete with evidence of attacks against civilians prior to and after April 1975,<sup>468</sup> as well as against Khmer Republic officials and soldiers who were *hors de combat*.<sup>469</sup> Nuon Chea fails to demonstrate<sup>470</sup> how the Chamber erred in finding that the forced evacuation of Phnom Penh was discriminatory in nature.<sup>471</sup>

133. Nuon Chea’s suggestion that the Chamber “explicitly found that fighting against the Khmer

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<sup>460</sup> KS Appeal, para. 57.

<sup>461</sup> Judgment, para. 181.

<sup>462</sup> KS Appeal, para. 57. Article 6 of the IMT Charter provides in relevant part: (c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”.

<sup>463</sup> KS Appeal, fns 135, 136.

<sup>464</sup> See *infra*, X.B-D (Persecution).

<sup>465</sup> NC Appeal, para. 477.

<sup>466</sup> See *infra*, IX (Murder and extermination); XI (Other inhumane acts); XVI (Policy to smash the enemy)].

<sup>467</sup> NC Appeal, paras 478-480, 483.

<sup>468</sup> See *infra*, XV (Policy to forcibly transfer the population), XI.B-D (Other inhumane acts).

<sup>469</sup> See *infra*, XVII (Policy targeting Khmer Republic soldiers), IX.A-B (Murder and extermination).

<sup>470</sup> NC Appeal, para. 479.

<sup>471</sup> See Judgment, paras 568-574. See also *infra*, paras XV.B (Policy to forcibly transfer population - Phnom Penh), X (Persecution).

Republic army continued in Phnom Penh for at least several days after 17 April 1975” is misleading.<sup>472</sup> First, the Chamber explicitly found that the armed conflict between the Khmer Republic and Khmer Rouge ended on 17 April 1975.<sup>473</sup> Second, the Chamber specifically found that deaths during the forced evacuation of Phnom Penh included civilians and former Khmer Republic soldiers “who were either detained, placed *hors de combat* or otherwise were no longer taking an active part in hostilities at the time they were killed”.<sup>474</sup>

134. The Chamber further explicitly stated that it did not base any conviction on the killings of Khmer Republic soldiers where a reasonable inference from the evidence was that they may have been killed in a combat situation “during the second search day of the city”.<sup>475</sup> Nuon Chea fails to demonstrate any error in the Chamber’s conclusion that the former Khmer Republic soldiers and officials who were killed while they were *hors de combat* “formed part of the millions of civilians attacked”.<sup>476</sup>

**D. Khieu Samphan fails to demonstrate that the Chamber erred in finding that widespread and systematic attacks occurred (KS paras 331-342, 357-358)**

135. Khieu Samphan generally alleges that the Chamber erred in finding that there was a widespread and systematic attack against the civilian population of Cambodia carried out on political grounds.<sup>477</sup> Khieu Samphan’s submissions merely disagreeing with the Chamber’s findings or providing alternative interpretations of the evidence<sup>478</sup> are insufficient to call into question the Chamber’s conclusions.<sup>479</sup> Similarly, Khieu Samphan’s arguments that do not have the potential to invalidate the Judgment, do not occasion a miscarriage of justice, or are not substantiated<sup>480</sup> should be summarily dismissed.<sup>481</sup>

136. Contrary to Khieu Samphan’s contention,<sup>482</sup> it was within the Chamber’s discretion to rely

<sup>472</sup> NC Appeal, paras 481-482.

<sup>473</sup> Judgment, para. 194.

<sup>474</sup> Judgment, para. 554.

<sup>475</sup> Judgment, para. 554.

<sup>476</sup> Judgment, para. 194. See also Judgment, para. 187.

<sup>477</sup> See KS Appeal, paras 331-342, 357-358.

<sup>478</sup> See KS Appeal, para. 338.

<sup>479</sup> *Karemera* AJ, paras 206, 235.

<sup>480</sup> See KS Appeal, paras 332, 335-336, 338, 341-342.

<sup>481</sup> See *supra*, II.B (Standard of Review). To the extent that Khieu Samphan’s arguments overlap with Nuon Chea’s (See KS Appeal, paras 333, 339-341, 357-358) the Co-Prosecutors incorporate by reference their responses herein. See *supra*, VIII (Crimes against humanity). See also *infra*, XVI (Policy to smash enemies), XXI (Khieu Samphan’s criminal liability).

<sup>482</sup> KS Appeal, paras 335-337.

on evidence outside the scope of the crimes charged in Case 002/01 as circumstantial corroboration for its findings regarding the widespread and systematic nature of an attack carried out on political grounds.<sup>483</sup> Khieu Samphan mischaracterises the Chamber’s conclusion that it declined to discuss the attack against the Buddhist, the Chams, and the Vietnamese, because they were outside the scope of Case 002/01.<sup>484</sup> Rather, the Chamber declined to discuss the attacks against these groups because it “already determined that the widespread attack was carried out against the civilian population on political grounds”.<sup>485</sup> Lastly, other than disagreeing with the Chamber’s finding,<sup>486</sup> Khieu Samphan fails to demonstrate how the Chamber erred in concluding that he had knowledge of the attack, considering the scale and scope of the attack, and the fact that it was undertaken in furtherance of, and pursuant to Party policies and plans.<sup>487</sup>

## IX. MURDER AND EXTERMINATION

### *i. Introduction*

137. The Chamber correctly found that CPK forces were legally responsible for deaths that occurred during the Phase I and Phase II population movements. These included willful killings of civilians and Khmer Republic soldiers and officials and deaths due to conditions imposed during the Phase I and Phase II population movements.

138. Nuon Chea challenges the sufficiency of the evidence for these findings, improperly analysing individual pieces of evidence in isolation. He then applies an unduly narrow and legally incorrect definition of the crime of extermination to his own unsupported assessment of the scale of deaths. In contrast, the Chamber applied the correct definition of extermination after examining the evidence in its totality as is required by law. The resulting factual findings were amply supported by credible and reliable evidence.

### *ii. The alleged five general errors*

139. Nuon Chea contends that each finding in Grounds 48-171 of his appeal is erroneous for at least one of five reasons. First, he alleges that each individual piece of evidence “fails on its face

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<sup>483</sup> See *Nahimana* AJ, paras 315-316, 561.

<sup>484</sup> KS Appeal, para. 337

<sup>485</sup> Judgment, para. 196.

<sup>486</sup> KS Appeal, para. 338.

<sup>487</sup> Judgment, para. 197. See also *Blagojević* AJ, para. 102.

to establish that a death occurred or was unlawfully caused by the CPK”.<sup>488</sup> This piecemeal approach to assessing the sufficiency of the evidence is incorrect:<sup>489</sup> a trial chamber must view all of the evidence in its totality, not in isolated pieces, and can only then determine whether the burden has been met.<sup>490</sup> That is precisely what the Chamber did in this case.

140. Second, Nuon Chea fails to understand<sup>491</sup> that a trial chamber may properly rely on out-of-court statements as long as it is mindful of the nature of the evidence when assessing their probative value.<sup>492</sup> Third, Nuon Chea contends that out-of-court statements were not tested by “cross-examination” or were not adequately corroborated.<sup>493</sup> Not every statement is required to be tested by “cross-examination” as long as that fact is taken into account in assessing its weight.<sup>494</sup> Moreover, when a witness appears, if the Defence chooses not to “cross-examine” on the impugned deaths, it cannot claim that making a finding on such evidence was unreasonable.<sup>495</sup> As to the allegation that statements were not adequately corroborated, while it is well-established that a trial chamber may rely on a single witness to support a finding,<sup>496</sup> much of the evidence that Nuon Chea impugns as the “sole support” for a finding was in fact corroborated.<sup>497</sup> The Chamber correctly addressed the issue of weight to be attached to uncorroborated evidence<sup>498</sup> and expressly considered whether the parties had the opportunity to challenge the evidence as a factor relevant to the probative value of that evidence.<sup>499</sup>

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<sup>488</sup> NC Notice, para. 6(i).

<sup>489</sup> See *supra*, VI.D.ii (Probative Value of the Evidence), para. 89.

<sup>490</sup> *Tadić* Contempt AJ, para. 92 (“[A] tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of *all* the evidence in the case which must be considered”); *Martić* AJ, para. 233 (“[T]he ultimate weight to be attached to each piece of evidence cannot be determined in isolation. Even though in some instances a piece of evidence, viewed alone, may not be sufficient to satisfy the burden of proof beyond reasonable doubt, it is the totality of the evidence that must be weighed to determine whether the Prosecution has met the burden upon it.”). See also *Ngirabatware* AJ, para. 86; *Halilović* AJ, para. 125; *Limaj* AJ, para. 153 (“the Trial Chamber correctly found that ... [e]ven though each ... relevant piece of evidence, viewed in isolation, may not be sufficient to satisfy the obligation of proof on the Prosecution, it is the *cumulative effect on the evidence* ... which must be weighed to determine whether the Prosecution has proved beyond reasonable doubt that each Accused is a perpetrator as alleged.”).

<sup>491</sup> NC Notice, para. 6(ii).

<sup>492</sup> See *supra*, VI.D.i and VI.G (Probative Value of the Evidence). See also Judgment, paras 31, 61. The Chamber specifically noted that it would not base a conviction solely or decisively on such evidence; the statements were admitted because they were relevant to prove matters such as the crime base and contextual elements of crimes against humanity.

<sup>493</sup> NC Notice, para. 6(iii).

<sup>494</sup> See *supra*, VI.D-H (Probative Value of the Evidence).

<sup>495</sup> Specific examples are noted in the relevant sections below.

<sup>496</sup> *Nahimana* AJ, para. 949.

<sup>497</sup> Specific examples are noted in the relevant sections below.

<sup>498</sup> Judgment, paras 59-64.

<sup>499</sup> Judgment, para. 34.



141. Fourth, Nuon Chea’s assertion that the evidence “was not subject to any assessment of probative value”<sup>500</sup> by the Chamber is without basis, as discussed above,<sup>501</sup> and is clearly contradicted by any fair reading of the Judgment.<sup>502</sup> Finally, the contention that the evidence was “anecdotal”<sup>503</sup> is without merit. Given the extended periods over which the transfers occurred, the broad geographic area covered and the vast number of people affected by the population movements, the array of unique accounts of deaths is understandable. These individual accounts corroborate each other and support the general conclusions for which they are relied upon. Moreover, the Chamber tested the evidence for reliability in a variety of ways.<sup>504</sup>

142. These five alleged general errors regarding the Chamber’s approach to the assessment of unlawful deaths during the population movements are neither sufficiently reasoned nor supported by applicable law. The grounds of appeal and specific errors alleged by Nuon Chea are addressed in each section below.

**A. The Chamber correctly and reasonably found that murder was committed during the Phase I movement through killings of civilians (NC Grounds 48-97)**

143. Nuon Chea contests the finding that murders were committed via the wilful killings of civilians, claiming that the evidence was insufficient for a reasonable trier of fact to find that murder was proven beyond a reasonable doubt.<sup>505</sup> Contrary to his assertions, the Chamber made this finding based on overwhelming evidence, which Nuon Chea has arbitrarily fragmented, mischaracterised and ignored.

144. Nuon Chea’s key argument relies on assessing each killing in isolation from the rest of the evidence, incorrectly claiming that a murder conviction was entered for each.<sup>506</sup> The Chamber clearly stated that because the crimes of murder and extermination during the Phase I population movement were based on the same killings, and extermination subsumes murder, it would enter

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<sup>500</sup> NC Notice, para. 6(iv).

<sup>501</sup> See *supra*, VI.D (Probative Value of the Evidence).

<sup>502</sup> Judgment, para. 34.

<sup>503</sup> NC Notice, para. 6(v).

<sup>504</sup> See, e.g., Judgment, paras 26, 34, 35, 36, 554, 555.

<sup>505</sup> NC Appeal, para. 285.

<sup>506</sup> NC Appeal, paras 293 (“each one of these references in each one of these footnotes amounts to a conviction for murder”), 295 (“The Defence will analyze the Trial Chamber’s murder convictions in two stages...”), 301 (“Instead, it entered three murder convictions...”), 313 (“No reasonable trier of fact could enter a conviction for murder...”). Nowhere does the Chamber state that it “entered murder convictions” for each citation. See Judgment, paras 553-554, 559.

convictions only for extermination.<sup>507</sup> As a result, the correct judicial inquiry is not to view individual killings in complete isolation from one another, but to assess whether it is beyond reasonable doubt that murders occurred during the evacuation of Phnom Penh, and if so, on what scale, based on the totality of the evidence.

145. The Chamber cited 48 separate accounts of wilful killings of civilians from 45 individuals.<sup>508</sup> The Chamber explicitly stated that it considered the individual circumstances in which the deaths occurred, and made a finding based on the totality of the evidence.<sup>509</sup> Nuon Chea dismisses the evidence as a “series of citations,” and claims that no reasonable trier of fact could find beyond reasonable doubt that murders were committed based on these 48 separate accounts.<sup>510</sup> He comes to this conclusion by first dividing the evidence into categories to be viewed in isolation,<sup>511</sup> dismissing categories of evidence,<sup>512</sup> ignoring corroboration, making false assumptions,<sup>513</sup> and relying on his own failure to cross-examine witnesses.<sup>514</sup> Nuon Chea’s specific claims are addressed below.

*i. Specific claims based on mischaracterisation of evidence*

146. Nuon Chea states that “the Chamber was unable to identify a single person who described

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<sup>507</sup> Judgment, para. 1057.

<sup>508</sup> Judgment, fns 1402-1405, 1450 and 1462-1463. These include 32 eyewitness accounts (19 of which were signed or sworn), 11 accounts given via live testimony, 27 civil party applications and victim complaints, 5 interview records, and 7 other documentary accounts. One cited account included both a civil party application and interview record.

<sup>509</sup> Judgment, paras 554, 560. Further, as Nuon Chea acknowledges, the Chamber is not required to articulate the basis of its assessment of each piece of evidence (see NC Appeal, para. 291).

<sup>510</sup> NC Appeal, para. 290.

<sup>511</sup> Nuon Chea divides the evidence into the categories of “alleged killings for failing to obey orders” and “alleged willful killings for other reasons”, then within each category, into “live evidence given at trial” or “live testimony”, “evidence given to the CIJs”, “evidence given in civil party applications and victim complaints”, and “other statements”, viewing each piece of evidence in isolation (see NC Appeal, paras 295-318).

<sup>512</sup> Nuon Chea claims that the Chamber ought to have established killings beyond reasonable doubt *solely* on the basis of live testimony (see NC Appeal, para. 289, stating that *if* such was established, *then* it could consider other forms of evidence (emphasis added)), claims that victim impact testimony cannot be used to prove the truth of its contents (NC Appeal, para. 291), calls admitted documentary evidence that is not an interview or witness statement taken by Tribunal staff as “inherently unreliable” and “outside the framework of the Tribunal” (NC Appeal, para. 307), and describes civil party applications and victim complaints as “unreliable” despite the fact that they are sworn (NC Appeal, paras 292, 313). But see *supra*, VI (Probative Value of the Evidence).

<sup>513</sup> Nuon Chea in his introductory arguments appears to imply, *inter alia*, that it is lawful to kill someone to prevent them from stealing rice (NC Appeal, para. 291), that witnesses who do not know the victim cannot provide compelling evidence of murder (NC Appeal, paras 291, 308), and that once an intentional killing is found to have occurred, it should be assumed to be lawful despite the end of hostilities and no indication of any defence (NC Appeal, para. 294). See *contra*, IX.B.i (Soldiers *hors de combat* were executed).

<sup>514</sup> See, e.g., para. 140, *supra*, paras 148-149, 151 below.

witnessing a single killing first-hand.”<sup>515</sup> This claim is rooted in Nuon Chea’s deliberate fragmentation of the evidence. In short, he is asserting that no witness testified live about seeing someone killed for refusing to obey orders. As discussed above, this claim relies on Nuon Chea’s misguided contention that murders must be proven solely in reliance on live testimony<sup>516</sup> and his mischaracterisation of the evidence.<sup>517</sup> In fact, the Chamber cites 32 eyewitness accounts of wilful killings of civilians, including 14 for refusing to obey orders.<sup>518</sup>

147. Nuon Chea attempts to support this claim by mischaracterising the evidence given in court. Pin Yathay, whose testimony Nuon Chea describes as non-eyewitness hearsay “rife with ambiguity”,<sup>519</sup> provided crucial evidence of a killing. He heard a gunshot, saw the body of a boy on the ground, saw a soldier 15 yards away holding the still-smoking gun, and “[w]ithin a minute” heard that the boy was killed for attempting to return to his house. The OCP questioned Pin Yathay about the incident using a book he authored which described the event in great detail. Before the court, he confirmed that it was correct, was cross-examined extensively about the book, and stood by the accounts recorded therein.<sup>520</sup>

148. Denise Affonço testified that her friend’s brothers and sisters told her that the Khmer Rouge had executed her friend while she was waiting for her husband.<sup>521</sup> Although her account was hearsay, she was cross-examined extensively. Nuon Chea’s complaint that “[n]o party asked any follow-up questions” about the incident is disingenuous when his own team chose not to question her on the issue.<sup>522</sup> Nuon Chea also challenges the Chamber’s citation of Lay Bony’s testimony to support the claim that people who tried to return to Phnom Penh were shot.<sup>523</sup> Her testimony was consistent with the OCIJ interview she gave in 2009,<sup>524</sup> as well as with other reports of

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<sup>515</sup> NC Appeal, para. 296, emphasis removed.

<sup>516</sup> NC Appeal, para. 289.

<sup>517</sup> See discussion of testimony of Pin Yathay, below at para. 147.

<sup>518</sup> See Judgment, fns 1402-1404 and 1462.

<sup>519</sup> NC Appeal, para. 298 (Nuon Chea wrongly asserts that Pin Yathay “only gave victim impact testimony”); NC Notice, ground 49.

<sup>520</sup> See **E1/170.1** Pin Yathay, T. 7 February 2013, pp. 51 (*citing E3/3988* Book by P. Yathay: *Stay Alive, My Son*, ENG 00587560-61), 66-106 (full cross-examination). Pin Yathay was not cross-examined about this particular incident, but Defence counsel had ample opportunity to do so. Note that Nuon Chea’s Defence team chose not to question him at all (see p. 65).

<sup>521</sup> **E1/152.1** Denise Affonço, T. 12 December 2012, p. 71 (cited in Judgment, para. 474, fn 1403). Challenged in NC Appeal, para. 297 and NC Notice, ground 48.

<sup>522</sup> NC Appeal, para. 297; **E1/153.1** Denise Affonço, T. 13 December 2012, pp. 74-102.

<sup>523</sup> NC Appeal, para. 300; NC Notice, ground 73.

<sup>524</sup> **E3/3958** Lay Bony Interview Record, p. 3, ENG 00379156.

soldiers threatening and/or shooting those who disobeyed orders.<sup>525</sup> Finally, Nuon Chea complains that the Chamber cited Sum Chea's sworn live testimony that Bong Hak, a Khmer Rouge battalion commander, told him that soldiers killed civilians, but did not cite evidence from soldiers claiming the opposite.<sup>526</sup> This is completely false.<sup>527</sup>

149. Nuon Chea further mischaracterises evidence by arguing that killings "for no discernible reason" were unrelated to the purpose of the evacuation,<sup>528</sup> and raises the possibility that the killings could be lawful.<sup>529</sup> This is illogical when there are no indicators that hostilities were ongoing or that the killing was justified in any way.<sup>530</sup> For example, Yim Sovann gave compelling live testimony that he saw people pushing a car during the evacuation, then Khmer Rouge soldiers dragged the driver from the car and killed him.<sup>531</sup> Nuon Chea challenges this account because Yim Sovann did not identify a reason for the killing and the parties did not question her further about the incident (Nuon Chea again improperly relies on his decision not to question a civil party).<sup>532</sup> Whilst one can speculate as to the "reason" the Khmer Rouge soldiers killed the driver, it is of no consequence when there is zero indication that the killing was lawful in any way.<sup>533</sup> Similarly, it is inexplicable how killing someone for picking mangoes to eat or driving over people who are leaving the city as instructed could be legally justified.<sup>534</sup>

<sup>525</sup> See, e.g., Judgment, para. 474, fns 1401 (for threats to kill) and 1402-1405 (for killings).

<sup>526</sup> NC Appeal, para. 299, fn. 814, citing **E1/140.1** Sum Chea, T. 5 November 2012, p. 24.

<sup>527</sup> See Judgment, fn. 1406. See also Judgment, fn. 1402, citing **E3/424** Meas Voeun Interview Record, p. 4, ENG 00421071, *contra* Nuon Chea's allegation that the Chamber neglected to cite his testimony (NC Appeal, para. 299, fn. 817). As for the other three examples Nuon Chea alleged the Chamber should have cited, there was no reason to do so because the accounts do not support what Nuon Chea alleges they support (namely, that no civilians were killed during the evacuation). Ieng Phan "testif[ied] for a full day without mention of killing civilians" because he maintained that he saw people fleeing while he was engaged in the battlefield near the Pochentong Airport but otherwise did not know about the evacuation; further, he did not enter Phnom Penh until 20 days later (see **E1/193.1** Ieng Phan, T. 20 May 2013, pp. 17, 34, 43-47). Chhouk Rin gave evidence regarding the evacuation of Kampot, not Phnom Penh (as indicated by Nuon Chea in fn. 817). The lines Nuon Chea cites from Kung Kim's account say, "But when we entered Phnom Penh, we were not ordered to shoot", which indicates an *absence of an order to shoot*, as opposed to a concrete *order not to shoot* civilians. Further, this statement does not support the proposition that no civilians were killed during the evacuation.

<sup>528</sup> NC Appeal, para. 309. It is unclear why Nuon Chea expects murders to be reasoned. Nevertheless, there is also evidence that soldiers were brutal to ensure everyone evacuated (see, e.g., **E1/140.1** Sum Chea, T. 5 November 2012, pp. 24-25).

<sup>529</sup> NC Appeal, para. 311.

<sup>530</sup> See also *infra*, IX.B.i (Soldiers *hors de combat* were executed).

<sup>531</sup> **E1/135.1** Yim Sovann, T. 19 October 2012, pp. 83, 85.

<sup>532</sup> NC Appeal, para 311; NC Notice, ground 74. See **E1/135.1** Yim Sovann, T. 19 October 2012, p. 116 (Nuon Chea Defence declined to ask any questions of the witness).

<sup>533</sup> Despite a relatively detailed, sequential account, there is no evidence of an altercation between the driver and the soldiers, let alone an altercation that would threaten the life of a soldier or others so as to warrant lethal force.

<sup>534</sup> See **E3/5402** Tieng Sokhom Victim Complaint, p. 6, ENG 00870347 (along National Road 2, saw a person picking mangoes to eat being shot to death by militiamen) (see also NC Notice, ground 92); **E3/5469** Chou Kim Lan

150. Nuon Chea makes a similar error in his analysis of Chum Sokha's testimony.<sup>535</sup> As acknowledged by Nuon Chea,<sup>536</sup> Chum Sokha gave detailed, eyewitness testimony of Khmer Rouge soldiers killing evacuees trying to steal rice.<sup>537</sup> Nuon Chea alleges that Chum Sokha's testimony was evidence that "violence was used only to counter unlawful activity".<sup>538</sup> This argument is frivolous, as the totality of the evidence shows otherwise.<sup>539</sup> Regardless, the act of killing civilians who are stealing food in order to survive is a grossly disproportionate response and cannot be justified.<sup>540</sup>

*ii. Specific claims based on dismissing categories of evidence*

151. Nuon Chea dismisses three eyewitness accounts given as live testimony, claiming victim impact testimony cannot be used to prove the truth of its contents.<sup>541</sup> As discussed above, this has no legal basis.<sup>542</sup> A chamber may rely on any evidence it deems to have probative value.<sup>543</sup> Chheng Eng Ly gave a consistent, detailed account both in and out-of-court where she described seeing a crying baby crawling on his dead mother's body and then suddenly being ripped apart by a Khmer Rouge soldier.<sup>544</sup> Yos Phal gave detailed eyewitness testimony of the shooting of a driver that was corroborated in important respects by other evidence.<sup>545</sup> He was cross-examined

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Victim Complaint, p. 6, ENG 00746218 (saw Khmer Rouge soldiers shoot or drive over people who were being evacuated) (see also NC Notice, ground 93).

<sup>535</sup> NC Appeal, para. 310; NC Notice, ground 81.

<sup>536</sup> NC Appeal, para. 291.

<sup>537</sup> **E1/136.1** Chum Sokha, T. 22 October 2012, p. 92 (Khmer Rouge soldiers shot civilians as they tried to break into a warehouse to take rice; many were injured and died).

<sup>538</sup> NC Appeal, paras 291, 310.

<sup>539</sup> See, e.g., Judgment, paras 471-475, 489-490 and the citations contained therein.

<sup>540</sup> Common Article 3 to the 1949 Geneva Conventions (barring "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" for those taking no active part in hostilities).

<sup>541</sup> NC Appeal, para. 308.

<sup>542</sup> See *supra*, VI.G (Probative value of the evidence, Civil Party impact statements).

<sup>543</sup> *Karemera* AJ at para. 468, citing *Kajelijeli* AJ, para. 167.

<sup>544</sup> **E1/198.1** Chheng Eng Ly, T. 29 May 2013, pp. 92, 98; **E3/5736** Chheng Eng Ly Victim Information Form, p. 7, ENG 00922084; *contra* NC Appeal, para. 308, fn. 833 and NC Notice, ground 77. Nuon Chea also wrongly suggests that witnesses who do not know the victim cannot provide compelling evidence of a killing (NC Appeal, para. 308).

<sup>545</sup> See **E1/197.1** Yos Phal, T. 27 May 2013, p. 76 (saw Khmer Rouge soldiers shoot dead the driver of a GMC truck at Chen Dam Dek Pagoda while he sat in the driver's seat). Yim Sovann and Sun Henri also reported the killings of drivers (see **E1/135.1** Yim Sovann, T. 19 October 2012, pp. 83, 85; **E3/5457** Sun Henri Victim Complaint, p. 6, ENG 00474754). See also Judgment, para. 484, fns 1441-1442 describing the Khmer Rouge confiscating vehicles as "spoils of war", suggesting they opposed civilians using them. *Contra* NC Appeal, para. 308, fn. 833 and NC Notice, grounds 74 and 94.

and remained consistent and honest when he could not recall information.<sup>546</sup> Though Phandarasar gave testimony rich in detail and, on her own initiative, described witnessing a shooting.<sup>547</sup> In all three cases, Nuon Chea chose not to question them about the killings.<sup>548</sup>

152. Second, Nuon Chea mischaracterises any documentary evidence not collected in person by a Tribunal staff member as “inherently questionable” and “unverifiable”, ignoring evidence of any methodology that supports its reliability.<sup>549</sup> On this basis, he challenges the refugee accounts collected by François Ponchaud as well as the evidence collected by the Norwegian and French governments.<sup>550</sup> Father Ponchaud was questioned extensively before the Chamber about his methods of gathering refugee accounts recorded in the compilation. He was candid about the possible limitations, but stated that he recorded the interviews, was careful to cross-check and compare<sup>551</sup> and noticed that “as time went on the accounts were consistent”.<sup>552</sup> The Chamber was reasonable to rely on these accounts. Similarly, the Norwegian government sponsored a three-day hearing in Oslo on the human rights situation in Kampuchea and compiled the accounts of experts and refugees who were questioned by a panel of prominent Norwegians and international press. The preliminary report from these proceedings was submitted to a U.N. sub-commission and was deemed corroborative and credible when evaluated alongside other reports.<sup>553</sup> The letter from the French ambassador conveyed *testimony* given to the embassy’s legal counsel by Brigadier-General Sor Buon, who had just arrived from Cambodia, prefaced with an analysis of

<sup>546</sup> See **E1/197.1** Yos Phal, T. 27 May 2013, pp. 92-106.

<sup>547</sup> **E1/198.1** Though Phandarasar, T. 29 May 2013, p. 5 (heard a gunshot and saw a man who had just been killed). *Contra* NC Appeal, para. 308, fn. 833 and NC Notice, ground 79.

<sup>548</sup> **E1/198.1** Chheng Eng Ly, T. 29 May 2013, p. 108 (declined to ask any questions at all); **E1/197.1** Yos Phal, T. 27 May 2013, pp. 92-106; **E1/198.1** Though Phandarasar, T. 29 May 2013, pp. 33-38.

<sup>549</sup> NC Appeal, paras 288, 307, 315.

<sup>550</sup> NC Appeal, paras 316-317 (Ponchaud’s accounts from Pech Ling Kong and Mr. Worker), 307 and 318 (French government’s account from Brigadier-General Sor Buon), 307 (statements taken by the government of Norway).

<sup>551</sup> **E1/178.1** François Ponchaud, T. 9 April 2013, pp. 84 (“we had to be careful because we wanted the truth and refugees could exaggerate their stories to defend themselves”), 85 (the information was collected scientifically; the two sources corroborated each other), 86-87 (reading excerpts from **E3/4587** Letter from François Ponchaud to CIJ, pp. 2-3 re. the 94 testimonies and the other interviews of refugees), 104; **E1/179.1** François Ponchaud, T. 10 April 2013, pp. 115-116; **E1/180.1** François Ponchaud, T. 11 April 2013, pp. 46-58.

<sup>552</sup> **E1/178.1** François Ponchaud, T. 9 April 2013, p. 84.

<sup>553</sup> **E3/1805** *Submission from the Government of Norway under Commission on Human Rights decision 9 (XXXIV)* (ECOSOC), pp. 1, 2, 21 (eyewitness statement of Pam Moeun). See also that this report was referenced in **E3/2060** *Analysis Prepared on Behalf of the Sub-Commission by Its Chairman of Materials Submitted to It and the Commission on Human Rights under decision 9 (XXXIV)* (ECOSOC), at paras 10.A.2, 14 and 17, while paras 18-22 comment upon the reliability of the accounts. *Contra* NC Appeal, para. 307, fn. 830 and NC Notice, ground 54 (see further that Nuon Chea argues in his Notice that the Chamber relied “solely” on Pam Moeun’s statement to conclude that incidents in which civilians “who did not immediately obey [the evacuation order] were killed on the spot”, but this account was one of 16 cited to support that conclusion in Judgment, para. 474, fn. 1402).

his reliability and noted to be “consistent in all respects” to the testimonies of other refugees who had also managed to cross into Thailand.<sup>554</sup> The Chamber was also reasonable to cite Sydney Schanberg’s testimony as a supplement to more direct accounts of killings during the evacuation.<sup>555</sup> Schanberg was an experienced journalist who gave sworn evidence and was subject to cross-examination.<sup>556</sup> Although acknowledged hearsay,<sup>557</sup> his account corroborated other evidence.

153. Third, Nuon Chea mischaracterises civil party applications as unauthenticated, lacking detail and self-interested.<sup>558</sup> First, Civil Parties have absolutely no personal financial interest in proceedings at the ECCC; they may only make requests for collective and moral reparations.<sup>559</sup> Typical requests include memorial stupas, a mental hospital to treat trauma, and justice.<sup>560</sup> Second, Nuon Chea’s mischaracterisation neglects to appreciate that civil party applications are signed declarations,<sup>561</sup> and fails to acknowledge the compelling evidence and consistency of events recounted. For example, Hum Ponak gave a clear, detailed, eyewitness account of people killed because they did not obey orders:

That night, I walked straight to meet my family at French Embassy; however, I was ordered to go to the other direction. I also explained to the Khmer Rouges, but they did not allow me to

<sup>554</sup> **E3/2666** French Embassy Letter, Subject: Testimony of Brigadier-General Sor Buon, ENG 00517764 (describing the General as a “level-headed man, who takes care to talk only about what he has seen, avoiding inferences and generalizations”) and ENG 00517770. *Contra* NC Appeal, para. 307, fn. 830. Nuon Chea further alleges Sor Buon’s account is unbelievable because he travelled across Cambodia for weeks under an assumed identity and the Chamber should have considered whether any other account described the issuance of a ‘laissez-passer’ (NC Appeal, para. 318). In fact, Yos Phal testified about being told to throw away a laissez-passer that had been given to him by the Khmer Rouge because it had been written in red pen (see **E1/197.1** Yos Phal, T. 27 May 2013, p. 105, referring to **E3/4611** Yuos Phal Interview Record, p. 4, ENG 00455377).

<sup>555</sup> Judgment, para. 490, fn. 1462 (“*See also*, T. 7 June 2013 (Sydney SCHANBERG), pp. 4-5 (citing S. Schanberg: Cambodia Diary 1975, E236/114/3.1, p. 72, ENG 00898280, noted foreigners who trickled into the embassy in subsequent days carried reports of executions, but none of the latter were eyewitness accounts”). *Contra* NC Appeal, para. 308, fn. 834 and NC Notice, ground 82.

<sup>556</sup> Mr. Schanberg was cross-examined over the course of two days. See **E1/202.1** Sydney Schanberg, T. 6 June 2013, pp. 41-70 and **E1/203.1** Sydney Schanberg, T. 7 June 2013, pp. 2-64.

<sup>557</sup> See also para. 182 below.

<sup>558</sup> NC Appeal, paras 292, 306 and 313.

<sup>559</sup> Internal Rule 23*quinquies* states: “If an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties ... . These benefits shall not take the form of monetary payments to Civil Parties.”

<sup>560</sup> See, e.g., **E3/4719** Beng Boeun Civil Party Application, p. 7, ENG 00436832 (requesting a mental hospital, a center for the elderly and a public apology to the citizens of Cambodia); **E3/5005** Sam Pha Civil Party Application, p. 6, ENG 00871753 (requesting that the tribunal conduct the trial soon to provide justice to the victims); **E3/4703** Meas Mut Civil Party Application, p. 5, ENG 00417842 (requesting a memorial stupa and a maternity hospital).

<sup>561</sup> The standard Civil Party Application requires applicants to sign below the statement, “I hereby declare that: to the best of my knowledge and belief, the information I have given in the present Form is correct, otherwise I will be liable under the applicable law” and it must be counter-signed by a witness.

go; and at that time I saw that people who opposed their orders were killed immediately in front of me. From then I separated from my family.<sup>562</sup>

Phuong Phalla, Yann Nhar and Sem Virak also provided similarly detailed eyewitness accounts on the same issue.<sup>563</sup>

*iii. Specific claims based on ignoring corroborative evidence*

154. Perhaps most egregiously, Nuon Chea's fragmented approach to the evidence causes him to dismiss a litany of clear, unambiguous statements that report killings during the evacuation, ignoring their corroborative value and context.<sup>564</sup> For example, Phuong Mom, Sun Henri, Yim Sovann, Chey Yeun and Sor Buon all described civilians being killed in their homes because they refused to evacuate.<sup>565</sup> Sot Sem, Khiev Horn, and Pal Rattanak all told of killings along National Road One.<sup>566</sup> Seang Chan gave detailed eyewitness testimony of seeing people killed at

<sup>562</sup> **E3/4759** Hum Ponak Civil Party Application, ENG 00887719. *Contra* NC Appeal, para. 306, *citing* Judgment, fn. 1404; NC Notice, ground 70.

<sup>563</sup> **E3/4757** Phuong Phalla Civil Party Application, p. 4, ENG 00864243 ("When we arrived at the end of the bridge in the west, the Khmer Rouge, guarding the bridge, banned us from crossing. Some people decided to swim across the river, and they were shot to death") (*contra* NC Notice, ground 89); **E3/4987** Yann Nhar Civil Party Application, p. 6, ENG 00873677 (*contra* NC Appeal, para. 306, *citing* Judgment, fn. 1402; NC Notice, ground 62); **E3/4678** Sem Virak Civil Party Application, p. 3, ENG 00877009 ("Along the way, KR soldiers were lining the route to follow; so it was impossible to stray from it. Armed with AK47s, the KR soldiers, did not hesitate to execute people who didn't follow the indicated route or who strayed from it. I clearly remember witnessing such executions.") (*contra* NC Notice, ground 96).

<sup>564</sup> See Judgment, fns 1401-1405, 1462-1463, 1450; *contra* NC Notice, grounds 48-97; NC Appeal, paras 284-326.

<sup>565</sup> **E3/5416** Phuong Mom Victim Complaint, p. 6, ENG 00869941 (personally saw that those who did not agree to leave their home or wanted to wait for relatives were immediately killed by the Khmer Rouge, sometimes they killed the whole family) (see NC Appeal, para. 306, *citing* Judgment, fn. 1404; NC Notice, ground 71); **E3/5457** Sun Henri Victim Complaint, ENG 00474753-54 (saw the Khmer Rouge use rocket launchers to blast down doors and kill everyone who remained in their homes) (see NC Appeal, para. 306, *citing* Judgment, fn. 1404; NC Notice, ground 72); **E1/135.1** Yim Sovann, T. 19 October 2012, p. 81 (saw Khmer Rouge soldiers at O'Russey Market shoot open a locked door to a house, then shoot dead the people who came out) (see NC Notice, ground 78); **E3/4824** Chey Yeun Civil Party Application, p. 2, ENG 00891213 (some people were killed in their houses because they would not leave as ordered) (see NC Appeal, para. 306, *citing* Judgment, fn. 1402; NC Notice, ground 60); **E3/2666** French Embassy Letter, Subject: Testimony of Brigadier-General Sor Buon, ENG 00517765 (personally witnessed the execution of a Cambodian man from Phnom Penh who was shot with a pistol in front of his family because he refused to leave his home three times in a row) (see NC Appeal, para. 306, *citing* Judgment, fn. 1404; NC Notice, ground 69).

<sup>566</sup> **E3/4689** Sot Sem Civil Party Application, p. 8, ENG 00446581 ("They ordered us to take National Road number one and those who resisted would be shot [to] death. Along the road, I saw too many dead people killed by the Khmer Rouge. Some of them had just been shot dead (with fresh bleeding)") (see NC Appeal, para. 306, *citing* Judgment, fn. 1402; NC Notice, ground 55); **E3/5559** Khiev Horn Interview Record, p. 3, ENG 00377368 (traveling along National Road No. 1, there was no battle; he saw that any person who opposed the forced evacuation was immediately shot dead by the Khmer Rouge soldiers) (see NC Appeal, para. 304; NC Notice, ground 53); **E3/4839** Pal Rattanak Civil Party Application, p. 4, ENG 00893372 (saw people dying along the road, recently shot by soldiers; along National Road Number One from Wat Champa, he saw dead bodies everywhere along the road).



a checkpoint who were hesitating and did not know what route to take.<sup>567</sup> Nuon Chea argues this evidence proves the opposite of what it was cited to support, as not knowing what route to take implies the people had received no instructions to disobey.<sup>568</sup> Nuon Chea's argument ignores ample evidence that the instruction being disobeyed was the instruction to keep moving, and people were killed for hesitating, stopping, or not complying quickly enough.<sup>569</sup> The totality of the evidence gives Seang Chan's account corroboration and context.

155. Another example of corroborative accounts came from Morm Phai Buon and Pech Ling Kong, who both said hospital patients were killed by the Khmer Rouge.<sup>570</sup> Nuon Chea wrongly argues that the Chamber did not evaluate the evidence of Pech Ling Kong carefully, as other evidence indicates he is known as Pech Lim Kuon, which, Nuon Chea claims, raises contradictions.<sup>571</sup> Evidence does indeed suggest the two are the same person, and the Chamber had testimony before it on this issue.<sup>572</sup> More to the point, the Chamber never claimed, as Nuon Chea alleges, that Pech Ling Kong personally saw patients chased out of a hospital.<sup>573</sup> That evidence was attributed to the refugee account given by Lt. Non Thol, which follows the

<sup>567</sup> **E3/5505** Seang Chan Interview Record, p. 3, ENG 00399168 (saw people shot to death at the Steung Mean Chey exit because they were hesitating and did not know which route to take).

<sup>568</sup> NC Appeal, para. 303. See also NC Notice, ground 52.

<sup>569</sup> See, e.g., **E3/4839** Pal Rattanak Civil Party Application, p. 2, ENG 00893370 (those who were not willing to leave or were hesitant to leave were killed immediately) (see also NC Appeal, para. 306, *citing* Judgment, fn. 1402; NC Notice, ground 61); **E3/5482** Eam Teng Victim Complaint, p. 7, ENG 00824222 (soldiers shot people to death when they requested to wait for their family to leave altogether) (see also NC Notice, ground 63); **E3/4703** Meas Mut Civil Party Application, p. 7, ENG 00417844 (Khmer Rouge soldiers killed a family who refused to leave as they did not want to leave their belongings) (see also NC Notice, ground 64); **E3/4719** Beng Boeun Civil Party Application, p. 5, ENG 00436830 (those who did not leave in time were killed by the Khmer Rouge) (see also NC Notice, ground 65); **E3/4590** Refugee Accounts, pp. 132, ENG 00820450 (all those who did not comply with the orders were immediately killed, orders were not repeated twice) (see also NC Notice, ground 66), and p. 250, ENG 00820568 (some people gave up their belongings willingly, those who hesitated were shot right away) (see also NC Notice, ground 67); **E3/4687** Khoem Naret Civil Party Application, p. 3, ENG 00375736 (his family chose to leave after learning another family who refused had been shot) (see also NC Notice, ground 68); **E3/2666** French Embassy Letter, Subject: Testimony of Brigadier-General Sor Buon, p. 3, ENG 00517765 (those along the way who were no longer willing or able to follow others were gunned down) (see also NC Notice, ground 76); **E3/4980** Ly Ream Civil Party Application, p. 2, ENG 00893407 (from outskirts of Phnom Penh to Kirium in Kampong Speu Province, saw many people shot dead by Khmer Rouge troops; people who could no longer continue walk were shot dead one by one along the way) (see also NC Notice, grounds 76 and 91).

<sup>570</sup> **E3/4901** Morm Phai Buon Civil Party Application, p. 4, ENG 00944523 (*contra* NC Notice, ground 84); **E3/4590** Refugee Accounts (Pech Ling Kong), p. 205, ENG 00820523. See also para. 152, *supra*, regarding the reliability of François Ponchaud's refugee accounts.

<sup>571</sup> NC Appeal, para. 316 and NC Notice, ground 88.

<sup>572</sup> François Ponchaud testified that he changed the names of people for his book for their own safety; he wanted to protect their identities, then he discussed "Pech Lim Kuon" as being the pilot he met in Thailand (E1/179.1 François Ponchaud, T. 10 April 2013, pp. 101-103).

<sup>573</sup> Judgment, fn. 1411 shows the Chamber relied upon Pech Ling Kong as follows: "Pech Ling Kong stated that they deported the patients who were in the hospitals, those who could walk did; those who had drips, they removed the drips and deported them too". *Contra* NC Appeal, para. 316.

summary of Pech Ling Kong's evidence in the Judgment footnote cited by Nuon Chea.<sup>574</sup> The alleged contradiction is entirely due to Nuon Chea's misreading of the Judgment. Similarly, Pech Lim Kuon's statement that he had not seen anyone being killed since arriving in Phnom Penh does not contradict the Pech Ling Kong account of killings at the hospital, as that evidence did not purport to be eyewitness testimony and only stated that killings occurred.<sup>575</sup> Nuon Chea has shown nothing unreasonable about the Chamber's reliance on this evidence.

156. Another refugee account from Ponchaud's compilation was the evidence of "Mr. Worker", whom the Chamber relied upon for his description of the killing of famous film actor Kong Savuon, in Kieng Svay district.<sup>576</sup> Corroborating this in part was Pal Rattanak, who also placed Kong Savuon in Kieng Svay during the evacuation.<sup>577</sup> Nuon Chea alleges that it is unclear from the wording of the refugee account whether the person beheaded by the Khmer Rouge was Kong Savuon<sup>578</sup> or a pharmacist who had been grumbling. What *is* clear is that Mr. Worker saw the Khmer Rouge behead a civilian during the evacuation for no lawful reason.<sup>579</sup>

*iv. Remaining grounds*

157. The remaining grounds either do not rise to the level of reversible error or have not been argued. With regard to the evidence of Meas Saran, Nuon Chea observed that there are discrepancies between the original Khmer language version of the Written Record of Interview and its English translation, but falsely claimed that the witness confirmed he saw no dead bodies during the evacuation.<sup>580</sup> The excerpt referenced by Nuon Chea referred only to what Meas Saran observed along one road on which he was travelling, not his overall experience of the

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<sup>574</sup> *Contra* NC Appeal, para. 316 ("These statements establish that, contrary to the Chamber's claim that he 'saw' patients chased out of a hospital, Pech Lim Kuon arrived in Phnom Penh on 27 April 1975, witnessing no part of the evacuation"). Judgment, fn. 1411 shows the evidence that patients were chased out of a hospital came from p. 250 of the refugee account compilation and states the refugee "saw patients, some in serious conditions, being chased out of Russian Hospital". Page 250 contained Lt. Non Thol's account, not Pech Ling Kong's (his account is contained on p. 205). See **E3/4590** Refugee Accounts, pp. 3-4, ENG 00820321-22 table of contents. Nuon Chea has attributed the wrong evidence to Pech Ling Kong.

<sup>575</sup> *Contra* NC Appeal, para. 316, *citing* **E3/4060** Conversation with Pech Lim Kuon, ENG 00823178. See Judgment, fn. 1462, *citing* **E3/4590** Refugee Accounts, p. 205, ENG 00820523.

<sup>576</sup> Judgment, para. 490, fn. 1462, *citing* **E3/4590** Refugee Accounts, p. 30, ENG 00820348.

<sup>577</sup> **E3/4839** Pal Rattanak Civil Party Application, p. 4, ENG 00893372 (spelled "Kong Sam Oeun" in this account).

<sup>578</sup> NC Appeal, para. 317; NC Notice, ground 75 (note that the Chamber's finding in Judgment, para. 490 is not restricted to the Khmer Rouge soldiers shooting Kong Savuon but also encompasses other victims who were killed).

<sup>579</sup> **E3/4590** Refugee Accounts, p. 30, ENG 00820348.

<sup>580</sup> NC Appeal, para. 314; NC Notice, ground 83.

evacuation.<sup>581</sup> Indeed, Meas Saran clearly stated in his testimony that he saw two dead bodies near Monivong Bridge.<sup>582</sup> At any rate, the translation error does not indicate a “misleading treatment” of the evidence on the part of the Chamber,<sup>583</sup> nor does it rise to the level of reversible error, particularly when it was relied upon in combination with 47 other accounts.

158. Nuon Chea’s incorrect methodology, mischaracterisations, dismissal of entire categories of evidence and failure to recognise corroboration led him to erroneously state that “killings during the evacuation were, *at most*, extremely rare.”<sup>584</sup> Unfortunately for the people of Phnom Penh, this was not the reality. The Chamber properly looked at the totality of the evidence and concluded that the scale of killings of civilians (by execution and from severe conditions imposed during the transfer) and former Khmer Republic soldiers and officials together met the massiveness requirement for extermination during the evacuation of Phnom Penh.<sup>585</sup> These findings are discussed more fully below and were reasonable conclusions.

**B. The Chamber reasonably found that murder was committed during the Phase I movement through killings of Khmer Republic soldiers (NC Grounds 98-131)**

159. Nuon Chea’s assertion that “no killings of Khmer Republic soldiers and officials during the evacuation have been proven beyond reasonable doubt”<sup>586</sup> is based on an erroneously fragmented view of the facts which belies the corroborative strength of the evidence when viewed in its totality.

*i. Soldiers hors de combat were executed*

160. The Chamber reasonably relied upon nine eyewitness accounts as part of the basis for its finding that Khmer Republic soldiers who were *hors de combat* were executed in Phnom Penh.<sup>587</sup> First, contrary to Nuon Chea’s characterisation of the evidence,<sup>588</sup> when Khat Khe was asked what orders the Khmer Rouge were given on how to deal with the soldiers they found, he

<sup>581</sup> NC Appeal, para. 314, *citing* E1/145.1 Meas Saran, T. 22 November 2012, p. 35.

<sup>582</sup> E1/144.1 Meas Saran, T. 14 November 2012, pp. 108-109; E1/145.1 Meas Saran, T. 22 November 2012, p. 34.

<sup>583</sup> *Contra* NC Appeal, para. 314.

<sup>584</sup> NC Appeal, para. 319.

<sup>585</sup> Judgment, para. 560.

<sup>586</sup> NC Appeal, paras 321, 588.

<sup>587</sup> Judgment, para. 507, fn. 1518 (13 accounts were cited in support of this finding) and paras 515, 553, 554, 559.

<sup>588</sup> NC Appeal, para. 596 asserting that Khat Khe’s evidence of killings “concerned *only* Khmer Republic soldiers who had ‘locked themselves up in the house or hidden in the drains’” during ongoing hostilities (emphasis added). See also NC Notice, ground 102.

said, “[t]hey would be arrested and handcuffed. After their background had been checked and confirmed, they would be killed.”<sup>589</sup> Second, Khen Sok<sup>590</sup> stated that she saw a Khmer Rouge soldier shoot “dead on the ground” an unarmed Lon Nol soldier wearing a uniform.<sup>591</sup> A third eyewitness account came from Eam Tres,<sup>592</sup> who described how six of the 11 former Lon Nol soldiers he was tied to were shot to death at the riverbank.<sup>593</sup> Nothing in Nuon Chea’s Appeal challenges the fact that these six detained and bound soldiers were murdered.<sup>594</sup> Fourth, Both Soth<sup>595</sup> saw a government soldier who was tied up shot to death by the Khmer Rouge.<sup>596</sup>

161. Fifth, as Nuon Chea rightly states, “Pal Rattanak ... describes a large group of detained Khmer Republic soldiers, among whom a small number were killed when they tried to escape.”<sup>597</sup> Using a deadly weapon against a prisoner trying to escape constitutes “an extreme measure”, and opening fire is permissible “only when there is no other means of putting an immediate stop to the attempt.”<sup>598</sup> Even if firing at someone is justified, it must be preceded by at least two warnings, and guards “should first aim low, unless they are themselves in imminent danger, so as to avoid inflicting fatal wounds.”<sup>599</sup> These killings were clearly unlawful. Sixth, Ket Chhean<sup>600</sup> told Henri Locard that he was asked to carry a message by motorbike into Phnom Penh and, while there, witnessed the shooting of a colonel.<sup>601</sup>

162. In the seventh eyewitness account, refugee law student “CP” stated that the Khmer Rouge

<sup>589</sup> **E3/5598** DC-Cam Statement of Khat Khe, p. 20, ENG 00874735.

<sup>590</sup> See NC Notice, ground 99.

<sup>591</sup> Judgment, para. 507, fn. 1518. See also **E3/5556** Khen Sok Interview Record, p. 3, ENG 00377358. Nuon Chea alleges that the Chamber “apparently deliberately” omitted the detail that the soldier refused to evacuate Phnom Penh (NC Appeal, para. 594). This submission is irrelevant: although still wearing his uniform, the man was clearly *hors de combat*. Even if the order to expel the population of Phnom Penh had been legal, a lawful response to his refusal to comply would have been to arrest him, not to kill him (Third Geneva Convention, Art. 3). Commentary to the Third Geneva Convention, p. 40 states that “the acts referred to under items (a) to (d) are prohibited absolutely and permanently, no exception or excuse being tolerated.”

<sup>592</sup> See NC Notice, ground 103.

<sup>593</sup> Judgment, para. 507, fn. 1518. See also **E3/4822** Eam Tres Civil Party Application, p. 4, ENG 00893354.

<sup>594</sup> NC Appeal, para. 596.

<sup>595</sup> See NC Notice, ground 104.

<sup>596</sup> Judgment, para. 507, fn. 1518. See also **E3/4823** Both Soth Civil Party Application, p. 4, ENG 00840000. Nuon Chea’s submission that Both Soth did not specify why the soldier was shot is irrelevant. The soldier was tied up, thus clearly *hors de combat*. See NC Appeal, para. 596; Third Geneva Convention, Art. 3.

<sup>597</sup> NC Appeal, para. 596. See also NC Notice, ground 105.

<sup>598</sup> Commentary to the Third Geneva Convention, Art. 42, pp. 246-248.

<sup>599</sup> *Ibid.*

<sup>600</sup> See NC Notice, ground 110.

<sup>601</sup> **E3/3209** Report by Henri Locard: *Bophea Region*, p. 27, ENG 00403157. Nuon Chea rightly states that there are no further details concerning the killing but fails to establish that the Chamber did not consider this when determining the probative value of the evidence. See NC Appeal, para. 596; Judgment, para. 34.

killed the soldiers at Preak Ket Méalea hospital, which was confirmed by refugee “701”.<sup>602</sup> Eighth, Pam Moeun said he saw soldiers in uniform executed on Mao Tse Tung Boulevard on 17 April 1975.<sup>603</sup> Nuon Chea raises no argument for either account.<sup>604</sup>

163. The ninth eyewitness account of killings came from Ut Seng.<sup>605</sup> Nuon Chea’s arguments regarding this account<sup>606</sup> ignore the fact that Ut Seng’s statement is materially corroborated by Brigadier-General Sor Buon.<sup>607</sup> Ut Seng was at the Prêk Kdam ferry crossing when he saw “female Pol Pot soldiers tie up two people and walk them away”.<sup>608</sup> The two people he believed were “probably soldiers” removed their clothes and were shot by the female soldiers, who had automatic weapons.<sup>609</sup> Similarly, Brigadier-General Sor Buon said that soldiers who were fleeing with their families were easily recognised at checkpoints and were forced to take off their shoes and jackets, then shot on the spot.<sup>610</sup> Between Phnom Penh and Prek Kdam where Ut Seng saw this incident, the General also saw communist girls execute several officers, asking them to step about 20 metres ahead and then shooting them in the back with automatic rifles.<sup>611</sup>

164. Evidence from three other sources also supports the Chamber’s finding regarding the killing of *hors de combat* soldiers. First, Prum Sokha said that her father, the Chief of Military Finance in the Lon Nol Ministry of National Defense, was detained, tied up and *brutally killed* along with other military commanders at the garrison at the Royal Palace.<sup>612</sup> Second, Chhiev Si Lang told Henri Locard that during the evacuation of Phnom Penh, her husband was killed because he was a Lon Nol soldier.<sup>613</sup> And third, Nuon Chea calls Mei Nary’s evidence into question because it

<sup>602</sup> Judgment, para. 507, fn. 1518. See also **E3/4590** Refugee Accounts, p. 133, ENG 00820451.

<sup>603</sup> Judgment, para. 507, fn. 1518. See also **E3/1805** *Submission from the Government of Norway under Commission on Human Rights decision 9 (XXXIV)* (ECOSOC), p. 21, ENG 00087557.

<sup>604</sup> See NC Notice, grounds 101, 108.

<sup>605</sup> See NC Notice, ground 100.

<sup>606</sup> NC Appeal, para. 594.

<sup>607</sup> See NC Notice, ground 126. Nuon Chea makes no arguments in this Appeal section relating to this evidence.

<sup>608</sup> See Judgment, para. 507, fn. 1518. See also **E3/5267** Ut Seng Written Record of Interview, p. 3, ENG 00282352.

<sup>609</sup> *Ibid.*

<sup>610</sup> **E3/2666** French Embassy Letter, Subject: Testimony of Brigadier-General Sor Buon, p. 5, ENG 00517767. Note that “Prek Kdam” is spelled “Prek Dam” by the ambassador who took Sor Buon’s account. Note further that at p. 8, ENG 00517770, the ambassador stated that the testimonies of the few refugees who had managed to cross into Thailand were “consistent in all respects” to Sor Buon’s testimony. See also Judgment, para. 513, fn. 1532.

<sup>611</sup> *Ibid.*

<sup>612</sup> See Judgment, para. 507, fn. 1518. Note the Chamber made a typographical error in stating that the killing took place on 20 January 1978 rather than 20 January 1975 as stated in the Complaint. See also **E3/5392** Prum Sokha Victim Complaint, pp. 6-7, ENG 00873794-95. The allegation that Prum Sokha’s Complaint does not describe killings “even on [its] face” is without basis (NC Appeal, para. 596, fn. 1602. See also NC Notice, ground 106).

<sup>613</sup> Judgment, fn. 1518. See also **E3/3209** Report by Henri Locard: *Bophea Region*, p. 13, ENG 00403143. Nuon Chea is correct that there are no details concerning the circumstances of the killing but fails to establish that the

does not indicate how he knew about the killing of his relatives in Phnom Penh “from hundreds of kilometres away”.<sup>614</sup> Clearly, Mei Nary heard about the killing from someone else. It is presumed the Chamber took the hearsay nature of the evidence into account when assessing its weight.<sup>615</sup> Further, the specific details regarding the location of the killing and identity of the victims are circumstantial guarantees that the hearsay came from a source with knowledge of the event.<sup>616</sup>

165. The thirteenth account supporting the Chamber’s *hors de combat* finding was Civil Party Kim Vandy’s account of how his uncle, a colonel, was parking his jeep in front of his house when shot by a Khmer Rouge soldier who stated “that’s what happens to a traitor and all traitors must be smashed.”<sup>617</sup> Nuon Chea rightly notes that the killing occurred some hours before hostilities had been formally terminated,<sup>618</sup> however, it occurred “when there w[ere] no more bombs or fire”<sup>619</sup> and the soldier’s statement clearly evinced an intent to kill all soldiers of the defeated army.<sup>620</sup> However, even if one set this testimony aside, no miscarriage of justice has been shown. The Chamber’s finding is firmly established by the other twelve accounts discussed above, in addition to evidence regarding the execution of senior Khmer Republic officials who were killed while being detained by the Khmer Rouge.<sup>621</sup>

*ii. There were reports that soldiers were killed elsewhere (Judgment, para. 508)*

166. Eight accounts support the Chamber’s conclusion that “some accounts reported that [Khmer Republic] soldiers were taken to be killed elsewhere”.<sup>622</sup> Sau Sary, Kim Sarou, Sao Thoeun, Phan Yim and Rou Ren each described situations where one or more victim(s) who had been affiliated with the Khmer Republic were arrested by the Khmer Rouge and then taken away to be

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Chamber did not consider this when determining what weight to assign the evidence (NC Appeal, para. 596. See also NC Notice, ground 109; Judgment, para. 34).

<sup>614</sup> NC Appeal, para. 596. See also NC Notice, ground 107.

<sup>615</sup> See *supra*, VI.E (Probative Value of the Evidence, hearsay).

<sup>616</sup> Judgment, fn. 1518. See also **E3/5397** Mei Nary Victim Complaint, ENG 00834021.

<sup>617</sup> Judgment, fn. 1518.

<sup>618</sup> NC Appeal, para. 593. See also NC Notice, ground 98.

<sup>619</sup> **E1/148.1** Kim Vandy, T. 5 December 2012, p. 83.

<sup>620</sup> Judgment, fn. 1518, *citing* **E1/148.1** Kim Vandy, T. 5 December 2012, pp. 83-84, 92 and **E1/149.1** Kim Vandy, T. 6 December 2012, pp. 20-21.

<sup>621</sup> See Judgment, para. 503 and fn. 1510.

<sup>622</sup> Judgment, para. 508 and fn. 1521.

killed.<sup>623</sup> Nuon Chea’s arguments that their evidence lacks detail<sup>624</sup> does not detract from the fact that each account clearly and credibly supports exactly what it is cited to support. As discussed previously, the Chamber may rely on any evidence it deems has probative value.<sup>625</sup> Nuon Chea has not demonstrated that the Chamber failed to appropriately assess the probative value of this evidence. In regard to the other three accounts supporting the finding, Nuon Chea asserts no argument in this section of grounds relating to the evidence of Pech Ling Kong or the interview with the Lon Nol soldier who was sent to Amleang.<sup>626</sup> As for Seang Chan’s evidence,<sup>627</sup> Nuon Chea alleges that it is irrelevant as to killings of former soldiers because it described a group of men arrested and killed “without distinction for who was a Khmer Republic soldier”.<sup>628</sup> While true that Seang Chan did not specify that the men assembled at the glass factory were former soldiers, when considered alongside the corroborative account of Pam Moeun, who identified men assembled at the glass factory as “generals, officers, sub-officers and soldiers”,<sup>629</sup> it was reasonable for the Chamber to conclude that the men Seang Chan saw were soldiers.<sup>630</sup>

*iii. Some learned that certain former soldiers had been killed (Judgment, para. 513)*

167. In a similar vein, the Chamber also found that some individuals “subsequently learned that certain former Khmer Republic soldiers had been killed.”<sup>631</sup> Again, the Chamber was precise in stating what the three accounts supported. Chum Sokha’s hearsay account that Lon Nol soldiers who were arrested and tied with thread were to be killed contains circumstantial guarantees of trustworthiness.<sup>632</sup> Chum Sokha’s own father, a military police officer in the Lon Nol regime, was the source of the hearsay, which he relayed to his then 20-year-old son after managing to

<sup>623</sup> **E3/5372** Sau Sary Civil Party Application, p. 5, ENG 00870324; **E3/5435** Kim Sarou Victim Complaint, p. 7, ENG 00810026; **E3/5436** Sao Thoeun Victim Complaint, p. 6, ENG 00873857; **E3/5424** Phan Yim Victim Complaint, p. 7, ENG 00873875; **E3/4694** Rou Ren Civil Party Application, p. 6, ENG 00398344.

<sup>624</sup> NC Appeal, para. 596, fns 1602-1604. See also NC Notice, grounds 112 (Sau Sary), 113 (Kim Sarou), 114 (Sao Thoeun), 117 (Phan Yim) and 118 (Rou Ren).

<sup>625</sup> See *supra*, VI.F (Probative Value of the Evidence, fact witnesses).

<sup>626</sup> See NC Notice, grounds 115-116.

<sup>627</sup> See NC Notice, ground 111.

<sup>628</sup> NC Appeal, para. 594.

<sup>629</sup> See **E3/1805** *Submission from the Government of Norway under Commission on Human Rights decision 9 (XXXIV)* (ECOSOC), p. 21, ENG 00087557. Note that Steung Meanchey is spelled in this account as “Stung Meanshey”. See also NC Notice, ground 108. Nuon Chea makes no arguments in this Appeal section relating to this evidence.

<sup>630</sup> Judgment, para. 508, fn. 1521. See also **E3/5505** Seang Chan Interview Record, pp. 3-4, ENG 00399168-69.

<sup>631</sup> Judgment, para. 513, fn. 1537.

<sup>632</sup> See Judgment, para. 513, fn. 1537. See also NC Notice, ground 127.

escape from being tied to other soldiers who were to be killed.<sup>633</sup> Chum Sokha testified that later in their journey, he observed his father look shocked when they saw people walking with their thumbs tied together or their arms tied to their backs, and his father told his family to walk quickly.<sup>634</sup> His father said the people in line were Lon Nol soldiers, and Chum Sokha said that his father “was very afraid that he could be implicated.”<sup>635</sup> As there was no reason for Chum Sokha’s father to lie under the circumstances, his fearful behaviour matched what he said, and the totality of the evidence shows similar events elsewhere,<sup>636</sup> the Chamber was reasonable to rely on this evidence. Finally, Nuon Chea is correct that Chum Sokha’s hearsay evidence of killings was not subject to cross-examination,<sup>637</sup> but only because Defence counsel *chose* not to question him.<sup>638</sup> The other two accounts, from Tieng Sokhom and Beng Boeun, did not describe circumstances surrounding the killings,<sup>639</sup> but they provided other details about the killings which indicated their evidence was reliable and clearly demonstrated that they learned that certain former Khmer Republic soldiers had been killed.<sup>640</sup>

*iv. Soldiers disappeared (Judgment, paras 511, 513)*

168. There are two aspects to the finding regarding Khmer Republic soldiers who heeded calls from the Khmer Rouge to return to Phnom Penh: they either *disappeared* or were *executed*.<sup>641</sup> Nuon Chea calls into question the accounts of Lay Bony, Chhor Dana and Seng Mardi as if they were relied upon to prove killings<sup>642</sup> when their evidence clearly supports the disappearance aspect of the finding.<sup>643</sup> Four other accounts support the execution portion, discussed below.<sup>644</sup>

<sup>633</sup> See **E3/5788** Chum Sokha Interview Record, p. 3, ENG 00380711; **E1/136.1** Chum Sokha, T. 22 October 2012, pp. 32, 39-40.

<sup>634</sup> **E1/136.1** Chum Sokha, T. 22 October 2012, p. 42.

<sup>635</sup> *Ibid.*, pp. 42, 43.

<sup>636</sup> See also **E3/5505** Seang Chan Interview Record, pp. 3-4, ENG 00399168-69; **E3/4839** Pal Rattanak Civil Party Application, p. 3, ENG 00893371; **E3/5425** Nuon Mom Victim Complaint, p. 6, ENG 00829759; **E3/4823** Both Soth Civil Party Application, p. 4, ENG 00840000; **E1/199.1** Po Dina, T. 30 May 2013, pp. 98, 109-110.

<sup>637</sup> NC Appeal, para. 594 and fn. 1588.

<sup>638</sup> **E1/136.1** Chum Sokha, T. 22 October 2012, pp. 102-104.

<sup>639</sup> NC Appeal, para. 596, fns 1603, 1604. See also NC Notice, grounds 128 (Tieng Sokhom) and 129 (Beng Boeun).

<sup>640</sup> See **E3/5402** Tieng Sokhom Victim Complaint, p. 6, ENG 00870347. See **E3/4719** Beng Boeun Civil Party Application, p. 5, ENG 00436830.

<sup>641</sup> Judgment, para. 511 (last sentence). See also Judgment, paras 515, 553 (fn. 1653) and 559.

<sup>642</sup> NC Appeal, paras 593 (Lay Bony is the “second witness”), 594, fn. 1587 (Seng Mardi) and 596, fn. 1604 (Chhor Dana). See also NC Notice, grounds 120 (Lay Bony), 121 (Chhor Dana) and 124 (Seng Mardi).

<sup>643</sup> **E1/138.1** Lay Bony, T. 24 October 2012, pp. 27-28; **E3/4664** Chhor Dana Civil Party Application, pp. 3-4, ENG 00156847-48; **E3/5613** Seng Mardi Interview Record, pp. 3, 5, ENG 00494399, 00494401 .

<sup>644</sup> See paras 170-173 below.



169. Similarly, reference in the Judgment to Pech Chim's account of women whose Lon Nol soldier husbands had disappeared is preceded by a sentence which indicates that his evidence is an example of people who "never received any news of those family members who were taken away",<sup>645</sup> not an example of killings.<sup>646</sup> The Chamber assessed the evidence reasonably and stated precisely what was and was not supported by the evidence.<sup>647</sup>

v. *Soldiers who heeded calls to return to Phnom Penh were executed (Judgment, para. 511)*

170. The portion of the finding regarding Khmer Republic soldiers who heeded calls from the Khmer Rouge to return to Phnom Penh and were executed<sup>648</sup> is supported by four accounts. Nuon Chea alleges that the Chamber was unreasonable because it failed to consider an inconsistency in Sum Chea's evidence regarding killings of soldiers west of Preak Pnov.<sup>649</sup> The same argument was raised during closing submissions,<sup>650</sup> and there is no indication that the Chamber failed to consider the argument.<sup>651</sup> The hearsay account was specific as to the location of the killings and the manner in which the soldiers were killed.<sup>652</sup> Several aspects were also consistent with evidence from other witnesses.<sup>653</sup>

171. [REDACTED]

[REDACTED] <sup>654</sup> [REDACTED]

<sup>645</sup> Judgment, para. 513.

<sup>646</sup> Contra NC Appeal, para. 593 (Pech Chim is identified as the "third witness"). See also NC Notice, ground 130.

<sup>647</sup> The legal finding at Judgment, para. 555 (see fns 1657 and 1658) refers back to para. 513, which discusses Pech Chim's account. The finding states that the evidence of officials who were identified and subsequently disappeared at checkpoints, fate unknown, "does not establish that the only reasonable inference is that they were all killed".

<sup>648</sup> Judgment, para. 511 (last sentence). See also Judgment, paras 515, 553 (fn. 1653) and 559.

<sup>649</sup> NC Appeal, para. 593 (Sum Chea is identified as "a fourth witness"). See also NC Notice, ground 119.

<sup>650</sup> See **E1/233.1** Final Submissions Day 2, T. 24 October 2013, pp. 37-38. It is clear that the Chamber extensively considered arguments made in Closing Submissions, both written and oral. See, e.g., Judgment, paras 40, 42, 63, 69-72, 266, 628 and fns 108, 110, 111, 114, 118, 121, 132, 133, 142, 147, 148, 445, 530, 542, 543, 574, 843, 1263, 1269, 1287, 1289, 1314, 1577, 1604, 1605, 1616, 1640, 1641, 1695, 1696, 1992, 3103.

<sup>651</sup> See *supra*, VI.F (Probative value of the evidence, fact witnesses; inconsistent and unreliable testimony). If there was an inconsistency, it is well-established that a Chamber can find a witness credible on some aspects of his testimony and not others (as discussed in para. 94, *supra*).

<sup>652</sup> **E3/3961** Sum Chea Interview Record, 6 March 2008, p. 3, ENG 00223346 ("the killing site was about 200 meters west of Prek Phnoeu"; "Those soldiers were killed with clubs"; "During that killing, they revved up the trucks to make an incredibly loud noise").

<sup>653</sup> Other witnesses described the tactic of using a pretence to lure former soldiers to report and then killing them. See, for example, [REDACTED] Written Record of Interview of [REDACTED] pp. 3-4, ENG [REDACTED]; **E3/3962** Khoem Samhoun Interview Record, p. 4, ENG 00293365; **E3/5256** Written Record of Hok Hoeun, p. 4, ENG 00251304.

<sup>654</sup> [REDACTED] Written Record of Interview of [REDACTED] pp. 3-4, ENG [REDACTED] See also Judgment, para. 511, fn. 1530.

[REDACTED] .<sup>655</sup> [REDACTED]

[REDACTED]

[REDACTED]<sup>656</sup>

172. The Chamber also reasonably relied on Khoem Samhoun’s hearsay evidence,<sup>657</sup> which contained circumstantial guarantees of trustworthiness. First, he said there was an order to arrest high-ranking Lon Nol civil servants and Lon Nol patients at Preah Ket Mealea Hospital.<sup>658</sup> Second, he knew forces were being sent to carry out the order, although he refused to participate.<sup>659</sup> Third, he heard directly from his colleagues who *did* participate that they had arrested a “great number” of Lon Nol officers, killed them and threw the bodies into a well in Tuol Kork.<sup>660</sup> Fourth, one of the soldiers showed Khoem Samhoun the clubs they had used in the killings, which he saw had bloodstains.<sup>661</sup> His testimony is also consistent with other evidence.<sup>662</sup>

173. Finally, Nuon Chea is correct that Koy Mon’s evidence does not offer an explanation as to why he believed the Khmer Republic soldiers placed on trucks by the Southwest Zone troops were probably killed.<sup>663</sup> However, Koy Mon’s account does not have to stand on its own to prove killings beyond a reasonable doubt.<sup>664</sup> When correctly viewed alongside all of the other evidence, it is one of several corroborative accounts that together form a basis for the Chamber

<sup>655</sup> [REDACTED]

<sup>656</sup> [REDACTED]

<sup>657</sup> Judgment, para. 511, fn. 1530.

<sup>658</sup> E3/3962 Khoem Samhoun Interview Record, p. 4, ENG 00293365.

<sup>659</sup> *Ibid.* (He knew “what was happening” because he was the chairman of Company 3 of Division 310.)

<sup>660</sup> *Ibid.*

<sup>661</sup> *Ibid.*

<sup>662</sup> As discussed *supra*, in Section IX.B.i (Soldiers *hors de combat* were executed), former Lon Nol officers were arrested, thus placed *hors de combat*, and then killed, as also described here. See also E3/3961 Sum Chea Interview Record, 6 March 2008, p. 3, ENG 00223346 (soldiers were taken and killed west of Prek Phnoeu; the soldiers were killed with clubs).

<sup>663</sup> NC Appeal, para. 594. See also NC Notice, ground 125.

<sup>664</sup> See, *supra*, para. 139.

to reasonably conclude that soldiers were killed.<sup>665</sup> [REDACTED]

[REDACTED]<sup>666</sup> It was within the Chamber's discretion to reject evidence it did not find credible or reliable. Numerous accounts discussed in this section demonstrate that any order not to harm military officers was not followed, making it unlikely such an order was given. The Chamber reasonably relied on Koy Mon's evidence.

*vi. Those who registered in Kien Svay were rounded up and killed (Judgment, para. 514)*

174. Nuon Chea misstates that the Chamber relied on the hearsay evidence of François Ponchaud “to find that *everyone* who returned to Phnom Penh in the same period was systematically executed.”<sup>667</sup> The Judgment paragraph referenced by Nuon Chea does not refer to Ponchaud's evidence in the body or footnotes, nor does it categorically state that everyone who returned was executed.<sup>668</sup> The Judgment paragraph which *does* reference Ponchaud's evidence makes no such finding either.<sup>669</sup> That aside, Nuon Chea has spotted a discrepancy in Ponchaud's dates, which is understandable due to the almost 40-year passage of time.<sup>670</sup> This discrepancy is immaterial and does not render the evidence unreliable. Ponchaud was clear and consistent that the man from Kien Svay said that military officers and high-ranking officials of the previous regime were told to write their names on the board in Kien Svay Pagoda, and those who did were killed.<sup>671</sup> The Chamber correctly viewed the totality of the evidence, including corroborating evidence,<sup>672</sup> and reasonably relied upon Ponchaud's account.

*vii. Khmer Republic soldiers and officials were killed during the Phnom Penh evacuation*

175. The totality of the evidence demonstrates just how dangerous it was to be a former Lon Nol

<sup>665</sup> See, for example, **E3/4839** Pal Rattanak Civil Party Application, p. 3, ENG 00893371; **E3/4664** Chhor Dana Civil Party Application, pp. 3-4, ENG 00156847-48; **E3/1805** *Submission from the Government of Norway under Commission on Human Rights decision 9 (XXXIV)* (ECOSOC), p. 21, ENG 00087557.

<sup>666</sup> [REDACTED]  
<sup>667</sup> NC Appeal, para. 593, emphasis added (Ponchaud is the “fifth witness”). See also NC Notice, ground 131.

<sup>668</sup> See NC Appeal, fn. 1579, which refers to Judgment, para. 511, which allows that some people disappeared.

<sup>669</sup> Judgment, para. 514 states that many of the evacuees urged to register their names with the promise of being able to return to Phnom Penh distrusted the promises; Ponchaud was told that people who registered in Kien Svay and Battambang were rounded up and killed, while other accounts “state the identified Khmer Republic officials were taken away and never seen again.”

<sup>670</sup> See NC Appeal, para. 593.

<sup>671</sup> **E1/179.1** François Ponchaud, T. 10 April 2013, pp. 13-14, 29, 56.

<sup>672</sup> See, for example, **E3/4590** Refugee Accounts, p. 125, ENG 00820443. In Dey, “the KR wrote on a blackboard that all officers, from second lieutenant above had to register to return to Phnom Penh. Many fell into the trap and signed up. They were given rice. Then they were taken away by truck and we never saw them again. There were colonels, generals, etc.”

soldier or official during the evacuation of Phnom Penh. Considered the enemy, former soldiers were executed even when tied up and unarmed.<sup>673</sup> Former officers and officials were lured under false pretences to register their names, then were executed or never seen again.<sup>674</sup> The Chamber reasonably concluded, based on *all* of the evidence before it, that Khmer Republic soldiers and officials were killed during the evacuation of Phnom Penh.<sup>675</sup> Nothing articulated by Nuon Chea in his appeal amounts to a miscarriage of justice.

**C. The Chamber reasonably and correctly found that murder was committed due to conditions during the evacuation of Phnom Penh (NC Grounds 132-157)**

176. Nuon Chea misconstrues the purpose for which the Chamber cited evidence and attempts to minimise the strength of the evidence upon which the Chamber relied. All of his claims are without merit,<sup>676</sup> as the evidence overwhelmingly supports the Chamber's finding that the conditions of the evacuation and lack of assistance caused the death of evacuees.

*i. The Chamber reasonably found that evacuees died during the evacuation*

177. Contrary to Nuon Chea's submissions,<sup>677</sup> the Chamber relied on the evidence cited in footnote 1472 of the Judgment not to prove deaths, but to support the Chamber's finding that "[m]any evacuees were soon rendered weak or fell sick due to the conditions".<sup>678</sup> Similarly, Seng Sivutha's evidence of an old man lying on the side of the road with ants crawling into his eyes was cited to show the conditions people suffered, not to prove a death.<sup>679</sup>

178. Regarding the finding that evacuees died, the Chamber clearly stated in the same footnote that the conclusion "concerning evacuees who died as a result of the conditions" was supported

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<sup>673</sup> As discussed in Section IX.B.i (Soldiers *hors de combat* were executed), *supra*.

<sup>674</sup> As discussed in Section IX.B.ii-vi, *supra*.

<sup>675</sup> Judgment, para. 515. This finding is based on the factual findings in impugned Judgment paras 507-508, 511, 513 as well as evidence regarding executions of senior officials in Judgment, para. 503. These paragraphs also form the basis for the findings in Judgment, paras 553 (fns 1653, 1655), 554-555, 559.

<sup>676</sup> Note that the allegations in NC Appeal, para. 322 that the Judgment "wildly exaggerates the uniformity and severity of the conditions during the evacuation", "evacuees travelled at their own pace to destinations of their choosing" and "both food and shelter were far better available than the Judgment suggests" are fully addressed in the Section XI.B (Other Inhumane Acts, conditions during population movements)

<sup>677</sup> NC Appeal, para. 323. See also NC Notice, ground 132.

<sup>678</sup> Judgment, para. 491, fn. 1472 and sources cited therein.

<sup>679</sup> *Contra* NC Appeal, fn. 875 and NC Notice, ground 133. Judgment, para. 492 where this evidence is cited is part of the "Conditions Suffered" section of the Judgment.

by the evidence discussed in paragraphs 497 and 498 of the Judgment.<sup>680</sup> There, the Chamber relied on eight eyewitness accounts recounted in court, firsthand evidence contained in sixteen out-of-court statements and evidence contained in five contemporaneous documents.<sup>681</sup> The Chamber correctly considered the totality of the evidence and reasonably concluded that some evacuees died during the evacuation of Phnom Penh.

*ii. The conditions of the evacuation caused deaths*

179. The remainder of Nuon Chea's arguments challenge the sufficiency of the underlying evidence to prove that the conditions of the evacuation *caused* deaths. As stated in the *Čelebići* case:

[I]t is a well-recognised legal principle that a wrongdoer must take the victim as he finds him. Thus, if a perpetrator by his acts shortens the life of his victim, it is legally irrelevant that the victim may have died shortly thereafter from another cause. To establish criminal liability in situations where there are pre-existing physical conditions which would cause the victim's death, therefore, it is only necessary to establish that the accused's conduct contributed to the death of the victim.<sup>682</sup>

180. It is evident from the Judgment that the Chamber followed this approach in its causation analysis of deaths during the Phnom Penh evacuation. The Chamber considered the evidence regarding conditions of the evacuation, including the ongoing food shortages which had "seriously weakened" the population, the fact that people were expelled with no notice and without adequate supplies at the hottest time of year, and the "almost complete absence of any aid or assistance" from the Khmer Rouge.<sup>683</sup> It was especially mindful that everyone was evacuated without exception and with no plan to assist "even the most vulnerable, such as infants, children, the sick and injured, some of whom were only recently operated on, as well as pregnant women, the elderly and the infirm."<sup>684</sup> It then concluded that the Khmer Rouge "knew that the evacuation of at least these particularly vulnerable groups in the especially arduous conditions" would result in their deaths and found that the deaths of the victims "who died due to the conditions and lack of any assistance" constituted murder.<sup>685</sup>

<sup>680</sup> Judgment, fn. 1472 stating "See also, Section 10: Movement of the Population (Phase I), paras 497-498 concerning evacuees who died as a result of the conditions."

<sup>681</sup> Judgment, fns 1487-1494 and sources cited therein.

<sup>682</sup> *Čelebići* TJ, para. 909.

<sup>683</sup> Judgment, para. 556.

<sup>684</sup> Judgment, para. 557.

<sup>685</sup> Judgment, paras 558-559.

181. Underpinning these findings is the eyewitness evidence of Phat Han,<sup>686</sup> Chim Morn,<sup>687</sup> Ni Bunly,<sup>688</sup> Ly Ream,<sup>689</sup> Sam Pha,<sup>690</sup> Soth Navy,<sup>691</sup> Loas Vannan,<sup>692</sup> Preab Ken,<sup>693</sup> Kem Kuon,<sup>694</sup> Toch Monin,<sup>695</sup> Im Sunty,<sup>696</sup> Refugee2 “S”,<sup>697</sup> Pok Sareth,<sup>698</sup> Non Thol,<sup>699</sup> Pech Srey Phal,<sup>700</sup> Bay Sophany,<sup>701</sup> Yim Sovann,<sup>702</sup> Sum Chea,<sup>703</sup> Chan Socheat,<sup>704</sup> Chheng Eng Ly,<sup>705</sup> Nou Hoan,<sup>706</sup> Refugee “M”,<sup>707</sup> and Saidnattar Roshane,<sup>708</sup> as well as two telegrams dated May and

<sup>686</sup> Judgment, para. 497, fn. 1487, *citing* **E3/4756** Phat Han Civil Party Application, p. 4, ENG 00864559. *Contra* NC Appeal, para. 324 and NC Notice, ground 138.

<sup>687</sup> Judgment, para. 497, fn. 1487, *citing* **E3/4910** Chim Morn DC-Cam Supplementary Information, p. 3, ENG 00861850. *Contra* NC Appeal, para. 324 and NC Notice, ground 139.

<sup>688</sup> Judgment, para. 497, fn. 1487, *citing* **E3/4590** Refugee Accounts (Ni Bunly), p. 183, ENG 00820501. *Contra* NC Appeal, para. 324 and NC Notice, ground 140.

<sup>689</sup> Judgment, para. 497, fn. 1487, *citing* **E3/4980** Ly Ream Civil Party Application, p. 3, ENG 00893408. *Contra* NC Appeal, para. 324 and NC Notice, ground 141.

<sup>690</sup> Judgment, para. 497, fn. 1487, *citing* **E3/5005** Sam Pha Civil Party Application, p. 3, 00871750 *Contra* NC Appeal, para. 324 and NC Notice, ground 142.

<sup>691</sup> Judgment, paras 497, fn. 1487 and 498, fn. 1491, *citing* **E3/4921** Soth Navy Civil Party Application, p. 5, ENG 00858006. *Contra* NC Appeal, paras 324, 325 and NC Notice, grounds 143, 152.

<sup>692</sup> Judgment, para. 497, fn. 1487, *citing* **E3/5327** Loas Vannan Victim Complaint, p. 6, ENG 00875606. *Contra* NC Appeal, para. 324 and NC Notice, ground 144.

<sup>693</sup> Judgment, para. 497, fn. 1487, *citing* **E3/5406** Preab Ken Victim Complaint, p. 6, 00749400. *Contra* NC Appeal, para. 324 and NC Notice, ground 145.

<sup>694</sup> Judgment, paras 497, fns 1487 and 498, fn. 1491 *citing* **E3/5418** Kem Kuon Victim Complaint, p. 6, ENG 00890622. *Contra* NC Appeal, paras 324, 325 and NC Notice, grounds 146, 153.

<sup>695</sup> Judgment, para. 497, fn. 1487, *citing* **E3/4668** Toch Monin Civil Party Application, p. 3, ENG 00238410. *Contra* NC Appeal, para. 324 and NC Notice, ground 147.

<sup>696</sup> Judgment, para. 497, fn. 1487, *citing* **E3/5555** Im Sunty Interview Record, p. 3, ENG 00364783. *Contra* NC Appeal, para. 324 and NC Notice, ground 148.

<sup>697</sup> Judgment, para. 498, fn. 1491, *citing* **E3/4590** Refugee Accounts, p. 51, ENG 00820369. *Contra* NC Appeal, para. 325 and NC Notice, ground 149.

<sup>698</sup> Judgment, para. 498, fn. 1491, *citing* **E3/4590** Refugee Accounts, pp. 198-199, ENG 00820516-17. *Contra* NC Appeal, para. 325 (one of the three refugee statements, but not anonymous as alleged); NC Notice, ground 150.

<sup>699</sup> Judgment, para. 498, fn. 1491, *citing* **E3/4590** Refugee Accounts, p. 251, ENG 00820569. *Contra* NC Appeal, para. 325 (one of the three refugee statements, but not anonymous as alleged) and NC Notice, ground 151.

<sup>700</sup> Judgment, para. 498 and fn. 1493, *citing* **E1/148.1** Pech Srey Phal, T. 5 December 2012, p. 25. *Contra* NC Appeal, para. 325 and NC Notice, ground 155.

<sup>701</sup> Judgment, para. 498 and fn. 1494, *citing* **E1/200.1** Bay Sophany, T. 4 June 2013, pp. 11-12. *Contra* NC Appeal, para. 325 and NC Notice, ground 156.

<sup>702</sup> Judgment, para. 497, fn. 1488, *citing* **E1/135.1** Yim Sovann, T. 19 October 2012, pp. 83-84. *Contra* NC Appeal, para. 325.

<sup>703</sup> Judgment, para. 497, fn. 1488, *citing* **E1/140.1** Sum Chea, T. 5 November 2012, pp. 14-15. *Contra* NC Appeal, para. 325.

<sup>704</sup> Judgment, para. 497, fn. 1488, *citing* **E1/198.1** Chan Socheat, T. 29 May 2013, pp. 42-43. *Contra* NC Appeal, para. 325.

<sup>705</sup> Judgment, para. 497, fn. 1488, *citing* **E1/198.1** Cheng Eng Ly, T. 29 May 2013, p. 92. *Contra* NC Appeal, para. 325.

<sup>706</sup> Judgment, para. 497, fn. 1488, *citing* **E1/199.1** Nou Hoan, T. 30 May 2013, p. 6. *Contra* NC Appeal, para. 325.

<sup>707</sup> Judgment, para. 497, fn. 1488, *citing* **E3/4590** Refugee Accounts, p. 34, ENG 00820352. *Contra* NC Appeal, para. 325.

<sup>708</sup> Judgment, para. 497, fn. 1488, *citing* **E3/5076** Saidnattar Roshane Civil Party Application, p. 6, ENG 00857597. *Contra* NC Appeal, para. 325.

June 1975 that describe evacuees dying from cholera,<sup>709</sup> a contemporaneous diary referenced during the author's testimony in court,<sup>710</sup> and two official reports written close to the time of the events that describe deaths of children during the evacuation.<sup>711</sup> All of the evidence cited describes vulnerable members of the population who were subjected to conditions that put their physical health under extreme strain and shortened their lives. It is clear that the conditions and lack of assistance substantially contributed to their deaths<sup>712</sup> and the Chamber's finding was reasonable.

182. As to specific challenges regarding the underlying evidence, Nuon Chea contends that Sydney Schanberg could not "possibly have known what happened" to the people he had been told had died on the road during the evacuation due to illness or exhaustion.<sup>713</sup> However, there are several circumstantial guarantees of this hearsay evidence. First, Schanberg was a professional journalist accustomed to interviewing people and taking accurate notes of their accounts. Second, the diary notes were contemporaneously compiled close to the time of the events. Third, use of the word "foreigners" in the plural form indicates that he heard the information from more than one source.<sup>714</sup> Fourth, there is no apparent motive for the sources to lie about what they had just seen and experienced during the evacuation. Finally, the evidence is

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<sup>709</sup> Judgment, para. 497, fn. 1487, citing **E3/3004** U.S. Embassy in Bangkok Telegram, Subject: Khmer Refugee Walks out from Phnom Penh, June 1975, para. 3, ENG 00495557-58 (*contra* NC Appeal, para. 324 and NC Notice, ground 136) and **E3/3006** U.S. Embassy in Bangkok Telegram, Subject: The New Cambodia, 29 May 1975, para. 6, ENG 00495565-66 (*contra* NC Appeal, para. 324 and NC Notice, ground 137). Note also that these telegrams are corroborated by Sor Buon's June 1975 account in **E3/2666** French Embassy Letter, Subject: Testimony of Brigadier-General Sor Buon, p. 5, ENG 00517766 as well as **E3/2060** *Analysis Prepared on Behalf of the Sub-Commission by Its Chairman of Materials Submitted to It and the Commission on Human Rights under decision 9 (XXXIV)* (ECOSOC), p. 11, ENG 00078653 and **E3/3319** UK Government Report: *Human Rights Violations in Democratic Kampuchea*, para. 6, ENG 00420600 ("Some were killed by Kampuchean troops in order to keep the marchers moving or to maintain discipline. More died from exposure, however, and from diseases like cholera.").

<sup>710</sup> Judgment, para. 497, fn. 1487, citing **E1/203.1** Sydney Schanberg, T. 7 June 2013, p. 4 (citing S. Schanberg: *Cambodia Diary 1975*, **E236/1/4/3.1**, p. 72, ENG 00898280), *contra* NC Appeal, para. 324.

<sup>711</sup> Judgment, para. 498, fn. 1492, citing **E3/3319** UK Government Report: *Human Rights Violations in Democratic Kampuchea*, 14 July 1978, para. 6, ENG 00420600-01 and **E3/2060** *Analysis Prepared on Behalf of the Sub-Commission by Its Chairman of Materials Submitted to It and the Commission on Human Rights under decision 9 (XXXIV)* (ECOSOC), 30 January 1979, p. 11, ENG 00078653. *Contra* NC Appeal, para. 325 and NC Notice, ground 154.

<sup>712</sup> *Čelebići* TJ, para. 424.

<sup>713</sup> NC Appeal, para. 324 and NC Notice, ground 135. Note that Nuon Chea's Defence counsel read the impugned passage to Schanberg while he was on the stand, but asked him to elaborate on the other aspect of the passage, namely, about the executions of Lon Nol soldiers, rather than about the people who had died of illness or exhaustion on the march (see **E1/203.1** Sydney Schanberg, T. 7 June 2013, pp. 3-7).

<sup>714</sup> **E1/203.1** Sydney Schanberg, T. 7 June 2013, p. 4 (citing S. Schanberg: *Cambodia Diary 1975*, **E236/1/4/3.1**, p. 72, ENG 00898280, "Foreigners who trickle into the embassy in subsequent days carry stories of bodies on the road, people who died of illness or exhaustion on the march").

consistent with other evidence before the Chamber, as already discussed.

183. Nuon Chea raises the same complaint regarding Pin Yathay's testimony about observing two women who had hanged themselves in two separate locations.<sup>715</sup> Pin Yathay assessed what he saw and the context in which it occurred. Soth Navy also stated that while on the road, she "saw people taking their own lives",<sup>716</sup> corroborating Pin Yathay's account. When considered in light of the miserable and hopeless conditions evacuees were subjected to, the conclusion that some evacuees took their own lives<sup>717</sup> was a reasonable one.

184. To dispute that "[n]umerous witnesses recounted seeing people dying in the streets and along the roadside," Nuon Chea minimises the underlying evidence based on its source and argues, *inter alia*, that the witnesses did not specify how they "could possibly have known" the victims were dying.<sup>718</sup> A trial chamber may rely upon out-of-court statements and victim impact testimony as long as it is mindful of the nature of the evidence when assessing its probative value.<sup>719</sup> It was within the Chamber's discretion to determine if the conclusions that people were dying were credible. Further, Nuon Chea's defence team had an opportunity to test several of these accounts and declined to do so.<sup>720</sup> Arguments on this issue were not contained in Nuon Chea's Notice, so the Co-Prosecutors will only additionally point out that the evidence was corroborative of a multitude of other evidence on the record, and note that observations of people dying along the way add credence to the finding that corpses seen at the time of the evacuation included evacuees.<sup>721</sup>

185. To challenge the evidence underlying the finding that "children in particular succumbed to hunger and illnesses they contracted throughout the journey",<sup>722</sup> Nuon Chea attempts to diminish the strength of the evidence relied upon by the Chamber. First, he ignores the clear indication in the supporting footnote that the evidence cited was by way of example, not a complete list of all

<sup>715</sup> NC Appeal, para. 324 and NC Notice, ground 134. Nuon Chea's Defence team chose not to put any questions to this witness when given the chance to do so (see **E1/170.1** Pin Yathay, T. 7 February 2013, p. 65).

<sup>716</sup> Judgment, para. 497, fn. 1487, citing **E3/4921** Soth Navy Civil Party Application, p. 5, ENG 00858006.

<sup>717</sup> Judgment, para. 497.

<sup>718</sup> NC Appeal, para. 325.

<sup>719</sup> See *supra*, VI.D.i and VI.G (Probative Value of the Evidence). *Contra* NC Appeal, paras 324, 325 and fn. 875.

<sup>720</sup> See **E1/135.1** Yim Sovann, T. 19 October 2012, p. 115-116; **E1/140.1** Sum Chea, T. 5 November 2012, pp. 68-105 (the Defence questioned the witness, but not about people he saw dying along the streets); **E1/198.1** Chan Socheat, T. 29 May 2013, p. 60; **E1/198.1** Cheng Eng Ly, T. 29 May 2013, p. 108; **E1/199.1** Nou Hoan, T. 30 May 2013, pp. 29-33 (the Defence questioned the civil party, but not about people who died and were left along the street).

<sup>721</sup> Judgment, para. 500, also discussed below in paras 186-187.

<sup>722</sup> Judgment, para. 498.



of the evidence which the Chamber had before it relating to children dying during the evacuation.<sup>723</sup> Second, he misstates that the three refugee statements were anonymous<sup>724</sup> when, in reality, two of the three statements identified the refugee by name, two provided specific details regarding the locations of events, and all three described a sequence of events leading up to the children’s deaths.<sup>725</sup> Fourth, he downplays the Civil Party evidence cited, mentioning that they only concern “a total of three deaths”.<sup>726</sup> Kem Kuon stated that her third son died of starvation, while Soth Navy’s account describes her parents being “at pains” to feed the family during their journey with tubers and insects and anything they could catch, but also that her infant sister and brother died of hunger.<sup>727</sup> Fifth, Nuon Chea refers to the evidence of “a mysterious ‘Dr. Hay’” in a UK government report as though it is dubious and unreliable.<sup>728</sup> In reality, not only is the evidence compatible with other accounts before the Chamber, but also, the report contains an internal assessment of the reliability of the contents and was considered to be consistent with even more materials analysed by the U.N. ECOSOC Commission on Human Rights.<sup>729</sup> It was therefore not unreasonable for the Chamber to rely on this evidence from a Cambodian physician with the training and expertise to assess the causes of death of the children he saw as he himself took part in the evacuation.<sup>730</sup> Sixth, Nuon Chea tries to minimise Pech Srey Phal’s impactful account by stating “[a]lthough plainly tragic,” her evidence is “insufficient

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<sup>723</sup> Judgment, fn. 1491 clearly states “*See e.g.*” before citing supporting evidence. Other evidence on the record not cited by the Chamber in Judgment, para. 498 support the finding and were considered by the Chamber, including (but not limited to) **E3/3004** U.S. Embassy in Bangkok Telegram, Subject: Khmer Refugee Walks out from Phnom Penh, para. 3, ENG 00495557 (insufficient or bad water and sunstroke killed the old and the very young); **E3/3006** U.S. Embassy in Bangkok Telegram, Subject: The New Cambodia, para. 6, ENG 00495565-66 (Indians and Filipinos mistakenly forced out of Phnom Penh say that many old, very young, ill and infirm died during the short time they marched north as cholera broke out, food was short and clean water unavailable); **E3/5005** Sam Pha Civil Party Application, p. 3, ENG 00871750 (women who had delivered their babies on the way were forced to continue traveling, making some pregnant women and their babies die on the way because they could no longer bear the hardship); **E3/4910** Chhim Morn DC-Cam Supplementary Information, p. 3, ENG 00861850 (along the way, saw that some elderly people and children had died).

<sup>724</sup> NC Appeal, para. 325.

<sup>725</sup> See Judgment, fn. 1491. See also NC Notice, grounds 149-151.

<sup>726</sup> NC Appeal, para. 325.

<sup>727</sup> See **E3/5418** Kem Kuon Victim Complaint, 21 October 2008, p. 6, ENG 00890622 (see NC Notice, ground 153); **E3/4921** Soth Navy Civil Party Application, p. 5, ENG 00858006 (see NC Notice, ground 152).

<sup>728</sup> NC Appeal, para. 325. See also NC Notice, ground 154.

<sup>729</sup> See **E3/3319** UK Government Report: *Human Rights Violations in Democratic Kampuchea*, 14 July 1978, para. 3, ENG 00420599; **E3/2060** *Analysis Prepared on Behalf of the Sub-Commission by Its Chairman of Materials Submitted to It and the Commission on Human Rights under decision 9 (XXXIV)* (ECOSOC), 30 January 1979, paras 18-22, ENG 00078649-50.

<sup>730</sup> Judgment, para. 498.

... to establish that the conditions of the evacuation as such are to blame” for her baby’s death.<sup>731</sup> Pech Srey Phal told the Chamber that she could only feed her baby water during the evacuation because that is all she had to provide, and the baby died.<sup>732</sup> It is not clear how the Chamber did not have enough information or was unreasonable to conclude that the baby died because of the evacuation conditions when the trial record is replete with evidence regarding the heat in which the population was forced to travel, evacuees had been deceived as to how long they would be gone and had brought little to no provisions, assistance from the Khmer Rouge was neither planned for nor provided, and the baby had nothing to eat. The Chamber’s finding that the evacuation caused the infant’s death is patently reasonable.

186. Finally, contrary to Nuon Chea’s assertions,<sup>733</sup> the Chamber reasonably concluded that some of the corpses seen at the time of the evacuation were “evacuees”,<sup>734</sup> thereby indicating they had died during the forced transfer rather than during the attack preceding the evacuation. The fact that the Chamber referred to paragraphs 497 and 498 of the Judgment in making this finding should not be interpreted to limit the basis of the finding to the evidence discussed in those two paragraphs.<sup>735</sup> Rather, the Chamber arrived at its conclusion after a careful consideration of the evidence as a whole, as demonstrated in the same paragraph where the Chamber painstakingly noted which evidence identified the corpses on the road as Khmer Republic soldiers<sup>736</sup> and which evidence identified civilian corpses.<sup>737</sup> The Chamber also noted which evidence was inconclusive in making such a distinction<sup>738</sup> and when the circumstances of death were unclear.<sup>739</sup> Finally, it qualified the finding, recognising that other corpses seen during

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<sup>731</sup> NC Appeal, para. 325.

<sup>732</sup> See **E1/148.1** Pech Srey Phal, T. 5 December 2012, p. 25.

<sup>733</sup> NC Appeal, para. 326. See also NC Notice, ground 157.

<sup>734</sup> Judgment, para. 500.

<sup>735</sup> *Contra* NC Appeal, para. 326 and fn. 878.

<sup>736</sup> Judgment, para. 500, fns 1498 and 1499 (describing both soldiers and civilians). See also Judgment, para. 499, fn. 1496 citing **E1/148.1** Kim Vandy, T. 5 December 2012, pp. 101-102 (saw the bodies of three dead Lon Nol soldiers along the road); **E1/147.1** Toeng Sokha, T. 4 December 2012, p. 44 (saw a decapitated soldier along the road); **E3/4664** Chhor Dana Civil Party Application, p. 3, ENG 00156847 (on the way out of Phnom Penh along Monivong road, saw many corpses of soldiers killed in the war).

<sup>737</sup> Judgment, para. 500, fn 1499. See also Judgment, para. 499, fn. 1496 citing **E1/138.1** Lay Bony, T. 24 October 2012, p. 28; **E3/4664** Chhor Dana Civil Party Application, pp. 3-4, ENG 00156847-48; **E3/5167** Phuy Pok Victim Complaint, p. 6, ENG 00219002.

<sup>738</sup> E.g., see Judgment, para. 499, fn. 1496, esp. **E1/198.1** Chheng Eng Ly, T. 29 May 2013, pp. 92, 107 (as she walked along National Road No. 1 and the river, she saw floating corpses, although she did not know whether they were the corpses of civilians or soldiers); **E3/4702** Seng Sokhom Civil Party Application, p. 7, ENG 00417836 (there were a lot of human bodies on the way, but she could not tell if they were civilians or soldiers).

<sup>739</sup> Judgment, para. 500, fn. 1500.

the evacuation were casualties of the battle to capture Phnom Penh.<sup>740</sup>

187. Ample evidence on the record and described above supports the finding that some of the corpses were evacuees and that their deaths were caused by the evacuation. For example, numerous witnesses described seeing the sick and injured still attached to intravenous drips, crawling because they could not walk, or being transported in wheelbarrows and even hospital beds.<sup>741</sup> When considered alongside Pech Srey Phal's testimony that she saw dead people on hospital beds abandoned by the roadside on the outskirts of Phnom Penh,<sup>742</sup> it was reasonable for the Chamber to conclude that they died during the evacuation, as it would be unreasonable to believe they would be in the area on their hospital beds during the attack. As discussed above, the Chamber's reasoning adheres to the principle that a perpetrator must take the victim in whatever state he finds him at the time of his act (in this case, the forced transfer) and that the act was a "substantial cause" of the victim's death.<sup>743</sup> The finding that some of the corpses seen at the time of the evacuation were evacuees who died due to the conditions of the evacuation<sup>744</sup> was not an example of circular reasoning<sup>745</sup> but was a reasonable conclusion drawn from careful consideration of the totality of the evidence.

**D. The Chamber correctly and reasonably found that deaths occurred during, and were unlawfully caused by, the Phase II movement (NC Grounds 158-171)**

188. Nuon Chea has abandoned six grounds of appeal<sup>746</sup> which should be summarily dismissed. In eight other grounds, he challenges the sufficiency of the evidence supporting the conclusion that deaths *occurred* during the Phase II transfer<sup>747</sup> and that the conditions of the Phase II movement *caused* the deaths.<sup>748</sup>

<sup>740</sup> See Judgment, para. 500 ("the Chamber finds that the corpses which were seen at the time of the evacuation comprised both soldiers, including those who died during the fighting, and evacuees"). *Contra* NC Notice, ground 157 ("The Chamber [...] failed to adequately consider the alternative reasonable inference that any such corpses were casualties of the battle to capture Phnom Penh").

<sup>741</sup> Judgment, paras 476 (particularly fns 1411 and 1413), 484 (fn. 1440 citing E1/165.1 Al Rockoff, T. 28 January 2013, p. 64. See also E3/3319 UK Government Report: *Human Rights Violations in Democratic Kampuchea*, para. 5, ENG 00420600 (foreign witnesses in Phnom Penh in April 1975 saw cripples dragging themselves along, while people who were too ill to move themselves were pushed along the streets in their hospital beds).

<sup>742</sup> Judgment, para. 497.

<sup>743</sup> See *Čelebići* TJ, paras 424, 909.

<sup>744</sup> Judgment, paras 500, 556-559.

<sup>745</sup> NC Appeal, para. 326.

<sup>746</sup> NC Appeal contains no arguments in support of grounds 159, 160, 164, 166, 167 and 171 of his Notice.

<sup>747</sup> NC Appeal, paras 327-328, emphasis added.

<sup>748</sup> NC Appeal, para. 327. To be clear, part of the Chamber's finding that unlawful deaths occurred during the Phase II transfer is based on evidence with a clear and direct causal link between CPK forces and the death. For example,

189. As demonstrated below, the Chamber was reasonable to conclude that deaths occurred during and as a result of the Phase II population transfer. The Chamber specifically took into account the evidence of killings from 14 individuals: eight through live testimony<sup>749</sup> and six through accounts provided in admitted documents.<sup>750</sup> The Chamber considered nine specific accounts of deaths<sup>751</sup> corroborated with further accounts of up to thousands of deaths<sup>752</sup> occurring at different times<sup>753</sup> and locations.<sup>754</sup>

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children were thrown out of moving trains (Judgment, para. 597, fn. 1838), people were left to drown when the boat transferring them capsized (Judgment, para. 594, fn. 1813), and people were shot for relieving themselves (E1/148.1 Pech Srey Phal, T. 5 December 2012, pp. 47, 73-74) or for expressing excitement at returning home (Judgment, para. 595, fns 1817, 1818). Nuon Chea takes issue with the remaining evidence.

<sup>749</sup> E1/197.1 Aun Phally, T. 27 May 2013; E1/198.1 Chan Socheat, T. 29 May 2013; E1/179.1 François Ponchaud, T. 10 April 2013; E1/209.1 Nou Mao, T. 19 June 2013; E1/148.1 Pech Srey Phal, T. 5 December 2012; E1/170.1 Pin Yathay, T. 7 February 2013; E1/137.1 Sokh Chhin, T. 23 October 2012; E1/147.1 Toeng Sokha, T. 4 December 2012.

<sup>750</sup> E3/4656 Dy Roeun Civil Party Application, E3/4695 Kong Vach Civil Party Application, E3/5590 Kong Vach Interview Record, E3/4992 San Mom Civil Party Application, E3/4590 Refugee Accounts; E3/5324 Treh Eal Victim Complaint.

<sup>751</sup> E3/4695 Kong Vach Civil Party Application, p. 7, ENG 00391744; E3/5590 Kong Vach Interview Record, p. 5, ENG 00426477; E1/170.1 Pin Yathay, T. 7 February 2013, pp. 40-41; E3/4590 Refugee Accounts, p. 126, ENG 00820444; E1/137.1 Sokh Chhin, T. 23 October 2012, p. 26; E1/198.1 Chan Socheat, T. 29 May 2013, p. 44; E3/5324 Treh Eal Victim Complaint, p. 6, ENG 00873761.

<sup>752</sup> E1/179.1 François Ponchaud, T. 10 April 2013, p. 62 (“It was a little bit like when Hitler had Jews transported by train. So, there were many casualties.”); E3/4590, Refugee Accounts, p. 240, ENG 00820558 (“During the more 500 km journey, many children and old people died owing to the lack of food and the difficult conditions. Perhaps 10%.” (of many thousands)); E1/209.1 Nou Mao, T. 19 June 2013, p. 52 (“There were many casualties in the course of evacuation.”); E3/4656 Dy Roeun Civil Party Application, p. 3, ENG 00893384 (“I travelled by train to Pursat with my two children. There were many citizens on the train. I had no idea where they were from. Some children had lost their mothers and cried nonstop. The Chief of Squad threw them out through the train’s windows.”); E1/148.1 Pech Srey Phal, T. 5 December 2012, p. 46; E1/197.1 Aun Phally, T. 27 May 2013, p. 40; E3/4992 San Mom Civil Party Application, p. 3, ENG 00893412 “There were so many people boarding the boats at night [...] [t]he flowing water current was so strong that it caused the two boats in the 2<sup>nd</sup> pair to sink and the people on these boats were drowned”).

<sup>753</sup> E1/147.1 Toeng Sokha, T. 4 December 2012, p. 48; E3/4590 Refugee Accounts, p. 126, ENG 00820444, p. 239, ENG 00820557; E1/170.1 Pin Yathay, T. 7 February 2013, p. 41; E1/137.1 Sokh Chhin, T. 23 October 2012, p. 19 (“There were two stages of transportation: the first one was after April 1975, in October, November and December”); E1/179.1 François Ponchaud, T. 10 April 2013, p. 61 (“especially in late 1975 or early 1976, Angkar evacuated the population for the second time”); E3/4992 San Mom Civil Party Application, p. 2, ENG 00893411; E3/4695 Kong Vach Civil Party Application, p. 7, ENG 00391744; E1/197.1 Aun Phally, T. 27 May 2013, p. 40; E3/5324 Treh Eal Victim Complaint, p. 6, ENG 00873761; E3/4656 Dy Roeun Civil Party Application, p. 3, ENG 00893384.

<sup>754</sup> E3/2411 Copy of article published in *Le Monde*, p. 4, ENG 00609103; E1/209.1 Nou Mao, T. 19 June 2013, p. 52; E3/5324 Treh Eal Victim Complaint, p. 6, ENG 00873761; E1/148.1 Pech Srey Phal, T. 5 December 2012, pp. 44-46; E3/4590 Refugee Accounts, p. 240, ENG 00820558 (“After a one-day train journey, we reached Sisophon. From there, we were taken [to] Phnom Srok by tractor, then by oxcart to the middle of nowhere, to a part of the forest that we didn’t know. During the more 500 km journey, many children and old people died owing to the lack of food and the difficult conditions. Perhaps 10%.”); E1/197.1 Aun Phally, T. 27 May 2013, pp. 35-36; E3/5740 Aun Phally Civil Party Application, p. 4, ENG 00938145; E1/137.1 Sokh Chhin, T. 23 October 2012, p. 66; E3/5590 Kong Vach Interview Record, p. 5, ENG 00426477 (“I stayed overnight in SâmRaong Yông. There, my one and a half year old son ... died in my carrying baskets while I was walking along the street” “...while travelling by truck to Battambang, my youngest daughter ... died in my arms.”); E3/4656 Dy Roeun Civil Party Application, p. 3, ENG

*i. Specific challenges regarding occurrence of deaths*

190. Contrary to Nuon Chea's submissions,<sup>755</sup> the record contains abundant evidence of deaths caused by the Phase II movement. In addition to the in-court eyewitness accounts of Pech Srey, Phal,<sup>756</sup> and Pin Yathay,<sup>757</sup> the Chamber reasonably relied on the eyewitness evidence contained in the out-of-court statements of Kong Vach,<sup>758</sup> San Mom,<sup>759</sup> Aun Phally,<sup>760</sup> and Treh Eal.<sup>761</sup> Further, the only reasonable inference from the evidence of Chan Socheat,<sup>762</sup> Sokh Chhin,<sup>763</sup> and Dy Rouen<sup>764</sup> is that deaths occurred as a result of the forced transfer. Finally, Nuon Chea's arguments that the victim impact testimony of Kong Vach and Aun Phally is inadmissible<sup>765</sup> are without legal basis.<sup>766</sup>

*ii. Specific challenges regarding causation*

191. The conditions imposed upon the population during the Phase II movement<sup>767</sup> were both

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00893384; **E3/4590** Refugee Accounts, p. 126, ENG 00820444; **E1/170.1** Pin Yathay, T. 7 February 2013, pp. 40-41, ENG 00888690-91 (on the truck he was travelling in from Takeo to the Pursat region, two people fainted and subsequently died); **E3/4992** San Mom Civil Party Application, p. 3, ENG 00893412; **E1/198.1** Chan Socheat, T. 29 May 2013, p. 44.

<sup>755</sup> NC Appeal, para. 327; NC Notice grounds 161, 170. Nuon Chea's assertion that only two people "who testified to having seen anyone die at any time during the Phase II movement" relies on an improper fragmentation of the evidence and understates the totality of the evidence upon which the Chamber relied.

<sup>756</sup> Pech Srey Phal saw one person in her train wagon shot for relieving himself on the train. She also saw people who died in her wagon being pushed off the moving train by Khmer Rouge soldiers. See Judgment, para. 597, fns 1835, 1837 and **E1/148.1** Pech Srey Phal, T. 5 December 2012, pp. 73-74.

<sup>757</sup> Pin Yathay said that two people in his truck to Battambang fainted and died. See Judgment, para. 598, fn. 1849 and **E1/170.1** Pin Yathay, T. 7 February 2013, pp. 40-41.

<sup>758</sup> Kong Vach watched her small son die one day and her infant daughter die the next. See Judgment, paras 592, 598, fns 1794, 1849. See also **E3/5590** Kong Vach Interview Record, p. 5, ENG 00426477.

<sup>759</sup> San Mom watched people from the boats in front of him drown. See Judgment, para. 594, fn. 1813.

<sup>760</sup> Aun Phally recalled that the people on his train died, were covered with white cloth and left along the road. Note that this evidence was elicited during questioning by a lawyer for the civil parties. Nuon Chea's Defence team asked no questions on the subject. See Judgment, para. 597, fn. 1836 and **E1/197.1** Aun Phally, T. 27 May 2013, p. 40.

<sup>761</sup> Treh Eal's maternal grandmother died on their train to Pursat Province. See Judgment, para. 597, fn. 1836 and **E3/5324** Treh Eal Victim Complaint, p. 6, ENG 00873761.

<sup>762</sup> Chan Socheat said that the man sitting next to her on a motorboat expressed joy at arriving back in Phnom Penh, he was called outside by Khmer Rouge soldiers, then she heard two gunshots and the man fell into the water. See Judgment, para. 595 and **E1/198.1** Chan Socheat, T. 29 May 2013, pp. 44, 58, 60-63.

<sup>763</sup> Judgment, para. 597.

<sup>764</sup> Dy Rouen recounted how Khmer Rouge soldiers threw crying children out of the window of her moving train. See Judgment, para. 597, fn. 1838 and **E3/4656** Dy Roeun Civil Party Application, p. 3, ENG 00893384.

<sup>765</sup> NC Appeal, fn. 880; NC Notice, grounds 158, 162. Note that the two accounts at issue, the evidence of Kong Vach and Aun Phally, are corroborated by several other accounts in support of the findings. See Judgment, para. 597, fns 1836-1837 and para. 598, fn. 1849.

<sup>766</sup> See *supra*, VI.G (Probative Value of the Evidence, civil party impact statements).

<sup>767</sup> Such conditions were also present in the *Čelebići* case, where the Trial Chamber unequivocally noted that there is "a minimum standard of treatment, from which no derogation can be permitted." See *Čelebići* TJ, paras 1085-1119, quotation at para. 1117.

cause of the victims' deaths. These included being herded into crowded trucks or train cars;<sup>768</sup> subjected to an atmosphere of terror;<sup>769</sup> given little to no food, clean water<sup>770</sup> or medical assistance;<sup>771</sup> and subjected to poor sanitary conditions.<sup>772</sup> These horrendous conditions inflicted extreme strains on the physical health of the evacuees and proved particularly deadly to infants, children, the elderly and the infirm.

192. The conditions were a substantial cause<sup>773</sup> of the victims' deaths, even if some of the victims were already ill, injured or even suffering from a fatal disease. As discussed above,<sup>774</sup> a perpetrator must take his victim as he finds him, even if in a weakened state; he cannot prey on the especially vulnerable and then plead their vulnerability in defence or mitigation of his crime. In the accounts relied upon by the Chamber, there is no evidence of an intervening act that broke the chain of causation between the conditions of the evacuation and the victims' deaths. In light of all these factors, it was reasonable for the Chamber to conclude that the Phase II conditions caused unlawful deaths.

193. Nuon Chea's contention that witnesses Pech Srey Phal and Pin Yathay did not know the victims or have "any basis on which to assess the effect of the conditions of the movement on the strangers' health" is without merit.<sup>775</sup> Reasonable bystanders are able to assess circumstances and draw conclusions based upon their observations. It is within the Chamber's discretion to determine if that evidence is credible and the conclusions reliable. When assessed in light of the conditions these particular victims had been subjected to, the conclusion was a reasonable one.

194. Contary to Nuon Chea's assertions,<sup>776</sup> the hearsay evidence of François Ponchaud and Nou Mao contains numerous circumstantial guarantees of trustworthiness<sup>777</sup> which demonstrate that

<sup>768</sup> Judgment, para. 591, fn. 1789; para. 592, fn. 1796; para. 596, fn. 1823; para. 597, fn. 1832; para. 598, fn. 1846.

<sup>769</sup> Judgment, para. 594, fn. 1811; para. 597, fns 1835, 1838; para. 598, fns 1844, 1845.

<sup>770</sup> Judgment, para. 591, fns 1790, 1792; para. 592; para. 594, fns 1810, 1811; para. 597, fn. 1833.

<sup>771</sup> Judgment, para. 591, fn. 1791; para. 594, fn. 1812; para. 597, fn. 1834.

<sup>772</sup> Judgment, para. 594, fns 1804, 1805; para. 598, fns 1846-1848.

<sup>773</sup> See *Čelebići* TJ, para. 424, fn. 435.

<sup>774</sup> See para. 179, *supra*. See also *Čelebići* TJ, para. 909.

<sup>775</sup> NC Appeal, para. 327; NC Notice, grounds 161, 170.

<sup>776</sup> NC Appeal, para. 327, fn. 881; NC Notice, grounds 165, 163.

<sup>777</sup> François Ponchaud testified about the details of the first-hand accounts of numerous refugees whom he had interviewed near the time of the events about what they had endured during the Phase II movement. He was questioned extensively in court about how the refugees he interviewed were chosen and whether he was able to tell when refugees were giving accurate or exaggerated information. He testified to how the interviews were spontaneous and voluntary (as opposed to the interviews being arranged by refugee camp administrators), the level of detail of the accounts and the consistency across the accounts which corroborated each other. See **E1/179.1** François Ponchaud, T. 10 April 2013, pp. 61-62, 111-116 and **E1/180.1** François Ponchaud, T. 11 April 2013, pp. 50-58. Nou Mao testified candidly about what he did and did not see and what he could and could not remember,

the evidence is credible, and the Chamber was reasonable to rely on it as two of the six accounts supporting the finding that people died of exhaustion or starvation during the journey.<sup>778</sup>

195. Also contrary to Nuon Chea's submissions,<sup>779</sup> Sokh Chhin had a unique vantage point to observe that the forced transfers caused deaths. He described working on the tracks in Pursat Province and seeing trains passing by from October through December 1975, filled with people who were guarded by armed soldiers. He testified to seeing dead bodies along the tracks, roads and rice dykes and how sometimes the corpses smelled so bad that he and the others could not work, so they had to bury the bodies. He testified that no villagers lived in the area where he saw the corpses, and he concluded that the bodies were of people who had been on the trains.<sup>780</sup> This evidence is corroborated by the evidence of Pech Srey Phal and Dy Roeun, evacuees who saw Khmer Rouge soldiers throw bodies off their moving trains,<sup>781</sup> as well as Aun Phally's evidence, which corroborates the presence of corpses along the roads near the trains.<sup>782</sup>

196. Finally, Nuon Chea incorrectly states that Toeng Sokah's evidence was relied on to prove that deaths occurred.<sup>783</sup> In fact, it was relied on to support the findings that people were forced to take part in the transfer.<sup>784</sup> Nuon Chea has failed to demonstrate any error in assessing the evidence of unlawful deaths during the Phase II movement.<sup>785</sup> His conviction for extermination should stand.

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even when offered a document to help refresh his memory. He was cross-examined extensively but no questions were put to him about the deaths that he heard about from other people at the cooperative. See **E1/209.1** Nou Mao, T. June 2013, pp. 37, 44, 50, 52-53.

<sup>778</sup> Judgment, para. 597, fn. 1836.

<sup>779</sup> NC Appeal, para. 327; NC Notice ground 168. Insofar as Nuon Chea argues the evidence is insufficient to establish that deaths occurred commonly or frequently, this relates to whether the scale of the crimes meets the "massiveness" requirement for extermination, which is addressed below in Section IX.F (Population movements caused death on a massive scale).

<sup>780</sup> **E1/137.1** Sokh Chhin, T. 23 October 2012, pp. 13-14, 17-20, 25-26, 53 (start of Nuon Chea Defence's questioning, which did not ask about this issue), 76 (Nuon Chea's Defence declined additional time).

<sup>781</sup> Judgment, para. 597 (Pech Srey Phal "recounted that Khmer Rouge soldiers threw the bodies of those who died off the train without stopping"; Dy Rouen "spoke of children looking for their parents on the train crying continuously and saw Khmer Rouge soldiers throw some out the window".)

<sup>782</sup> See fn. 760, *supra*.

<sup>783</sup> NC Appeal, para. 328; NC Notice, ground 169.

<sup>784</sup> See Judgment, paras 632, 640. Note that it is not cited to support para. 646, fn. 2037.

<sup>785</sup> Even if Nuon Chea succeeds on one ground, there is no basis to overturn the conviction, as the totality of the evidence still supports the findings that deaths occurred and were unlawfully caused by the Phase II movement.

**E. The Chamber correctly defined the *mens rea* for murder and extermination (NC Ground 173, KS paras 59-67, 364, 511)**

197. Contrary to the Appellants' contentions,<sup>786</sup> the Chamber reasonably relied on the *Krstić* Trial Judgment, which defined the *mens rea* of extermination to be the same as for murder, namely "[t]he offences of murder and extermination have a similar element in that they both intend the death of the victims. They have the same *mens rea*, which consists of the intention to kill or the intention to cause serious bodily injury to the victim which the perpetrator must have reasonably foreseen was likely to result in death."<sup>787</sup>

198. As the Chamber acknowledged, subsequent ICTY and ICTR Appeal Judgments did not include this aspect of the *mens rea* in their articulations of the elements of extermination,<sup>788</sup> but none directly addressed the issue and no case has repudiated the *Krstić* conclusion. The *ad hoc* tribunals have continued to define extermination as the crime of murder of a mass scale: "[t]he jurisprudence of the Tribunal has consistently held that, apart from the question of scale, the core elements of murder and extermination are the same."<sup>789</sup> It is significant that this same jurisprudence also cites to the ICTY and ICTR Appeal Judgments relied upon by Nuon Chea, showing that those decisions in no way intended to repudiate the coherence between extermination and murder found by *Krstić*.<sup>790</sup> With respect to murder, and contrary to Khieu Samphan's submissions,<sup>791</sup> the Chamber correctly defined the *mens rea* as "[t]he intent ... to kill or to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death."<sup>792</sup> This *mens rea* standard was clearly established in customary international law, and was a general principle of law in national systems, in 1975.<sup>793</sup>

199. Nuon Chea does not dispute that extermination includes the creation of conditions resulting in death. It follows, therefore, that in order to maintain coherence between the crimes of

<sup>786</sup> NC Appeal, paras 329-345; KS Appeal, paras 63-67.

<sup>787</sup> *Krstić* TJ, para. 495.

<sup>788</sup> Judgment, para. 417, citing *Lukić* AJ, para. 536 (using the phrase "would lead"); *Ntakirutimana* AJ, para. 522 ("would inevitably lead").

<sup>789</sup> *Perišić* TJ, para. 106.

<sup>790</sup> *Perišić* TJ, para. 106 (citing language from *Stakić* and *Ntakirutimana* relied upon by Nuon Chea. See NC Appeal, para. 330) (*Cf.*, para. 108 describing the *mens rea* using the phrase "would lead").

<sup>791</sup> KS Appeal, paras 59-62.

<sup>792</sup> Judgment, para. 412.

<sup>793</sup> *Čelebići* TJ, paras 420-439; See *infra*, XX.G (Nuon Chea's Criminal Responsibility, *mens rea* of planning, ordering and instigating) (demonstrating that law relied upon by the ICTY in cases such as *Blaškić* and *Čelebići* was the same in 1975) (*contra* KS Appeal, para. 60); *Tadić* AJ, para. 225 (when chamber can rely on general principles of law); 1956 Cambodia Penal Code, arts. 502-503 (criminalising unintentional killing).



extermination and murder, as required by the jurisprudence of the *ad hoc* tribunals, the *mens rea* for extermination must include an intent “to inflict serious bodily injury or create conditions of living that lead to death, in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons,” as was articulated by the Chamber.<sup>794</sup> Any other approach would produce anomalous results. Accepting Nuon Chea’s cramped definition would mean that an accused could be guilty of murder on a mass scale without being guilty of extermination.

200. Nuon Chea claims that the IMT and *Eichmann* Judgments demonstrate that extermination requires a certainty of mass killing.<sup>795</sup> While those cases both dealt with Hitler’s “final solution,” neither case held that the crime of extermination required knowledge of certain death. Contrary to Nuon Chea’s suggestion,<sup>796</sup> the Chamber correctly found that the notion that the accused must know that his actions were part of a “vast murderous enterprise,” was directly rejected by the *Stakić* Appeals Chamber and that the WWII jurisprudence simply set forth the facts of each case without in any way requiring knowledge of a greater plan to convict for extermination.<sup>797</sup>

201. Lastly, Nuon Chea fails to demonstrate that these alleged errors impacted the verdict. The Chamber’s factual findings demonstrate that Nuon Chea’s conviction for extermination did not turn on the errors he alleges. Specifically, the Chamber found with respect to Nuon Chea’s *mens rea* that “the only reasonable expectation was that vast numbers of people *would die* during forced population movements because of the conditions of the evacuations”.<sup>798</sup> Accordingly, even if the Chamber had accepted Nuon Chea’s arguments concerning the law, it still would have convicted him based on its factual findings in the case.

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<sup>794</sup> Judgment, para. 412.

<sup>795</sup> NC Appeal, paras 335-336.

<sup>796</sup> NC Appeal, paras 338-340.

<sup>797</sup> Judgment, para. 419.

<sup>798</sup> Judgment, para. 840 (emphasis added). See also Judgment, paras 843 (“plan contemplated and/or involved the crimes against humanity of murder, extermination”), 844 (“Nuon Chea admitted that there was a policy and an intention to eliminate bad elements which justified ‘smashing’ or eliminating people if they could not be re-educated”; “Nuon Chea confirmed that the CPK’s ‘political orders’ that the super-traitors ‘were to be liquidated’, were in fact carried out”; “The Chamber is satisfied that, in view of his role in the Party leadership which designed and implemented the policies concerning forced population movement and the targeting of Khmer Rouge officials, Nuon Chea *knew* of these policies and the resulting patterns of conduct”) (emphasis added).

**F. The Chamber correctly applied the facts to the law and reasonably found that the population movements caused death on a massive scale (NC Grounds 174-175, KS paras 362-364)**

202. The crime of extermination requires killing on a large or “massive” scale.<sup>799</sup> Whether the number of people killed satisfies the “massiveness” requirement must be assessed on a case-by-case basis.<sup>800</sup> Factors to consider in the assessment include the time and place of the killings, the selection of the victims and the manner in which they were targeted, and whether the killings were aimed at the collective group rather than victims in their individual capacity.<sup>801</sup> The Chamber correctly applied this test to conclude on the totality of the evidence that both the Phase I and Phase II population transfers satisfy this requirement.<sup>802</sup>

*i. The Phnom Penh evacuation caused death on a massive scale*

203. It is important to note that the Chamber found the requirement of scale for the Phnom Penh evacuation was satisfied by evidence *not only* of victims who died due to the conditions imposed during the journey *but also* of victims who were shot and killed.<sup>803</sup> Nuon Chea challenges the scale of the evidence of deaths caused by conditions, ignoring the other fundamental portion of evidence on which the finding of scale was based.<sup>804</sup> Similarly, Khieu Samphan broadly argues that the Chamber erred in applying the facts to the law, but fails entirely to substantiate his contention.<sup>805</sup>

204. The Judgment demonstrates that the Chamber correctly applied the assessment factors to *all* of the evidence to determine if the deaths occurred on a massive scale during the Phnom Penh evacuation.<sup>806</sup> The Chamber also considered the impact of the food shortage in Phnom Penh

<sup>799</sup> See, e.g., *Lukić* AJ, para. 536; *Ntakirutimana* AJ, para. 516; *Brđanin* TJ, para. 388; *Sesay* TJ, para. 130.

<sup>800</sup> Judgment, para. 416, fn.1264, *citing Duch* TJ, para. 336; *Lukić* AJ, para. 538.

<sup>801</sup> Judgment, para. 416, fn.1264, *citing Duch* TJ, para. 336; *Lukić* AJ, para. 538.

<sup>802</sup> Judgment, paras 560-562, 646-648.

<sup>803</sup> Judgment, para. 560 (“having regard to the totality of the evidence ... describing the deaths that occurred during the evacuation, ... overall the element of scale required for the crime of extermination is satisfied”).

<sup>804</sup> NC Appeal, para. 346.

<sup>805</sup> KS Appeal, paras 362-364.

<sup>806</sup> Judgment, paras 553-562. Factors assessed: time and place of the killings: Judgment, Section 10.2, particularly paras 464, 471, 474, 477, 487, 490-491, 497-500, 507, 511, 515, 521; selection of victims and the way in which they were targeted: Judgment, paras 471, 474, 476-477, 490, 492, 501-507, 509, 512-515, 553-554, 556-559, 561; killings aimed at the collective group: The Chamber found that the collective group was comprised of at least 2 million people (Judgment, paras 520, 556). The conditions imposed on all of the evacuees were discussed extensively. See, e.g., Judgment, paras 476-479, 481-483, 487, 489, 491-492, 495-500, 556-558, 562.

prior to the evacuation<sup>807</sup> and found that it was within the Khmer Rouge leadership's ability and control to alleviate the food shortage, but they chose instead to "expel the population with little to no prior planning for the welfare of the evacuees".<sup>808</sup> In light of all of the evidence, it was reasonable for the Chamber to conclude that the deaths which occurred during the evacuation rose to the "massive" scale required for the crime of extermination.

205. Despite Nuon Chea's claims, the Chamber did not need to exactly quantify the total number of people who died because of the journey,<sup>809</sup> as there is no numerical threshold required to establish "massiveness".<sup>810</sup> Certainly, the Chamber's finding that at least several thousand died during the transfer, after taking into account "the totality of the evidence before the Trial Chamber describing the deaths that occurred during the evacuation *due to killings, starvation and exhaustion*,"<sup>811</sup> satisfies the element of massiveness. Nuon Chea's reliance on evidence outside the trial record to argue that the deaths during the evacuation did not exceed the normal mortality rate<sup>812</sup> is misplaced and unpersuasive: he cites no legal authority to support that the Chamber wrongly assessed the evidence, nor any authority that his alternative analysis is the correct one.

206. The deaths underpinning the factual findings considered in assessing the scale of deaths are all attributable to the decision to evacuate Phnom Penh.<sup>813</sup> Patients abandoned on the operating table and in hospital wards were left to die,<sup>814</sup> civilians shot and killed by soldiers overseeing the evacuation died,<sup>815</sup> evacuees forced to walk for days or weeks at the hottest time of year with poor sanitary conditions and little to no food, clean water or medicine died,<sup>816</sup> all because of the decision to evacuate Phnom Penh. As discussed previously,<sup>817</sup> the conditions imposed by the Khmer Rouge upon the population during the Phase I evacuation were the substantial cause of deaths,<sup>818</sup> and it is legally irrelevant that the victims may have had pre-existing conditions or

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<sup>807</sup> Judgment, paras 535-540.

<sup>808</sup> Judgment, paras 538-539.

<sup>809</sup> NC Appeal, para. 347.

<sup>810</sup> See, e.g., *Duch* TJ, para. 336; *Lukić* AJ, para. 537; *Ntakirutimana* AJ, para. 516; *Brđanin* AJ, para. 471; *Sesay* TJ, para. 132.

<sup>811</sup> Judgment, para. 521 (emphasis added).

<sup>812</sup> NC Appeal, para. 348, relying on data from a website cited in fn. 920 that was not part of the evidence before the Chamber.

<sup>813</sup> *Contra* NC Appeal, para. 347. Note that the Chamber was careful to identify deaths that were *not* attributable to the decision to evacuate (Judgment, paras 500, 554, 555).

<sup>814</sup> Judgment, para. 477.

<sup>815</sup> See, e.g., Judgment, paras 471, 474, 486, 490, 507, 511, 515.

<sup>816</sup> See, e.g., Judgment, paras 487, 491, 492, 495-498.

<sup>817</sup> See *supra*, IX.C.ii (Murder and Extermination, The conditions of the evacuation caused deaths).

<sup>818</sup> *Čelebići* TJ, para. 424, fn. 435.

would have died shortly thereafter of another cause.<sup>819</sup>

ii. *The Phase II forced movements caused death on a massive scale*

207. Contrary to Nuon Chea's characterisations and as discussed above,<sup>820</sup> the evidence supporting the Chamber's finding that deaths occurred and were caused by the Phase II population movement is credible, reliable and compelling. To assess the scale of these deaths, the Chamber correctly applied the facts to the assessment factors of time and place of the deaths,<sup>821</sup> the selection of the victims and the manner in which they were targeted,<sup>822</sup> and whether the killings were aimed at the collective group rather than victims in their individual capacity.<sup>823</sup> It also considered that the CPK leadership ignored the lessons to be learned from the Phnom Penh evacuation and took no measures to provide adequate assistance or accommodation to the people being moved during Phase II,<sup>824</sup> once again inflicting conditions of life calculated to bring about the destruction of a large number of people. In short, withholding food, medicine and other assistance ensured that the people who were not strong enough to work did not survive.

208. Concluding that the evidence before it was a representative sample of the total number of deaths during the Phase II movement of the population<sup>825</sup> was reasonable, within the Chamber's discretion,<sup>826</sup> and supported by the totality of the evidence.<sup>827</sup> Nuon Chea's assertions that the

<sup>819</sup> *Čelebići* TJ, para. 909. *Contra* NC Appeal, para. 351 argument that vulnerable groups were more prone to die under any circumstances.

<sup>820</sup> NC Appeal, paras 352-354. See *supra*, IX.D (Deaths occurring during Phase II movement).

<sup>821</sup> Judgment, paras 646-647 ("During transfers from southern Cambodia to Battambang and Pursat Provinces"; "hundreds of thousands were re-located ... over the course of days, or as long as a week"; "Many died due to starvation, exhaustion and at the hands of their Khmer Rouge guards during different stages and phases of the transfer"). See also Judgment, paras 579-581, 586-588, 630 (regarding relocation number estimates), 592, 595, 597-598 (regarding deaths).

<sup>822</sup> Judgment, paras 646-647 ("hundreds of thousands were re-located with insufficient accommodation and assistance and under inhumane conditions"; "The old, the young and the sick were all moved ... without medical assistance, sufficient food or water, no shelter or hygiene facilities"). See also Judgment, paras 582, 591-592, 594-598, 600 regarding conditions during the transfer.

<sup>823</sup> Judgment, paras 646-647 ("people died as a result of the inhumane conditions in which they were moved, including as a result of indifference and failure to provide any assistance"; "Khmer Rouge soldiers shot others"). See also Judgment, paras 591-592, 594-595, 597-598.

<sup>824</sup> Judgment, para. 648.

<sup>825</sup> Judgment, para. 647.

<sup>826</sup> A Chamber may consider evidence relating to the murder of specific individuals as an illustration of the extermination of the targeted group (*Kajelijeli* TJ, para. 893; *Kamuhanda* TJ, para. 694).

<sup>827</sup> Aside from the evidence already cited, contemporaneous reports which were before the Chamber refer to numerous deaths: **E3/4170** *Cambodia: The New York Times Reports New and Forced Movements with a High Death Toll* (AFP), ENG 00519810: "the New York Times reported Wednesday that hundreds of thousands of Cambodians are being again moved from one part of the country to another and that many of them have died during these very rigorous journeys"; **E3/1804** *Submission from the International Commission of Jurists under Commission on Human*

Chamber made extreme conclusions and exceeded its discretion are without basis.<sup>828</sup> Beyond disagreeing with the Chamber's findings, Nuon Chea has not identified any error in the Chamber's consideration of the evidence.

## X. PERSECUTION

### A. The Chamber correctly defined political persecution (NC Ground 190)

209. Nuon Chea argues that the Chamber erred in holding that persecution on political grounds may occur “where discrimination has been effected pursuant to political motivations or a political agenda against a group which itself may not hold any political views.”<sup>829</sup> In the *Duch* Appeal Judgment, the SCC recognised that perpetrators of political persecution “may define the targeted victims based on a subjective assessment as to what group or groups pose a political threat or danger” and, as a result, “the targeted political group or groups may be defined broadly *by a perpetrator* such that they are characterised in negative terms and include close affiliates or sympathisers as well as suspects.”<sup>830</sup> Nuon Chea complains that the Chamber applied a test whereby “[t]he characteristics of the persecuted group are irrelevant, so long as the perpetrator subjects the group to ill-treatment in furtherance of a political purpose.”<sup>831</sup> However, this is the exact approach that the SCC took when it affirmed Duch's conviction for political persecution against “all political enemies as defined by the Party Centre,”<sup>832</sup> noting that “the CPK was focused not only on actual political activity or political convictions of the targeted group, *but on its own designation of certain classes of persons who[m] it considered to pose a political threat.*”<sup>833</sup>

210. An approach that includes defendants who subjectively define their victims on negative

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*Rights Decision 9 (XXXIV)* (ECOSOC), ENG 00087526-27 (“After studying the testimony of several hundred refugees, it has been possible to establish the following facts with certainty: .... As from August-September 1975, the population ... was again deported to the north-western part of the country. This deportation caused many deaths owing to the weak state of the people transported”). See also reports regarding starvation which do not specify deaths during the transfer, but it is reasonable to conclude that at least a portion of the deaths occurred during the population movement: E3/1181 DK Report entitled “General View of Sector 5, Northwest Zone,” pp. 2-3, ENG 00223176-77 (The population of Preah Net Preah grew from 150 families prior to 17 April to more than 30,000 people; more than 70,000 came from Phnom Penh; “It is the worse place of starvation, which last year alone killed more than 20,000 people”); E3/684 Ieng Thirith Interview (“In 1975, 20,000 dead of hunger and illness”).

<sup>828</sup> NC Appeal, paras 353-354.

<sup>829</sup> Judgment, para. 430; NC Appeal, paras 358, 361.

<sup>830</sup> *Duch* AJ, para. 272 (emphasis added).

<sup>831</sup> NC Appeal, para. 363.

<sup>832</sup> *Duch* AJ, para 273.

<sup>833</sup> *Ibid.* (emphasis added).

political grounds is fully in keeping with the rationale and purpose of the crime of persecution. Victims experience persecution on political grounds exactly the same whether the perpetrator identifies the victim negatively or positively. It would be absurd for the law to provide victims with less protection simply because they did not hold the political views attributed to them by their persecutors.<sup>834</sup> The Trial Chamber in the *Tadić* case held that discriminatory intent on religious and political grounds was satisfied where an “attack on the civilian population was conducted against only the non-Serb portion of the population because they were non-Serbs.”<sup>835</sup> In *Naletilić and Martinović*, the ICTY Trial Chamber explained its rationale for adopting a broad approach to defining the group targeted by the perpetrator of political persecution:

The targeted group must be interpreted broadly, and may, in particular, include such persons who are defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group. The Chamber finds this interpretation consistent with the underlying *ratio* of the provision prohibiting persecution, as it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status.<sup>836</sup>

211. Nuon Chea’s reliance on the *Kvočka* Appeal Judgment is misplaced.<sup>837</sup> The *Kvočka* Appeals Chamber affirmed the persecution conviction of Žigić, after determining that the discriminatory grounds on which he had targeted prisoners for abuse were “founded upon exclusion from membership in a particular group, the Serb group,”<sup>838</sup> thus confirming that the persecuted group may be defined *by the perpetrator* in negative terms.

### **B. The New People constitute a political group (NC Grounds 191-192)**

212. The Chamber found that “[t]he Party identified the ‘New People’, including former government officials, intellectuals, landowners, capitalists, feudalists and the petty bourgeoisie, as key enemies of the revolution and collectivization”.<sup>839</sup> The Chamber found that the crimes committed by the Khmer Rouge against the New People or ‘17 April people’ during the first and second forced displacement amounted to persecution.<sup>840</sup> Nuon Chea alleges that the Chamber

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<sup>834</sup> NC Appeal, para. 364.

<sup>835</sup> *Tadić* TJ, para. 652.

<sup>836</sup> *Naletilić* TJ, para. 636 (emphasis omitted).

<sup>837</sup> NC Appeal, para. 359.

<sup>838</sup> *Kvočka* AJ, para. 455.

<sup>839</sup> Judgment, para. 169. See also Judgment, paras 569, 613, 634.

<sup>840</sup> See Judgment, paras 568-574, 651-657. The Co-Prosecutors’ note that Nuon Chea misrepresents the Judgment insofar as he contends that the Chamber found regarding the second forced population movement “that persecution was charged only as to New People, which it held included civilian and military officials of the Khmer Republic”. NC Appeal, para. 366. Instead, the Chamber found that the Closing Order did not reference high-ranking or low-ranking Khmer Republic officials as distinct groups for persecution with respect to the second forced transfer, and,

erred in finding that the New People constituted a political group.<sup>841</sup>

*i. The Chamber correctly articulated a consistent definition of New People*

213. Contrary to Nuon Chea's contention,<sup>842</sup> the Chamber articulated a consistent definition of New People.<sup>843</sup> The Chamber's reference to the New People as 'city people', people who lived in the city', those who were evacuated from Phnom Penh, or '17 April people', falls squarely within the definition identified by the Chamber,<sup>844</sup> namely former government officials, intellectuals, landowners, capitalists, feudalists and the petty bourgeoisie. Indeed, the evidence upon which the Chamber relied clearly demonstrates that the people who were evacuated from the city were labelled '17 April people' or 'New People' and were viewed with suspicion as capitalists or feudalists.<sup>845</sup> There is nothing contradictory or ambiguous about this characterisation of the urban population.

214. Contrary to Nuon Chea's contention,<sup>846</sup> the Chamber correctly concluded that the New People constituted a sufficiently discernible group.<sup>847</sup> The Chamber relied on ample evidence throughout the Judgment, which reveals that the Khmer Rouge questioned people as they were forcibly transferred from Phnom Penh about their background and work history, as well as upon their arrival at their destination once evacuated from Phnom Penh to identify and categorise the New People as such.<sup>848</sup> Nuon Chea's mere disagreement with the Chamber's finding<sup>849</sup> is unsupported by the plethora of evidence on the record and insufficient to call into question the Chamber's findings regarding the definition maintained by the CPK of New People.<sup>850</sup>

*ii. The Chamber correctly found that New People constitute a political group*

215. The Chamber correctly determined that the definition of "political group" is not limited to

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accordingly, concluded that political persecution was not charged against these specific groups in relation to this forced movement. Judgment, para. 651.

<sup>841</sup> NC Appeal, paras 365-383.

<sup>842</sup> NC Appeal, paras 367-369.

<sup>843</sup> See Judgment, para. 169.

<sup>844</sup> Judgment, paras 112, 517, 569, 571, 787-788, 873.

<sup>845</sup> See Judgment, fns 310, 1547-1550, 1931, 2498.

<sup>846</sup> NC Appeal, para. 368.

<sup>847</sup> Judgment, para. 569.

<sup>848</sup> See, e.g., Judgment, fns 1446, 1517, 1548-1549, 1687, 1736, 1762, 1771, 1928, 1969. See also E1/223.1 Stephen Heder, T. 15 July 2013, pp. 83-84.

<sup>849</sup> Judgment, para. 569.

<sup>850</sup> *Karemera* AJ, paras 206, 235.

individuals holding political views or members of a political organisation, but also encompasses discrimination “pursuant to political motivations or a political agenda against a group which itself may not hold any political views”.<sup>851</sup> Accordingly, Nuon Chea’s submission that there is no evidence that the New People held a common set of political views is irrelevant.<sup>852</sup>

216. Applying this correct articulation of the law, the Chamber found on the basis of ample evidence<sup>853</sup> that the Khmer Rouge identified groups it regarded as enemies or obstacles to the pursuit of its political agenda of socialist reform, including “17 April people”.<sup>854</sup> Nuon Chea’s attempt to selectively address and mischaracterise the nature of the evidence upon which the Chamber relied is without merit.<sup>855</sup> First, it is within the Chamber’s discretion to rely on hearsay evidence, expert evidence, and out-of-court statements in coming to its findings.<sup>856</sup> Second, the Chamber reasonably relied on Ponchaud’s evidence as further corroboration of its finding that the CPK had been fomenting resentment towards city people well before April 1975.<sup>857</sup> Nuon Chea does not demonstrate how the Chamber abused its discretion in this regard,<sup>858</sup> nor has he established how any potential error would invalidate the Judgment or occasioned a miscarriage of justice.<sup>859</sup>

217. Nuon Chea further does not identify any “extensive direct evidence”, which he contends “should have been the primary source of the Chamber’s evidence”<sup>860</sup> in support of its finding that the CPK indoctrinated cadres and people in the bases to be hostile towards, and suspicious of, city people.<sup>861</sup> Nuon Chea has not demonstrated how the Chamber abused its discretion in relying on portions of Witness Chhouk Rin’s testimony,<sup>862</sup> while rejecting others, particularly in view of the fact that this evidence is corroborated by other sources of evidence relied upon by the Chamber throughout the Judgment.<sup>863</sup> Indeed, it is within the Chamber’s discretion to accept or

<sup>851</sup> Judgment, para. 430. See also *supra*, X.A (Persecution).

<sup>852</sup> NC Appeal, para. 370.

<sup>853</sup> See, e.g., Judgment, fns 306-310, 324, 496, 1381, 1547-1548, 1929, 1927, 1930-1932, 1935, 1938-1939, 2260-2261, 2376, 2495-2500, 2504-2505, 2512, 2531, 2533.

<sup>854</sup> Judgment, para. 569.

<sup>855</sup> NC Appeal, paras 372-380.

<sup>856</sup> See NC Appeal, para. 375. See also *supra*, VI.D-E ( Hearsay/out-of-court statements).

<sup>857</sup> Judgment, para. 517. See also E3/11 *Revolutionary Flag*, September 1977, ENG 00486226-33.

<sup>858</sup> NC Appeal, para. 375, *citing* Judgment, fns 307, 1547.

<sup>859</sup> See *supra*, II.B (Standard of Review).

<sup>860</sup> NC Appeal, para. 375.

<sup>861</sup> Judgment, para. 787.

<sup>862</sup> See NC Appeal, para. 376.

<sup>863</sup> See Judgment, fn. 2498. See also Judgment, fns 233, 306-308, 310, 2495-2497, 2500.



reject the fundamental features of the evidence.<sup>864</sup>

218. Contrary to Nuon Chea's suggestion,<sup>865</sup> there is nothing contradictory in the Chamber's finding that the New People as a group were persecuted while also finding that the CPK sought to eliminate "horrible elements" existing among the "New People".<sup>866</sup> While persecution can include killings or elimination, it includes a much broader category of discriminatory acts. As the Chamber found "[t]he way in which 'enemy' was defined was tactical, remaining vague enough to allow various interpretations and to create an uncertain atmosphere".<sup>867</sup> By fomenting resentment and classifying those who fled to the cities during the 1970-1975 conflict, former government officials, intellectuals, landowners, capitalists, feudalists and the petty bourgeoisie as the enemy, the Khmer Rouge created a situation in which New People or city dwellers were considered suspect and discriminated against.

219. Contrary to Nuon Chea's suggestion,<sup>868</sup> the Chamber did not find that contemporaneous issues of the Revolutionary Flag explicitly made reference to "city dwellers" or "New People" as opponents of the revolution.<sup>869</sup> Instead, the Chamber reasonably inferred from the evidence that the terms "feudalists", "capitalists", "colonialists" and "imperialists" referred to in these documents were synonymous with 'New People' or 'city dwellers'.<sup>870</sup> As Nuon Chea concedes,<sup>871</sup> this finding is corroborated by further evidence on the record,<sup>872</sup> including evidence which specifically refers to 'New People'.<sup>873</sup> Nuon Chea's own interpretation of this evidence<sup>874</sup> is insufficient to call into question the reasonableness of the Chamber's findings.<sup>875</sup>

220. Nuon Chea attacks the Chamber as "illogical" and "incoherent" for a finding it never

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<sup>864</sup> *Karemera* AJ, para. 467, citing *Hategekimana* AJ, para. 82; *Munyakazi* AJ, para. 71.

<sup>865</sup> NC Appeal, paras 377-382.

<sup>866</sup> Judgment, para. 745.

<sup>867</sup> Judgment, para. 117. See also *infra*, XVI (Policy of smashing enemies).

<sup>868</sup> NC Appeal, para. 378.

<sup>869</sup> Judgment, paras 544, 616.

<sup>870</sup> Judgment, fns 1625, 1938.

<sup>871</sup> NC Appeal, para. 379.

<sup>872</sup> See, e.g., Judgment, fns 1548, 1924, 1928-1929, 1931-1938, 2260-2262, 2376-2377, 2485, 2500, 2505, 2567.

<sup>873</sup> See, e.g., Judgment, fns 512, 1871, 1923, 2542. See also E1/115.1 Em Oeun, T. 27 August 2012, p. 49, 51-53 ("you said that Khieu Samphan 'asked the cadres to pay special attention to the New People who were steeped in feudalism.' But...of course the word 'feudalism' was mentioned in his speech"); E3/213, E3/213/Corr-1 CPK Publication entitled "The Party's Four Year Plan to Build Socialism in All Fields, 1977-1980," July 1976 – August 1976, ENG 00104101 ("In some places, such as the Northwest, new people are the majority...take up the key positions on these cooperatives so as not to allow enemies to penetrate the co-operatives at will").

<sup>874</sup> NC Appeal, para. 379. See also NC Appeal, paras 380-383.

<sup>875</sup> *Karemera* AJ, para. 235.

made.<sup>876</sup> He alleges that the Chamber found that “the notion that people who lived in the city were regarded as enemies is proven by the fact that they were identified through questioning during the evacuation”. What the Chamber actually found was that as the people who lived in the city and became known as ‘New People’ were “identified pursuant to criteria defined by the CPK leadership, and the backgrounds of each were verifiable, as demonstrated by checkpoints and questioning of [this group] along the way” they constituted a sufficiently discernible group.<sup>877</sup> There is nothing contradictory therein and the Chamber was reasonable in so finding.

**C. The Chamber correctly found that *mens rea* and discrimination in fact were proven with regarding to the forced evacuation of Phnom Penh (NC Grounds 193-195)**

221. Based on the correct articulation of the law,<sup>878</sup> the Chamber reasonably inferred from the evidence as a whole that the Khmer Rouge intended to discriminate against the New People on political grounds, based on the attitudes of the Khmer Rouge and its soldiers towards city people, evidence of criticism that they were capitalists leveled at city people, and that evacuees from Phnom Penh were labelled ‘17 April people’ or ‘New People’ and treated with suspicion in the base villages.<sup>879</sup> Contrary to Nuon Chea’s contention,<sup>880</sup> the Chamber relied on ample evidence throughout the Judgment in support of this finding, including evidence of ill treatment by Khmer Rouge soldiers during and after the forced evacuation of Phnom Penh.<sup>881</sup> The Chamber further referred to ample additional evidence on the record, which serves as further contextual support for the finding that the Khmer Rouge possessed discriminatory intent with respect to the New People during the forced evacuation of Phnom Penh, including the existence of resentment towards the city people before April 1975,<sup>882</sup> the CPK’s policy of re-educating “bad elements”,<sup>883</sup> and the questioning to ascertain the evacuees’ backgrounds.<sup>884</sup>

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<sup>876</sup> NC Appeal, para. 373.

<sup>877</sup> Judgment, para. 569.

<sup>878</sup> The Chamber correctly determined that that discriminatory intent can be inferred from the general discriminatory nature of an attack, as long as the circumstances surrounding the commission of the alleged acts substantiate the existence of such intent. The Chamber further correctly stated that the circumstances which may be taken into consideration include the systematic nature of the crimes committed against a group and the general attitude of the alleged perpetrator as demonstrated by his behaviour. Judgment, para. 429. Nuon Chea does not dispute this. See NC Appeal, paras 384-388.

<sup>879</sup> Judgment, para. 571.

<sup>880</sup> NC Appeal, para. 384.

<sup>881</sup> See, e.g., Judgment, fns 1391-1405, 1459-1464, 1548-1549. See also *infra*, XI.B (Other inhumane acts).

<sup>882</sup> See, e.g., Judgment, fns 306-308, 310, 312.

<sup>883</sup> See, e.g., Judgment, fns 326, 339.

<sup>884</sup> See, e.g., Judgment, fns 1531, 1533, 1541.

222. The fact that the New People at times were treated kindly by others upon their arrival in the base villages<sup>885</sup> does not detract from the fact that they were discriminated against as a general matter by the Khmer Rouge in furtherance of the CPK's political agenda. Similarly, the Chamber's finding that certain evacuees from Phnom Penh were allowed to return to their native villages<sup>886</sup> does not mean that those forcibly evacuated from Phnom Penh were not discriminated against as they left the city and upon their arrival at their destination.<sup>887</sup> Nuon Chea's alternative interpretations of the evidence and mere disagreement with the Chamber's factual findings regarding the discriminatory intent of the CPK during the forced evacuation from Phnom Penh,<sup>888</sup> fail to meet the standard of review on appeal.<sup>889</sup>

**D. The Chamber correctly found that *mens rea* and discrimination in fact were proven with regard to the second forced evacuation (NC Grounds 178, 196-197)**

223. Applying the correct legal standard,<sup>890</sup> the Chamber reasonably determined that the Khmer Rouge intended to discriminate on political grounds by specifically selecting New People to be forcibly transferred from certain locations in southern DK to certain locations in the Northwest Zone, the East Zone, and the Central (old North) Zone.<sup>891</sup> The Chamber also found that the Khmer Rouge intended to discriminate against New People on political grounds by depriving them of their liberty and refusing to disclose information concerning their whereabouts (enforced disappearances) during movements from certain locations in southern DK to the Northwest Zone, the East Zone, and the Central (old North) Zone.<sup>892</sup>

224. The Chamber reasonably concluded that in many locations, exclusively New People were forcibly transferred during the Phase II movement.<sup>893</sup> Contrary to Nuon Chea's contention,<sup>894</sup> the Chamber relied on ample evidence in support of its finding.<sup>895</sup> Additional evidence throughout the Judgment provides further contextual support for its finding, including evidence that people

<sup>885</sup> See NC Appeal, para. 385, *citing* Judgment, para. 516.

<sup>886</sup> NC Appeal, para. 386, *citing* Judgment, para. 485.

<sup>887</sup> See, *e.g.*, Judgment, fns 1531, 1535, 1541-1542, 1548-1550.

<sup>888</sup> NC Appeal, para. 387.

<sup>889</sup> *Karemera* AJ, paras 206, 235. See also *supra*, IX.B (Murder and Extermination).

<sup>890</sup> See Judgment, para. 429.

<sup>891</sup> Judgment, para. 656. See also Judgment, para. 655.

<sup>892</sup> Judgment, para. 656. See also Judgment, para. 655.

<sup>893</sup> Judgment, para. 655.

<sup>894</sup> NC Appeal, paras 390-394, 399.

<sup>895</sup> See, *e.g.*, Judgment, fns 1771, 1799-1801, 1854, 1967-1970, 1975-1976. See also *supra*, IX.D (Murder and Extermination, Phase II), XI.B (Other inhumane acts).

were questioned about their background upon their arrival at the new locations,<sup>896</sup> the CPK's ongoing class struggle against New People,<sup>897</sup> and the discriminatory treatment to which the New People were subjected.<sup>898</sup> Nuon Chea's attempts to selectively focus on certain pieces of evidence, provide alternative interpretations of the evidence, or merely disagreeing with the Chamber's findings<sup>899</sup> fail to establish that the Chamber was unreasonable.

225. Contrary to Nuon Chea's contention,<sup>900</sup> there is nothing contradictory in the Chamber's finding that where "Old People" and "New People" were both displaced at the same time, this was motivated by the need to fulfil the CPK's production quotas, while only New People were forcibly displaced.<sup>901</sup> This was done with discriminatory intent. Nuon Chea fails to demonstrate how this finding was unreasonable.

226. Similarly, the fact that not every piece of evidence throughout the Judgment mentions the different treatment to which New People were subjected,<sup>902</sup> does not contradict the Chamber's finding that, as a general matter, New People were discriminated against. The only example Nuon Chea refers to in this respect in fact supports the Chamber's finding, as the witness testifies to the harsher effect on the New People's health when sent to work in cooperatives.<sup>903</sup> It was further in the Chamber's discretion to rely on Witness Nou Mao's evidence to find that many New People disappeared when they were moved as further circumstantial evidence.<sup>904</sup> Nuon Chea fails to demonstrate how the Chamber abused its discretion in so doing.<sup>905</sup>

227. Contrary to Nuon Chea's contention,<sup>906</sup> it was within the Chamber's discretion to rely on evidence beyond the specific crimes at issue in Case 002/01 as circumstantial evidence of the discriminatory intent towards the New People.<sup>907</sup> Accordingly, the Chamber reasonably referred to evidence of New People being sent for re-fashioning at various locations, as further contextual support for the finding that they were generally subjected to discriminatory treatment or

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<sup>896</sup> See, e.g., Judgment, fns 1854, 1964-1965, 1975.

<sup>897</sup> See, e.g., Judgment, fns 1925, 1929, 1933-1936, 1938, 1962.

<sup>898</sup> See, e.g., Judgment, fns 1928, 1930, 1948-1961, 1963, 1966.

<sup>899</sup> NC Appeal, paras 392-394, 399.

<sup>900</sup> NC Appeal, paras 390-391.

<sup>901</sup> Judgment, para. 655.

<sup>902</sup> NC Appeal, para. 393. See also NC Appeal, para. 396.

<sup>903</sup> NC Appeal, para. 393, citing Judgment, fn. 1866, referring to E1/194.1 Prum Son, T. 21 May 2013, pp. 15-16.

<sup>904</sup> Judgment, para. 614, citing E1/209.1 Nou Mao, T. 19 June 2013, pp. 44, 52-53.

<sup>905</sup> NC Appeal, para. 394.

<sup>906</sup> NC Appeal, para. 395. See also NC Appeal, para. 397.

<sup>907</sup> See *Nahimana* AJ, paras 315-316, 561.

disappeared during the Phase II population movement, including to security centres.<sup>908</sup>

228. Lastly, the Chamber reasonably found that the Closing Order charged political persecution broadly against New People, which included Khmer Republic soldiers and officials.<sup>909</sup> Accordingly, the Chamber reasonably concluded that the differential treatment of Khmer Republic soldiers during the Phase II population movement constituted political persecution.

**E. Khieu Samphan fails to demonstrate that the Chamber erred in finding that the New People were persecuted on political grounds (paras 164, 365-368, 453, 478-491, 495-496, 512-514)**

229. Khieu Samphan generally contends that the Chamber erred in law and in fact in finding that crimes on the basis of political persecution were committed against New People.<sup>910</sup> Khieu Samphan's broad submissions disagreeing with the Chamber's findings or providing alternative interpretations of the evidence<sup>911</sup> are insufficient to meet the standard for review on appeal.<sup>912</sup> Similarly, Khieu Samphan's arguments<sup>913</sup> that do not have the potential to invalidate the Judgment or do not occasion a miscarriage of justice should be summarily dismissed.<sup>914</sup>

230. As Khieu Samphan's concedes,<sup>915</sup> the Chamber referred to Yun Kim's testimony, which only supports the fact that New People were questioned and categorised differently from the 'base people'.<sup>916</sup> Kim's opinion that the New People were not treated any differently despite their different classification does not outweigh the abundance of evidence on the record which demonstrates that they were subject to harsher treatment.<sup>917</sup> Contrary to Khieu Samphan's contention,<sup>918</sup> the Chamber discussed instances where the New People were not treated

<sup>908</sup> See Judgment, paras 619, 622.

<sup>909</sup> Judgment, para. 652. See also Judgment, para. 169.

<sup>910</sup> KS Appeal, para. 365. To the extent that Khieu Samphan's arguments in any way overlap with Nuon Chea's grounds of appeal regarding the persecution of New People (KS Appeal, paras 365-368, 453, 478-491, 495-496, 512-514), the Co-Prosecutors incorporate by reference their responses herein. See *supra*, X (Persecution). See also *infra*, XVI (Policy to smash enemies), IX.D (Murder and Extermination, Phase II), XI.B (Other inhumane acts, Phase II).

<sup>911</sup> See KS Appeal, paras 365-368, 453, 484, 486-487, 489.

<sup>912</sup> *Karemera* AJ, paras 206, 235.

<sup>913</sup> See KS Appeal, paras 367, 485.

<sup>914</sup> See *supra*, II.B (Standard of Review).

<sup>915</sup> KS Appeal, para. 485.

<sup>916</sup> See Judgment, fn. 1965, *citing* E1.88.1 Yun Kim T. 19 June 2012, pp. 62-66; E1.89.1 Yun Kim, T. 20 June 2012, pp. 29-30.

<sup>917</sup> See *supra*, XI.D (Other inhumane acts, Phase II), XV.C (Forced movement policy).

<sup>918</sup> KS Appeal, para. 486.

differently.<sup>919</sup> However, these isolated incidents do not nullify the general discriminatory treatment encountered by the New People after their forced evacuation from Phnom Penh.<sup>920</sup>

## XI. OTHER INHUMANE ACTS

### A. The Chamber correctly defined other inhumane acts through forced transfer and enforced disappearances (NC Grounds 179, 183)

231. Nuon Chea challenges the Chamber's finding that forced transfers and enforced disappearances constituted other inhumane acts in 1975 and, alternatively, challenges the Chamber's definition of enforced disappearances.<sup>921</sup> Nuon Chea misrepresents the Judgment, which determined that "the principle of legality attaches to the entire category of 'other inhumane acts' and not to each sub-category of this offence."<sup>922</sup> Accordingly, the principle of legality is preserved with respect to each alleged sub-category of other inhumane acts by, in the context of a widespread or systematic attack on a civilian population: (i) assessing the nature and gravity of the act or omission and (ii) determining whether it caused "serious bodily or mental harm or constitute[d] a serious attack on human dignity" and whether it was "performed deliberately with the intent to inflict serious bodily or mental harm or commit a serious attack upon the human dignity of the victim at the time of the act or omission."<sup>923</sup> Thus, because the crime of inhumane acts was firmly established in customary international law in 1975, and was therefore reasonably foreseeable and accessible to the Accused, any act that meets the stringent definition of inhumane acts satisfies the requirements of legality.<sup>924</sup>

232. Contrary to the Nuon Chea's contention,<sup>925</sup> the Chamber correctly found that these offences were accessible and foreseeable because they were sufficiently similar in nature and gravity to crimes enumerated in the ECCC Law and established in customary international law.<sup>926</sup> To hold

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<sup>919</sup> See Judgment, para. 516.

<sup>920</sup> See *supra*, X.D (*Mens rea* for Persecution).

<sup>921</sup> NC Appeal, paras 400-421.

<sup>922</sup> Judgment, para. 436, *citing* **D427/1/30** PTC Decision on Ieng Sary's Appeal Against the Closing Order, paras 371-378.

<sup>923</sup> Judgment, para. 437, *citing* *Duch* TJ, paras 368, 371; *D. Milošević* AJ, para. 108.

<sup>924</sup> Judgment, para. 436, *citing* *Duch* TJ, para. 367; **D427/1/30** PTC Decision on Ieng Sary's Appeal Against the Closing Order, paras 385, 395-396 (finding that "the principle that an individual may be held criminally responsible for committing crimes which are 'similar in nature and gravity' to the other listed crimes against humanity was established and generally understood" in 1975), 398; **D427/2/15** PTC Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, paras 130-31, 157, 165; *Stakić* AJ, para. 315.

<sup>925</sup> NC Appeal, paras 405-406.

<sup>926</sup> Judgment, paras 547-552, 640-643.

otherwise would defeat the purpose of other inhumane acts as a residual category to capture all crimes of such gravity rather than leave voids where imaginative perpetrators would enjoy impunity.<sup>927</sup> The application of the principle of legality to other inhumane acts requires no more than the well-established nature and gravity inquiry.<sup>928</sup>

233. Nuon Chea further argues that, rather than assessing the severity of the particular conduct of CPK troops “on a case-by-case basis with due regard for the individual circumstances of the case,” the Chamber erroneously “articulated the elements of specific crimes and held that conduct which satisfied those elements was criminal as such.”<sup>929</sup> Nuon Chea’s argument misconstrues the Chamber’s decision which expressly noted that “the severity of particular conduct needs to be assessed on a case-by-case basis with due regard for the individual circumstances of the case.”<sup>930</sup> Thus, the Chamber correctly determined that, in light of the context of the acts, the personal circumstances of the victims, and the impact on the victims, the CPK’s commission of forced transfers and enforced disappearances in 1975 was of a sufficiently similar nature and gravity to enumerated crimes in the ECCC Law.<sup>931</sup> This is the consistent approach of other tribunals that conduct the nature and gravity inquiry by looking to the context in which the act or omission took place and the circumstances of, and impact on, the victims.<sup>932</sup>

234. Nuon Chea challenges the Chamber’s determination with regard to forced population transfers, alleging that it was not accessible and foreseeable to him in 1975 that forced transfer,

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<sup>927</sup> *Duch* TJ, para. 367 (“Other inhumane acts comprise a residual offence which is intended to criminalise conduct which meets the criteria of a crime against humanity but does not fit within one of the other specified underlying crimes.”); *Stakić* AJ, para. 315; *Brima* AJ, paras 183 (“the crime of ‘Other Inhumane Acts’ is intended to be a residual provision so as to punish criminal acts not specifically recognised as crimes against humanity, but which, in context, are of comparable gravity to the listed crimes against humanity. It is therefore inclusive in nature, intended to avoid unduly restricting the Statute’s application to crimes against humanity.”), 185 (“A tribunal must take care not to adopt too restrictive an interpretation of the prohibition against ‘Other Inhumane Acts’ which, as stated above, was intended to be a residual provision.”); *Kupreškić* TJ, para. 563 (“the phrase ‘other inhumane acts’ was deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition”). See also Commentary to the Fourth Geneva Convention, p. 39 (“[I]t is always dangerous to try to go into too much detail – especially in this domain [defining ‘humane treatment’ in Article 3]. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise.”).

<sup>928</sup> *Duch* TJ, para. 367; *Naletilić* TJ, para. 247; *Blagojević* TJ, para. 627; *Niyitegeka* TJ, para. 460.

<sup>929</sup> NC Appeal, para. 408.

<sup>930</sup> NC Appeal, para. 408; Judgment, para. 438.

<sup>931</sup> Judgment, paras 552, 642-643.

<sup>932</sup> See, e.g., *Brima* AJ, para. 200 (looking to “the nature of the perpetrators’ conduct especially the atmosphere of violence in which victims were abducted and the vulnerability of the women and girls especially” as well as “the effects of the perpetrators’ conduct on the physical, moral, and psychological health of the victims” to determine that forced marriage constituted another inhumane act); *Kordić* AJ, para. 117.

as opposed to deportation, was an other inhumane act.<sup>933</sup> However, consistent with the principle of legality, forced transfers, being a sub-category of other inhumane acts, need not have been expressly prohibited as a matter of customary international law in 1975, since forced transfers were of a sufficiently similar nature and gravity to the enumerated crime of deportation.<sup>934</sup>

*i. Enforced disappearances*

235. Nuon Chea challenges the Chamber's finding that enforced disappearances constituted an other inhumane act as of 1975, arguing that it erred in concluding that, because conduct akin to enforced disappearances was prosecuted as a crime against humanity at the IMT and NMT, it was established as a matter of customary international law that enforced disappearances constituted an other inhumane act in 1975.<sup>935</sup> Nuon Chea's argument misconstrues the clear and well-established purpose of other inhumane acts as a statutory residual category.<sup>936</sup> In looking to the *Justice Case* and IMT Judgment against Keitel, the Chamber assessed whether enforced disappearances were of a sufficiently similar nature and gravity as the ECCC Law's enumerated crimes.<sup>937</sup> That is all that the principle of legality requires.<sup>938</sup> Whether the conduct was prohibited as an enumerated crime or another inhumane act under the Nuremberg Charter and Control

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<sup>933</sup> NC Appeal, para. 413.

<sup>934</sup> Unlawful deportations across international borders and forced transfer within the borders of occupied States have long been prohibited under international law. For instance, the obligations that the Hague Conventions of 1899 and 1907 placed on belligerent occupants would have necessarily been breached by deportation. After the First World War, unlawful deportation was formally categorised as a crime by the 1919 Report of the Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties (see 14 AMER. J. OF INT'L L. 95 (1920) at 114). Following the Commission Report, the 1920 Treaty of Sèvres also regarded deportation as a crime. See Treaty of Sèvres, art. 144(2). There was a proposal for deportation to be included as a crime at the International Red Cross Conference of 1934 in Tokyo. See Draft International Convention on the Condition and Protection of Civilians of enemy nationality who are on territory belonging to or occupied by a belligerent (1934), art. 19(b). Following the Second World War, unlawful deportation was criminalised by the Nuremberg Charter, Control Council Law No. 10, and the Tokyo Charter. See Judgment, para. 454. There were numerous pre-1975 prosecutions at international and domestic tribunals, based on international law, for forced transfers within national territory. See Judgment, para. 454, fn. 1345.

<sup>935</sup> NC Appeal, para. 417.

<sup>936</sup> See *supra*, para. 232 (discussing the purpose of the crime of other inhumane acts as a statutory catch-all).

<sup>937</sup> Judgment, para. 444 ("While it is unclear from the Nuremberg Judgment whether [Keitel's] conduct concerning enforced disappearances was also considered to amount to a crime against humanity, it was clearly considered to be of extreme gravity.") (emphasis added); see also IMT Nuremberg Judgment, at p. 44 (explaining that, not only did the *Nacht und Nebel* Decree violate the laws of war, but it was "contrary to ... the general principles of criminal law as derived from the criminal laws of all civilized nations"); *Justice Case* Judgment, p. 1057 (holding that "the enforcement and administration of the [*Nacht und Nebel*] directives resulted in the commission of war crimes and crimes against humanity in violation of the international law of war and international common law relating to recognized human rights.") (emphasis added).

<sup>938</sup> See *supra*, para. 231 (discussing the application of the principle of legality to the content of the crime of other inhumane acts).



Council Law No. 10 was wholly irrelevant for the Chamber's purposes.

236. Contrary to Nuon Chea's contention, the Chamber conducted such an inquiry when it reasoned that, in light of the context of the acts, the personal circumstances of the victims, and the impact on the victims, the CPK's enforced disappearances in 1975 were of a sufficiently similar nature and gravity to enumerated crimes in the ECCC Law.<sup>939</sup>

237. Nuon Chea's interpretation that the *Justice Case* Judgment requires that the perpetrator of enforced disappearances have the specific intent to cause terror or fear in the population is without merit.<sup>940</sup> On the contrary, the NMT merely found that the purpose of the *Nacht und Nebel* Decree was "making [inhabitants of occupied territories] disappear without a trace and so that their subsequent fate remained uncertain."<sup>941</sup> While the NMT noted that this naturally created an atmosphere of fear, it did not find that the specific intent to cause fear was a necessary element of the crime.<sup>942</sup> Tellingly, no other international legal source prohibiting enforced disappearances mentions a specific intent to cause fear or terror; neither the ICC Elements nor the International Convention for the Protection of All Persons from Enforced Disappearance, for instance, refers to such a requirement.<sup>943</sup>

**B. The Chamber made reasonable findings concerning conditions during population movements (NC Grounds 176-177, KS paras 351-353, 454-456)**

238. Nuon Chea alleges that the Chamber erred in fact by making broad conclusions concerning conditions and the use of force during the population movements. Khieu Samphan makes similar arguments at various places in his Appeal. Both Appellants fail to show any such error. As demonstrated below, Nuon Chea's interpretation of what constitutes force is unduly narrow; his approach to analysing the Judgment in fragments is fundamentally flawed; he fails to accord the proper weight to Civil Party evidence; and he mischaracterises the Chamber's use of the evidence. Khieu Samphan's arguments suffer from similar flaws.

*i. Civilians were forcibly displaced during the evacuation of Phnom Penh*

239. Nuon Chea asserts that the "mere fact that people were required to leave Phnom Penh on

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<sup>939</sup> Judgment, paras 640-643.

<sup>940</sup> NC Appeal, para. 421.

<sup>941</sup> NC Appeal, para. 420, citing *Justice Case* Judgment, p. 1057.

<sup>942</sup> *Justice Case* Judgment, p. 1057.

<sup>943</sup> ICC Elements. 7(1)(i); International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

short notice does not necessarily prove that threats or physical force were employed to ensure that they left”,<sup>944</sup> apparently wanting to convince this Chamber that over two million people of all ages and physical conditions would voluntarily and simultaneously leave their homes or hospital beds and take to the road in the heat of April with no planning or provisions for such a journey. He ignores the ample evidence of Khmer Rouge forces threatening, beating, killing and coercing the population to leave the city.<sup>945</sup> For example, the evidence includes eyewitness accounts that Khmer Rouge forces used their guns to beat civilians,<sup>946</sup> testimony from a former cadre that groups of Khmer Rouge soldiers “shot and killed a few people to scare the hell out of other people”,<sup>947</sup> and other firsthand accounts of extreme acts of violence.<sup>948</sup>

240. The claim that the Chamber’s findings exaggerate what “most” evacuees experienced results from Nuon Chea’s improper fragmentation of the evidence.<sup>949</sup> Viewed as a whole, the evidence shows that the intentional, multiple acts of violence and coercion by the Khmer Rouge during the evacuation form a pattern of crimes that constitute a widespread and systematic attack on civilians. The Chamber was reasonable to conclude that “most” or “the majority” of evacuees witnessed or experienced threats or acts of violence during the evacuation.<sup>950</sup>

241. Nuon Chea argues that the finding that evacuees were “under all circumstances” forced to keep moving was based on evidence concerning events primarily within Phnom Penh in the first hours after the evacuation, and he asserts that there is no evidence of force once outside the

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<sup>944</sup> NC Appeal, para. 424. *See also* KS Appeal, para. 454.

<sup>945</sup> Judgment, paras 464, fn. 1373; 466, fn. 1377; 471-475; 478, fn. 1421; 481, 486, 489-490. In paras 489-490 alone, the Chamber cited more than 30 different statements regarding the use of force. This evidence came from a variety of sources in varying roles and locations, and was given both in and out of court. As discussed in Section VI.D.i and VI.G (Probative Value of the Evidence), *supra*, it is not an error for a trial chamber to rely on out-of-court statements as long as it is mindful of the nature of the evidence when assessing its probative value.

<sup>946</sup> See Judgment, para. 473, fn. 1400, *citing* E1/148.1 Pech Srey Phal, T. 5 December 2012, pp. 17, 69; Judgment, para. 489, fn. 1460, *citing* E1/135.1 Yim Sovann, T. 19 October 2012, p. 79; E1/148.1 Kim Vandy, T. 5 December 2012, pp. 89-90; E3/4839 Pal Rattanak Civil Party Application, p. 3, ENG 00893371; E3/5005 Sam Pha Civil Party Application, p. 3, ENG 00871750.

<sup>947</sup> Judgment, para. 474, fn. 1405, *citing* E1/140.1 Sum Chea, T. 5 November 2012, p. 24.

<sup>948</sup> See, e.g., Judgment, para. 490, fns 1465 *citing* E3/4951 Sau Sary Supplementary Information, p. 1, ENG 00874077; 1463, *citing* E1/198.1 Chheng Eng Ly, T. 29 May 2013, pp. 92, 98; and 1462, *citing* E3/4980 Ly Ream Civil Party Application, p. 2, ENG 00893407.

<sup>949</sup> NC Appeal, paras 423, 426, 428. Note that the sentence impugned by Nuon Chea in para. 489 is the introductory sentence to a Section in the Judgment relating to violence suffered at the hands of the Khmer Rouge and is substantiated in the following sentences of paras 489 and 490, *contra* to Nuon Chea’s argument in his Appeal at para. 426 that “the Chamber cited no evidence at all”.

<sup>950</sup> Judgment, paras 489, 563.

general vicinity of the city.<sup>951</sup> This argument fails because it is based on a narrow interpretation of what constitutes force. In the context of forced transfer, force is not limited to physical force but can also include “coercion, fraud, exploitation of a panic and the pressure of terror”.<sup>952</sup> Aside from the Khmer Rouge’s fraudulent representations regarding the duration and reasons for the evacuation,<sup>953</sup> the Judgment canvasses a wide scope of coercive acts that caused people to believe that failure to relocate would put them in more danger.<sup>954</sup> The totality of the evidence demonstrates that during the evacuation: people experienced threats, violence and chaos,<sup>955</sup> were made to abandon family members who could travel no further,<sup>956</sup> saw the Khmer Rouge shoot evacuees who could not continue,<sup>957</sup> were screened at checkpoints where some were pulled aside for an unknown fate, often without explanation<sup>958</sup> and heard no announcements permitting them to return home.<sup>959</sup> These experiences created a “coercive environment” that was sustained throughout the evacuation.<sup>960</sup> It kept the people moving as they had been instructed, whether they were closely monitored outside the capital or not.<sup>961</sup>

242. The key question to determining whether people were “forcibly” displaced is whether the displacement was involuntary, such that there was no genuine choice to stay or to leave.<sup>962</sup> The totality of the evidence clearly demonstrates that the people of Phnom Penh had no “genuine

<sup>951</sup> NC Appeal, para. 425. To support his argument, he points to evidence that the population travelled to home villages at unhurried paces, concluding that these were “not stories of people forced on pain of violence to travel as quickly as possible” nor of “people whose movements were closely controlled or monitored by CPNLF troops”.

<sup>952</sup> Judgment, fn. 1329. See also *Stakić* AJ, paras 279-282 (refers to use of force in reference to the crime of deportation, but *Milošević* Acquittal Decision, para. 79 notes that “[t]he crimes of deportation and forcible transfer have the same elements, except in relation to destination”); *Simić* TJ, para. 125; *Krajišnik* TJ, para. 724.

<sup>953</sup> Judgment, paras 465, 468, 469, 548, 549.

<sup>954</sup> Judgment, paras 470-479, 481-484.

<sup>955</sup> Judgment, paras 471-477, 481-484, 486, 489-490.

<sup>956</sup> Judgment, para. 477, fn. 1415, citing **E1/136.1** Chum Sokha, T. 22 October 2012, p. 100; Judgment, para. 492, fn. 1476 citing **E1/199.1** Nou Hoan, T. 30 May 2013, pp. 6-7, **E1/144.1** Meas Saran, T. 14 November 2012, p. 107, **E3/5004** Ngoun Tin Civil Party Application, p. 3, ENG 00871742, **E3/5482** Eam Teang Victim Complaint, p. 7, ENG 00824222; Judgment, para. 492, fn. 1477, citing **E1/148.1** Pech Srey Phal, T. 5 December 2012, pp. 19-20, 25.

<sup>957</sup> Judgment, para. 490, fn. 1462, citing **E3/4980** Ly Ream Civil Party Application, p. 2, ENG 00893407 and **E3/2666** French Embassy Letter, Subject: Testimony of Brigadier-General Sor Buon, p. 3, ENG 00517765.

<sup>958</sup> Judgment, paras 512-513.

<sup>959</sup> Judgment, para. 486.

<sup>960</sup> For discussion on “coercive environments”, see *Stakić* AJ, para. 282 (the allegation that departures were voluntary because of the absence of physical force was without merit); *Krajišnik* TJ, paras 724, 729; *Simić* TJ, para. 126.

<sup>961</sup> However, there is ample evidence that the Khmer Rouge did in fact monitor evacuees’ movements outside of the city. See, e.g., **E3/5327** Loas Vannan Victim Complaint, p. 6, ENG 00875606; **E3/5005** Sam Pha Civil Party Application, p. 3, ENG 00871750; **E3/4921** Soth Navy Civil Party Application, p. 5, ENG 00858006; **E3/4980** Ly Ream Civil Party Application, pp. 2-3, ENG 00893407-08

<sup>962</sup> *Stakić* AJ, para. 279; *Simić* TJ, paras 125-126, 968; *Krajišnik* TJ, para. 724.

choice” in the matter.<sup>963</sup> The fact that many evacuees determined where they would travel once outside the city does not negate the forcible nature of the evacuation from Phnom Penh. Further, the slow pace of some of the travel, rather than signaling a lack of force, is indicative that these extremely difficult journeys, often with vulnerable persons such as young children, the elderly, sick, disabled, or pregnant women, were neither planned nor voluntary.<sup>964</sup> For all of these reasons, the Chamber reasonably concluded that the people of Phnom Penh were forcibly displaced.

*ii. The evacuation caused conditions that led to suffering and death*

243. Nuon Chea challenges the Chamber’s findings on the lack of food, shelter, hygiene and medicine on five bases. First, he claims that the lack of food and shelter was not caused by the evacuation, as these conditions were widespread in Phnom Penh before the evacuation.<sup>965</sup> This argument fails when applying a causation analysis. While circumstances were admittedly dire in Phnom Penh prior to 17 April 1975, the CPK leadership’s decision to evacuate the city became the superseding cause in a chain of events leading to suffering and death. Forcing millions of people from their homes,<sup>966</sup> telling them they would only be gone for three days,<sup>967</sup> denying them

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<sup>963</sup> See Judgment, para. 548.

<sup>964</sup> For example, Nuon Chea’s reference to Lay Bony “stopping for extended periods and deciding [...] when to resume and where to go” (NC Appeal, para. 425, fn. 1106) fails to mention that when they reached Chheu Teal Commune, the Khmer Rouge did not allow them to go further nor allow them to go back, and if they had tried to go back, “the Khmer Rouge would have killed us” so they fled at night. Lay Bony described being weak after having just delivered a baby, traveling on foot with two young children, one sick, carrying one in front of her and one on her back (see **E3/3958** Lay Bony Written Record of Interview, p. 5, ENG 00379158 and **E1/137.1** Lay Bony, T. 23 October 2012, pp. 95-96). Similarly, Nuon Chea points to Mom Sam Oeurn as an example of a family being allowed to wait with their daughter who had blacked out, but fails to mention that when their daughter regained consciousness after a half hour, a Khmer Rouge soldier signaled them to move on (see **E3/3963** Mom Sam Oeurn Statement (Annex 4), p. 2, ENG 00242249). See also **E3/4824** Chey Yeun Civil Party Application, p. 2, ENG 00891213. Finally, the Co-Prosecutors note that Nuon Chea refers in para. 425 of his Appeal to evidence outside of the trial record. Rather than file a Rule 108(7) motion, he uses fn. 1107 in his Appeal Brief to request admission of the diary of Civil Party Oum Sophany which was admitted during her testimony in Case 002/02. The diary evidence in no way supports Nuon Chea’s claim that the entire population of Phnom Penh voluntarily left the city on 17 April 1975 and thus would not satisfy the requirements of Rule 108 that new evidence would have been a decisive factor in the Judgment. In fact, Ms. Sophany testified regarding her diary entry: “I write this song because when I left from Phnom Penh, when I left from my house and reached Monivong Boulevard, I saw bodies. I could see people carry their belongings to the direction *ordered by Angkar*. If we were ordered to go on National Road Number One, we had to go. And if we were ordered to go on National Road Number Two, *we had to do so*. So, I had no freedoms in the time I left.” See **E1/250.1** Oum Sophany, T. 22 January 2015, p. 66 (emphasis added).

<sup>965</sup> NC Appeal, paras 424, 427. Still, Civil Party Seng Sivutha, a refugee at Cambodiana hotel in 1972-1975, mentions that prior to the evacuation, she and her family were united and had sufficient food for living. Comparing the situations before and after 17 April 1975 was like “the sky and the earth. It was completely different ... I had to live separately from my parents. We were not given sufficient food”. **E1/200.1** Seng Sivutha, T. 4 June 2013, p. 112.

<sup>966</sup> Judgment, para. 520.

reasonable opportunity to pack supplies,<sup>968</sup> rendering the currency worthless so that they were unable to buy necessities during their journey,<sup>969</sup> prohibiting their return home, thereby forcing them to travel for several days or even weeks to other villages,<sup>970</sup> and generally failing to provide assistance in these conditions,<sup>971</sup> was the substantial cause of suffering and deaths.

244. Second, Nuon Chea contends that the finding that “*everyone* experienced ‘terrible conditions’ for the *entire period* of the evacuation” is not supported by a single piece of admissible eyewitness testimony.<sup>972</sup> Not only has Nuon Chea misstated the wording of the actual finding,<sup>973</sup> but he also arrives at this conclusion by disregarding every piece of evidence from a Civil Party. As previously discussed, a trial chamber may rely on out-of-court statements as long as it is mindful of the nature of the evidence when assessing its probative value.<sup>974</sup> The accounts cited in support of the finding regarding conditions were reliable and corroborative.<sup>975</sup> Other than arguing that the accounts are categorically inadmissible, Nuon Chea has not demonstrated that a reasonable trier of fact should not have relied upon them.<sup>976</sup> In fact, he fails to mention that the Defence had the opportunity to test several of the accounts on cross-examination<sup>977</sup> and he provides no reason as to why the hearsay evidence is unreliable.<sup>978</sup>

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<sup>967</sup> Judgment, para. 465.

<sup>968</sup> Judgment, paras 466, 471, 472, 474.

<sup>969</sup> Judgment, para. 493.

<sup>970</sup> Judgment, paras 486, 487, 491, 518.

<sup>971</sup> Judgment, paras 494-496.

<sup>972</sup> NC Appeal, para. 426 (emphasis added by Nuon Chea).

<sup>973</sup> Judgment, para. 491.

<sup>974</sup> See *supra*, VI.D.i and VI.G (Probative Value of the Evidence). See also Judgment, paras 31, 61.

<sup>975</sup> In addition to the evidence referenced in Judgment, fn. 1467. See other evidence cited in Judgment, paras 491-493.

<sup>976</sup> NC Appeal, para. 426.

<sup>977</sup> Although the Chamber cited evidence from Chum Sokha’s statement of suffering in Judgment, fn. 1467, Chum Sokha had already testified about evacuation conditions, and the Defence had chosen not to question him. **E1/136.1** Chum Sokha, T. 22 October 2012, pp. 41, 45, 102-104. Nou Hoan gave eyewitness testimony before the court and was cross-examined by Nuon Chea’s defence counsel. See **E1/199.1** Nou Hoan, T. 30 May 2013, pp. 29-33. The Chamber cited evidence from Yim Sovann’s interview record, but his testimony in Court was consistent with the interview record, and all three defence teams declined to question him. **E1/135.1** Yim Sovann, T. 19 October 2012, pp. 83-84, 116, 120. Similarly, the Chamber cited from Chheng Eng Ly’s civil party application, but her testimony before the Court on the matter was consistent with the application, and the Defence chose not to test her evidence **E1/198.1** Chheng Eng Ly, T. 29 May 2013, pp. 92-93; 104-106, 108. Phy Phuon was subjected to extensive cross-examination. See **E1/99.1** T. 31 July 2012, pp. 28 *et seq.*, **E1/100.1** T. 1 August 2012 and **E1/101.1** T. 2 August 2012, pp. 2-56.

<sup>978</sup> See NC Appeal, para. 426. See also **E1/98.1** Phy Phuon, T. 30 July 2012, pp. 69-71 (a former member of the Khmer Rouge said that he heard from the base and from soldiers that those who were evacuated from Phnom Penh endured a lot of difficulties). There was no reason for the soldiers to lie to one of their own, nor was Phy Phuon one to overstate the plight of the evacuees, as he displayed no sympathy when giving evidence, saying, “they had been living in luxurious life for a long time, so they should endure the difficulty like what we had done”. As noted in 983

245. Third, Nuon Chea challenges the finding that there was an “almost complete absence of food, water, medical care, shelter and hygiene for periods ranging from several days to several weeks”,<sup>979</sup> saying if it were true, many more would have died.<sup>980</sup> This contention ignores the language of the finding. The *almost* complete absence of food, water, medical care, shelter and hygiene for *several days* to several weeks would not automatically result in several hundred thousand people dying. It would however, contribute to a total of at least several thousand dying<sup>981</sup> because of the forced transfer from Phnom Penh and is consistent with the evidence before the Chamber.<sup>982</sup>

246. Fourth, he claims that the Chamber cited almost as many witnesses who received assistance from soldiers as those who did not.<sup>983</sup> This is incorrect. The Chamber cited a limited number of accounts of Khmer Rouge cadres providing occasional food,<sup>984</sup> medical assistance,<sup>985</sup> and transport.<sup>986</sup> This is contrasted against 22 accounts of the Khmer Rouge failing to provide assistance in any way.<sup>987</sup> Taken as a whole, the evidence establishes what the Chamber found: “overall, Khmer Rouge soldiers did not provide adequate food, water, medical treatment or accommodation for those forced to leave Phnom Penh.”<sup>988</sup>

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above, this witness’ evidence was subjected to extensive cross-examination. (footnote immediately preceding this one)

<sup>979</sup> Judgment, para. 521.

<sup>980</sup> NC Appeal, para. 429.

<sup>981</sup> Judgment, para. 521.

<sup>982</sup> See Judgment, paras 491-492, 495-496.

<sup>983</sup> NC Appeal, para. 429, *citing* fns 1481, 1483. Although he articulates a somewhat different argument, Khieu Samphan also relies on the fact that some evacuees received assistance. See KS Appeal, paras 351-353.

<sup>984</sup> **E3/5191** Chem Sem Interview Record, p. 3, ENG 00274680 (note that this is one report of food assistance in a six-day journey); **E3/4590** Refugee Accounts, p. 50, ENG 00820368; **E3/3004** U.S. Embassy in Bangkok Telegram, Subject: Khmer Refugee Walks out from Phnom Penh, June 1975, para. 2, ENG 00495557 (also reporting that in some places, not only was no food provided, but the Khmer Rouge confiscated the marchers’extra clothing).

<sup>985</sup> **E3/3004** U.S. Embassy in Bangkok Telegram, Subject: Khmer Refugee Walks out from Phnom Penh, June 1975, para. 3, ENG 00495557-58 (also noting that one of the two vaccinations given was a panacea used against every illness or wound which was not effective against cholera).

<sup>986</sup> **E1/136.1** Chum Sokha, T. 22 October 2012, p. 99 (a former Lon Nol soldier, stated that although the evacuation was largely done by one’s own resources, at Bar Borng Commune they were transported by a vehicle captured by the Khmer Rouge soldiers to Samraong District; that was the only occasion they were transported on a vehicle); **E3/5326** Matt Sa Victim Complaint, p. 8, ENG 00842258; **E3/5364** Heng Nget Victim Complaint, p. 6, ENG 00869916 (he was evacuated and requested a ride on a Khmer Rouge military vehicle, although after Baek Chan everyone was ordered to walk); **E3/4590** Refugee Accounts, pp. 50, ENG 00820368, 205, ENG 00820523. The remaining three accounts cited by Nuon Chea are confined to assistance to people at the French embassy. **E1/165.1** Al Rockoff, T. 28 January 2013, p. 65; **E1/178.1** François Ponchaud, T. 9 April 2013, p. 72; **E3/2690** French Ministry of Foreign Affairs Incoming Telegram, Subject: Situation in Phnom Penh on 18 April at 15:00, p. 1, ENG 00488011.

<sup>987</sup> Judgment, fn. 1483 (excluding multiple accounts from the same person).

<sup>988</sup> Judgment, para. 496.

247. Finally, Nuon Chea claims that the mortality rate was not obviously higher than the normal mortality rate for a population of that size,<sup>989</sup> ignoring the fact that death is just one of several indicators of harm that can prove other inhumane acts.<sup>990</sup> Moreover, as Ponchaud testified,<sup>991</sup> it cannot be reasonably contested that evacuating vulnerable persons, including the wounded, sick, or post-operative patients, caused their deaths.

*iii. The evidence supports the Chamber's findings regarding Phase II conditions*

248. In regard to the Phase II population movement, Nuon Chea challenges statements based on civil party evidence of a single incident, misstating that they are “generalized findings”.<sup>992</sup> This raises two issues: first, the formulation of a generalised finding based on a single incident and, second, the reliance on a single civil party to prove that incident. The first issue is easily disposed with: none of the challenged statements purport to be generalised findings. For example, the Chamber’s findings relate to Khmer Rouge treatment of “[s]ome children on *the boat*”<sup>993</sup> or the lack of care for “[m]any people *on board*”<sup>994</sup> a particular boat. Neither statement purports to characterise every boat.<sup>995</sup> Individually, these and the other statements comprising Judgment paragraph 594 describe the suffering on particular boat journeys during the Phase II population movement. Cumulatively, these experiences form part of a pattern of inhumane conditions.<sup>996</sup>

249. In relation to the second issue, as discussed above, it is not an error for the Chamber to rely

<sup>989</sup> NC Appeal, para. 429.

<sup>990</sup> This argument has been addressed elsewhere in relation to the scale requirement for extermination. See *supra*, IX.F (Population movements caused death on a massive scale).

<sup>991</sup> **E1/179.1** François Ponchaud, T. 10 April 2013, p. 17 (regarding the wounded or the sick, who were forced to leave the hospitals, Ponchaud said that the foreseeable consequence of this evacuation was that “sooner or later they would die. That was the only eventual result”).

<sup>992</sup> NC Appeal, para. 430.

<sup>993</sup> Judgment, para. 594, *citing* **E1/199.1** Sophan Sovany, T. 30 May 2013, p. 52 (emphasis added). The Defence chose not to put questions to the Civil Party (see p. 63).

<sup>994</sup> Judgment, para. 594, *citing* **E1/146.1** Or Ry, T. 23 November 2012, p. 15 (emphasis added). Note that Nuon Chea’s Defence team cross-examined the Civil Party, beginning at p. 22.

<sup>995</sup> The Chamber further states that no assistance was provided “when boats capsized in strong currents and some people drowned”, describing an incident where a pair of boats capsized (Judgment, para. 594, *citing* **E3/4992** San Mom Civil Party Application, p. 3, ENG 00893412). The footnote in the Judgment incorrectly states that the Civil Party had reported one boat capsizing when in fact he reported a pair of boats capsizing on the way from Svay Rieng to Pursat (“The flowing water current was so strong that it caused the two boats in the 2<sup>nd</sup> pair to sink and the people on these boats were drowned because there was no intervention to save their lives”). In this context, the Chamber cited evidence that “[t]he Khmer Rouge did not distribute food.” (See Judgment, para. 594, *citing* **E3/5084** Chea Sowatha Civil Party Application, p. 6, ENG 00569478).

<sup>996</sup> See also KS Appeal, para. 456. See also KS Appeal, para. 508.

upon Civil Party testimony.<sup>997</sup> Nuon Chea either questioned or had the opportunity to question many of the Civil Parties whose evidence he now challenges.<sup>998</sup> Finally, the Chamber need not assess whether individual incidents, viewed in isolation, are proven beyond a reasonable doubt.<sup>999</sup> Instead, it must assess whether the totality of the evidence proves that the assistance provided was insufficient and that conditions were inhumane.

250. Nuon Chea also challenges the Chamber's statements about the poor, overcrowded conditions on the trucks and trains.<sup>1000</sup> It is difficult to see how the conditions described could be characterised as anything other than "crowded" and "poor". The evidence cited described the trucks as "fully loaded",<sup>1001</sup> with people "standing, packed",<sup>1002</sup> "squeezed together",<sup>1003</sup> "on top of one another, falling all over one another, ... as though the lorries were transporting pigs",<sup>1004</sup> and with "barely room to breathe".<sup>1005</sup> The cited evidence also describes people being soaked by the rain,<sup>1006</sup> having to stand the entire journey<sup>1007</sup> and suffering from diarrhoea or otherwise ill.<sup>1008</sup>

251. Nuon Chea contends that because the Phase II transfers occurred in a large geographical area over a long period of time, individual civil party accounts cannot establish the general conditions of the transfers.<sup>1009</sup> However, the accounts describe widespread suffering across varied locations and times, and, taken together, establish a clear pattern of inhumane conditions that indict the Phase II population movement as a whole. For example, the three accounts Nuon

<sup>997</sup> See *supra*, VI.D.i and VI.G (Probative Value of the Evidence).

<sup>998</sup> **E1/146.1** Or Ry, T. 23 November 2012, Nuon Chea Defence questions begin at p. 22; **E1/199.1** Sophan Sovany, T. 30 May 2013, p. 63 (declined to question the civil party); **E1/135.1** Yim Sovann, T. 19 October 2012, p. 116 (no questions from the Nuon Chea Defence team); **E1/148.1** Pech Srey Phal, T. 5 December 2012, Nuon Chea Defence questions begin at p. 67; **E1/147.1** Toeng Sokha, T. 4 December 2012, Nuon Chea Defence questions begin at p. 84; **E1/170.1** Pin Yathay, T. 7 February 2013, p. 65 (declined to question the civil party).

<sup>999</sup> See *supra*, VI.D.ii (Probative Value of the Evidence), para. 89.

<sup>1000</sup> Judgment, para. 598; NC Appeal, para 431.

<sup>1001</sup> **E1/146.1** Or Ry, T. 23 November 2012, p. 5.

<sup>1002</sup> **E1/170.1** Pin Yathay, T. 7 February 2013, p. 7.

<sup>1003</sup> **E1/147.1** Toeng Sokha, T. 4 December 2012, pp. 50-51.

<sup>1004</sup> **E3/4590** Refugee Accounts, p. 239, ENG 00820557.

<sup>1005</sup> **E3/20** Book by E. BECKER: *When the War was Over: Cambodia and the Khmer Rouge Revolution*, p. 231, ENG 00237936.

<sup>1006</sup> **E1/170.1** Pin Yathay, T. 7 February 2013, p. 7.

<sup>1007</sup> *Ibid*; **E3/5022** Morm Sokly Civil Party Application, p. 3, ENG 00950254.

<sup>1008</sup> **E1/147.1** Toeng Sokha, T. 4 December 2012, p. 51. See also **E3/5022** Morm Sokly Civil Party Application, p. 3, ENG 00950254. Similarly, the challenge to the basis of the statement that "those on board had to relieve themselves on the truck" is without merit. Three of the four accounts cited fully support the statement. The remaining citation, one instance where Khmer Rouge soldiers permitted a stop every five to six hours, merely shows that the Chamber considered all of the evidence (see NC Appeal, para. 431, fn. 1138 citing Judgment, fn. 1847).

<sup>1009</sup> NC Appeal, para. 432.



Chea cites of transferees receiving food during the journey actually support the finding that transferees had “insufficient food” during the journey and that conditions were inhumane.<sup>1010</sup> Yim Sovann stated that during her journey, her family of eight was given three kilograms of rice, one loaf of bread and no water. Her mother was “skinny and too exhausted” to produce enough breast milk to feed her three-month-old brother, and was given no special care or help.<sup>1011</sup> Pin Yathay’s account concerns manifestly insufficient rations provided upon *arrival* at Veal Vong, not during the transfer.<sup>1012</sup> Toeng Sokha refers to eating on the truck from Takeo to Pursat province, but her daughter died when they reached Battambang due to diarrhoea and lack of food.<sup>1013</sup>

**C. The Chamber correctly and reasonably found that the evacuation of Phnom Penh was not legally justified (NC Grounds 180-181, KS paras 224-228)**

252. Nuon Chea argues that the Chamber applied the wrong legal standard for forced transfer, and consequently its factual findings regarding the justifications for evacuating Phnom Penh are either irrelevant or erroneous.<sup>1014</sup> Khieu Samphan contends that the Chamber erroneously minimised the circumstances prior to 1975 that impacted the fears of Khmer Rouge leaders who decided to evacuate Phnom Penh<sup>1015</sup> and claims that the leadership held an honest belief that its reasons to evacuate were valid and legal.<sup>1016</sup>

253. The legal definition of other inhumane acts through forced transfer as it existed in 1975 is addressed above.<sup>1017</sup> The Chamber applied the correct legal standard as it assessed the justifications and circumstances presented by Nuon Chea and Khieu Samphan.<sup>1018</sup> It then reasonably concluded that the expulsion of the population was unlawful, but even if it *had* been legally permissible, it was not proportional and was therefore still criminal.<sup>1019</sup>

<sup>1010</sup> *Contra* NC Appeal, para. 432, fn. 1143; Judgment, paras 635, 639.

<sup>1011</sup> **E1/135.1** Yim Sovann, T. 19 October 2012, pp. 89-90 (in 1975, she had three younger brothers and two sisters) 94, 98-101 (her mother and father travelled with them).

<sup>1012</sup> **E1/170.1** Pin Yathay, T. 7 Feb 2013, pp. 8-10 (one can of rice per day to split between two people, which later had to be shared amongst six people, then eight).

<sup>1013</sup> **E1/147.1** Toeng Sokha, T. 4 December 2012, pp. 49-51.

<sup>1014</sup> NC Appeal, para. 433.

<sup>1015</sup> KS Appeal, paras 224-228.

<sup>1016</sup> KS Appeal, para. 228.

<sup>1017</sup> See *supra*, XI.A (Other Inhumane Acts, definition of other inhumane acts).

<sup>1018</sup> Judgment, paras 450-455.

<sup>1019</sup> Judgment, paras 550, 551.

*i. Expelling the people of Phnom Penh was not justified by a legally permissible reason*

254. Nuon Chea's assertion that the Chamber's treatment of the reasons for the expulsion was "a caricature" of the decision-making process is without basis.<sup>1020</sup> The Chamber carefully assessed all of the circumstances and factors put forward at trial to justify the CPK's policy choice, weighing the totality of the evidence both objectively and subjectively.<sup>1021</sup> The Chamber considered the CPK's ideological and agrarian goals for the Cambodian economy,<sup>1022</sup> meetings planning the evacuation,<sup>1023</sup> instructions given to cadres carrying out the evacuation,<sup>1024</sup> the pattern of evacuation of other towns and cities,<sup>1025</sup> the prior history and likelihood of American bombings in Cambodia,<sup>1026</sup> food shortages and conditions in Phnom Penh,<sup>1027</sup> the actions of the leaders during and after the evacuation,<sup>1028</sup> and the statements of Nuon Chea, Pol Pot and the CPK leadership made after the evacuation.<sup>1029</sup> Further, the Chamber took into account evidence from Ieng Sary, Nuon Chea and Khieu Samphan regarding fears of an American bombing campaign which could cause instability and open the door for Vietnam to interfere in Cambodia's affairs.<sup>1030</sup> Upon the totality of the evidence, it concluded that the evacuation was not lawful.<sup>1031</sup>

255. Nuon Chea argues that it was unreasonable for the Chamber to hold that it was improbable

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<sup>1020</sup> NC Appeal, para. 435. Khieu Samphan makes a related claim that the Chamber failed to sufficiently consider the impact that American bombings had on the refugee influx and food shortages in the capital (KS Appeal, para. 227). This argument appears to be based on a misreading of the Judgment. In the section of the Judgment where the Chamber analysed the legality of the decision to evacuate, it referred back to its previous discussion on the impact of the bombings instead of repeating it wholesale (see Judgment, fns 1581, 1585, 1587, 1607, 1609, 1633 referring to Judgment, paras 153-160, *contra* KS Appeal, para. 224 re. partiality). For example, the Chamber noted that from March 1969, the U.S. secretly bombed locations in the eastern provinces of Cambodia, sent thousands of ground troops into Cambodia in December 1970, sharply increased its bombing of Khmer Rouge-controlled locations throughout Cambodia after the Khmer Rouge refused to sign a ceasefire in January 1973, dropping several hundred thousand tonnes of bombs and killing an estimated tens of thousands of people. The Chamber stated that the primary effect was probably to drive people from rural areas to take refuge in Phnom Penh, contributing to a massive increase in population and noting that the food and sanitation in the refugee camps was very poor. Khieu Samphan misses this in his allegation of error, which only refers to Judgment, para. 737.

<sup>1021</sup> *Contra* NC Appeal, paras 433-435. See Judgment, paras 153-160, 468-470, 486-488, 525-552.

<sup>1022</sup> Judgment, paras 525, 544-545.

<sup>1023</sup> Judgment, paras 132-147, 531.

<sup>1024</sup> Judgment, paras 148-151, 530.

<sup>1025</sup> Judgment, paras 541-543.

<sup>1026</sup> Judgment, paras 153-156, 527-528.

<sup>1027</sup> Judgment, paras 157-160, 535-540.

<sup>1028</sup> Judgment, para. 528.

<sup>1029</sup> Judgment, paras 529, 532-534, 540, 544-545, 549.

<sup>1030</sup> Judgment, paras 525, 526.

<sup>1031</sup> Judgment, paras 528-530, 534, 543, 549-552.

that the American bombing campaign in Cambodia would continue.<sup>1032</sup> The Chamber reasonably arrived at this finding, noting that U.S. bombing had stopped<sup>1033</sup> and there was no evidence that it would start again.<sup>1034</sup> The Chamber also considered admissions in propaganda materials which showed that the leadership's main concern was infiltrators and "pacifist agents" embedded in the cities<sup>1035</sup> rather than bombing attacks. Other evidence before the Chamber<sup>1036</sup> also demonstrates that the evacuation was not a response to imperative military necessities of the moment but was in fact a policy planned a considerable time before to counteract subversive attacks from within, not bombs from without.<sup>1037</sup>

256. The declarations of FUNK/GRUNK representatives<sup>1038</sup> before 17 April 1975 do not demonstrate fear as Khieu Samphan alleges; rather, they are defiant and call for support to defeat an enemy.<sup>1039</sup> The Chamber considered all relevant contexts<sup>1040</sup> but was not persuaded by the

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<sup>1032</sup> NC Appeal, para. 436.

<sup>1033</sup> Judgment, para. 527. Nuon Chea's reliance on a note in Sydney Schanberg's diary (see NC Appeal, para. 436) of a mere rumour that the Americans might bomb Phnom Penh to save the government does not constitute evidence of a probable threat justifying the immediate forced expulsion.

<sup>1034</sup> Judgment, para. 527.

<sup>1035</sup> **E3/749** *Revolutionary Youth*, August 1975, p. 3, ENG 00532683; **E3/759** *Revolutionary Flag*, April 1976, p. 5, ENG 00517853 (recalling how the imperialists were expelled after the 17 April 1975 liberation, such that "the imperialists had no forces to attack our people from the inside"); **E169/4.1.1.1** *Revolutionary Male and Female Youths*, p. 11, ENG 00815133 ("the enemy would have been able to burrow inside our revolutionary stance, cause chaos in the revolutionary ranks and break up the Party's discipline and solidarity"); **E3/1762** Telegram to French Ministry of Foreign Affairs, Subject: Pol Pot Press Conference, p. 2, ENG 00751832 (relaying that Pol Pot recounted, "We had resolved to evacuate the towns as early as February 1975, because it would otherwise have been impossible to smash the spies, saboteurs and trouble-makers"); **E3/2072** Pol Pot's Press Conference in Beijing (in SWB Collection), ENG 00080549 (evacuation of the city residents to the countryside was decided in February 1975 before victory was won "because we knew that before the smashing of all sorts of enemy spy organizations, our strength was not enough to defend the revolutionary regime").

<sup>1036</sup> Judgment, paras 132-134, 141-152, 531. See also **E1/189.1** Philip Short, T. 6 May 2013, p. 24 where expert Short said about the possibility of American bombings: "The explanation was knowingly false. There was never any possibility of bombing. But not only that, the Khmer Rouge knew there was no possibility of bombing. The reason for telling people, you are just going for two or three days, was to make it easier to persuade them to go. Was also to persuade them not to take lots of belongings with them, because if you're going only for a few days, you don't need to, you think you're going to be coming back."

<sup>1037</sup> See *Krstić* TJ, para. 526 discussing *Von Lewinski (called von Manstein)*, British Military Court at Hamburg (Germany), Dec. 19, 1949, in 16 Annual Dig. and Reports of Public International Law Cases pp. 509, 521-523.

<sup>1038</sup> KS Appeal, para. 226.

<sup>1039</sup> See, e.g., **E3/167** Khieu Samphan Speech given at FUNK/GRUNK delegation reception in Korea, ENG 00280585 (news of the victories which the CPNLF and the Kampuchean people "have won against the American imperialists and their lackeys of all persuasions"), 00280586 (the U.S. mobilized their aviation against the Khmer Rouge in 1973, "attempting to annihilate our people but did not succeed"; on the contrary, the CPNLF "attacked the enemy forcefully and are now solidly implanted at the very gates of Phnom Penh"), 00280587 (the American imperialists and traitors of Phnom Penh are collapsing in droves but they nonetheless remain stubborn); **E3/488** *Sihanouk 5 Feb Statement Denounces U.S. Cambodia Involvement* (in FBIS Collection), FR 00854212/ ENG 00166744 (Sihanouk stated that *even if* the U.S. gave thousands of millions of dollars to Lon Nol, the FUNK/GRUNK, CPNLF and Norodom Sihanouk would "proclaim to the world that they will never renounce their struggle". Note that Sihanouk's denouncement did not refer to "tens of billions of dollars" actually given by the U.S.

rhetoric and concluded that the population was not evacuated for imperative military reasons.<sup>1041</sup>

257. The Chamber's rejection of the argument that the accused *subjectively* believed there was an immediate threat from the Americans was well-founded.<sup>1042</sup> First, Nuon Chea stated in a 1978 speech that the American plan to seize power was expected to take place *six months after* the liberation of Phnom Penh,<sup>1043</sup> not imminently. Second, a Khmer Rouge division was *instructed to deceive* residents by telling them that the city was going to be attacked.<sup>1044</sup> Third, the CPK leadership moved to the centre of Phnom Penh after the forced transfer – an illogical step if it actually feared an imminent bombing.<sup>1045</sup> Fourth, the fact that the order for immediate evacuation did not extend to foreigners was another sign that the leadership did not believe there was an imminent threat.<sup>1046</sup>

258. The Chamber also examined the claim that the food crisis created the urgent need to evacuate Phnom Penh.<sup>1047</sup> In particular, it scrutinised whether the CPK had a hand in making the

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to Lon Nol as alleged by Khieu Samphan in fn. 525 of his Appeal, but was hypothetical); **E3/120** FBIS Collection of reports for March 1975, FR 00943644-45/ ENG 00166820 (everyone is in agreement, even the U.S. Government, that the fall of the Lon Nol regime is certain; a combined operation by the U.S. Air Force and Saigon Army is not impossible but it would be a risky operation and international opinion would violently condemn such an undertaking).

<sup>1040</sup> See, e.g., Judgment, paras 79-101, 153-156, 525-534.

<sup>1041</sup> Judgment, para. 549.

<sup>1042</sup> *Contra* NC Appeal, para. 435.

<sup>1043</sup> Judgment, para. 529. *Contra* NC Appeal, fn. 1154.

<sup>1044</sup> Judgment, para. 530. See also **E1/140.1** Sum Chea, T. 5 November 2012, p. 26, emphasis added. Although Nuon Chea challenges the relevance of this testimony because Sum Chea was an “ordinary soldier” who “had no role in the decision to evacuate Phnom Penh” (NC Appeal, para. 438), this evidence is relevant because the instruction indicates that the leadership did not actually believe there was an immediate need for evacuation; therefore, the troops needed to deceive the people. Nuon Chea also wrongly claims that the Chamber implicitly rejected Sum Chea's testimony because it was contradicted by the finding “that the threat of an attack from Lon Nol soldiers in the city was the Party's *actual* reason for the evacuation”. The actual finding states that one of the reasons for the evacuation was “to prevent enemies from destabilising CPK forces” (Judgment, para. 534) and does not contradict Sum Chea's testimony, which: (i) agrees that the purpose of the evacuation was to sweep out the Lon Nol soldiers; (ii) says they were told to tell people to leave for only 4 or 5 days; and (iii) says they deceived people by saying that soon the fighting would explode and everyone would die.

<sup>1045</sup> Judgment, para. 528. *Contra* NC Appeal, para. 437, this was especially reasonable in light of the CPK's longstanding policy of secrecy to protect its leadership (see, for example, Judgment paras 199, 207, fn. 2314; **E3/196** Nuon Chea Speech to the Communist Workers' Party of Denmark, pp. 21, 27, 29, 36, ENG 00762393, 00762399, 00762401, 00762408).

<sup>1046</sup> Judgment, paras 480, 528.

<sup>1047</sup> Judgment, paras 535-540. Among others, the Chamber cited François Ponchaud who said, based on his experience, that it was possible to feed the population of Phnom Penh for another two months (**E1/179.1** François Ponchaud, T. 10 April 2013, p.25, see also **E243.1** Book by F. Ponchaud “Cambodia, Year Zero”, ENG 00862037). The Chamber also cited Expert Philip Short who clearly stated that “there were sufficient reserves to feed the city population, at least for a matter of days. Leave aside the possibility that they could have asked for food to be sent in, for rice to be sent in from elsewhere. But a static population is, by definition, much easier to feed than some millions of people who are streaming out of the city in all directions; when no medical facilities have been provided for that

crisis worse or could have alleviated the problem before choosing the drastic alternative of expelling millions of people.<sup>1048</sup> Nuon Chea challenges the Chamber's holding that rice could have been brought in by air or by sea, asserting that the Chamber did not specify a source of aid that could have alleviated the food shortage.<sup>1049</sup> Khmer Rouge leaders explicitly rejected the idea of seeking aid at the time of the evacuation to preserve Cambodia's "independence" and self-reliance.<sup>1050</sup> Evidence further indicates that the Khmer Rouge refused offers of humanitarian assistance, expelling International Red Cross personnel<sup>1051</sup> and rejecting a plane packed with medicine because "Angkar was independent and ... they no longer need[ed] assistance from colonialists."<sup>1052</sup> Millions of dollars' worth of aid were offered after the evacuation by Yugoslavia, Sweden, China, East Germany, Hungary and Czechoslovakia.<sup>1053</sup> Indeed, in 1976, the Khmer Rouge distributed Chinese aid rice.<sup>1054</sup> It is far-fetched at best to imply that food assistance was not at least a reasonable possibility had it been sought before forcibly evacuating Phnom Penh.

259. The Chamber also correctly noted that the Mekong was one more supply route which had previously allowed supplies in but was cut off under CPK control.<sup>1055</sup> The Chamber reasonably found that it caused the food situation in Phnom Penh to deteriorate further,<sup>1056</sup> a point which even Khieu Samphan acknowledged in 1975.<sup>1057</sup>

260. Finally, the Chamber considered whether evidence made it reasonably possible that the

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exodus; when no food reserves along the route have been provided; when ... they are going to areas where...there are no warehouses with food to feed them." **E1/189.1** Philip Short, T. 6 May 2013, p. 31.

<sup>1048</sup> See *Stakić* AJ, para. 287 (displacement is not justifiable where the humanitarian crisis that caused the displacement is itself the result of the accused's own unlawful activity).

<sup>1049</sup> NC Appeal, para. 439. He also complains that the Chamber refused to hear witnesses on this point. This has been addressed above in the Response to Ground 7, para. 61 ("Pre-1975 Conditions").

<sup>1050</sup> **E3/550** Ieng Sary Interview by Newsweek, p. 1, ENG 00087603 (the people had to go where the food was; we had to furnish this food with independence and dignity and without asking for help from any country); **E3/482** Report by L. Triviere: *China and Cambodia*, p. 28, ENG 00524012 (Ieng Sary said they had to provide food for the population while preserving their independence and dignity without begging for aid from any country); **E1/193.1** Ieng Phan, T. 20 May 2013, p. 49 (during the evacuation of Phnom Penh, the upper echelon used the phrase 'You have to rely on yourself, we do not need the aid from foreign country, we do not use money so we had to do everything to help ourselves'); **E3/3373** Washington Post, *Cambodians are Starving, Refugees Say* (Western relief organizations no longer have aid programs in Cambodia, although officials say they would like to resume again if possible).

<sup>1051</sup> Judgment, para. 478, fn. 1421.

<sup>1052</sup> **E1/178.1** François Ponchaud, T. 9 April 2013, p. 79.

<sup>1053</sup> Judgment, fn. 1614.

<sup>1054</sup> **E3/230** Standing Committee Minutes, 22 February 1976, para. 7.

<sup>1055</sup> Judgment, paras 537-538, *contra* NC Appeal, para. 440 and KS Appeal, para. 225.

<sup>1056</sup> Judgment, paras 537-538.

<sup>1057</sup> Judgment, para. 537, fn. 1608, *citing* **E3/30** *Khieu Samphan Issues Appeal to Compatriots, Monks* (in FBIS Collection), ENG 00166721. See also **E3/120** FBIS Collection of reports for March 1975, ENG 00166837.

CPK opted not to implement a staged evacuation because it was logistically complicated<sup>1058</sup> and instead chose to immediately and without exception evacuate the entire population of Phnom Penh.<sup>1059</sup> It was mindful of Nuon Chea's closing submission that the population would have been evacuated and moved into cooperatives regardless of the food crisis.<sup>1060</sup>

261. Contrary to Khieu Samphan's claims, the Chamber appropriately considered factors regarding humanitarian aid, agricultural lands destroyed by the war, disappearance of livestock, pre-existing malnutrition problems, and the impact of American bombings on food shortages.<sup>1061</sup> It applied the correct legal standard to the evidence and reasonably concluded, both objectively and subjectively, that the population was not evacuated for imperative military or humanitarian reasons, the transfer was not justified by necessity, and it was not part of a legitimate resettlement policy.<sup>1062</sup>

*ii. The evacuation was not proportional*

262. The Chamber added that even if the evacuation *had* been legally permissible, it was not proportional and was therefore still unlawful.<sup>1063</sup> The Geneva Conventions provide that a Power undertaking an evacuation "shall ensure, to the greatest practicable extent, that ... the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated".<sup>1064</sup> As discussed here and elsewhere, the evidence shows that assistance provided during the evacuation was vastly inadequate, and no effort was made to keep families together.<sup>1065</sup>

263. For all of these reasons, the Chamber was reasonable to find that the evacuation was

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<sup>1058</sup> Judgment, para. 539.

<sup>1059</sup> Judgment, paras 476-478, 539.

<sup>1060</sup> Judgment, paras 535, 540. NC Appeal, paras 434, 441. See also Judgment, paras 544-545.

<sup>1061</sup> Judgment, paras 155, 157-160, 535-540 and fns 1577, 1641, *contra* KS Appeal, paras 227, 516.

<sup>1062</sup> Judgment, para. 549 (economic policy is not recognised under international law to justify forced transfer).

<sup>1063</sup> Judgment, paras 550-551, emphasis added. A similar analysis applies to the absence of proportionality for the Phase II population movement. KS Appeal, paras 505- 507. Khieu Samphan's alternative interpretations of the evidence are insufficient to call into question the reasonableness of the Chamber's findings regarding the Phase II movement.

<sup>1064</sup> Fourth Geneva Convention IV, Art. 49. The same article also requires that even people evacuated for a legally justified reason must still be "transferred back to their homes as soon as hostilities in the area in question have ceased". Although Nuon Chea makes a passing reference that the evacuation of Phnom Penh was "in principle temporary", he understandably does not argue the point, as the evidence proves the contrary (NC Appeal, para. 434; Judgment, paras 465-467, 518-519, 529, 535, 550).

<sup>1065</sup> See *supra*, IX.C (Murder and Extermination, conditions during the evacuation of Phnom Penh). See also Judgment, paras 466, 481, 483, 487, 491-496, 513-514, 550.

unlawful and constituted forced transfer.<sup>1066</sup> Neither Appellant has demonstrated any errors occasioning a miscarriage of justice.

**D. Other inhumane acts via enforced disappearances occurred (NC Grounds 178, 184-185; KS paras 475-477, 502-503, 509-510)**

264. Nuon Chea and Khieu Samphan contest the finding that other inhumane acts via enforced disappearances occurred,<sup>1067</sup> alleging that the Chamber exceeded the scope of Phase II,<sup>1068</sup> relied on inadequate evidence,<sup>1069</sup> and failed to establish a deliberate refusal to give information about the whereabouts of people detained.<sup>1070</sup> These claims are demonstrably false.

*i. The Chamber's findings were within the Scope of Phase II*

265. Contrary to the Appellants' assertions,<sup>1071</sup> the Closing Order broadly describes Phase II<sup>1072</sup> and explicitly alleges that disappearances occurred during the Phase II movement.<sup>1073</sup> Both Appellants contend that the Chamber relied on evidence of disappearances after victims arrived at their destination or which were otherwise outside the scope of the Phase II movement.<sup>1074</sup> This is incorrect. First, the movements often proceeded in stages and people sometimes suffered transfers falling within Phase II more than once.<sup>1075</sup> Second, the population movements were often used to sift out bad elements or enemies,<sup>1076</sup> so it is illogical and arbitrary to exclude disappearances simply because they occurred upon reaching a cooperative. Evidence of disappearances relied upon by the Chamber occurred from 1975 to 1977, via movements of people to particular regions,<sup>1077</sup> sent to work other places,<sup>1078</sup> sent to a "new village",<sup>1079</sup> sent to

<sup>1066</sup> Judgment, para. 552.

<sup>1067</sup> NC Appeal, paras 442-445; KS Appeal, paras 509-510.

<sup>1068</sup> NC Appeal, para. 443; KS Appeal, paras 502-503.

<sup>1069</sup> NC Appeal, para. 444.

<sup>1070</sup> NC Appeal, para. 444; KS Appeal, paras 475-477.

<sup>1071</sup> NC Appeal, para. 443; KS Appeal, para. 503.

<sup>1072</sup> The Closing Order links but does not confine Phase II to transfers conducted for agriculture and infrastructure. See Closing Order, paras 262 (re. time and location), 276-278 (reasons given to the population for the movement), 279-282 (planning) and 161 (objectives of the population movements). See also Judgment, para. 796 (reasons).

<sup>1073</sup> Closing Order, paras 270, 1470 (legal elements of enforced disappearance established for Phase II forced transfer).

<sup>1074</sup> NC Notice, ground 178; KS Appeal, para. 503.

<sup>1075</sup> Judgment, paras 580-581 (describing transfers "on a massive scale" from the southern regions to the northern regions, and then within the regions), 590 (describing the stages of the movement).

<sup>1076</sup> See Judgment, paras 625, 796.

<sup>1077</sup> Judgment, paras 589, fn. 1787 and 614, fn. 1930, *citing* E1/209.1 Nou Mao, T. 19 June 2013, pp. 44, 52-53; Judgment, para. 589, fn. 1787, *citing* E3/5427 Thach Yuong Victim Complaint, p. 7, ENG 00873844 and E3/5478 Kim Bohanavuthy Victim Complaint, pp. 10-13, 00815159-62.

zones with “plentiful food”,<sup>1080</sup> sent to “new cooperatives” or sent for “farming”.<sup>1081</sup> These disappearances are therefore inextricable from Phase II and were properly considered.

*ii. The facts establish enforced disappearances*

266. Nuon Chea challenges the Chamber’s reliance on Lay Bony’s and Pin Yathay’s testimony to support the finding that people were unloaded in places other than where they were told they would be transferred, as both witnesses were traveling with family and thus had not disappeared.<sup>1082</sup> However, the Chamber never held that these two witnesses disappeared.<sup>1083</sup> Rather, the Chamber relied on these accounts to demonstrate the existence of a general practice of deception, especially as people who *did* disappear were obviously not available to testify. Next, Nuon Chea misleadingly claims that other enforced disappearance findings “are not supported by any relevant factual findings”, referencing one paragraph in a string of ten cited by the Chamber.<sup>1084</sup> The paragraph he impugns describes the killing of a man who expressed excitement in the belief that his group was returning to Phnom Penh, which is directly relevant to the finding that people were given false information about their destinations – again, exactly what it was cited to support.<sup>1085</sup>

*iii. The refusal to provide whereabouts*

267. Khieu Samphan asserts that because there was no evidence that people affirmatively sought information from the Party regarding displaced persons,<sup>1086</sup> there is no support for the finding that the Khmer Rouge deliberately refused to provide accurate information on the fate or

<sup>1078</sup> Judgment, paras 625, fns 1976-78, *citing* E3/5542 In Vuthy Interview Record, p. 6, ENG 00373230; para. 609 fn. 1901, *citing* E3/4656 Dy Roeun Civil Party Application, p. 3, ENG 00893384 and E3/5258 Man Saroeun Interview Record, p. 3, ENG 00251700.

<sup>1079</sup> Judgment, para. 618, fn. 1952, *citing* E3/4657 Suong Sim Interview Record, pp. 7-8; para. 623, fn. 1969, *citing* E3/4699 Say Kanal Civil Party Application, pp. 7-8, ENG 00414895-96, E3/5390 Hon Sikem Victim Complaint, pp. 7-10, ENG 00877810-13, E3/5390 Nhem Yang Victim Complaint, p. 6, ENG 00874120.

<sup>1080</sup> Judgment, para. 618, fns 1948-1951.

<sup>1081</sup> Judgment, paras 601, fn. 1861 and 611, fn. 1915, both *citing* E3/3958 Lay Bony Interview Record, p. 8, ENG 00379161 (people disappeared from the Koh Chum Co-Operative, including Chhan, whose wife only knew her husband had been sent to farm paddies; Lay Bony’s elder brother and his wife were also taken away, told they were being sent to new co-operatives).

<sup>1082</sup> NC Appeal, para. 444.

<sup>1083</sup> Judgment, para. 599, fn. 1853.

<sup>1084</sup> NC Appeal, para. 444, *citing* Judgment, para. 595. Judgment, fns 2024-2025 also cite to supporting evidence contained in Judgment paras 593, 599, 601, 609, 611, 614, 618, 623, 625.

<sup>1085</sup> Judgment, para. 641, fn. 2024, *citing* Judgment, para. 595, *citing* E1/198.1 Chan Socheat, T. 29 May 2013, p. 44.

<sup>1086</sup> Judgment, para. 641.



whereabouts of people who disappeared, as it is impossible to refuse a request never made.<sup>1087</sup> Nuon Chea similarly challenges the finding, also alleging that the evidence falls short because the perpetrators were not shown to have specifically intended to refuse to provide information and cause widespread terror.<sup>1088</sup> In the DK context, where false information was given at the outset of the journey on which the people disappeared and where a climate of fear and total obedience was imposed by those in power who could provide the information, it would be absurd to require proof of an explicit request for information in order to establish that a disappearance occurred.<sup>1089</sup> Likewise, it would be wholly unreasonable to believe that false information could consistently be given on such a wide scale without an intention to mislead.<sup>1090</sup> As to the second argument, Nuon Chea has invented an element for enforced disappearance which does not exist.<sup>1091</sup>

**E. Other inhumane acts through attacks against human dignity were committed during Phase I and II population movements (NC Ground 182)**

268. The Chamber's descriptions of what people experienced during the first and second forced transfers were amply supported by the evidence and its underlying findings of fact. In claiming

<sup>1087</sup> Judgment, para. 641; KS Appeal, paras 475-477, 509-510.

<sup>1088</sup> NC Appeal, para. 445.

<sup>1089</sup> *Contra* Khieu Samphan's argument that the Chamber's resort to "invoking secrecy" as a reason people did not seek information was "speculative" (see KS Appeal, para. 476). False information: see, e.g., Judgment, paras 593 (people at Ang Roka who volunteered to work for the new government were sent to Phnom Penh and never heard from again; there was a rumour that they had been killed); 595 (a boat full of people who thought they were returning to Phnom Penh were taken to Kampong Chhnang); 599 (people were unloaded in places different from where they were told they would be transferred); 601 (people who were allegedly sent to new cooperatives disappeared), 609 (people assigned to new locations disappeared), 618 (people sent to zones with "plentiful food" disappeared, their clothes returned for others to use), 623 (educated people and Khmer Republic officials were taken to "new locations" and some disappeared), 625 (people called to work at other places followed the Khmer Rouge soldiers and disappeared; their clothing was redistributed so their relatives assumed they had been killed); **E3/3976** Denise Affonço Interview Record, p. 6, ENG 00346934 (in September 1975, 10 of 15 families were taken to the Northwest region after being told they would be taken back to Phnom Penh); Climate of fear and total obedience: see, e.g., Judgment, paras 588 (people were ordered to depart or face the consequences), 591 (people were constantly monitored during transfer, received no assistance), 594 (transferred under armed guard; soldiers threatened to throw crying children overboard), 595 (a man was shot for expressing excitement at returning to Phnom Penh); 596 (soldiers rode in each train wagon, the doors were barred with wooden poles); 597 (soldiers threw some crying children out the window of a moving train); 598 (civilians were transferred on trucks guarded and driven by armed Khmer Rouge soldiers who shot at those who tried to escape); 600 (after being forced to disembark, people were questioned about their past and were instructed to wait, some under armed guard); 608-09 (people were displaced because of insufficient manpower and were moved under guard; some who attempted to escape were chased by Khmer Rouge soldiers); 611-12 (nobody refused transfer unless they were sick or unable to walk), 617-20, 625, 632.

<sup>1090</sup> *Contra* KS Appeal, para. 510, alleging that intent was not demonstrated.

<sup>1091</sup> See *supra*, XI.A (Other Inhumane Acts, definition of other inhumane acts), para. 237; *contra* NC Appeal, para. 445.

otherwise,<sup>1092</sup> Nuon Chea ignores evidence, misreads the Judgment and misstates key findings.

269. First, Nuon Chea challenges the finding that “at least two million people in Phnom Penh were forcibly evicted from their houses by Khmer Rouge soldiers at gunpoint”,<sup>1093</sup> claiming that the findings are “gross exaggerations unsubstantiated by any evidence”.<sup>1094</sup> The Chamber cited 22 accounts of Khmer Rouge soldiers forcing people from houses and pagodas at gunpoint;<sup>1095</sup> 15 accounts of soldiers firing shots to urge people to leave their homes or move;<sup>1096</sup> 23 accounts of threats to kill;<sup>1097</sup> 25 reports of Khmer Rouge soldiers killing those who refused to immediately obey orders;<sup>1098</sup> and a further 12 reports that soldiers were armed and had a serious demeanour which made people feel that the orders were not optional.<sup>1099</sup> In total, 97 incidents were described by 74 different sources. Nuon Chea then simply declares it “absurd”<sup>1100</sup> that the Chamber found that “the majority witnessed beatings, killings, and shootings”, again ignoring the vast evidence cited by the Chamber which supports this finding.<sup>1101</sup> Finally, he speculates that “probably the majority” of the population were refugees who were living in camps or were homeless<sup>1102</sup> but does not explain why he believes it is lawful to forcibly transfer homeless people or refugees from camps where they are lawfully present.

270. Similarly, in relation to Phase II, Nuon Chea challenges the finding that “[t]hese conditions were imposed systematically and at all stages of Phase II”.<sup>1103</sup> A plain reading of the Judgment shows that “conditions” refers to a lack of minimally sufficient food, water, shelter, medicine, and hygiene<sup>1104</sup> which the evidence amply demonstrates were imposed systematically throughout

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<sup>1092</sup> NC Appeal, paras 446-448.

<sup>1093</sup> Judgment, para. 563, fn. 1672, *citing* Judgment, paras 464, 468, 471-474.

<sup>1094</sup> NC Appeal, para. 446.

<sup>1095</sup> Judgment, para. 471, fns 1394-1396.

<sup>1096</sup> Judgment, para. 472, fns 1397, 1399. One account (E3/5427 Thach Yuong Victim Complaint) was cited twice.

<sup>1097</sup> Judgment, para. 474, fn. 1401.

<sup>1098</sup> Judgment, para. 474, fns 1402-1405.

<sup>1099</sup> Judgment, para. 475, fns 1407-1408.

<sup>1100</sup> NC Appeal, para. 446.

<sup>1101</sup> Judgment, para. 563, fn. 1674. As to beatings, see Judgment, para. 473, fn. 1400 (*citing* 3 accounts of beatings), para. 489, fn. 1460 (*citing* 4 accounts of beatings). See also Judgment, para. 489, fn. 1461 (*citing* 1 account of rape). Killings and shootings: see Judgment, para. 474, fns 1402-1405 (*citing* 26 accounts of killings), para. 486, fn. 1450 (soldiers said that if evacuees returned, they would be killed; she heard gun shots), para. 490, fns 1462-1465 (*citing* 22 accounts of shootings and killings). See also fns 1397, 1399 (*citing* 15 accounts of shots being fired).

<sup>1102</sup> NC Appeal, para. 446.

<sup>1103</sup> NC Appeal, paras 447-448, *citing* Judgment, para. 644.

<sup>1104</sup> Judgment, para. 644 (“During journeys lasting days or weeks, Khmer Rouge soldiers and officials provided insufficient food, water, shelter, medical assistance and hygiene facilities. Due to *these conditions*, some died. Their bodies were disposed of along the way, *some* thrown out of the windows of moving trains, thereby depriving the

the second forced population movement.<sup>1105</sup>

## XII. TUOL PO CHREY

271. The Appellants' challenges to the Chamber's findings on the Tuol Po Chrey massacre have no merit.<sup>1106</sup> The Chamber exercised proper caution when it assessed the evidence and reasonably concluded that at least 250 former Lon Nol officials were executed there.

### A. The Chamber correctly and reasonably found that the evidence of Lim Sat, Ung Chhat and Sum Alat was credible and reliable (NC Ground 203, KS paras 432-433)

272. *The Chamber cautiously assessed Lim Sat's evidence:* Contrary to Nuon Chea's assertion that the Chamber failed to use the requisite caution when assessing Lim Sat's testimony,<sup>1107</sup> the Judgment demonstrates that the Chamber reasonably relied on his evidence when it was corroborated or consistent with other evidence. For example, Lim Sat's testimony that the message about the meeting was conveyed to Lon Nol leaders and then to their subordinates<sup>1108</sup> is materially corroborated. Former Lon Nol soldier Sum Alat said that CPK Sector Secretary Sot called the Pursat provincial governor to meet at the provincial town-hall office, and that he, Sum Alat, personally learned of the meeting from the Lon Nol communication structures still in place at the time.<sup>1109</sup> Lim Sat's evidence that the Khmer Rouge assembled former officials because they feared the police and soldiers would revolt against them<sup>1110</sup> is consistent with ample evidence of a CPK policy to kill former Khmer Republic officials in order to prevent a counter-revolution.<sup>1111</sup> Lim Sat learned this from his regimental commander,<sup>1112</sup> who had no reason to lie to his subordinates. Finally, Lim Sat's background and assignment controlling the flow of trucks to Tuol Po Chrey made it reasonable to conclude that he could identify the drivers as Zone

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families the opportunity to mourn the deceased. Families were *often* separated over the course of the population movements. *These conditions* were imposed systematically and at all stages of Phase II") (emphasis added).

<sup>1105</sup> See *supra*, XI.B.iii (Other Inhumane Acts, Conditions during population movements, Phase II conditions).

<sup>1106</sup> Khieu Samphan's argument without more that the Chamber erred in finding that crimes were committed at Tuol Po Chrey is without merit and should be summarily dismissed. KS Appeal, para. 436.

<sup>1107</sup> NC Appeal, paras 451-452.

<sup>1108</sup> *Contra* NC Appeal, para. 453.

<sup>1109</sup> Judgment, para. 666, fn. 2091, *citing* E3/4637 Sum Alat Interview Record, p. 5, ENG 00242126 and Judgment, para. 668, fn. 2097, *citing* E1/218.1 Sum Alat, T. 4 July 2013, pp. 15-16.

<sup>1110</sup> Judgment, para. 672, fn. 2112, *citing* E1/187.1 Lim Sat, T. 2 May 2013, pp. 23-24; *contra* NC Appeal, para. 453.

<sup>1111</sup> See, e.g., the evidence cited in Judgment, paras 817 (especially fn. 2576, *citing* E3/89 Ieng Sary Interview by Stephen Heder, p. 8, ENG 00417606), 818 and 834.

<sup>1112</sup> E1/187.1 Lim Sat, T. 2 May 2013, pp. 23-24.

forces.<sup>1113</sup> He had been a soldier in Pursat province for four years<sup>1114</sup> and was close to the drivers as the trucks waited to be sent to Tuol Po Chrey and returned empty.<sup>1115</sup> The Chamber was able to observe Lim Sat's demeanour and assess his credibility firsthand when he testified.<sup>1116</sup>

273. The Chamber reasonably resolved other inconsistencies: Nuon Chea argues that the Chamber was required to find all Tuol Po Chrey witnesses unreliable because of inconsistencies between them.<sup>1117</sup> It is common for witnesses to see and recall the same events differently, particularly when observed from distinct perspectives. It is well-established that a trier of fact has the discretion to accept testimony as reliable despite such inconsistencies.<sup>1118</sup>

274. Nuon Chea challenges the Chamber's finding that attendance at the provincial town-hall meeting was voluntary,<sup>1119</sup> alleging it is inconsistent with the Chamber's general account that Khmer Rouge forces used violence when interacting with the people.<sup>1120</sup> However, ample evidence shows a common CPK tactic was to lure former Khmer Republic soldiers and officials to come forward by promising some benefit, then kill those who did so.<sup>1121</sup>

275. Nuon Chea complains that the Chamber did not discuss Sum Alat's inability to name attendees at the meeting,<sup>1122</sup> but chamber need not articulate every step of its reasoning,<sup>1123</sup> and the fact that a witness cannot remember specific names of people who attended a meeting almost 40 years prior does not render the rest of his evidence unreliable nor the Chamber's acceptance

<sup>1113</sup> *Contra* NC Appeal, para. 453. See Judgment, para. 674, fn. 2117, citing **E1/187.1** Lim Sat, T. 2 May 2013, p. 30.

<sup>1114</sup> **E1/187.1** Lim Sat, T. 2 May 2013, p. 7; **E1/188.1** Lim Sat, T. 3 May 2013, p. 41.

<sup>1115</sup> **E1/187.1** Lim Sat, T. 2 May 2013, pp. 21-22, 29-30, 50-51.

<sup>1116</sup> Note further that Lim Sat's testimony on this issue was consistent with his prior statement (see **E3/4601** Lim Sat Interview Record, p. 3, ENG 00412158 (the soldiers who took the military and policemen to be killed were only soldiers from Zone and Sector)).

<sup>1117</sup> NC Appeal, para. 454.

<sup>1118</sup> *Kupreškić* AJ, para. 31; *Setako* AJ, para. 31; *Munyakazi* AJ, para. 71.

<sup>1119</sup> In NC Appeal, para. 455, Nuon Chea asserts that the accounts as to how the meeting attendees arrived at the hall were "directly contradictory" but fails to demonstrate how. The fact that some of the attendees were brought in trucks merely shows the Khmer Rouge provided transportation to the meeting. See Judgment, fn. 2097, particularly Lim Sat's testimony that "assembling soldiers" for the meeting meant not that they physically gathered the soldiers but that they passed the message to the group leaders, who relayed it to their subordinates and "the soldiers would gather eventually" (**E1/188.1** Lim Sat, T. 3 May 2013, pp. 19-22).

<sup>1120</sup> NC Appeal, para. 455, fn. 1201 (citing to paragraphs of the Judgment which discuss the Khmer Rouge violence during the forced transfer of Phnom Penh).

<sup>1121</sup> See, e.g., Judgment, paras 511, 514, 834; **E1/191.1** Philip Short, T. 8 May 2013, p. 136 (in Battambang, officers who were told to put on their dress uniforms and they would be taken to be presented to the king were killed *en route*); [REDACTED] Written Record of Interview of [REDACTED] pp. 3-4, ENG [REDACTED]

<sup>1122</sup> NC Appeal, para. 457.

<sup>1123</sup> *Karemera* AJ, para. 415, citing *Ntabakuze* AJ, para. 161; *Kanyarukiga* AJ, para. 114

of it unreasonable. He also claims that the evidence is unreliable because no eyewitness to the killings testified.<sup>1124</sup> Nuon Chea cites to no jurisprudence requiring eyewitness testimony of mass executions, and it is understandable that there were none, given that the only surviving eyewitnesses were perpetrators who would not only be disinclined to provide testimony about their criminal conduct but would also have the right to remain silent to avoid self-incrimination, even if summonsed. Any sort of policy that would require eyewitness testimony before a conviction could be entered would incentivize perpetrators of such crimes to make sure no victims survived who might one day become eyewitnesses in court proceedings against them. Further, the Chamber acknowledged the lack of an eyewitness but stated that the totality of the evidence allowed it to conclude that the only reasonable inference was that the soldiers and officials transported to Tuol Po Chrey were executed.<sup>1125</sup>

276. Khieu Samphan argues that the three witnesses who testified before the Chamber did not corroborate each other because two referred to only one meeting while the third described meetings held over the course of two days.<sup>1126</sup> The Chamber expressly considered this issue and articulated that the content of the testimony indicated all three were describing meetings over at least two days.<sup>1127</sup> Khieu Samphan fails to demonstrate how this approach was unreasonable.

277. Khieu Samphan also wrongly contends that because Lim Sat did not specify how he found out that Ta Nhim and Ta Kan attended the meeting in Pursat, the Chamber could not conclude beyond a reasonable doubt that Zone leaders were there.<sup>1128</sup> It is clear from Lim Sat's testimony that he learned of the meeting from the commander of his regiment, Mr. Huon.<sup>1129</sup> It is reasonable to infer that Mr. Huon told Lim Sat who led the meeting at the same time he told him of the content. Other evidence demonstrates further Zone involvement in the events at Tuol Po Chrey,<sup>1130</sup> which the Chamber also considered.

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<sup>1124</sup> NC Appeal, para. 457.

<sup>1125</sup> Judgment, paras 678-681. *Contra* NC Appeal, para. 457 stating that the evidence was unreliable in other respects "not reflected in the Chamber's evidentiary discussion" and *contra* KS Appeal, para. 432 stating Lim Sat's evidence was not corroborated by Sum Alat and Ung Chhat since neither of the latter witnessed the executions. Actually, none of them did.

<sup>1126</sup> KS Appeal, para. 432.

<sup>1127</sup> Judgment, para. 667.

<sup>1128</sup> KS Appeal, paras 432-433.

<sup>1129</sup> E1/187.1 Lim Sat, T. 2 May 2013, pp. 22-24.

<sup>1130</sup> The trucks transporting meeting attendees to Tuol Po Chrey were driven by Zone drivers (as discussed in para. 272 above). Zone Commander Ta Khleng chose Tuol Po Chrey as the location to assemble Lon Nol soldiers and policemen and also radioed Lim Sat's commander at the guard post from Tuol Po Chrey when they were ready to

278. The Chamber's finding that multiple trips were made from the provincial town-hall to Tuol Po Chrey<sup>1131</sup> does not make the Chamber's key findings regarding the killings unreasonable. Sum Alat's observations from the provincial town-hall can reasonably be expected to differ from what Lim Sat saw from a Khmer Rouge guard post three to five kilometres away.<sup>1132</sup> Sum Alat's testimony that he saw trucks depart in a column from the hall says nothing of the manner in which they stopped at and left the checkpoint heading towards Tuol Po Chrey.<sup>1133</sup> More importantly, whether multiple or round trips were made and how the trucks left the hall has no bearing on whether the execution took place. Even if the Chamber erred in finding that the trucks made multiple trips, no miscarriage of justice resulted since the conclusion that at least 250 Lon Nol officials were killed at Tuol Po Chrey was not based on this detail.<sup>1134</sup>

279. Finally, Nuon Chea quotes OCP submissions from a trial management meeting<sup>1135</sup> which merely show the OCP attempting to ensure that the best evidence was brought before the Chamber and obviously do not affect the evidence on record.<sup>1136</sup> In addition, he downplays the strength of the evidence given after that trial management meeting by Sum Alat.<sup>1137</sup> Sum Alat's testimony as a former Lon Nol soldier provided crucial insight into how the Lon Nol soldiers learned of the meeting,<sup>1138</sup> what attendees were told inside the hall,<sup>1139</sup> how many people were present,<sup>1140</sup> and how many trucks transported people to Tuol Po Chrey.<sup>1141</sup> His testimony also corroborated other evidence which assisted the Chamber to conclude that former officials taken

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receive more truckloads of soldiers and police at the fort (see Judgment, paras 674 and 675, fns 2117, 2118 and 2121 citing **E1/187.1** Lim Sat, T. 2 May 2013, pp. 19, 26-27, 29-30 and **E1/188.1** Lim Sat, T. 3 May 2013, p. 11).

<sup>1131</sup> NC Appeal, paras 453, 456.

<sup>1132</sup> See **E1/218.1** Sum Alat, T. 4 July 2013, pp. 25-30; **E1/187.1** Lim Sat, T. 2 May 2013, pp. 21-22 (when the Lon Nol soldiers arrived at the provincial town-hall, Lim Sat was on duty about five kilometres away), 24-25 (during the course of transporting the soldiers and the police, his unit was stationed about three kilometres from the provincial town-hall and about ten kilometres from Tuol Po Chrey); **E3/4601** Lim Sat Interview Record, p. 3, ENG 00412158. See also KS Appeal, para. 430 (as to where Lim Sat was stationed).

<sup>1133</sup> **E1/218.1** Sum Alat, T. 4 July 2013, pp. 29-30; **E1/187.1** Lim Sat, T. 2 May 2013, pp. 24-26; **E1/188.1** Lim Sat, T. 3 May 2013, pp. 11; **E3/4601** Lim Sat Interview Record, p. 3, ENG 00412158 (they dispatched trucks after receiving radio orders from Tuol Po Chrey – if they commanded only two soldier-carrying trucks, the remaining trucks had to wait until a new command was issued).

<sup>1134</sup> See *infra*, XII.C (Tuol Po Chrey, at least 250 soldiers and officials killed).

<sup>1135</sup> NC Appeal, para. 458.

<sup>1136</sup> **E1/207.1** Trial Management Meeting, T. 13 June 2013, pp. 71-72.

<sup>1137</sup> NC Appeal, para. 458.

<sup>1138</sup> **E1/218.1** Sum Alat, T. 4 July 2013, pp. 15-16, 64.

<sup>1139</sup> **E1/218.1** Sum Alat, T. 4 July 2013, pp. 15, 20-22, 25-27.

<sup>1140</sup> **E1/218.1** Sum Alat, T. 4 July 2013, pp. 14-17, 27-28, 76-77.

<sup>1141</sup> **E1/218.1** Sum Alat, T. 4 July 2013, pp. 24-25, 29-30.

to the fort were subsequently killed.<sup>1142</sup>

**B. The Chamber reasonably relied on Lim Sat’s CIJ evidence regarding the orders to kill Lon Nol soldiers at Tuol Po Chrey (NC Ground 204, KS paras 430-431)**

280. Nuon Chea asserts that the Chamber erred in relying on Lim Sat’s CIJ interviews rather than his less inculpatory live testimony and that this occasioned a miscarriage of justice because Lim Sat’s evidence was the only link between the executions at Tuol Po Chrey and the JCE.<sup>1143</sup> The Judgment, however, demonstrates that the Chamber cautiously considered the evidence and reasonably relied on Lim Sat’s CIJ accounts.

281. Lim Sat gave three statements to the CIJs, two of which discussed the orders to assemble Lon Nol soldiers and policemen to be killed.<sup>1144</sup> At trial, Lim Sat’s testimony was initially consistent with his CIJ statements. When asked about the meeting in which Khmer Rouge commanders were advised that the Lon Nol soldiers and policemen had to be killed, he said the kill order came from the Zone Committee – specifically, Ta Kan and Ta Nhim.<sup>1145</sup> However, he subsequently testified that the orders were to assemble the soldiers and policemen so they could attend a study session; he did not realise that the people would be killed.<sup>1146</sup>

282. The Chamber first considered Lim Sat’s in-court testimony. It observed his demeanour and behaviour and did not find him to be credible when he said that he did not know the assembled soldiers were to be killed.<sup>1147</sup> The Chamber articulated in the Judgment that it was conscious that Lim Sat might be “motivated to diminish or shift responsibility for his involvement in the

<sup>1142</sup> Sum Alat’s evidence regarding That and Dor (two Lon Nol soldiers who escaped the scene of the execution) corroborated other evidence regarding the killings, as discussed in Judgment, paras 678-681.

<sup>1143</sup> NC Appeal, paras 459-461. The OCP has fully responded to the arguments in NC Appeal, para. 462 in F2/4/1 Co-Prosecutors’ Response to Nuon Chea’s Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01, 19 December 2014.

<sup>1144</sup> E3/364 Lim Sat Interview Record, p. 2, ENG 00250759 (“I received orders to assemble the soldiers and policemen from low to high rank who had connections to the Lon Nol era and kill them at Banteay Pochrey in Kandieng District”); E3/4601 Lim Sat Interview Record, p. 3, ENG 00412158 (in a meeting of Khmer Rouge chairmen of companies, battalions and regiments, Ta Nhim and Ta Sot said that all Lon Nol dignitaries, both military and policemen, had to be killed). Lim Sat was not asked about the issue in his third statement (see E3/5723 Lim Sat Interview Record).

<sup>1145</sup> E1/187.1 Lim Sat, T. 2 May 2013, pp. 16-17.

<sup>1146</sup> Judgment, para. 664.

<sup>1147</sup> Judgment, paras 664 and 665. Relevant portions of the interview records were read to the witness which contradicted his testimony, so the Chamber was cognisant of the inconsistency as it observed him answering related questions (see E1/187.1 Lim Sat, T. 2 May 2013, pp. 19, 23-24, 48-49 (citing E3/4601 Lim Sat Interview Record); E1/188.1 Lim Sat, T. 3 May 2013, pp. 19 (citing E3/364 Lim Sat Interview Record), 25).

events”,<sup>1148</sup> which was especially reasonable given that he was testifying publicly about orders regarding a mass execution in which he played a part. Khieu Samphan contends that the Chamber offended the *audi alteram partem* principle and accused Lim Sat of lying without any proof.<sup>1149</sup> However, as noted by this SCC, a trial chamber has the advantage of observing a witness in person and is best positioned to determine whether he or she is credible.<sup>1150</sup>

283. The Chamber then assessed Lim Sat’s two interviews with the CIJs, given almost one year apart, which both indicated that the orders included the instruction to kill former Lon Nol soldiers.<sup>1151</sup> The Chamber found that the content of the orders was corroborated by evidence that fit into a pattern of conduct.<sup>1152</sup> Aside from the evidence cited by the Chamber regarding the pattern, additional evidence corroborates the finding, including evidence of other mass executions of former Lon Nol soldiers and incidents in which the CPK used false pretences to lure former Khmer Republic officials to register or turn themselves in, then executed those who did so.<sup>1153</sup> Finally, Lim Sat described to the CIJs the same process of disseminating orders that he testified to in Court.<sup>1154</sup> His consistency on the issue and the fact that the evidence accorded with the Chamber’s findings on communication structures were further indicators that the CIJ evidence was reliable.<sup>1155</sup>

<sup>1148</sup> Judgment, para. 665.

<sup>1149</sup> KS Appeal, para. 430.

<sup>1150</sup> Duch AJ, para. 17. See also Setako AJ, paras 31, 48; Limaj AJ, para. 88; Munyakazi AJ, paras 51, 154.

<sup>1151</sup> See *supra*, fn. 1144. Note that E3/4601 Lim Sat Interview Record, p. 3, ENG 00412158 indicates that these orders came from Ta Nhim and Ta Sot of the Zone and Sector Committees, respectively, in a meeting prior to the gathering of Lon Nol officials at the provincial town-hall.

<sup>1152</sup> Judgment, para. 665, fn. 2088, *citing* Judgment, Section 3 and Section 10, paras 511 and 514.

<sup>1153</sup> *Contra* NC Appeal, para. 460 and KS Appeal, para. 431. See, e.g., Judgment, para. 834; E1/218.1 Sum Alat, T. 4 July 2013, pp. 20-21 (they were loaded onto trucks to meet Angkar but he did not reach Tuol Po Chrey; three days later, he heard the people had all been killed); Judgment, paras 124-127 (execution of Khmer Republic soldiers following the evacuation of Oudong in March 1974), 172 (targeting of Khmer Republic officials throughout the newly liberated areas of Cambodia), 501-503 (the Khmer Rouge announced on the radio that only the seven traitors would be executed; ministers and generals who heeded a radio announcement and turned themselves over at the Ministry of Information disappeared; subsequent media and diplomatic dispatches reported certain officials had been executed – including officials who were not one of the seven traitors), 511 (the Khmer Rouge announced by radio that Khmer Republic officials should turn themselves in; soldiers who heeded these calls were executed) 794; E1/191.1 Philip Short, T. 8 May 2013, p. 136 (in Battambang, officers who were told to put on their dress uniforms and they would be taken to be presented to the king were killed *en route*); E3/5392 Prum Sokha Victim Complaint, pp. 6-7, ENG 00873794-95 (the Chief of Military Finance in the Lon Nol Ministry of National Defense was detained, tied up and brutally killed along with other military commanders at the garrison at the Royal Palace); [REDACTED] Written Record of Interview of [REDACTED] pp. 3-4, ENG [REDACTED]

<sup>1154</sup> NC Appeal, para. 461.

<sup>1155</sup> Judgment, para. 665. The Chamber used its discretion to discard Lim Sat’s in-court testimony on the *content of the orders* because it found him not credible on the matter. That does not preclude it from considering other portions



284. The Chamber acted as a reasonable trier of fact in relying on the CIJ evidence regarding the content of the orders. There is nothing “wholly erroneous” about its approach that would warrant the SCC to substitute its own finding for that of the Chamber.<sup>1156</sup>

**C. The Chamber reasonably found that at least 250 soldiers and officials were killed at Tuol Po Chrey (NC Ground 205, KS paras 429-430, 433)**

285. The Chamber’s conclusion that at least 250 people were killed at Tuol Po Chrey hinges on witness estimates of the number of trucks transporting the Lon Nol soldiers to Tuol Po Chrey and how many people were aboard the trucks. Nuon Chea argues that the conclusion is arbitrary and largely contradicted,<sup>1157</sup> but the Judgment demonstrates that the finding was reasonable.

286. *Number of trucks*: The Chamber was mindful of the various estimates of the number of trucks that transferred Lon Nol soldiers to Tuol Po Chrey.<sup>1158</sup> Lim Sat’s “lowest estimate” was six to eight trucks.<sup>1159</sup> However, this figure refers to the number of trucks he saw returning empty *from* the execution site before he left his post that day.<sup>1160</sup> When asked how many trucks transported police and soldiers *to* Tuol Po Chrey, Lim Sat consistently testified that he saw 10 to 15 trucks<sup>1161</sup> and the Chamber reasonably accepted this evidence. Sum Alat told investigators that there were 13 or 15 trucks in total and testified that he had attempted to board the seventh or

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of his in-court testimony (as cited in Judgment, fn. 2089), nor does it indicate unreasonableness in relying on the CIJ evidence which shared similarities with in-court testimony that was deemed credible. Khieu Samphan contends that this evidence only corroborates Lim Sat’s membership of FAPLNG, not events that he did not claim to have witnessed such as the leaders’ meeting (see KS Appeal, para. 431). However, the Chamber merely relied upon this as another indicator that his CIJ evidence was reliable.

<sup>1156</sup> Duch AJ, para. 17, citing Kupreškic AJ, para. 30.

<sup>1157</sup> NC Appeal, paras 463-466.

<sup>1158</sup> Judgment, para. 676.

<sup>1159</sup> Judgment, para. 676.

<sup>1160</sup> E1/187.1 Lim Sat, T. 2 May 2013, pp. 24-25 (during the course of transporting the soldiers and the police, he was stationed in Kandieng district, three kilometres from the provincial town-hall and 10 kilometres from Tuol Po Chrey; he saw two trucks allowed to leave at a time), 29-31 (he was still working at his post when he saw empty trucks returning from Tuol Po Chrey; he saw the trucks on three or four occasions before returning to his barracks). The Chamber seems to have multiplied the two trucks allowed to leave at a time by the number of occasions Lim Sat saw empty trucks returning, arriving at the figure of six to eight trucks.

<sup>1161</sup> E1/187.1 Lim Sat, T. 2 May 2013, pp. 31, 51 (he saw the 10 to 15 trucks when they passed as he was standing guard on the route to Tuol Po Chrey), 71 (on cross-examination, he was asked how 3,000 people could fit in 30 to 50 trucks and he replied, “I didn’t say that. I said about 10 to 15 trucks.”), 72 (when asked about the discrepancy between his prior statement to the CIJs where he said about 30 to 40 truckloads of people were transported and his testimony earlier that morning, Lim Sat said “I will stand by my statement this morning when I said 10 to 15 trucks); E1/188.1 Lim Sat, T. 3 May 2013, pp. 8-9 (when asked if he was sure that he saw 10-15 trucks of Lon Nol soldiers passing by, he said if his estimation of 15 trucks was not correct, he did not wish to make another estimate; the situation was confusing and he could say there were about 15 trucks, but he did not stand there and count them), 15 (“I still stand by my estimation that it could have been 15 trucks”).

eighth truck but was pushed off because there were too many people.<sup>1162</sup> The Chamber also considered Un Pon's statement that he saw 12 trucks, scrutinising the evidence so closely that it noted a discrepancy between the French and Khmer transcripts.<sup>1163</sup> Similarly, it considered Suy Seng's testimony that there were 100 trucks,<sup>1164</sup> but as no other evidence corroborated such a high estimate, the Chamber reasonably rejected it. Thus, the Chamber had credible evidence from witnesses at three different vantage points saying there were 10 to 15, 13 or 15, or 12 trucks. The Chamber made a conservative finding that a minimum of 10 trucks transported the meeting attendees to Tuol Po Chrey.<sup>1165</sup> This was neither arbitrary nor unreasonable.

287. Number of people on the trucks: Nuon Chea also challenges the reliability of the evidence upon which the Chamber found that at least 25 people were aboard each truck, stating that the observations were often made from a distance and citing Lim Sat's testimony as an example.<sup>1166</sup> Lim Sat was responsible for controlling the flow of trucks through a roadside checkpoint, so he was in a position to make a reliable estimate as to the number of people aboard the trucks waiting to be allowed through.<sup>1167</sup> Nuon Chea's reference to portions of Lim Sat's testimony where he estimated that 3,000 people were transferred (he observed 10 to 15 trucks carrying 30 to 40 people each) merely demonstrates that Lim Sat is poor at math (10 x 30 equals 300, not 3,000).<sup>1168</sup> His arithmetic error does not undermine the credibility of his recollections as to the number of trucks and number of people aboard, which he observed at close range.<sup>1169</sup>

288. The Chamber carefully assessed the range of estimates of the number of Lon Nol soldiers and officials aboard the trucks. It contrasted Sum Alat's evidence that there were 50 to 60 people on each truck with the lower estimates from Lim Sat (30), Un Pon (25 to 30), Chak Muli (30)

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<sup>1162</sup> Judgment, fn. 2124.

<sup>1163</sup> Judgment, fn. 2124.

<sup>1164</sup> Judgment, para. 676, fn. 2122.

<sup>1165</sup> Judgment, para. 676.

<sup>1166</sup> NC Appeal, para. 464, fn. 1228.

<sup>1167</sup> See, e.g., **E3/4601** Lim Sat Interview Record, ENG 00412158 (he was stationed along the road in Kandieng district; his unit was responsible for waiting for radio orders from Tuol Po Chrey to dispatch two trucks; the remaining trucks were banned from entering Tuol Po Chrey until a new command was issued; he was stationed about ten kilometers from Tuol Po Chrey); **E1/187.1** Lim Sat, T. 2 May 2013, pp. 24-25 (during the course of transporting the soldiers and the police, he was stationed three kilometres from the provincial town-hall and 10 kilometres from Tuol Po Chrey; he saw two trucks allowed to leave at a time), 26 (people at the Tuol Po Chrey fort communicated through radio for more truckloads of soldiers and police to be transported there).

<sup>1168</sup> NC Appeal, fn. 1228. Khieu Samphan also complains that "no one seemed to question" this claim even though it was out of proportion (see KS Appeal, 430).

<sup>1169</sup> Lim Sat did not make any attempt to mislead the Chamber about his uncertainty of the estimated figure. He explained that he did not study arithmetic or computing (see **E1/187.1** Lim Sat, T. 2 May 2013, pp. 71-73, 84-85).

and Siem Soeum (40).<sup>1170</sup> It again took a conservative approach, choosing the lowest compatible number among the accounts to find that each truck carried at least 25 people to Tuol Po Chrey.<sup>1171</sup>

289. Lack of physical or documentary evidence: Nuon Chea suggests the CIJ investigation was inadequate because investigators failed to find a list of victims, but the evidence indicates that no such list was kept.<sup>1172</sup> He also suggests that, despite indications that the integrity of the site has been compromised, the CIJ should have attempted to retrieve dead bodies.<sup>1173</sup> Under international law, a chamber can infer a death circumstantially using the “only reasonable inference” test.<sup>1174</sup> The Chamber correctly applied this legal standard to the evidence and found that the only reasonable inference to be drawn was that 250 Lon Nol officials were killed at Tuol Po Chrey.<sup>1175</sup>

290. Alleged contradictions: Nuon Chea alleges the evidence shows that the number killed at Tuol Po Chrey was considerably less than 250.<sup>1176</sup> He mischaracterises what the CIJ investigators reported when they visited the Pursat provincial compound accompanied by Ung Chhat, who told them that 200 people attended the meeting in the hall. The investigators viewed the site and found it plausible that the area could hold 200 soldiers, but they did not place an upper limit on the number of people the area could contain.<sup>1177</sup> Secondly, Nuon Chea refers to Ung Chhat’s estimate that 200 people attended the meeting,<sup>1178</sup> but this was based solely on his personal assessment of the hall’s capacity.<sup>1179</sup> In contrast, Sum Alat attended the meeting and

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<sup>1170</sup> Judgment, fn. 2125.

<sup>1171</sup> Judgment, para. 676.

<sup>1172</sup> *Contra* NC Appeal, para. 465. See **E1/218.1** Sum Alat, T. 4 July 2013, p. 83 (when asked if somebody kept a list of all the people present on the second day at the provincial town-hall, he responded, “It isn’t possible.”).

<sup>1173</sup> **E3/4599** OCIJ Site Identification Report – Tuol Pochrey, pp. 2-3, 5-7, 19-22, ENG 00294306-07, 000294309-11, 00294323-26 (disposal of bodies after April 1975 would make it difficult to determine whether corpses were Lon Nol officials executed in April 1975 or others killed thereafter; after the 1979 liberation, looters unearthed remains at the site; animals, farming and development likely further disrupted remains).

<sup>1174</sup> Judgment, para. 413; *Kvočka* AJ, paras 260-261, favourably citing the *Krnojelac* TJ, paras 326-327.

<sup>1175</sup> Judgment, paras 678-681.

<sup>1176</sup> NC Appeal, para. 466.

<sup>1177</sup> **E3/4599** OCIJ Site Identification Report, Tuol Pochrey, pp. 9-10, ENG 00294313-14. *Contra* NC Appeal, para. 466 (“The CIJs’ own investigators concluded that the town hall ... could hold no more than 200 people”).

<sup>1178</sup> NC Appeal, para. 466.

<sup>1179</sup> **E1/185.1** Ung Chhat, T. 29 April 2013, p. 83; **E1/186.1** Ung Chhat, T. 30 April 2013, p. 61. Ung Chhat testified that the closed door prevented him from seeing inside the hall during the meeting, and people also entered the hall from another gate (see **E1/186.1** Ung Chhat, T. 30 April 2013, pp. 35 (he was positioned at the front gate and normally the leaders came from the back gate), 58 (other people could have entered the provincial town-hall through the other gate), 65-66 (the door was closed; they could not see or hear anything from outside), 68).

estimated that 500 people were in the hall.<sup>1180</sup> His subsequent testimony that 50-60 people were unable to fit on the trucks<sup>1181</sup> still allows that, at a minimum, 250 people were transported and executed. The Chamber's finding is compatible with his account.<sup>1182</sup>

291. In spite of some indications that victims at Tuol Po Chrey numbered in the thousands,<sup>1183</sup> the Chamber cautiously assessed the evidence before it and demonstrated conservative restraint in finding that at least 250 Lon Nol officials were killed there.<sup>1184</sup> Neither Appellant has demonstrated anything "wholly erroneous" about the Chamber's cautious approach.<sup>1185</sup>

### XIII. STRUCTURE OF THE CPK

#### A. The Chamber rightly assessed the operative authority structure of the CPK (NC Grounds 37-39)<sup>1186</sup>

292. Contrary to Nuon Chea's assertion,<sup>1187</sup> the Chamber adequately substantiated its findings regarding the hierarchical structure of the CPK.<sup>1188</sup>

##### *i. The Chamber reasonably assessed the role of Zone leaders*

293. Nuon Chea accuses the Chamber of "unreasonably downplay[ing] the authority of zone leaders who were themselves members of the Standing Committee."<sup>1189</sup> The Chamber did no such thing. It recognised that some Zone Leaders were also members of the Standing Committee, for example observing that "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."<sup>1190</sup>

294. The Chamber also correctly found that only two Zone Secretaries (Ta Mok and Sao Phim)

<sup>1180</sup> E1/218.1 Sum Alat, T. 4 July 2013, pp. 14-17, 28, 76-77, 82-83.

<sup>1181</sup> E1/218.1 Sum Alat, T. 4 July 2013, pp. 32.

<sup>1182</sup> See Judgment, paras 667, 669 and fn. 2098.

<sup>1183</sup> Judgment, paras 659, 669 and fn. 2136.

<sup>1184</sup> Judgment, para. 681. *Contra* KS Appeal, paras 429, 433.

<sup>1185</sup> Duch AJ, para. 17, citing Kupreškic AJ, para. 30.

<sup>1186</sup> While Nuon Chea entitled this section of his brief Grounds 37-39, his arguments have nothing to say about Grounds 38 and 39 of his Notice.

<sup>1187</sup> NC Appeal, paras 225-227.

<sup>1188</sup> Judgment, paras 148-151 (the first movement of population), 576-578 (the second movement of population), 659-660 (Tuol Po Chrey).

<sup>1189</sup> NC Appeal, paras 229-231.

<sup>1190</sup> Judgment, para. 859 (emphasis added).

were members of the Standing Committee during the relevant period of the DK regime.<sup>1191</sup> In that capacity, Sao Phim and Ta Mok participated in the process by which the Standing Committee made collective decisions.<sup>1192</sup> In their capacity as Zone Secretaries, however, they were responsible for the implementation of those decisions and were subordinate to the Party Centre under the organisational structure established by the CPK Statute<sup>1193</sup> and Standing Committee.<sup>1194</sup>

295. Nuon Chea cannot credibly assert that because individual Zone leaders were members of the Standing or Central Committee, they were allowed to operate autonomously in deciding whether and how to implement Party policy in their regions. No credible evidence exists supporting such an interpretation of the CPK authority structure. To the contrary, the CPK Statute prohibited any “independentism, liberalism [or] sectarianism.”<sup>1195</sup> Nuon Chea himself testified that power in the CPK was “not invested in individuals.”<sup>1196</sup> The Chamber was thus correct to reject the Defence argument that Zone Secretaries acted autonomously.<sup>1197</sup>

*ii. The Chamber accurately portrayed the evidence of instructions issued by the Party Centre*

296. The Chamber correctly characterised the evidence of instructions issued by the Party Centre, which were neither “rare” nor “limited in scope and substance”.<sup>1198</sup> Nuon Chea first mischaracterises the evidence relied on by the Chamber, stating it relied “solely” on the testimony of telegram encoder Norng Sophang for the finding that “the Party Center sent out general directives to the lower echelons by telegraph dealing with ‘all aspects of the

<sup>1191</sup> Judgment, paras 203, 219. Nuon Chea misrepresents both the Judgment and Ben Kiernan’s book in asserting that Ros Nhim was also a member of the Standing Committee (NC Appeal, para. 230, fn. 633), as both sources state that Nhim was only a member of the Central Committee.

<sup>1192</sup> Judgment, paras 223-224.

<sup>1193</sup> **E3/130** CPK Statute, Article 7.1 (“highest operational unit throughout the country is the Central Committee”), Article 19.4, Article 23.2 (responsibility of Central Committee to “Instruct all Zone and Sector-City organizations”); **E1/54.1** Duch, T. 27 March 2012, pp. 85-86 (“secretary of all Zones across the country were members of the Central Committee and they were under the order of the secretary and the first deputy secretary of the Central Committee”).

<sup>1194</sup> **E3/182** Standing Committee Minutes, 9 October 1975, ENG 00183394-96 (“In bringing up projects, we must ask the Standing Committee’s opinion so it may decide and approve... Working in each individual sector without asking the Standing Committee. This is a mistake. ...The Standing Committee monitors each section’s implementation of the line”); **E3/557** Khieu Samphan Interview Record, ENG 00153269 (“all the important decisions were taken by the Standing Committee which was the supreme organ”).

<sup>1195</sup> **E3/130** CPK Statute, ENG 00184025 (Fundamental Principles, para. 6); ENG 00184033 (Article 4.2: “opposing the Party political line” punishable as treason against the Party).

<sup>1196</sup> **E3/558** Nuon Chea Interview Record, ENG 00148699.

<sup>1197</sup> Judgment, paras 223, 274, 280, 859.

<sup>1198</sup> *Contra* NC Appeal, paras 232-236.

country.”<sup>1199</sup> While that testimony alone is sufficient, the Chamber cited additional evidence in the very same footnote.<sup>1200</sup> Nuon Chea also overlooks that the CPK’s hierarchical communication structure, in which information was reported up through the Zones to the Centre and instructions disseminated down from the Centre to the lower echelons, is evidenced by the Party Statute,<sup>1201</sup> Standing Committee minutes<sup>1202</sup> and the CPK publication *Revolutionary Flag*.<sup>1203</sup>

297. Nuon Chea cites testimony of Norng Sophang regarding the frequency and specific subjects of outgoing telegrams, but ignores that this witness did not have knowledge of all telegrams sent by the Party Centre because his unit was only tasked with decoding less sensitive telegrams.<sup>1204</sup> This witness also testified that communications on “strictly confidential” matters, such as enemies accused of treason, were often done in person rather than by telegram.<sup>1205</sup> Nuon Chea’s assertion that instructions from the Party Centre were “rare” fails to account whatsoever for the other means by which such instructions were communicated, such as: meetings between the Party Centre and Zone or Autonomous Sectors leaders;<sup>1206</sup> Zone Congresses attended by Pol Pot

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<sup>1199</sup> NC Appeal, para. 233.

<sup>1200</sup> Judgment, fn. 880. The other sources cited included a telegram from Office 870 instructing the recipient to monitor enemy activities in a certain area; testimony from Suon Kanil, chief of the North Zone telegram unit, confirming that “most” of the telegrams received from the Centre were “directives”, and the Interview Record of Pon Ol, a Central Zone telegram operator, who described receiving “four to five messages per day” that “mostly were from the upper echelon (870).”

<sup>1201</sup> **E3/130** CPK Statute, Article 19.4 (responsibility of Zone Committee to maintain a “system of reporting to the Central Committee on the situation and work of the Zone”), Article 23.2 (responsibility of Central Committee to “Instruct all Zone and Sector-City organizations”).

<sup>1202</sup> **E3/182** Standing Committee Minutes, 9 October 1975, ENG 00183394-95; **E3/232** Standing Committee Minutes, 8 March 1976, ENG 00182634 (“It is proposed that a report ... be sent to the Standing Committee every week. The report should either present a general description of the situation, or where necessary, provide details on each aspect. It is proposed that a brief report be sent by telegram to keep the Standing Committee informed of the situation and enable it to issue timely instructions”).

<sup>1203</sup> **E3/783** *Revolutionary Flag*, September - October 1972, ENG 00720229-30 (“In order for us and the senior levels to take hold of a situation clearly and to provide practical instructions, we must report in clear terms ... Clear and regular reports to the upper levels help them grasp and master the situations resulting in direct and timely advice”).

<sup>1204</sup> **E1/117.1** Norng Sophang, T. 29 August 2012, pp. 71-73.

<sup>1205</sup> **E1/120.1** Norng Sophang, T. 3 September 2012, 16-18; **E3/64** Norng Sophang Interview Record, ENG 00334053.

<sup>1206</sup> See, e.g., **E3/367** Sao Sarun Interview Record, ENG 00278695-96 (describing meetings with Pol Pot, Nuon Chea, Khieu Samphan and Son Sen at which he reported on his Sector and received directions); **E1/83.1** Sao Sarun, T. 7 June 2012, pp. 55-58; **E1/84.1** Sao Sarun, T. 11 June 2012, pp. 5-8 (“Q: when you returned to Mondulkiri after your meetings with the leaders in Phnom Penh, were you expected to implement the instructions that you had received from them? A. Yes.”); **E3/2782** Ke Pauk Interview, ENG 00089710-11 (describing orders given to him and to Koy Thuon between 1972 and 1974), ENG 00089713 (describing 1977 meeting with Nuon Chea and Pol Pot at which he was provided a list of the Zone cadres to be purged); **E3/4017** Khieu Samphan Statement, ENG 00793527 (Nuon Chea instruction to Ros Nhim to stop 1967 Samlaut rebellion).

or Nuon Chea;<sup>1207</sup> written directives or circulars from Office 870 and the Central Committee;<sup>1208</sup> and the monthly Revolutionary Flag publication.<sup>1209</sup>

298. While Nuon Chea challenges the Chamber's finding regarding his role in communications with the Zones,<sup>1210</sup> he concedes that the witnesses relied upon by the Chamber testified that letters and telegrams were sent by him,<sup>1211</sup> and that he regularly met in person with Zone leaders.<sup>1212</sup> Nuon Chea disputes the Chamber's finding that "[m]essages from the Zones also contained requests for instructions, guidance...or material assistance from the Party Centre," but acknowledges at least seven telegrams cited in the Judgment that support that conclusion.<sup>1213</sup> The documents in evidence contain even more such telegrams.<sup>1214</sup> In any event, the exact number of telegrams that expressly requested instructions is of little moment, as the underlying purpose of all such reporting was so that the Centre knew the "situation" in the Zones and could provide "timely instructions."<sup>1215</sup>

299. Nuon Chea fails to provide any rational reason why the Chamber was not entitled to rely on

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<sup>1207</sup> **E3/193** *Revolutionary Flag*, August 1977, ENG 00399222 (speech of Party Centre representative at West Zone Cadre Conference regarding "the instructions of the Party on a number of important matters for implementation in the second semester of 1977"); **E1/63.1** Saut Toeung, T. 18 April 2012, pp. 76-78; **E3/80** Meas Voeun Interview Record, ENG 00491657.

<sup>1208</sup> See, e.g., **E3/740** Central Committee Directive, 11 July 1977; **E3/1734** Instruction of Office 870, 3 January 1978; **E3/764** Guidance of Central Committee on Party Policy, 20 June 1978; **E3/1173**, Instructions from Office 870, 27 February 1976.

<sup>1209</sup> Judgment, paras 261-266. See, e.g., **E3/742** *Revolutionary Flag*, April 1977 (instructions on implementation of Party's 1977 Plan); **E3/193** *Revolutionary Flag*, August 1977, ENG 00399246 ("every leadership echelon in the Party concentrate on examining, discussing, and studying this presentation conscientiously in order to take it for implementation in their respective Zones").

<sup>1210</sup> NC Appeal, para. 234, *citing* Judgment, para. 280 ("[o]fficials at the Zone or Autonomous Sector level also received letters from Office 870 and from individual CPK leaders, including Nuon Chea").

<sup>1211</sup> NC Appeal, para. 234, fn. 648, acknowledging testimony of Sector 105 cadre Kham Phan that his father (Sector chief Laing) "occasionally" received letters from Nuon Chea and Khieu Samphan (**E1/151.1**, pp. 97-98) and testimony of messenger Tha Sot that he delivered letters from Nuon Chea to various Zone leaders (**E3/464** ENG 00226112-13). See also **E1/151.1**, Kham Phan, T. 11 December 2012, pp. 105-107 (instructions from Nuon Chea on security matters and enemies); **E3/58** Kham Phan Interview Record, ENG 00250089; **E3/383** Sao Sarun Interview Record, ENG 00350263 (telegrams sent to Office 870 responded to with "instructions" from Nuon Chea or Pol Pot); **E3/1192** Telegram from Sector 105 Secretary Laing to Brother Nuon, 12 October 1976 (confirming Laing received telegram from Nuon Chea); **E3/1194** Telegram, 19 October 1976 (telegram to Brother Nuon from Sector 105 Secretary Laing *alias* Chhan confirming receipt of instructions on 4-year Plan).

<sup>1212</sup> NC Appeal, para. 234, fn. 648.

<sup>1213</sup> NC Appeal, para. 235, *citing* Judgment, para. 278.

<sup>1214</sup> See, e.g., **E3/956** Telegram from West Zone (M-401), 25 June 1977; **E3/570** Telegram from Nhim, 12 August 1977 ("It is up to Angkar to decide on this matter"); **E3/1119** Telegram from Nhim, 20 October 1977 ("I would like to seek approval from Angkar"); **E3/1009** Telegram from Ke Pauk, 18 April 1978; **E3/950** Telegram from Nhim, 11 May 1978. See also **E3/1194** Telegram to Brother Nuon, 19 October 1976 (referencing to receipt of telegram with instructions).

<sup>1215</sup> **E3/232** Standing Committee Minutes, 8 March 1976, ENG 00182634; **E3/783** *Revolutionary Flag*, September - October 1972, ENG 00720229-30.

the 17 May 1978 report from Ros Nhim that sought instructions from the Centre (“Angkar 870”) on what to do with “Yuons with Khmer spouses and the half breed [Khmer-Yuon],”<sup>1216</sup> He erroneously asserts that there is only one such communication from Nhim,<sup>1217</sup> when in fact there are five telegrams or reports in which Nhim requests instructions from the Centre,<sup>1218</sup> and numerous others evidencing their subordinate relationship.<sup>1219</sup>

*iii. The Chamber’s findings regarding the hierarchical power structure of Democratic Kampuchea were reasonable*

300. Nuon Chea’s remaining arguments regarding the Structure of the CPK similarly fail to establish any error that would invalidate the Judgment. Nuon Chea makes the specious argument that evidence of the Party Centre arresting and killing Zone cadres proves that the Zones were attacking the Party Centre.<sup>1220</sup> He asserts it is “uncontroverted” that there was “outright warfare” between competing factions of the CPK,<sup>1221</sup> when in fact there is no credible evidence of any such conflict during the relevant time period.<sup>1222</sup> He criticises the investigation for not including a “publicly available document” in the Case File,<sup>1223</sup> but fails to explain why he did not put that document before the Chamber until 24 July 2014, and then only in relation to Case 002/02.<sup>1224</sup>

<sup>1216</sup> **E3/863** Report from Nhim to Angkar 870, 17 May 1978, ENG 00321962. NC Appeal para 236. Nuon Chea’s attempt to question the authenticity of this report post-trial, by testifying in his appeal brief that “he does not recall having seen” it, is entirely improper. The new witness who purportedly shows Nhim was in “outright armed conflict” with the Centre at the time of his report, in fact testified that Nhim was not plotting against the Centre and only realised “Nuon Chea had betrayed us” shortly before his arrest. **F2/4.1.1** SCW-5 Interview Record, at A33, A35.

<sup>1217</sup> NC Appeal, para. 235.

<sup>1218</sup> See also **E3/570** Telegram from Nhim to Angkar 870, 12 August 1977; **E3/1119** Telegram from Nhim to Angkar 870, 20 October 1977; **E3/910** Telegram from Nhim to Angkar 870, 24 December 1977; **E3/950** Report from Nhim to Angkar 870, 11 May 1978.

<sup>1219</sup> See **E3/1013** Telegram from Nhim to Office 870, 10 March 1976; **E3/179** Report from M-560, 29 May 1977; **E3/1179** Report from M-560, 8 June 1977; **E3/883** Telegram from Nhim to Angkar 870, 27 August 1977; **E3/1208** Telegram from Nhim to Angkar 870, 21 December 1977.

<sup>1220</sup> NC Appeal, para. 239.

<sup>1221</sup> NC Appeal, paras 228, 239-240.

<sup>1222</sup> It is clear that Nuon Chea bases these assertions on confessions extracted by torture at S-21, which is why he later asks this Chamber to be allowed to use such evidence (NC Appeal, para. 706-722). The Chamber was also correct to dismiss as not credible self-serving assertions by CPK leaders that sought to deflect blame from themselves, such as the statement of Ieng Sary cited by Nuon Chea (NC Appeal, para. 238).

<sup>1223</sup> NC Appeal, para. 241 (referring to **E307/5.2.1** Geng Biao’s Report). This document has not been admitted in Case 002/01, and in any case would be entitled to little weight. It is a publication in an English journal of a document supposedly obtained by “Taiwanese intelligence sources,” without even a copy of the original Chinese document. It purports to be an internal assessment of the Khmer Rouge regime by a member of the Chinese Politburo, but contains no references identifying its sources of information and presents patently incorrect facts (e.g. that Phnom Penh was liberated in “May 1975”).

<sup>1224</sup> **E307/5** [Nuon Chea] Initial Document List for Case 002/02, 24 July 2014.



301. In regards to cadres at other levels having some degree of decision-making authority, such evidence is not incongruent with the findings of the Chamber, and is normal in any large organization. What was extraordinary about DK was the explicit delegation of authority to commit crimes. Nuon Chea's argument that executions were ordered at levels below the Party Centre overlooks that the Central Committee expressly gave to the Zone Committees and General Staff the "right to smash inside and outside the ranks."<sup>1225</sup> Nuon Chea and Khieu Samphan now complain about being held responsible for killings by subordinates, but they were part of the leadership that gave subordinates the authority to commit those crimes.

**B. Khieu Samphan fails to show an error in the Chamber's findings regarding the CPK Structure (paras 120-149, 171-173, 343-350, 497-501)**

*i. The powers of the Central Committee*

302. Khieu Samphan alleges that the Chamber committed an error of fact invalidating the verdict in finding that the Central Committee had various powers,<sup>1226</sup> but fails to demonstrate an error. There is no inherent conflict between the Standing Committee having "effective control over the CPK", and the Central Committee having authority to "analyse the implementation of the Party's policies, to correct abuses and to issue directives."<sup>1227</sup> The evidence demonstrates that the Central Committee issued decisions and instructions on a several issues, such as the dissolution of the GRUNK/FUNK and creation of the DK Government; the designation of levels of power invested with the right to smash inside and outside the ranks; the reporting regime;<sup>1228</sup> the appropriate use of the terms "Angkar" and "Party";<sup>1229</sup> and the revised policy on the re-education and elimination of Party enemies, including supposed CIA, KGB and Vietnamese spies.<sup>1230</sup>

303. Khieu Samphan argues that the Chamber's interpretation of his own statements recognising the powers of the Central Committee were a "biased misrepresentation".<sup>1231</sup> His submissions are unconvincing, as they hinge on his unsubstantiated claim that there is a relevant difference between "discussion" and "analysis" of implementation of policies and his claim in this appeal

<sup>1225</sup> E3/12 Decision of the Central Committee, 30 March 1976, ENG 00182809.

<sup>1226</sup> KS Appeal para. 120.

<sup>1227</sup> KS Appeal, paras 120-121.

<sup>1228</sup> E3/12 Decision of the Central Committee, 30 March 1976, ENG 00182809-10, 13-14.

<sup>1229</sup> E3/740 CPK Central Committee Directive on the Use of the terms "Angkar" and "Party", 11 July 1977.

<sup>1230</sup> E3/763 and E3/764 CPK Directives entitled "Guidance of the Central Committee of the CPK on the Party's Policy towards Mised Persons who have joined the CIA, served as Yuon agents, or joined the KGB and opposed the Party, Revolution, People and Democratic Kampuchea," 20 June 1978, ENG 00275217-20.

<sup>1231</sup> KS Appeal, para. 122.

that when Khieu Samphan's admitted that "[d]irectives were given" by the Central Committee,<sup>1232</sup> these really were "more in the nature of recommendations".<sup>1233</sup> Such a reading is unsubstantiated and contrary to the strict hierarchical nature of the CPK.

304. Khieu Samphan cites Standing Committee meeting minutes and the testimony of Philip Short,<sup>1234</sup> but these in fact support the holding that the Central Committee had decision-making authority. The Standing Committee minutes record Pol Pot recognising that the decision as to what to do with Sihanouk was "major" and therefore should be "left for our Centre to decide".<sup>1235</sup> The latter affirms that Central Committee meetings were "partly work conferences."<sup>1236</sup> To the extent that the Chamber relied on references to the "Party" or "Party Centre" to ascribe actions to the Central Committee,<sup>1237</sup> this is either corroborative of other evidence, and/or is a reasonable interpretation of the evidence by the Chamber.

305. Moreover, Khieu Samphan's liability does not hinge exclusively on his relationship to the Central Committee. The Chamber also found that "Khieu Samphan actively participated in some Standing Committee meetings"<sup>1238</sup> and held various other roles before and during the DK period.<sup>1239</sup> Khieu Samphan's failure to appreciate this aspect of the Judgment also undermines his arguments contesting whether the 30 March 1976 "Decision of the Central Committee Regarding a Number of Matters"<sup>1240</sup> was actually a decision of the Central Committee, rather than the Standing Committee.<sup>1241</sup> Regardless, whether to admit evidence and what weight to give that evidence is firmly within the purview of the Chamber, which need not explain every decision it makes on the evaluation of evidence. Khieu Samphan's belated arguments that the document is inauthentic or should have been given little weight are therefore unpersuasive, particularly considering that in addition to the document itself, the Chamber had before it expert testimony that the Central Committee decision was both authentic and a document actually

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<sup>1232</sup> **E3/18** Khieu Samphan, *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, pp. 58-59, ENG 00103752.

<sup>1233</sup> KS Appeal, para. 122.

<sup>1234</sup> KS Appeal, para. 123.

<sup>1235</sup> **E3/197** Standing Committee Minutes, ENG 00182640.

<sup>1236</sup> **E1/189.1** Philip Short, T. 6 May 2013, p. 61.

<sup>1237</sup> KS Appeal, para. 124.

<sup>1238</sup> Judgment, para. 387.

<sup>1239</sup> Judgment, Sections 8.1.3-8.4.

<sup>1240</sup> **E3/12** Decision of Central Committee, 30 March 1976.

<sup>1241</sup> KS Appeal, paras 497-501.

recording decisions made by the Central Committee.<sup>1242</sup> Compounding his errors in this regard, Khieu Samphan confuses the “beyond a reasonable doubt” standard of proof with the standard for admission of evidence,<sup>1243</sup> which is within the discretion of the Chamber.

*ii. Democratic centralism*

306. Khieu Samphan offers his own definition of “democratic centralism” without any citation to the Judgment findings or evidence. He claims that the “democratic” prong of democratic centralism required the election of “each hierarchical level by the level immediately below,”<sup>1244</sup> a fundamental misunderstanding of the principle.<sup>1245</sup> In reality, the principle meant that “decisions would be made democratically, that is collectively rather than individually.”<sup>1246</sup> Khieu Samphan argues that the Chamber failed to properly consider the minutes of the Standing Committee meeting of 11 March 1976<sup>1247</sup> but these only serve to confirm the application of democratic centralism. They state that Pol Pot “outlined the principle ideas *on which the entire Standing Committee had already agreed*”.<sup>1248</sup>

*iii. “Party Centre” and “Angkar”*

307. Contrary to Khieu Samphan’s assertion,<sup>1249</sup> the Chamber did not define the terms “Angkar” and “Party Centre” with a precision unwarranted by the evidence. The Chamber described these terms, respectively, as “nebulous” and “vague and obfuscatory”.<sup>1250</sup> The Chamber appropriately assigned the term “Party Centre” the broadest possible meaning: the entire upper echelon of the CPK,<sup>1251</sup> and declined to place a precise definition on “Angkar.”<sup>1252</sup> Khieu Samphan is mistaken in alleging that elsewhere in the Judgment the Chamber gave a broader definition to the term “Angkar”. In the paragraphs of the Judgment cited by Khieu Samphan the Chamber’s discussion

<sup>1242</sup> E1/91.1 David Chandler, T. 18 July 2012, p. 28.

<sup>1243</sup> KS Appeal, para. 501.

<sup>1244</sup> KS Appeal, para. 128.

<sup>1245</sup> Khieu Samphan also misunderstands the import of the quote from Nuon Chea in paragraph 131 of his appeal brief. That quote demonstrates the “centralism” prong, whereby lower echelons would receive instructions from higher echelons. Judgment, para. 223.

<sup>1246</sup> Judgment, para. 223.

<sup>1247</sup> KS Appeal, para. 135.

<sup>1248</sup> E3/197 Standing Committee Minutes, 11 March 1976, ENG 00182640 (emphasis added).

<sup>1249</sup> KS Appeal, para. 139.

<sup>1250</sup> Judgment, paras 205, 221.

<sup>1251</sup> Judgment, para. 205.

<sup>1252</sup> Judgment, paras 221-222.

accurately reflects that this term was used in evidence before the court such as telegrams,<sup>1253</sup> and testimony,<sup>1254</sup> or to show, for example, that instructions from “Angkar” corroborated instructions of identified members of the Party.<sup>1255</sup>

308. Khieu Samphan fails to demonstrate any error or harm from the Chamber’s usage of these terms. He claims that the Chamber used this term to “connect the Appellant to all the decisions of all of the bodies of Democratic Kampuchea”.<sup>1256</sup> This erroneous allegation is unsupported by any citations to the Judgment. In regard to the term “Angkar”, Khieu Samphan paradoxically complains that he was harmed by the Chamber “opting for a broad definition without greater precision”<sup>1257</sup> – the exact opposite of his argument at the outset that the Chamber used the term “Angkar” “to clearly identify certain individuals or bodies while in fact there is considerable evidence to suggest that the two notions were blurred and confused.”<sup>1258</sup> The portions of the Judgment to which Khieu Samphan cites for the assertion that the Chamber “implicitly included Khieu Samphan” within a vague definition of “Angkar” show no such thing.

*iv. The principle of secrecy*

309. The Chamber amply substantiated that, despite the secrecy of the CPK,<sup>1259</sup> Khieu Samphan had knowledge of the crimes he was found guilty of committing.<sup>1260</sup> The Chamber found Khieu Samphan supported the principle of secrecy and “played a key role in preserving ... continuously denying and hiding the reality of the situation experienced by the Cambodian people” knowing “that, in doing so, he protected perpetrators and allowed the commission of further crimes.”<sup>1261</sup>

*v. Communications*

310. Khieu Samphan challenges the Chamber’s findings on communication between the Centre and the Zones by selectively challenging a tiny portion of the evidence cited by the Chamber in

<sup>1253</sup> Judgment, paras 279-280, 817. The Chamber’s finding that telegrams from the Zones and Autonomous Sectors to the Party Centre were generally addressed to ‘Committee 870’ or ‘Angkar’ is simply an accurate description of how the document was addressed.

<sup>1254</sup> Judgment, paras 608, 670. The Chamber accurately describing Sum Alat’s testimony that the group assembled at the Pursat provincial town hall were told they would be sent to meet “Angkar.”

<sup>1255</sup> Judgment, para. 817.

<sup>1256</sup> KS Appeal, para. 141.

<sup>1257</sup> KS Appeal, paras 141, 143.

<sup>1258</sup> KS Appeal, para. 139.

<sup>1259</sup> Judgment, para. 199.

<sup>1260</sup> Judgment, paras 944-959.

<sup>1261</sup> Judgment, para. 945.

that regard (and perforce an even smaller portion of the total evidence on the Case File), and then merely offering alternative, speculative interpretations of that evidence.<sup>1262</sup> Khieu Samphan attacks the Chamber's citation to two Revolutionary Flag magazines that he claims the Chamber used "to conclude that 'Party Centre' communicated easily with the zones".<sup>1263</sup> Reference to the two Judgment paragraphs to which Khieu Samphan cites, however, shows no such use. Paragraph 274, does not reference the magazines at all, and the second, paragraph 275, simply accurately quotes the contents of the magazine directing Zones to provide precise and regular reports.<sup>1264</sup> Even if Khieu Samphan had effectively discredited the value of these two magazines, which he emphatically has not, it would not undermine the Chamber's reasonable findings based on a plethora of evidence regarding both the communications between the Zones and the Party Centre, and Khieu Samphan's knowledge of events in Democratic Kampuchea before and after 1975.<sup>1265</sup>

*vi. Military Structure at the time of the forced expulsion of Phnom Penh*

311. In challenging the Chamber's assessment of military structure and hierarchy at the time of the Phase I population movement,<sup>1266</sup> Khieu Samphan complains that the Chamber used a variety of terms to refer to Khmer Rouge fighters.<sup>1267</sup> He does not, however, explain why any of the terms used could be considered inaccurate or why the use of a variety of terms constitutes error.<sup>1268</sup> He also objects to the Chamber's characterisation of the forces involved in the evacuation of Phnom Penh as belonging to the RAK, as he correctly points out that the RAK was only formally named in July of 1975.<sup>1269</sup> A review of the Judgment as a whole, however, demonstrates that the Chamber correctly understood the military structure and hierarchy as it

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<sup>1262</sup> KS Appeal, para. 172 ("[a] different finding could certainly be made"). See also KS Appeal, paras 492-494. Khieu Samphan merely disagrees with the Chamber's finding regarding the distribution and content of the magazines, provides his own alternative to the evidence and does not demonstrate how the alleged error could invalidate the Judgment or occasion a miscarriage of justice.

<sup>1263</sup> KS Appeal, para. 172, fn. 374.

<sup>1264</sup> Judgment, para. 275.

<sup>1265</sup> Contrary to his assertions, Khieu Samphan fails to show the Chamber relied on these magazines in relation to his awareness of crimes. See KS Appeal, fn. 379.

<sup>1266</sup> KS Appeal, paras 343-350.

<sup>1267</sup> KS Appeal, para. 345.

<sup>1268</sup> He also alleges that the use of multiple terms somehow demonstrates bias, but does not say how he reaches that surprising conclusion. KS Appeal, para. 345.

<sup>1269</sup> KS Appeal, para. 346.

existed in April 1975.<sup>1270</sup> Khieu Samphan also faults the Chamber’s use of former Khmer Rouge fighters’ testimony,<sup>1271</sup> but he misunderstands or misrepresents the importance of that testimony in the Chamber’s finding that the expulsion was carried out in a “consistent” manner.<sup>1272</sup> It is clear from a fair reading of the Judgment as a whole that this finding<sup>1273</sup> relies on far more than just the testimony of these cadre. Rather, it relies on the massive body of evidence cited in support of paragraph 460 through – at least – paragraph 484 of the Judgment.<sup>1274</sup> The consistency of the evacuation in various parts of the city is demonstrated primarily by evidence of the victims, whether they are giving consistent accounts of being told of an imminent airstrike<sup>1275</sup> or of being threatened with death if they did not leave.<sup>1276</sup> Changing the mix of fighters who testified would not have changed the Chamber’s conclusion as to the consistency of the evacuation. Finally, Khieu Samphan has failed to articulate any prejudice from these alleged errors.

#### XIV. JOINT CRIMINAL ENTERPRISE

##### A. The Chamber correctly found that JCE liability existed in 1975 (NC Ground 198)

312. Contrary to Nuon Chea’s submissions,<sup>1277</sup> JCE has been well established as a mode of liability in international criminal law since World War II.<sup>1278</sup> This is demonstrated not just by post-World War II cases (including,<sup>1279</sup> but not limited to,<sup>1280</sup> those analysed in *Tadić*); but also

<sup>1270</sup> See Judgment, para. 93 (the CPK later adopted January 1968 as the founding date of the RAK citing, *inter alia*, E3/131 Article by Nuon Chea: *Past Struggle of Our Kampuchean Peasants from 1954 to 1970*, p. 18, ENG 00716426 (“On 17 January 1968, an armed attack occurred at Bay Damram Battambang. ... That is why we decided to adopt 17 January as our army’s date of birth.”); E1/21.1 Nuon Chea, T. 13 December 2011 (“To the best of my recollection, the founding date of the Revolutionary Army of Kampuchea was on the 12th of January 1968. It was the founding date of revolutionary movement.”); para. 133 (military leaders attending June 1974 meeting with the Appellants); para. 146 (military commanders attending early April 1975 meeting with the Appellants); para. 240 (at the time of the takeover of Phnom Penh, CPK military forces had been fighting under the banner of the CPNLF).

<sup>1271</sup> KS Appeal, paras 347-350.

<sup>1272</sup> KS Appeal, para. 347. See Judgment, para. 151.

<sup>1273</sup> Judgment, para. 151.

<sup>1274</sup> Judgment, fns 1357-1442.

<sup>1275</sup> Judgment, para. 468 and fn. 1379.

<sup>1276</sup> Judgment, para. 474 and fn. 1401.

<sup>1277</sup> NC Appeal, paras 484-493.

<sup>1278</sup> *Tadić* AJ, paras 185-229; *Tolimir* AJ, paras 275-287; *Kayishema* AJ, paras 191-193; *Karemera* JCE Decision, paras 12-18; *Karemera* AJ, paras 145-146; *Brima* AJ, paras 72-80; *Ayyash* Applicable Law Decision, paras 237-249.

<sup>1279</sup> *Tadić* AJ, paras 195-220.

<sup>1280</sup> *Trial of Heinz Eck and Four Others*, British Military Court for the Trial of War Criminals, Hamburg, Germany, 17-20 October 1945, Law Reports of Trials of War Criminals, Vol. I, pp. 1-21 (1947); *Trial of Alfons Klein and Six Others*, United States Military Commission, Appointed by the Commanding General Western Military District,

by the London Charter of the IMT at Nuremberg;<sup>1281</sup> CCL No. 10;<sup>1282</sup> the unanimous affirmation of the Nuremberg Charter and judgments by the U.N. General Assembly in 1946;<sup>1283</sup> and the authoritative statements of the UN International Law Commission.<sup>1284</sup>

**B. The Chamber applied the correct definition of *mens rea* for JCE (KS paras 68-73)**

313. Contrary to Khieu Samphan's submissions,<sup>1285</sup> the Chamber applied the correct definition of the *mens rea* for JCE in analysing his criminal liability. Khieu Samphan highlights differences in terminology used by the Chamber at different places in the Judgment,<sup>1286</sup> but he does not show that these differences in wording amount to a difference in meaning. More importantly, he fails to show how the Chamber's alleged error, even if found, would invalidate the Judgment. Finally, he misidentifies a section of the Judgment relating to the modes of liability of planning, ordering, and instigating as relating to JCE and attempts to articulate an error based on his own

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Wiesbaden, Germany, 8-15 October 1945, Law Reports of Trials of War Criminals, Vol. I, pp. 46-54 (1947); *Trial of Erich Killinger and Four Others*, British Military Court, Wuppertal, Germany, 26 November-3 December 1945, Law Reports of Trials of War Criminals, Vol. III, pp. 67-75 (1948); *Trial of Karl Buck and Ten Others*, British Military Court for the Trial of War Criminals, Wuppertal, Germany, 15-21 May 1946, Law Reports of Trials of War Criminals, Vol. V, pp. 39-44 (1948); *Trial of Karl Adam Golkel and Thirteen Others*, British Military Court for the Trial of War Criminals, Wuppertal, Germany, 6-10 May 1946, Law Reports of Trials of War Criminals, Vol. V, pp. 45-53 (1948); *Trial of Werner Rohde and Eight Others*, British Military Court for the Trial of War Criminals, Wuppertal, Germany, 29 May-1 June 1946, Law Reports of Trials of War Criminals, Vol. V, pp. 54-59 (1948); *Trial of Josef Altstoetter and Others*, United States Military Tribunal, 17 February - 4 December 1947, Law Reports of Trials of War Criminals, Vol. VI, pp. 1-110 (1948); *Trial of Heinrich Gerike and Seven Others*, British Military Court, Brunswick, 20 March-3 April 1946, Law Reports of Trials of War Criminals, Vol. VII, pp. 76-81 (1948); *Trial of Carl Krauch and Twenty-Two Others*, United States Military Tribunal, Nuremberg, 14 August 1947-29 July 1948, Law Reports of Trials of War Criminals, Vol. X, pp. 1-68 (1949); *Trial of Alfried Felix Alwyn Krupp Von Bohlen Und Halbach and Eleven Others*, United States Military Tribunal, Nuremberg, 17 November 1947-30 June 1948, Law Reports of Trials of War Criminals, Vol. X, pp. 69-181 (1949); *Trial of Max Wielen and Seventeen Others*, British Military Court, Hamburg, Germany, 1 July-3 September 1947, Law Reports of Trials of War Criminals, Vol. XI, pp. 31-52 (1949); *Trial of Hans Renoth and Three Others*, British Military Court for the Trial of War Criminals, Elden, Germany, 8-10 January 1946, Law Reports of Trials of War Criminals, Vol. XI, pp. 76-78 (1949); *Trial of Eberhard Schoengrath and Six Others*, British Military Court for the Trial of War Criminals, Burgsteinfurt, Germany, 7-11 February 1946, Law Reports of Trials of War Criminals, Vol. XI, pp. 83-85 (1949); Control Council Law No. 10 Courts (German District Court) of the British Occupation Zone, StS 11/50, 5 September 1950; StS 356/49, 13 March 1950; StS 31/50, 15 August 1950; StS 156/49, 31 May 1949; StS 130/49, 24 April 1950; StS 287/49, 4 August 1949; StS 177/49, 4 October 1949; StS 256/49, 21 March 1950; StS 256 and 257/49, 21 March 1950; StS 514/49, 11 April 1950. All German District Court convictions were affirmed by the German Supreme Court of the British Occupation Zone.

<sup>1281</sup> Agreement for the Prosecution and Punishment of Major German War Criminals of the European Axis and Charter of the International Military Tribunal, art. 6, 59 Stat. 1544, 82 UNTS 279 ("Nuremberg Charter").

<sup>1282</sup> Control Council Law No. 10, *Official Gazette of the Control Council for Germany* (1946), Vol. III, p. 50.

<sup>1283</sup> Affirmation of the Principles Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), UN GAOR, 1<sup>st</sup> Sess., 11 December 1946, UN Doc A/236 (1946) pt. 2, 1144.

<sup>1284</sup> *Report of the International Law Commission on the Work of its Forty-Eighth Session*, 6 May-26 July 1996, Official Records of the General Assembly, Fifty-First Session, Supplement No. 10, p. 21.

<sup>1285</sup> KS Appeal, paras 68-73.

<sup>1286</sup> KS Appeal, paras 69-70.

misinterpretation.<sup>1287</sup>

**C. The Chamber correctly found that the JCE shared a common purpose (NC Ground 200; KS paras 229-231)**

314. The Chamber reasonably found that “at the latest, by June 1974 until December 1977, there was a plurality of persons who shared a common purpose to “‘implement rapid socialist revolution through a ‘great leap forward’ and defend the Party against internal enemies and external enemies, by whatever means necessary”.<sup>1288</sup> The Chamber further found that while the common purpose was not entirely criminal, the JCE members intended the common purpose to be implemented through the commission of crimes.<sup>1289</sup> Contrary to Khieu Samphan’s contention, the Chamber correctly found that he joined and contributed to a JCE that involved the commission of crimes.<sup>1290</sup>

315. Nuon Chea contends that the Chamber erred by finding that the common purpose was to be achieved by “any means necessary”,<sup>1291</sup> though concedes that “the effect of this error on the outcome of the Judgment is difficult to discern with specificity”.<sup>1292</sup> Nuon Chea’s arguments therefore clearly do not meet the standard of review on appeal.<sup>1293</sup> Further, Nuon Chea did not challenge this issue during the pre-trial or trial proceedings, and he should therefore be precluded from doing so for the first time on appeal.<sup>1294</sup>

316. Both Appellants studiously avoid addressing the *specific* policies the Chamber found the members of the JCE used to achieve their common purpose, and the *specific* crimes that those policies amounted to or involved, which are set out in detail in both the Closing Order and the Judgment.<sup>1295</sup> The Chamber found that the pattern of criminal conduct prior to April 1975 demonstrates that the implementation of the policies was intended to be effectuated through the commission of crimes.<sup>1296</sup> Further, the Chamber found that the “means necessary” agreed upon to effectuate a rapid socialist revolution and defend the Party included the design and

<sup>1287</sup> KS Appeal, para. 71, *referring to* Judgment, para. 944.

<sup>1288</sup> Judgment, para. 777.

<sup>1289</sup> Judgment, paras 778, 804-805, 835-836.

<sup>1290</sup> See Judgment, para. 778. KS Appeal, paras 229-231. See also *infra*, XXI (Khieu Samphan’s criminal liability).

<sup>1291</sup> NC Appeal, para 494-498.

<sup>1292</sup> NC Appeal, para. 498.

<sup>1293</sup> See *supra*, II.B (Standard of Review).

<sup>1294</sup> See *Karemera* AJ, para. 495, *citing Nahimana* AJ, para. 830; *Niyitegeka* AJ, para. 199; *Kayishema* AJ, para. 91.

<sup>1295</sup> Regarding the Population Movement Policy: Closing Order, paras 157, 160-167 and Judgment paras 779-810. Regarding the Targeting Policy: Closing Order paras 157, 205-206, 208-209 and Judgment paras 811-837.

<sup>1296</sup> See Judgment, paras 791-794, 800-805, 830-835.



implementation of the population movement policy (Phases I and II), and the policy of targeting Khmer Republic officials and soldiers. Based on abundant evidence, the Chamber found that these policies contemplated and involved the commission of the crimes of forced transfers, murders, extermination, attacks against human dignity and political persecution.<sup>1297</sup> The Appellants were not convicted simply for being revolutionaries, but rather because they knowingly joined and intentionally contributed to a criminal enterprise.

## **XV. CPK POLICY TO FORCIBLY TRANSFER THE POPULATION**

### **A. The Chamber applied the correct standard in determining that crimes were committed through a JCE during forced population movements (NC Ground 199)**

317. The Chamber correctly set forth the legal standard for JCE, including that there must be a common purpose which amounts to or involves the commission of a crime”.<sup>1298</sup> Contrary to Nuon Chea’s contention,<sup>1299</sup> the Chamber found throughout the Judgment that the evidence proved beyond a reasonable doubt each of the elements necessary under the legal standard for JCE-I. Specifically, the Chamber found that the JCE members shared the common plan to implement a socialist revolution “by whatever means necessary”<sup>1300</sup> and that the means necessary to implement the plan included forcibly transferring the population out of the cities and in between rural areas (Phases I and II).<sup>1301</sup> The Chamber found that both population movements followed a consistent pattern of conduct, involving the commission of crimes, including forced transfers, murders, extermination, attacks against human dignity, and political persecution.<sup>1302</sup>

318. It is apparent that the Chamber considered that the criminal policy to forcibly transfer the population (Phases I and II) formed part of the overall common plan, and that this criminal policy contemplated and involved the commission of crimes. Specifically, the Chamber concluded that both population movements were criminal in nature and had been planned beforehand in order to ensure that the common purpose would be achieved.<sup>1303</sup> Moreover, the

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<sup>1297</sup> Judgment, paras 778, 804, 835.

<sup>1298</sup> Judgment, para. 692, citing *Duch* TJ, para. 508; *Tadić* AJ, para. 227.

<sup>1299</sup> NC Appeal, para. 499.

<sup>1300</sup> Judgment, para. 777.

<sup>1301</sup> Judgment, paras 804-805.

<sup>1302</sup> Judgment, para. 804.

<sup>1303</sup> Judgment, para. 804.

Chamber was satisfied that Nuon Chea not only supported the common plan, “but played a key role in formulating its content”, which included the criminal policy to forcibly transfer the population.<sup>1304</sup> The Chamber further found that the DK leaders’ attack on the civilian population included, *inter alia*, forced transfer, murder and persecution, “carried out in furtherance of, and pursuant to, Party policies and plans to build socialism and defend the country”.<sup>1305</sup>

319. The Chamber found that the evacuation of the urban population from the cities and between rural areas followed a consistent pattern of criminal conduct, which predated the forced transfer of Phnom Penh and continued unabated thereafter.<sup>1306</sup> Indeed, as early as 1972, the policy to forcibly remove the urban population involved the ill-treatment of people taken from enemy territory, and deaths resulting from acts of terror, the conditions of transfer and the use of force.<sup>1307</sup> The Chamber determined that even then, the policy to forcibly move the population involved the commission of these crimes.<sup>1308</sup> The Chamber concluded that Nuon Chea and other senior leaders met before the forced evacuation of Phnom Penh, discussed and reviewed prior experiences of forced transfer, “which formed part of a consistent pattern of conduct beginning before April 1975”, affirmed the decision to forcibly transfer Phnom Penh’s population,<sup>1309</sup> and thereafter decided to move the population between rural areas.<sup>1310</sup>

320. The Chamber found that notwithstanding the fact that the Khmer Rouge’s prior experiences forcibly transferring populations were “characterised by suffering, discriminatory violence against ‘New People’ and Khmer Republic officials, and deaths resulting from the conditions of movement, use of force and acts of terror”, no provision was made to address similar anticipated conditions during the planned transfer of the population during Phases I and II.<sup>1311</sup> Predictably, the population movements (Phases I and II) followed this consistent pattern and involved the same criminal conduct, namely targeting ‘New People’ and forcing people to move under false pretexts with little, if any clean water or accommodation, causing many deaths due to illness, starvation and/or exhaustion.<sup>1312</sup> The Chamber further found that Khmer Rouge soldiers killed

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<sup>1304</sup> Judgment, para. 869.

<sup>1305</sup> Judgment, para. 193.

<sup>1306</sup> Judgment, paras 541, 799, 846, 880-881, 900, 1000-1001, 1024. See also Judgment, paras 104-116.

<sup>1307</sup> Judgment, para. 842.

<sup>1308</sup> Judgment, para. 843.

<sup>1309</sup> Judgment, para. 880. See also Judgment, paras 790, 805, 881.

<sup>1310</sup> Judgment, paras 900, 902, 1000.

<sup>1311</sup> Judgment, paras 648, 880, 947, 956.

<sup>1312</sup> Judgment, paras 794, 803, 805, 851, 881-882, 902.

people or took away victims who were never to be seen again.<sup>1313</sup>

321. Accordingly, it was reasonable for the Chamber to conclude, based on the totality of the evidence, that the CPK policy of population movements contemplated and involved the commission of crimes, including murder, political persecution and other inhumane acts (comprising forced transfers and attacks against human dignity).<sup>1314</sup>

**B. The Chamber correctly found that crimes were committed through a JCE during the evacuation of Phnom Penh (NC Ground 201)**

322. It is apparent from the Judgment that the Chamber found that the agreement to forcibly transfer Phnom Penh's population implied the commission of the crimes of murder, persecution or attacks against human dignity. The Chamber set forth the correct legal standard, namely that the common purpose of the JCE must amount to or involve the commission of crimes.<sup>1315</sup> As demonstrated above, the CPK's criminal policy to forcibly evacuate Phnom Penh formed part of the common criminal plan.<sup>1316</sup> After examining all the evidence, the Chamber reasonably concluded that the CPK population movement policy contemplated and involved the commission of crimes. The Chamber therefore reasonably applied the facts to the correct legal standard.

323. Nuon Chea appears to suggest that the Chamber's finding that it fell to the Zone Secretaries to implement the Party's policies concerning population movements somehow absolves Nuon Chea of responsibility,<sup>1317</sup> as some of the key Zone Secretaries were also members of the Standing Committee.<sup>1318</sup> The Chamber found that the Party Centre, including Nuon Chea, relied on the Zones, whose secretaries were often members of the Central or Standing Committees, to give effect to its policies and decisions.<sup>1319</sup> There is nothing exonerating about a finding that key members of the JCE were also implementers of the policy. In fact, this is the essence of JCE I liability.

*i. Attacks against human dignity*

324. The Chamber reasonably found that Nuon Chea was responsible as a member of the JCE for

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<sup>1313</sup> Judgment, paras 792, 803. See also Judgment, para. 903.

<sup>1314</sup> See, e.g., Judgment, paras 880, 843, 900, 948.

<sup>1315</sup> Judgment, para. 692. See also NC Appeal, para. 499. See also NC Appeal, para. 504.

<sup>1316</sup> See *supra*, XV.A (Policy of forced transfer).

<sup>1317</sup> NC Appeal, para. 505.

<sup>1318</sup> Judgment, para. 859.

<sup>1319</sup> Judgment, para. 859.

crimes committed as part of the CPK policy to forcibly move the populations (Phases I and II).<sup>1320</sup> Contrary to Nuon Chea's suggestion,<sup>1321</sup> the fact that the *Tadić* Appeals Chamber provided an example of how crimes that were not intended as part of a JCE to forcibly transfer persons but were foreseeable could lead to liability under JCE III is inapposite.

325. In the *Tadić* case, murders were not part of the common plan agreed upon, which was limited to forcibly transferring the inhabitants of one village. In the instant case, the Chamber found, based on a well-established pattern of conduct, that murders were contemplated as part of the means of implementing the common purpose.<sup>1322</sup> The DK policy to forcibly remove the population "involved" and "contemplated" these other crimes at the outset, while in *Tadić*, they were found to be merely a foreseeable possibility.

326. Lastly, Nuon Chea's contention<sup>1323</sup> that the Chamber relied only on Witness Sum Chea's testimony to show that killings were used to implement the forcible evacuation of Phnom Penh, simply disregards dozens of other sources cited by the Chamber.<sup>1324</sup> The Chamber reasonably concluded that the CPK policy to move the population out of Phnom Penh contemplated and involved the commission of crimes, including murder.<sup>1325</sup> It was not necessary for the Chamber to find that express orders were given to kill,<sup>1326</sup> as Nuon Chea appears to suggest.<sup>1327</sup> It is well-established that to incur JCE liability, an agreement to commit crimes need not be explicit, but can be inferred from the facts.<sup>1328</sup>

#### *ii. Persecution*

327. Contrary to Appellants' submission,<sup>1329</sup> the Chamber relied on an abundance of evidence throughout the Judgment to find that the CPK population movement policy contemplated and involved the political persecution of the "New People". Indeed, the Chamber found that the rationale behind this policy of forced movement was, *inter alia*, to "identify enemies among the

<sup>1320</sup> See *supra*, XV.A (Policy of forced transfer).

<sup>1321</sup> NC Appeal, para. 508, citing *Tadić* AJ, para. 204.

<sup>1322</sup> See *supra*, XV.A (Policy of forced transfer).

<sup>1323</sup> NC Appeal, para. 510.

<sup>1324</sup> Judgment, paras 474, fns 1402-1404.

<sup>1325</sup> See *supra*, XV.A (Policy of forced transfer).

<sup>1326</sup> See Judgment, para. 692.

<sup>1327</sup> NC Appeal, paras 510-511.

<sup>1328</sup> See, e.g., *Karemera* AJ, para. 147, citing *Kvočka* AJ, para. 117; *Ntakirutimana* AJ, para. 466.

<sup>1329</sup> NC Appeal, para. 512; KS Appeal, paras 159-164.

‘New People’ and to re-educate the ‘New People’.”<sup>1330</sup> The harsher treatment of “New People” characterised as “re-education” was accomplished in particular through acts of forced transfer,<sup>1331</sup> which in turn were undertaken pursuant to the Party leadership’s express instructions, decisions and policy.<sup>1332</sup> Moreover, the Chamber found that “the Khmer Rouge indoctrinated cadres and people in the bases to be hostile towards, and suspicious of, city people”, which resulted in the “hatred and distrust of ‘New People’”.<sup>1333</sup> This resentment had been fomented by the Khmer Rouge well before 17 April 1975,<sup>1334</sup> and was evident during the forced evacuation of Phnom Penh.<sup>1335</sup> Accordingly, the Judgment is replete with findings by the Chamber regarding the CPK policy to forcibly evacuate Phnom Penh, which involved and contemplated the persecution of “New People”. Appellants fail to demonstrate how the Chamber acted unreasonably in this regard.<sup>1336</sup>

**C. The Chamber correctly found that crimes were committed through a JCE during the phase II movement (NC Ground 202)**

328. The Chamber reasonably found that the CPK population movement policy formed part of the common plan of the JCE and that the second forced transfer involved and contemplated the commission of crimes.<sup>1337</sup> The Chamber found that the Phase II population movement occurred as part of the overarching CPK policy, approved by the Party leadership, to move the population.<sup>1338</sup> Nuon Chea’s arguments to the contrary are without merit.<sup>1339</sup>

329. First, Nuon Chea’s submission that the Chamber erroneously found that the Phase II population movement was described as an aspect of the policy in CPK publications<sup>1340</sup> mischaracterises the finding. The Chamber determined that “the Party policy concerning

<sup>1330</sup> Judgment, para. 788. See also Judgment, paras 195, 567-569, 571, 653, 784, 795.

<sup>1331</sup> Judgment, para. 652. See also Judgment, paras 169, 567, 657.

<sup>1332</sup> Judgment, para. 805. See also Judgment, paras 845, 903, 919, 998, 1000.

<sup>1333</sup> Judgment, para. 787. See also Judgment, paras 169, 734, 887, 908.

<sup>1334</sup> See Judgment, paras 111, 112, 517, 734, 881, 994. Khieu Samphan’s attempt to separate out the evidence is without merit and contradicted by the evidence on the record, including Nuon Chea’s own admissions. See Judgment, fn. 2298, *citing* E3/196 Nuon Chea Speech to the Communist Workers’ Party of Denmark, July 1978, ENG 00762395.

<sup>1335</sup> Judgment, para. 517, fns 1547-1548, 1550.

<sup>1336</sup> The fact that the CPK anticipated achieving multiple goals through its implementation of the policy to forcibly evacuate Phnom Penh does not detract from the fact that the policy also involved and contemplated the commission of crimes, including persecution. NC Appeal, para. 512.

<sup>1337</sup> See *supra*, XV.A (Nuon Chea Ground 199). See also NC Appeal, para. 514.

<sup>1338</sup> Judgment, paras 576-578, 580-582, 584-612.

<sup>1339</sup> See NC Appeal, paras 515-520.

<sup>1340</sup> NC Appeal, para. 515, *citing* Judgment, fn. 2531.

population movements was one of the topics frequently addressed during propaganda campaigns, education sessions and in Party publications to ensure strict and effective implementation”.<sup>1341</sup> The Chamber referred to a vast quantity of evidence, in addition to a Party publication, as a basis for finding that the CPK population movement policy included the Phase II movement of the population.<sup>1342</sup> Indeed, based on the variety of means through which the Party disseminated its policy, the Chamber found that between mid-1975 and 1977 “even the ordinary Khmer Rouge soldiers knew or heard about the evacuation plans”.<sup>1343</sup> It is clear from the Chamber’s findings that a population movement on that scale could only have occurred as part of the general policy agreed to by the Party leaders.<sup>1344</sup>

330. Nuon Chea himself concedes that the Phase II population movement “was not a secret”, and affected a large number of people.<sup>1345</sup> Accordingly, and in view of the enormous quantity of evidence referenced throughout the Judgment, Nuon Chea fails to demonstrate that the Chamber’s finding that the Phase II population movement occurred as part of the CPK’s overall policy to move the population was unreasonable. Second, contrary to Nuon Chea’s suggestion,<sup>1346</sup> the Chamber never found that the Phase II movement was discussed during the meeting of the Central Committee in September 1975.<sup>1347</sup> Instead, the Chamber held “that there was a meeting of the Party leadership in early September 1975 concerning the economic policies later reflected in the September 1975 policy document”,<sup>1348</sup> which led to the movement of the population. Accordingly, this argument fails to demonstrate an error that would invalidate the verdict or occasion a miscarriage of justice.<sup>1349</sup>

331. Lastly, Nuon Chea’s allegation that the Chamber erred by concluding on the basis of “a single document” that the Party leadership agreed to initiate the Phase II movement is misleading

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<sup>1341</sup> Judgment, para. 577.

<sup>1342</sup> See Judgment, fn. 1714.

<sup>1343</sup> Judgment, para. 577, citing E3/419 Ieng Phan Interview Record, 23 November 2009, pp. 3, 7 (Ren, Ta Mok’s son-in-law, was commander of Regiment 11, Brigade 2. Ieng Phan, commander of Special Battalion 203, Brigade 2, personally heard Ren discuss the evacuation plans in mid-1975 to 1978 and personally saw people being evacuated. In general, even the ordinary Khmer Rouge combatants knew or heard about evacuation plans).

<sup>1344</sup> See, e.g., Judgment, para. 578, fn. 1720. See also Judgment, fns 1721-1742; paras 583-601, 795-798, 800-803 (and citations therein).

<sup>1345</sup> NC Appeal, para. 517.

<sup>1346</sup> NC Appeal, paras 518-519.

<sup>1347</sup> See Judgment, para. 749.

<sup>1348</sup> Judgment, para. 749.

<sup>1349</sup> See *supra*, II.B (Standard of Review).

and without merit.<sup>1350</sup> As indicated, the Chamber elsewhere in the Judgment found on the basis of an abundance of evidence that the Party leadership agreed to the CPK policy to move Cambodia's population between rural areas, which included and encompassed the Phase II movement.<sup>1351</sup>

*i. Other inhumane acts through attacks against human dignity and political persecution*

332. As demonstrated above, the CPK policy of population movement formed part of the common plan of the JCE, which involved or contemplated the commission of crimes, including attacks against human dignity and political persecution.<sup>1352</sup> Contrary to Nuon Chea's submission,<sup>1353</sup> the Chamber found that the CPK leaders, including Nuon Chea, agreed to the CPK policy, which included the Phase II population movement.<sup>1354</sup> The Chamber further found that a pervasive pattern of the commission of crimes existed with respect to the movement of the population between rural areas.<sup>1355</sup> It was therefore reasonable for the Chamber to conclude that the Party leadership, including Nuon Chea, contemplated the commission of crimes, including attacks against human dignity.<sup>1356</sup> Specifically, the Chamber relied on ample evidence to find that during the Phase II population movement, the civilian population was deprived of adequate food, shelter, medical assistance, and minimum sanitary conditions.<sup>1357</sup> Indeed, the Party publications themselves acknowledge that the population movement caused "hardship".<sup>1358</sup>

333. Contrary to Nuon Chea's arguments,<sup>1359</sup> the Chamber relied on ample evidence throughout the Judgment to find that the Phase II movement of the population contemplated and involved the commission of crimes, including the political persecution of 'New People'.<sup>1360</sup> Specifically, the Chamber found that the movement of the population was also conducted to further the class

<sup>1350</sup> NC Appeal, para. 520.

<sup>1351</sup> See *supra*, XV (Policy to forcibly transfer). See also Judgment, paras 795-810.

<sup>1352</sup> See *supra* XV (Policy to forcibly transfer).

<sup>1353</sup> NC Appeal, para. 521.

<sup>1354</sup> See *supra*, XI (Other inhumane acts). See also Judgment, paras 577-578, 584-587, 602-606, 610, 613-616, 622-623, 625-626, 637.

<sup>1355</sup> See *supra*, XV.A (Policy to forcibly transfer).

<sup>1356</sup> See Judgment, para. 637.

<sup>1357</sup> Judgment, fns 1790-1795, 1804-1805, 1808-1813, 1821, 1832-1836, 1846-1849, 1855-1857, 1866, 1898, 1945, 1955-1957. See also Judgment, paras 635, 639, 644-645.

<sup>1358</sup> Judgment, para. 582, fn. 1743, *citing* E/31748 *Revolutionary Flag*, October-November 1975, p. 22; E3/166 *Revolutionary Flag*, February-March 1976, pp. 19-20.

<sup>1359</sup> NC Appeal, paras 523-525.

<sup>1360</sup> Judgment, paras 652-657, 795.

struggle, which referred to the Party's targeting of the "New People".<sup>1361</sup> In some situations, only "New People" were forced to move between rural areas.<sup>1362</sup> Indeed, "New People" were specifically distinguished as such, to "prevent any confusion in managing and gathering forces".<sup>1363</sup> Nuon Chea's mere disagreement with the Chamber's conclusion<sup>1364</sup> is insufficient to call into question the Chamber's findings regarding the political persecution of "New People" during the Phase II population movement.<sup>1365</sup>

**D. Khieu Samphan fails to demonstrate that the Chamber erred in its findings concerning the CPK's population movement policy (paras 153-155, 164, 174-201, 232-234, 353, 360-361, 369-373, 451-477, 489, 504, 515-521)**

334. Khieu Samphan asserts that the Chamber erred in law and fact in finding that there existed a criminal CPK policy to move the population (Phases I and II), which formed part of the common plan of the JCE.<sup>1366</sup> Khieu Samphan's submissions disagreeing with the Chamber's evaluation of the evidence or providing alternative interpretations of the evidence<sup>1367</sup> are insufficient to call into question the Chamber's conclusions regarding the CPK policy to move the population (Phases I and II).<sup>1368</sup> Similarly, Khieu Samphan's arguments<sup>1369</sup> that do not have the potential to invalidate the Judgment or do not occasion a miscarriage of justice should be summarily dismissed.<sup>1370</sup> Lastly, Khieu Samphan's contentions that the Chamber relied on evidence outside the scope of Case 002/01 are without merit.<sup>1371</sup> The Chamber reasonably relied on evidence outside the temporal scope of Case 002/01 to serve as corroboration or circumstantial evidence in support of findings regarding events that took place within the temporal scope of Case 002/01.<sup>1372</sup>

<sup>1361</sup> Judgment, para. 613. See also Judgment, fns 1746, 1932, 1935-1936, 1938.

<sup>1362</sup> Judgment, fn. 1771. See also Judgment, paras 619, 625.

<sup>1363</sup> Judgment, para. 621. See also Judgment, paras 622-623.

<sup>1364</sup> NC Appeal, paras 523-525.

<sup>1365</sup> See *Karemera* AJ, paras 206, 325, 459.

<sup>1366</sup> KS Appeal, paras 369-373, 451-486, 515-521. To the extent that Khieu Samphan's arguments overlap with Nuon Chea's grounds of appeal in relation to the Chamber's findings regarding the CPK policy to move population that contemplated and involved the commission of crimes (See, e.g., KS Appeal, paras 191-194, 232-234, 369-373, 451-458, 515-521), the Co-Prosecutors incorporate by reference their responses herein. See *supra*, XV (Policy to forcibly transfer). See also *supra*, X (Persecution).

<sup>1367</sup> See KS Appeal, paras 360-361, 455-456, 462-463, 470-471, 489, 504, 516.

<sup>1368</sup> See *Karemera* AJ, paras 206, 325, 459.

<sup>1369</sup> See KS Appeal, paras 153-155, 191, 193, 196-201, 456, 466-469.

<sup>1370</sup> See *supra*, II.B (Standard of Review).

<sup>1371</sup> See KS Appeal, paras 192, 467-468, 472-474.

<sup>1372</sup> See *Nahimana* AJ, paras 315-316, 561.



335. Contrary to Khieu Samphan's contention,<sup>1373</sup> the Judgment reflects that the Chamber took into account the civil war against the Lon Nol Regime before 1975 when relevant, including when analysing prior forced movements, which formed the paradigm for the policy to forcibly move the population of conquered territory after April 1975.<sup>1374</sup> Similarly,<sup>1375</sup> the Chamber also took into account the impact prior American bombardments and food shortages had at the time, and the alternative inference that the Khmer Rouge decided to move the population for fear of American bombings.<sup>1376</sup> The Chamber concluded that the forced movements served two purposes, namely: (i) to prevent enemies from destabilising CPK forces; and (ii) prevent cadres from being corrupted by the urban population.<sup>1377</sup> Khieu Samphan's disagreements and alternative interpretations of the evidence are insufficient to call into question the Chamber's findings.<sup>1378</sup>

336. Khieu Samphan's attempts to selectively focus on certain sources of evidence upon which the Chamber relied for specific findings related to the existence of a CPK policy to move the population are unpersuasive.<sup>1379</sup> It is well-established that the ultimate weight to be attached to each piece of evidence cannot be determined in isolation.<sup>1380</sup> Accordingly, the Chamber correctly reviewed the body of evidence as a whole, rather than adopting a piecemeal approach.

*i. Pattern of conduct prior to 1975*

337. The Chamber reasonably concluded on the basis of ample evidence that a pattern of conduct emerged prior to 1975 during which time populations were forcibly evacuated from villages and towns conquered, including Kratie, Kampong Cham, Banam and Oudong.<sup>1381</sup> Khieu Samphan only challenges the evacuations of the towns listed above,<sup>1382</sup> but ignores the Chamber's findings regarding the forced evacuations in Battambang, Svay Rieng and Prey Veng.<sup>1383</sup>

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<sup>1373</sup> KS Appeal, para. 174.

<sup>1374</sup> See, e.g., Judgment, paras 82-101, 731-735, 736-737.

<sup>1375</sup> See KS Appeal, paras 164, 175.

<sup>1376</sup> Judgment, paras 154-156, 468-470, 530-540.

<sup>1377</sup> Judgment para. 112.

<sup>1378</sup> See *Karemera* AJ, para. 206.

<sup>1379</sup> See KS Appeal, paras 177-201, 457, 469.

<sup>1380</sup> *Lubanga* AJ, para. 22; *Ntagerura* AJ, para. 174. See also *Ngirabatware* AJ, paras 202, 208; *Taylor* AJ, para. 55. *Martić* AJ, para. 233.

<sup>1381</sup> See Judgment, paras 104-112, 124-126.

<sup>1382</sup> See KS Appeal, paras 177-190.

<sup>1383</sup> See Judgment, para. 791.

338. Contrary to Khieu Samphan's suggestion,<sup>1384</sup> it was within the Chamber's discretion to rely on Yun Kim's and Philip Short's evidence to conclude that Kratie was eventually evacuated after the Khmer Rouge took control.<sup>1385</sup> Khieu Samphan further fails to substantiate how the fact that the population was not immediately evacuated after its take-over, and that it may have occurred in either 1973 or 1974,<sup>1386</sup> contradicts a finding that similar patterns of forced evacuations followed thereafter. Similarly, the Chamber reasonably relied on the evidence of François Ponchaud to conclude that Kampong Cham was forcibly evacuated. Contrary to Khieu Samphan's contention,<sup>1387</sup> Ponchaud's testimony was corroborated by other evidence on the record.<sup>1388</sup> The Chamber expressly considered Phy Phuon's evidence and found it unreliable on this issue.<sup>1389</sup>

339. The Chamber reasonably relied on an instruction to "capture the people at every location" in the CPK's Revolutionary Flag.<sup>1390</sup> Although published 3 years after the evacuation of Banam, it clearly demonstrated the CPK policy to expel the population from towns.<sup>1391</sup> Khieu Samphan fails to demonstrate how the Chamber abused its discretion. The Chamber further relied on ample evidence demonstrating that Oudong was also forcibly evacuated after it was captured by the Khmer Rouge.<sup>1392</sup> There is further no contradiction in finding that Oudong was evacuated and that some of its population was first sent to M-13 and later to Battambang province.<sup>1393</sup> As noted above, the Chamber expressly took into account the ongoing war and, in any event, the ongoing war does not contradict the finding that the urban population was expelled under terrible conditions.<sup>1394</sup> Moreover, it is within the Chamber's discretion to rely on hearsay evidence<sup>1395</sup> and Khieu Samphan does not demonstrate how the Chamber erred in this regard.<sup>1396</sup>

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<sup>1384</sup> KS Appeal, paras 179-181.

<sup>1385</sup> See Judgment, fns 291, 293.

<sup>1386</sup> KS Appeal, para. 178.

<sup>1387</sup> KS Appeal, paras 182-184.

<sup>1388</sup> Judgment, fn. 297.

<sup>1389</sup> See KS Appeal, para. 183. See also Judgment, para. 107.

<sup>1390</sup> Judgment, fn. 298, *citing* E3/25 *Revolutionary Flag*, December 1976 January 1977, ENG 00491424.

<sup>1391</sup> KS Appeal, paras 187.

<sup>1392</sup> Judgment, fns 258-365.

<sup>1393</sup> See KS Appeal, para. 188, *citing* Judgment, para. 124.

<sup>1394</sup> KS Appeal, para. 189.

<sup>1395</sup> See *supra*, VI.E (Assessment of Hearsay).

<sup>1396</sup> KS Appeal, para. 188.

ii. *Policy to forcibly move the population*

340. Furthermore, Khieu Samphan contends that the Chamber erred in law and in fact in relying on a September 1975 policy document which “addressed the movement policy.”<sup>1397</sup> The Chamber acknowledged that it could not determine who the authors were or the date when the plans contained in the September 1975 policy document were decided upon.<sup>1398</sup> However, based on a variety of corroborating circumstantial evidence, the Chamber reasonably concluded that the document reflected the Party leadership’s economic policies in 1975.<sup>1399</sup> Khieu Samphan’s attempts to separate out each piece of evidence upon which the Chamber relied and to provide alternative interpretations to demonstrate an error on the part of the Chamber are unconvincing.<sup>1400</sup> The Chamber correctly analysed the evidence as a whole, rather than adopting a piecemeal approach, and was reasonable in reaching its conclusion. Moreover, as demonstrated above, the Chamber relied on an abundance of evidence throughout the Judgment to conclude that there existed a CPK policy to move the population.<sup>1401</sup>

341. Contrary to Khieu Samphan’s suggestion,<sup>1402</sup> the Chamber relied on wide variety of evidence to conclude that the Party controlled the means and modes of transportation necessary to effectuate the population movements.<sup>1403</sup> The Chamber did not contradict itself by finding that the Khmer Rouge deliberately failed to provide information as to the whereabouts of the persons who were being transferred, while finding no explicit evidence of persons trying to obtain this type of information from the authorities.<sup>1404</sup> The Chamber reasonably concluded on the basis of the totality of the evidence that the Khmer Rouge created “an environment in which people were afraid to question or to seek information from the Party”.<sup>1405</sup> Khieu Samphan fails to demonstrate how this finding invalidates the Judgment or occasioned a miscarriage of justice.<sup>1406</sup>

342. Similarly, Khieu Samphan fails to demonstrate that no reasonable trier of fact could have found that copies of the Revolutionary Flag and the Revolutionary Youth magazines were

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<sup>1397</sup> KS Appeal, para. 459, *citing* Judgment, paras 478-759.

<sup>1398</sup> Judgment, para. 748.

<sup>1399</sup> Judgment, para. 749.

<sup>1400</sup> KS Appeal, paras 460-465.

<sup>1401</sup> See *supra*, XV (Policy of forced transfer).

<sup>1402</sup> KS Appeal, paras 470-471.

<sup>1403</sup> See Judgment, fns 1720-1726.

<sup>1404</sup> KS Appeal, paras 475-477, *citing* Judgment, para. 641.

<sup>1405</sup> Judgment, para. 641, *citing* Judgment, para. 199. See also Judgment, fns 788, 2260, 2263, 2283, 2314, 2317, 2511.

<sup>1406</sup> See *supra*, II.B (Standard of Review).

delivered to, *inter alia*, “officials at the Zone, Sector, District and sub-district levels”.<sup>1407</sup> The Chamber relied on various sources of mutually corroborating evidence.<sup>1408</sup> Khieu Samphan mischaracterises the testimony upon which the Chamber relies and does not establish how other portions of these witnesses’ evidence cast any doubt on the Chamber’s finding.<sup>1409</sup>

## XVI. CPK POLICY TO SMASH ENEMIES

### A. The CPK adopted a policy of smashing enemies (NC Ground 26)

- i. The Chamber’s finding that the CPK policy involved “smashing” of enemies was reasonable*

343. Nuon Chea asserts that the Chamber erred in law and in fact in finding that the CPK policy adopted a policy of smashing enemies.<sup>1410</sup> He does not claim the alleged error in the policy of smashing enemies invalidates the Judgment or occasioned a miscarriage of justice.<sup>1411</sup> Rather, he erroneously alleges that the actual implementation of the policy to smash enemies lies outside the scope of Case 002/01.<sup>1412</sup> His arguments related to the evidence, or lack thereof, of actual killings that occurred in furtherance of this policy<sup>1413</sup> should therefore be summarily dismissed. Moreover, the Chamber’s findings on the CPK policy to smash enemies are fully supported by the evidence. The SCC has established that it will not lightly disturb findings of fact made by the Chamber, given that the Chamber is best placed to assess and weigh the evidence presented at trial.<sup>1414</sup>

344. The Chamber reasonably concluded based on the totality of the evidence that a CPK policy to smash its enemies existed. In addition to the evidence cited in support of this finding,<sup>1415</sup> the Chamber relied on an abundance of evidence throughout the Judgment that demonstrates the

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<sup>1407</sup> KS Appeal, para. 493, *citing* Judgment, para. 263.

<sup>1408</sup> Judgment, fn. 822.

<sup>1409</sup> See KS Appeal, para. 493.

<sup>1410</sup> NC Appeal, paras 268-280.

<sup>1411</sup> See *supra*, II.B (Standard of Review).

<sup>1412</sup> NC Appeal, para. 269.

<sup>1413</sup> NC Appeal, paras 270, 278. In this context, the Co-Prosecutors disagree with Nuon Chea’s misleading statement that “[i]n most of these cases, it is simply uncontested that individuals belonging to these groups [of enemies] were not executed or even targeted for execution”. Nuon Chea Appeal, para. 270. The Co-Prosecutors recall that the actual implementation of the policy to smash enemies is within the Scope of Case 002/01 and is in fact an issue that is contested by the parties.

<sup>1414</sup> See *supra*, II.B (Standard of Review).

<sup>1415</sup> See Judgment, paras 117-118, fns 326-340.

existence of a CPK policy to smash enemies.<sup>1416</sup> Aside from the wide range of evidence referred to by the Chamber, there is ample evidence on the record that further supports the finding that a CPK policy to smash enemies existed.<sup>1417</sup> Indeed, Nuon Chea himself admitted as much on a number of occasions, stating that “after 1960 our Revolutionary Organisation clearly decided that political action and armed violence must be used to overthrow and crush the enemy”.<sup>1418</sup> He explained that the CPK’s Secret Defence Units established in 1961 provided the means to

<sup>1416</sup> See, e.g., Judgment, fns 233, 351, 414, 1602, 1717, 1929, 1938, 2439, 2571, 2577, 2579, 2580-2581, 2643.

<sup>1417</sup> See, e.g., **E1/21.1** Nuon Chea, T. 13 December 2011, pp. 6-10; **E3/5** Revolutionary Flag, August 1975, ENG 00401491-92; **E169/4/1.1.2** Revolutionary Flag, December 1975-January 1976, ENG 00865697; **E3/25** Revolutionary Flag, December 1976-January 1977, ENG 00491412-13 (mission of Covert Guards included “attacking and smashing government intelligence agents and the vicious enemies that were wrecking the revolution”); **E3/147** Nuon Chea Speech, 16 January 1977, ENG 00168467; **E1/192.1** Philip Short, T. 9 May 2013, pp. 2-3; **E1/191.1** Philip Short, T. 8 May 2013, pp. 98-99; **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, ENG 00396391 (quoting Phyu Phoun: “You’re asking me if we took prisoners? No...if we caught a government soldier, we killed him. There wasn’t any explicit guideline to that effect, but everyone understood it was what we should do”); **E1/71.1** Pean Khean, T. 2 May 2012, pp. 50-52; **E3/25** *Revolutionary Flag*, December 1976- January 1977, ENG 00491428; **E3/785** Revolutionary Flag, July 1973, ENG 00713998-99, (“If the spies are arrested to be executed in the meeting before the people, some people may be frightened of us. ... The stance to smash the spies is correct but it is inappropriately carried out”); **E3/197** CPK Standing Committee Meeting Minutes entitled “The Front,” 11 March 1976, ENG 00182641; **E3/729** Revolutionary Youth, October 1975, ENG 00357909; **E1/58.1** Duch, T. 3 April 2012, pp. 36-38 (“after 1975, the monarchy were to be smashed as long as they were encountered; there was no discrimination...I believe that the royal family members were also smashed....The feudalist landlords were also smashed.”); **E3/147** Nuon Chea Speech, 16 January 1977, ENG 00168467; **E1/21.1** Nuon Chea, T. 13 December 2011, pp. 6-10; **E3/147** Nuon Chea Speech, 16 January 1977, ENG 00168467; **E3/26** Nuon Chea Interview, 25 May 2009, ENG 00329515; **E3/742** Revolutionary Flag, April 1977, ENG 00478496 (“As for the enemies...agents...been smashed...smash them even more so they cannot raise their heads...we will create the preconditions for us to attack the enemy...and in future years and we will achieve additional major victories.”), 00478501 (“It is imperative to purge, to clean up, and to sweep clean the no-good elements and the enemy elements by further strengthening and expanding the good elements that successively emerge from the movements.”); **E3/143** FBIS, DK Media Reports for September 1977, 1 September - 30 September 1977, ENG 00168723 (“our Cambodian people and Revolutionary Army have striven...[to]...protect our national independence...by smashing all maneuvers of enemies of all stripes.”); **E3/13** DK Military Meeting Minutes entitled “Meeting of Secretaries and Deputies of Divisions and Independent Regiments,” 9 October 1976, ENG 00183993 (“It is imperative to purge no-good elements absolutely in the sense of an absolute class struggle.”); **E3/1094** Report from M-401 to Angkar, 4 August 1978, ENG 00143624 (“Continue to investigate and search for enemies of all kinds who have hidden and burrowed [inside the revolution], and cleanly sweep them thoroughly from inside of various bases, units, offices and ministries.”); **E3/12** “Decision of the Central Committee Regarding a Number of Matters,” 30 March 1976, ENG 00182809 (“The right to smash, inside and outside the ranks...All this to strengthen our state authority...to be decided by the Standing Committee. - The Center Military, to be decided by the General Staff.”); **E3/2012** Report from the Educational Office of District 105, ENG 00276596 (“Concerning the issue of all the prisoners who were arrested from the ChiengTomg commune (Iron smith commune), they are to be interrogated in order to find out their whole networks, then smash them.”); **E3/4001R**, Documentary Film entitled “Enemies of the People,” 00.48.00; **E3/808** DK Ministry of Social Affairs Staff’s Notebook, 23 April - 6 November 1978, ENG 00197641 (“Party Policies There are three duties: 1. Smashing enemies.”); **E3/35** Ke Pich Vannak Interview Record, ENG 00346160 (describing Party policy since 1973 that “an opponent is considered as a traitor and must be smashed” and that “an individual who does not follow the Party line will be considered as an opponent of the Party”).

<sup>1418</sup> **E3/147** Nuon Chea Speech, 16 January 1977, ENG 00168467.

“covertly smash the enemy, the government agents and various reactionaries.”<sup>1419</sup> Nuon Chea described the “revolution” of the CPK as “just,” in part, because it “smashed and eliminated enemies”.<sup>1420</sup> This policy was consistently reaffirmed at subsequent Party Congresses and meetings of the Central Committee, including in a January 1965 Central Committee resolution confirming that it was “absolutely necessary to use revolutionary violence.”<sup>1421</sup>

345. Nuon Chea’s argument that the Chamber “wrongly assumed that each use of the word ‘enemy’ by the CPK connotes the intent to commit criminal acts”<sup>1422</sup> does not meet the burden of review on appeal and should be rejected. Nuon Chea’s alternative interpretation of the evidence, suggesting instead that “the CPK identified certain people as enemies, some of whom were killed”, is insufficient to demonstrate that the Chamber’s findings were unreasonable.<sup>1423</sup>

346. Similarly, Nuon Chea’s attempts to show that “ambiguities in the evidence” exist are without merit.<sup>1424</sup> It is well-established that mere assertions that the Chamber failed to give sufficient weight to certain evidence, or that it should have interpreted evidence in a particular manner, are liable to be summarily dismissed.<sup>1425</sup> Even if the SCC were to entertain this argument, the Co-Prosecutors recall that the Chamber found that “the CPK established a further policy of re-education of ‘bad elements’ and ‘smashing’ those who had been found to be enemies”.<sup>1426</sup> Nuon Chea’s reference to Duch’s testimony that people linked to the Khmer Republic group were divided into groups and either re-educated or killed,<sup>1427</sup> therefore only serves to bolster the Chamber’s finding, rather than demonstrating ambiguity.<sup>1428</sup>

347. Lastly, the fact that not every person characterised by the CPK as an enemy was in fact smashed or killed, as Nuon Chea seems to suggest,<sup>1429</sup> is irrelevant to a finding that a policy to

<sup>1419</sup> **E1/21.1** Nuon Chea, T. 13 December 2011, pp. 6-10; **E3/147** Nuon Chea Speech, 16 January 1977, ENG 00168467.

<sup>1420</sup> See Judgment, fn. 1624, *citing, inter alia*, **E3/26** Nuon Chea Interview, 25 May 2009, ENG 00329515.

<sup>1421</sup> **E3/22**, **E3/2114** Stephen Heder, *Cambodian Communism and the Vietnamese Model*, ENG 00393755; **E3/16**, **E3/3855** Khieu Samphan, *Considerations on the History of Cambodia*, ENG 00498240; **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, ENG 00396346-47.

<sup>1422</sup> NC Appeal, para. 271.

<sup>1423</sup> *Cf. Karemera* AJ, para. 235.

<sup>1424</sup> NC Appeal, paras 274-277.

<sup>1425</sup> See *Karemera* AJ, para. 179, *citing Nchamihigo* AJ, para. 157; *Krajišnik* AJ, para. 27.

<sup>1426</sup> Judgment, para. 117.

<sup>1427</sup> NC Appeal, para. 274.

<sup>1428</sup> The same applies to Nuon Chea’s assertion that the Revolutionary Flag, dated September 1977, is an “affirmative” proof that the policy did not exist. This is a misrepresentation of the plain wording of the document. NC Appeal, para. 275, *citing E3/11* Revolutionary Flag, September 1977, ENG 00486235.

<sup>1429</sup> See NC Appeal, paras 270-273.

smash enemies existed.<sup>1430</sup> Accordingly, the Chamber's reference to four ways in which the policy manifested itself serves only to illustrate further the existence of the policy. It does not, as Nuon Chea seems to argue,<sup>1431</sup> constitute the sole evidence upon which the Chamber relied to infer the policy's existence. As noted above, the Chamber relied on a wide range of evidence when it made this finding and was reasonable in doing so.

*ii. The Chamber's definition of "enemies" was reasonable.*

348. Nuon Chea asserts that the Chamber erred in fact in defining "enemy",<sup>1432</sup> as well as in its characterisation of former soldiers and officers of the Lon Nol regime as key enemies prior to 1975.<sup>1433</sup> However, contrary to Nuon Chea's assertion, the Chamber relied on sufficient evidence when determining the tactical manner in which "enemy" was defined. Specifically, the Chamber relied on the evidence of expert David Chandler and on a September 1977 issue of the Revolutionary Flag.<sup>1434</sup> Elsewhere in the Judgment, the Chamber referred to similar contextual evidence that supports its finding of a tactically vague definition of the "enemy".<sup>1435</sup> For example, the Chamber made numerous findings regarding "perceived enemies",<sup>1436</sup> "internal

<sup>1430</sup> See *Nahimana* AJ, paras 315-316, 561.

<sup>1431</sup> NC Appeal, paras 278-279.

<sup>1432</sup> NC Appeal, paras 281-282.

<sup>1433</sup> NC Appeal, para. 283.

<sup>1434</sup> Judgment, fn. 332.

<sup>1435</sup> See, e.g., Judgment, fns 866, *citing* **E3/783** Revolutionary Flag, September- October 1972, ENG 00720229 (regular reports should cover the topic "the enemy"); 1927, *citing, inter alia*, **E3/13** Minutes of Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments, 9 October 1976, ENG 00183993 (there were three categories of enemies: the dangerous category had to be absolutely purged, the ordinary liberal category had to be educated again, and those incited by the enemies should undergo re-fashioning); 1934, *citing* **E3/729**, October 1975, ENG 00357903 ("enemy agents and a variety of other bad elements" were still mixed among the people); 2376, *citing, inter alia*, **E3/130** CPK Statute, ENG 00184025 (The Party had high-level revolutionary vigilance toward all enemy activities and trickery, direct or indirect, overt or secret, which had the intent to destroy the party); 2495, *citing, inter alia*, **E3/11**, Revolutionary Flag, September 1977, ENG 00486238 ("the enemy was everywhere" in the cities); 2612, *citing, inter alia*, **E3/201** Khieu Samphan's Speech at Anniversary Meeting, 15 April 1977, ENG 00486238 (Must preserve the fruits of the Cambodian revolution by resolutely suppressing all categories of enemies. Enemies must be wiped out); 2581, *citing*, **E3/742** Revolutionary Flag, April 1977, ENG 00478796, 00478502 (must be constantly on the offensive against enemies and it is imperative to purge, to clean up, and to sweep clean the no-good elements and the enemy elements), **E3/726** Revolutionary Flag, February 1978, ENG 00278714 (Revolutionary vigilance must be raised, as all types of enemies seek the opportunity to destroy the revolution); **E3/135** Revolutionary Flag June 1977, ENG 00446861-62 (Constantly attack the class enemies, embedded enemies and their agents; 2582, *citing, inter alia*, **E3/746**, July 1978, ENG 00428291-97, 00428301-02 (the concealed enemies boring from within were exposed).

<sup>1436</sup> See, e.g., Judgment, paras 199 ("the CPK ...continued to obfuscate and obscure its internal workings, largely to protect itself from perceived external enemies" after 1975); 256 ("radio programs reported on matters such as arrests and perceived enemies"), 795.

enemies”,<sup>1437</sup> and the Chamber referred to evidence of witnesses who did not know what the term “enemies” meant.<sup>1438</sup> Based on the above, a reasonable trier of fact could have relied on the evidence of Chandler and the September 1977 issue of the Revolutionary Flag, as well as the further evidence on the record and cited throughout the Judgment to conclude that the definition of “enemy” was tactically vague.

349. Moreover, Nuon Chea mischaracterises the Chamber’s findings elsewhere to suggest that its definition of enemy is contradictory.<sup>1439</sup> Specifically, the Chamber found that the CPK sought to “build and defend the country through a socialist revolution, based on the principles of secrecy”, which is consistent with its finding that the definition of the “enemy” was remained vague,<sup>1440</sup> and the deliberate creation of an “uncertain atmosphere”.<sup>1441</sup> The Chamber’s finding that the CPK was “strictly hierarchical” similarly does not contradict the finding that the definition of the term “enemy” was kept vague.<sup>1442</sup> Nuon Chea simply disagrees with the Chamber’s assessment of the evidence and therefore conjures up “contradictions” which do not exist.<sup>1443</sup>

350. Nuon Chea’s contention that the Chamber erred in fact in finding that “starting before 1975, former soldiers and officers of the Lon Nol regime were also identified as key enemies”, because Lon Nol soldiers and officers were not “former” members of the regime before 1975 is pedantic.<sup>1444</sup> A plain reading of the Judgment reflects that the Chamber found that Lon Nol soldiers and officers had already been identified as enemies by the Khmer Rouge before 1975.<sup>1445</sup> More importantly, Nuon Chea does not demonstrate how this alleged error of fact occasions a miscarriage of justice, nor does it have the potential to invalidate the verdict.

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<sup>1437</sup> See, e.g., Judgment, paras 298, *citing, inter alia*, E3/1202 DK Military Report (“the situation of internal enemies is of concern”); 325, *citing, inter alia*, E1/194.1 Prum Som, T. 21 May 2013, pp. 32-36 (describing a meeting where they discussed the need to be vigilant against the enemies), E3/1209 DK Telegram, ENG 00522888 (referring to “internal and external enemies”); 840. See also Judgment, fns 1022, *citing, inter alia*, E3/155 DK Telegram, 23 April 1978 (reporting about the situation of the outside enemy and the enemies inside the Party); 1381, *citing, inter alia*, E3/4664 Chhor Dana Civil Party Application, 26 October 2007, p. 3 (they said that Angkar had people leave so that they can purge all the insider enemies), 2567, *citing, inter alia*, E3/1024 DK Telegram, 23 September 1976, ENG 00185552 (Enemies whipped up the people to oppose cooperatives); 2612, *citing, inter alia*, E3/562 Phnom Penh Rally Marks 17<sup>th</sup> April Anniversary, 16 April 1978, ENG S 00010563 (All units had to continuously raise high the sense of revolutionary vigilance and defend against internal and external elements).

<sup>1438</sup> See Judgment, fn. 1381, *citing, inter alia*, E1/148.1 Kim Vandy, T. 5 December 2012, p. 95 (he did not understand what the term “enemies” meant at the time the city was being cleared of or emptied of enemies).

<sup>1439</sup> See NC Appeal, para. 282, *citing* Judgment, para. 777.

<sup>1440</sup> Judgment, para. 177.

<sup>1441</sup> Judgment, para. 117.

<sup>1442</sup> NC Appeal, para. 282.

<sup>1443</sup> *Cf. Karemera AJ*, paras 206, 235, 325, 459.

<sup>1444</sup> NC Appeal, para. 283, *citing* Judgment, para. 118.

<sup>1445</sup> Judgment, para. 118.



**B. Khieu Samphan fails to demonstrate that the Chamber erred in defining “enemies” (paras 165-170, 496, 642-643)**

351. Khieu Samphan contends that the Chamber erred in law and in fact when it determined that the way in which “enemy” was defined was tactical, remaining vague enough to allow various interpretations and to create an uncertain atmosphere”.<sup>1446</sup> Khieu Samphan’s arguments are broad in nature and primarily involve providing his own, alternative interpretation of the evidence.<sup>1447</sup> It is well-established that such general arguments without more are insufficient to demonstrate that the Chamber’s finding was unreasonable.<sup>1448</sup>

352. Khieu Samphan further alleges that the Chamber erred in fact by finding that the vague definition of “enemies” created an atmosphere of uncertainty.<sup>1449</sup> In support of his contention, Khieu Samphan only notes that the Chamber should have stated that expert David Chandler, whose evidence the Chamber referred to in support of this finding, provided evidence that was speculative.<sup>1450</sup> He provides no further argument as to how the Chamber’s reliance on Chandler was unreasonable, nor does he demonstrate that a miscarriage of justice was occasioned.<sup>1451</sup>

**XVII. POLICY TARGETING KHMER REPUBLIC SOLDIERS AND OFFICIALS**

**A. The CPK adopted a policy to target Khmer Republic soldiers and officials prior to 17 April 1975 (NC Ground 206)**

353. The Chamber based its finding regarding the CPK policy on the existence of a pattern of targeting and executing Khmer Republic soldiers and officials between 1972 and 1975,<sup>1452</sup> including: (i) executions at Phloeng Chhes in 1972; (ii); targeting during the evacuation of Kampong Cham in September 1973; (iii) unlawful killings at Oudong in March 1974; (iv) unlawful killings in Battambang in July 1974; and (v) reports of executions in Khmer Rouge

<sup>1446</sup> KS Appeal, para. 165. To the extent that Khieu Samphan’s arguments in any way overlap with Nuon Chea’s grounds of appeal (KS Appeal, paras 166-169), the Co-Prosecutors incorporate by reference their responses herein. See *supra*, XVI.A (Policy to smash enemies).

<sup>1447</sup> See KS Appeal, paras 166-169, 496, 642-643.

<sup>1448</sup> Cf. *Karemera* AJ, paras 206, 235, 325.

<sup>1449</sup> KS Appeal, paras 168-170.

<sup>1450</sup> KS Appeal, para. 168. Khieu Samphan also challenges the Chamber’s reliance on E3/11 Revolutionary Flag, September 1977, ENG 00486235, as support for its finding that an “atmosphere of uncertainty was created”. See KS Appeal, para. 169. However, the Chamber did not rely on this evidence to support this aspect of its finding, but instead referred thereto for purposes of concluding that the CPK favored a tactically vague definition of “enemies”. See Judgment, fn. 332.

<sup>1451</sup> See *supra*, II.B (Standard of Review).

<sup>1452</sup> Judgment, para. 830.

territory in March 1975.<sup>1453</sup> Nuon Chea contends that the Chamber erred in fact in coming to these determinations,<sup>1454</sup> and challenges the existence of this pattern of targeting Khmer Republic officials by viewing each incident in isolation.<sup>1455</sup> The Chamber, however, correctly reached its finding regarding the existence of a policy to target Khmer Republic officials after careful consideration of the evidence as a whole.<sup>1456</sup>

*i. Killing of Khmer Republic Soldiers at Oudong in March 1974*

354. Contrary to Nuon Chea's contention,<sup>1457</sup> the Chamber referred to reliable evidence to conclude that Khmer Republic soldiers were executed *en masse* immediately after the seizure of Oudong.<sup>1458</sup> It is within the discretion of the Chamber to rely on hearsay evidence and the Chamber is presumed to have assessed and weighed the evidence when reaching its conclusion.<sup>1459</sup> Additional evidence, which the Chamber referenced elsewhere in the Judgment,<sup>1460</sup> further supports the Chamber's finding that Khmer Republic officials were targeted and executed after Oudong fell to the Khmer Rouge.<sup>1461</sup> Lastly, even if Nuon Chea had shown that the Chamber's findings regarding Oudong were unreasonable, this would not impact the verdict, nor does it occasion a miscarriage of justice.

*ii. The June 1974 meeting of the Central Committee*

355. Contrary to Nuon Chea's contention,<sup>1462</sup> the Chamber reasonably found that the experience at Oudong was discussed at the June 1974 meeting of the Central Committee, who were planning

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<sup>1453</sup> Judgment, para. 830.

<sup>1454</sup> NC Appeal, para. 529.

<sup>1455</sup> NC Appeal, paras 530-549.

<sup>1456</sup> *Lubanga* AJ, para. 22; *Ntagerura* AJ, para. 174. See also *Ngirabatware* AJ, paras 202, 208; *Taylor* AJ, para. 55.

<sup>1457</sup> NC Appeal, paras 530-535.

<sup>1458</sup> Judgment, para. 127.

<sup>1459</sup> See *supra*, VI.E (Probative Value of the Evidence).

<sup>1460</sup> *Cf. Karemera* AJ, para. 485 (finding that while the Chamber did not discuss a passage of evidence, this does not mean that it did not consider this particular evidence).

<sup>1461</sup> See, e.g., E3/25 Revolutionary Flag, December 1976-January 1977, ENG 00491424 (Our line was to fight to capture the people...the line of taking away the people...1973...Banam town...taking the people away from the enemy...Oudong 1974"); E3/9 Philip Short, *Pol Pot: The History of a Nightmare*, ENG 00396455 ("Oudong was attacked at 3 a.m. on Sunday, March 3 1974... Officials and uniformed soldiers were separated from the rest, led away and killed."). The Chamber referred to this evidence throughout the Judgment in support of other findings. See, e.g., Judgment, fns 252, 297-299, 307, 316, 334, 338, 359-360, 371, 405, 446, 448, 462, 486, 630, 1053, 1060-1061, 1750, 1879, 1935, 1963, 2261.

<sup>1462</sup> NC Appeal, paras 536-540.

for the capture of Phnom Penh.<sup>1463</sup> The Chamber elsewhere concluded that the experience of Oudong involved the massacre of Khmer Republic officials and soldiers.<sup>1464</sup> Accordingly, it was reasonable for the Chamber to infer that when the CPK leaders discussed emulating the “experience” of Oudong at this meeting, they were all aware that this included the massacre of the Khmer Republic officials and soldiers.<sup>1465</sup> Nuon Chea fails to show how no reasonable trier of fact could have inferred that where the experience of Oudong was discussed, this would include the massacre that occurred there.

*iii. FUNK broadcasts in early 1975*

356. Contrary to Nuon Chea’s assertion,<sup>1466</sup> the Chamber relied on sufficient evidence to find that: (i) the FUNK struck a conciliatory tone in radio broadcasts directed at the Khmer Republic officials and soldiers, which were a calculated attempt to reduce opposition to the Khmer Rouge and lull the Khmer Republic officials and soldiers into a false sense of security; and (ii) the messages invited the Khmer Republic soldiers and civil servants to join the revolution, while implicitly warning that if they delayed in doing so, they would be seen in the same category as the “super-traitors”.<sup>1467</sup> Nuon Chea’s contention that this finding is inherently contradictory is without merit.<sup>1468</sup>

357. It is well-established that a trial chamber can rely on a single witness when making its findings, even if it relates to a material fact.<sup>1469</sup> Nuon Chea has not demonstrated how the Chamber was unreasonable in relying on Stephen Heder’s evidence to support its finding that the Khmer Republic soldiers were deliberately lulled into a sense of security by the FUNK broadcasts, or on Philip Short’s evidence to find that the FUNK messages implicitly warned the Khmer Republic soldiers that if they did not join the Khmer Rouge immediately, they would be seen as the “super-traitors”. Moreover, there is an abundance of evidence referenced throughout the Judgment demonstrating that Khmer Republic soldiers heeded the FUNK’s call to join its cause or surrender, and were subsequently targeted through executions, arrests or

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<sup>1463</sup> Judgment, para. 127.

<sup>1464</sup> Judgment, paras 124-126.

<sup>1465</sup> Judgment, para. 127.

<sup>1466</sup> NC Appeal, paras 541-542.

<sup>1467</sup> Judgment, para. 120.

<sup>1468</sup> NC Appeal, para. 543.

<sup>1469</sup> *Lukić* AJ, para. 375; *Ntawukulilyayo* AJ, para. 21; *Haradinaj* AJ, para. 219.

disappearances.<sup>1470</sup> Accordingly, a reasonable trier of fact could have concluded that the Khmer Republic soldiers and officials were deliberately lulled into a sense of security by the FUNK broadcasts.

*iv. Consistent evidence of radicalisation*

358. Contrary to Nuon Chea's submissions,<sup>1471</sup> the Chamber reasonably found on the basis of various sources of evidence that there was "consistent evidence of a radicalisation of the policy regarding captured Khmer Republic soldiers and officials from 1970 until 1975".<sup>1472</sup> It is clear from the Judgment that the anger caused by the American bombings served to further radicalise the existing policy to target the Khmer Republic officials,<sup>1473</sup> given that they were, as Nuon Chea himself states, "the on-the-ground manifestation of that very bombing campaign".<sup>1474</sup>

359. Further, the Chamber found that 500 captured Khmer Republic soldiers were killed by the Khmer Rouge in 1972.<sup>1475</sup> There is additional evidence on the record, which the Chamber is presumed to have taken into account,<sup>1476</sup> which further demonstrates that a radicalisation of the policy regarding captured Khmer Republic officials took place.<sup>1477</sup> Nuon Chea's suggestion that the evidence of former CPK cadres should be considered unreliable *per se* is unsupported by the jurisprudence.<sup>1478</sup> Indeed, it is well-established that a trial chamber has the discretion to rely upon evidence of accomplice witnesses,<sup>1479</sup> even if this evidence is uncorroborated.<sup>1480</sup> It is further within the Chamber's discretion to disbelieve this evidence and to rely on the refugee accounts to demonstrate a consistent radicalisation of the CPK policy to target Khmer Republic officials.<sup>1481</sup>

<sup>1470</sup> See, e.g., Judgment, fns 1367-1368, 1502, 1505-1511, 1517-1522, 1527-1530, 1532-1543.

<sup>1471</sup> NC Appeal, paras 544-547.

<sup>1472</sup> Judgment, para. 121.

<sup>1473</sup> Judgment, para. 121.

<sup>1474</sup> NC Appeal, para. 546.

<sup>1475</sup> Judgment, paras 121, 830.

<sup>1476</sup> *Zigiranyirazo* AJ, para. 45; *Halilović* AJ, para. 121.

<sup>1477</sup> See, e.g., **E1/190.1** Philip Short, T. 7 May 2013, pp. 37-38 ("[w]hen prisoners were captured...if...was a local person and was known, then he might be released...if he was not known, he would be killed...a 'take no prisoners' policy from the beginning."), 38 ("There was no written instruction. It was just what you did, what you knew you had to do, what you knew the Party would want you to do... it was clearly understood to be the case."); **E3/9** Philip Short *Pol Pot: The History of a Nightmare*, ENG 00396430 ("For those perceived to be hostile...Opposing the revolution, whether in word or deed, usually meant death...summoned to district headquarters and never returned.")

<sup>1478</sup> NC Appeal, para. 546.

<sup>1479</sup> *Setako* AJ, para. 143.

<sup>1480</sup> *Nchamihigo* AJ, para. 48.

<sup>1481</sup> *Cf. Karemera* AJ, para. 182.

v. *Targeting and Executions in Kampong Cham and Battambang*

360. The Chamber reasonably determined that Khmer Republic soldiers were targeted in Kampong Cham in 1973 and surrendered Khmer Republic soldiers were killed in Battambang in 1974.<sup>1482</sup> First, contrary to as Nuon Chea's claim,<sup>1483</sup> the Chamber did not find that Khmer Republic soldiers were executed in Kampong Cham. Instead it determined that the Khmer Republic soldiers were targeted.<sup>1484</sup> Nuon Chea fails to establish how the Chamber abused its discretion by relying on Stephen Heder's evidence to support this finding, other than referring to his arguments at trial.<sup>1485</sup> It was further within the Chamber's discretion to rely on Heder's evidence to conclude that Khmer Republic soldiers were killed in Battambang.<sup>1486</sup> Moreover, it is well-established that an appellant's right to a reasoned opinion does not ordinarily demand a detailed analysis of the credibility of particular witnesses. Lastly, there is additional evidence on the record, which the Chamber is presumed to have taken into account,<sup>1487</sup> to support the finding that executions of Khmer Republic soldiers took place in Battambang.<sup>1488</sup> Accordingly, a reasonable trier of fact could have found that Khmer Republic soldiers were targeted in Kampong Cham in 1973 and were killed in Battambang in 1974.

vi. *Khmer Republic soldiers and officials were considered enemies before 1975*

361. The Chamber found, and Nuon Chea concedes,<sup>1489</sup> that Khmer Republic officials were identified as key enemies starting before 17 April 1975.<sup>1490</sup> There is ample evidence throughout the Judgment which demonstrates that the Khmer Rouge targeted and intended to kill its perceived enemies, including Khmer Republic officials, before and after 17 April 1975. Khieu

<sup>1482</sup> Judgment, para. 830.

<sup>1483</sup> NC Appeal, para. 548.

<sup>1484</sup> Judgment, para. 830.

<sup>1485</sup> NC Appeal, para. 548, *citing* E295/6/3 Closing Brief, para. 401, E1/233.1 Final Submissions, T. 24 October 2013, pp. 10-12.

<sup>1486</sup> See *supra*, VI.F.ii (Reliance on Heder's evidence); VI.E (Reliance on hearsay evidence).

<sup>1487</sup> *Zigiranyirazo* AJ, para. 45; *Halilović* AJ, para. 121.

<sup>1488</sup> See, *e.g.*, E3/3319 United Kingdom Government, Human rights violations in Democratic Kampuchea, 14 July 1978, ENG 00420648 ("Lived in Battambang town since 1972. When Khmer Rouge seized power he was forced to live in Me Chhbar area (some 30 kilometres Battambang) to work as a farmer"), ("From our own village I estimate that some 200 people have been killed. This included all former Lon Nol officials."); E1/179.1 François Ponchaud, T. 10 April 2013, pp. 29-30 ("the killing of the high-ranking soldiers and former civil servants were consistent with the purpose of the national revolution with regard to the case of Battambang... former high-ranking soldiers were gunned down.").

<sup>1489</sup> NC Appeal, para. 549.

<sup>1490</sup> Judgment, para. 118.

Samphan and Nuon Chea admitted as much when stating that they sought to kill all enemies, in the hopes of preventing another foreign invasion.<sup>1491</sup> Further evidence on the record, which the Chamber is presumed to have taken into account,<sup>1492</sup> demonstrates that the Khmer Rouge identified Khmer Republic soldiers as the enemy, both during and after combat.<sup>1493</sup> Indeed, the Chamber's finding elsewhere that 500 captured Khmer Republic soldiers were killed by the Khmer Rouge in 1972,<sup>1494</sup> and other surrendered Khmer Republic soldiers in Battambang in 1974<sup>1495</sup> further bolsters this finding. Contrary to Nuon Chea's contentions,<sup>1496</sup> a reasonable trier of fact could therefore have concluded that Khmer Republic officials were identified as enemies before 17 April 1975, regardless of whether or not they were combatants.

**B. The Chamber reasonably found that a policy of targeting Khmer Republic soldiers and officials existed on or after 17 April 1975 (NC Ground 207)**

362. The Chamber found that there was “overwhelming evidence that the policy to target former Khmer Republic officials was expressly ordered and affirmed by the Party leadership during the final offensive to ‘liberate the country’ and then throughout the DK era”.<sup>1497</sup> The Chamber reasonably inferred from the facts that a CPK policy to kill Khmer Republic officials existed prior to 17 April 1974.<sup>1498</sup> It is well-established that an agreement to commit crimes need not be

<sup>1491</sup> Judgment, para. 815, *citing* E3/108 Khieu Samphan and Nuon Chea Interviews by Meng-Try Ea and Sopheap Loeung, (also available at E31122), 9-11 June 2006, p. 6, ENG 00000930.

<sup>1492</sup> *Zigiranyirazo* AJ, para. 45; *Halilović* AJ, para. 121.

<sup>1493</sup> See, e.g., E1/190.1 Philip Short, T. 7 May 2013, pp. 37-38 (“[W]hen prisoners were captured...if...was a local person and was known, then he might be released...if he was not known, he would be killed...a ‘take no prisoners’ policy from the beginning.”), 38 (“There was no written instruction. It was just what you did, what you knew you had to do, what you knew the Party would want you to do...it was clearly understood to be the case.”), 73 (“Q. you indicate that officials and uniformed soldiers were separated from the rest, led away and killed...? A. That is consistent with what had been happening before - what had started happening ... and what happened after”); E3/9 Philip Short *Pol Pot: The History of a Nightmare*, ENG 00396430 (“For those perceived to be hostile...Opposing the revolution, whether in word or deed, usually meant death...summoned to district headquarters and never returned.”); E3/1714 Stephen Heder and Masato Matsushita, Interviews with Kampuchean Refugees at Thai-Cambodia Border, February-March 1980, ENG 00170758 (“In 1972 there were lots of Lon Nol soldiers captured, about 500 of them. All were executed, none were forgiven”); E1/222.1 Stephen Heder, T. 11 July 2013, pp. 12 (“Q. “Prisoners of war and defectors of Lon Nol were wiped out.” A. Yes. This is a phrase which I conventionally translate as ‘swept cleanly away.’”), 31 (“Q. In 1972 there were lots of Lon Nol soldiers captured, about 500 of them. All were executed, none were forgiven. Can you confirm that that’s an accurate recording of what you were told in this interview? A. Yes.”).

<sup>1494</sup> Judgment, paras 121, 830.

<sup>1495</sup> Judgment, para. 830.

<sup>1496</sup> NC Appeal, paras 549-550.

<sup>1497</sup> Judgment, para. 817.

<sup>1498</sup> See *supra*, XVII.A (CPK policy targeting Khmer Republic soldiers and officials).

explicit, but can be inferred from the facts.<sup>1499</sup> Accordingly, Nuon Chea's claim that "the criminal responsibility for the executions at Tuol Po Chrey required decisive proof of a decision to execute Khmer Republic soldiers and officials around the time of liberation",<sup>1500</sup> is without merit.

*i. Party policy as to Khmer Republic officials*

363. The Chamber found that "[a]ccording to Nuon Chea, communism mandates the elimination of those who pose threats to the country and those who cannot be (re)educated".<sup>1501</sup> As Nuon Chea acknowledges,<sup>1502</sup> the Chamber is entitled to rely on any evidence it deems to have probative value and it may accept or reject a witness's testimony only in part if it considers other parts of his or her evidence not reliable or credible.<sup>1503</sup> The Chamber did not "misrepresent" Nuon Chea's testimony,<sup>1504</sup> rather it chose to rely on parts of his testimony it deemed credible and infer from the other evidence what Nuon Chea's words amounted to in practice, namely a Party policy to target Khmer Republic officials after 1975.<sup>1505</sup> Contrary to Nuon Chea's suggestion,<sup>1506</sup> it is within the Chamber's discretion to decide which witness's testimony to prefer, without necessarily articulating every step of its reasoning in reaching this decision.<sup>1507</sup>

364. As demonstrated elsewhere, the Chamber was reasonable in finding that the CPK policy was to smash enemies, including Khmer Republic Soldiers and 'New People'.<sup>1508</sup> The Judgment reflects that the Chamber took into account the context in which the policies were agreed upon, including the manner in which the socialist revolution was to be implemented.<sup>1509</sup> Nuon Chea's mere disagreement with the findings and alternative interpretations of evidence<sup>1510</sup> fail to demonstrate that the Chamber's findings were unreasonable.<sup>1511</sup> Contrary to what Nuon Chea

<sup>1499</sup> See, e.g., *Karemera* AJ, para. 147, citing *Kvočka* AJ, para. 117; *Ntakirutimana* AJ, para. 466.

<sup>1500</sup> NC Appeal, para. 552. Additionally, Nuon Chea cites to no jurisprudence in support of this assertion. Similarly, Nuon Chea fails to cite anything in support of his contention that "any evidence of Party policy after 1975 is irrelevant" when analysing the events at Tuol Po Chrey.

<sup>1501</sup> Judgment, para. 815, citing **E1/21.1** Nuon Chea, T. 13 December 2011, pp. 42, 45.

<sup>1502</sup> NC Appeal, para. 554.

<sup>1503</sup> See *Ngirabatware* AJ, para. 97; *Karera* AJ, para. 19.

<sup>1504</sup> See NC Appeal, para. 554. See also NC Appeal, para. 555.

<sup>1505</sup> See, e.g., Judgment, fns 2567-2579.

<sup>1506</sup> NC Appeal, para. 555.

<sup>1507</sup> *Karemera* AJ, para. 230.

<sup>1508</sup> See *supra*, XVI (Policy to smash enemies).

<sup>1509</sup> See, e.g., Judgment, paras 724-738.

<sup>1510</sup> NC Appeal, para. 556.

<sup>1511</sup> *Karemera* AJ, para. 235.

appears to suggest,<sup>1512</sup> the Chamber’s finding that “the Khmer Rouge leadership sought to eliminate all ‘remnants’ of the former feudal, imperialist and capitalist regimes throughout the DK era”,<sup>1513</sup> was based on a wide variety of evidence.<sup>1514</sup> Moreover, Nuon Chea fails to demonstrate how the alleged error could invalidate the Judgment or occasion a miscarriage of justice.<sup>1515</sup>

365. Lastly, Nuon Chea’s complaint that the Chamber failed to make reasonable inferences “that class theory and class contradictions do not necessarily equate with or amount to an intent or policy to target, let alone execute” completely misses the point. Regardless of what was stated in Communist theory or CPK propaganda, the Chamber found that the evidence showed that CPK policy was to remake Cambodian society by targeting those it perceived as enemies, including those suspected because of their prior occupations or economic activities. Nuon Chea fails to demonstrate how the fact that the Judgment does not explicitly recognise that class theory or class contradictions in the abstract do not necessarily equate to criminal intent could invalidate the Judgment or occasion a miscarriage of justice.

*ii. CPK Instructions to target Khmer Republic officials around 17 April 1975 and throughout the DK era*

366. Nuon Chea attempts to separate out the Chamber’s finding and the underlying evidence it cited in support thereof into two distinct temporal segments, namely the existence of orders regarding the CPK policy to target Khmer Republic officials (i) “around the time of liberation”,<sup>1516</sup> and (ii) “in 1976 or later”.<sup>1517</sup> However, the Chamber’s actual finding was based on a review of the evidence as a whole.<sup>1518</sup>

367. Contrary to Nuon Chea’s contention, the Chamber reasonably concluded that there was “overwhelming evidence that the policy to target former Khmer Republic officials was expressly ordered and affirmed by the Party leadership during the final offensive to ‘liberate the country’ and then throughout the DK era”.<sup>1519</sup> In addition to the evidence cited in support of this specific

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<sup>1512</sup> NC Appeal, para. 557.

<sup>1513</sup> Judgment, para. 815.

<sup>1514</sup> See Judgment, paras 814-818.

<sup>1515</sup> See *supra*, II.B (Standard of Review).

<sup>1516</sup> NC Appeal, paras 559-573.

<sup>1517</sup> NC Appeal, paras 574-580.

<sup>1518</sup> See Judgment, para. 817. See *supra*, VI.D.ii (Probative Value of the Evidence).

<sup>1519</sup> Judgment, para. 817.



finding,<sup>1520</sup> there is ample evidence referenced further in this same paragraph.<sup>1521</sup> Moreover, there is a vast amount of circumstantial evidence throughout the Judgment that former Khmer Republic soldiers were in fact targeted by arrest, detention and execution, providing further contextual support for the Chamber's finding regarding the existence of orders.<sup>1522</sup>

*iii. CPK Instructions to target Khmer Republic officials around the time of 'liberation'*

368. Nuon Chea's attempt to focus on just five sources of evidence,<sup>1523</sup> while ignoring the wide variety of evidence further relied upon by the Chamber is unpersuasive. Even considering the five sources of evidence separately, Nuon Chea fails to establish that it was unreasonable for the Chamber to rely upon them.

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<sup>1520</sup> Judgment, fn. 2574, *citing* **E3/3962** Khoem Samhuon Interview Record, 6 March 2009, ENG 00293365 (In May 1975, Son Sen gave an order to arrest high-ranking civil servants and soldiers of the Lon Nol regime); **E3/3472** U.S. National Security Council Memorandum, Subject: Assessment of Developments in Indochina Since the End of the War, 15 July 1976, ENG 00443170 (Reports that a Khmer Rouge order went out to kill all army officers and civilian officials of the Lon Nol government); **E3/3327** *Further Submission from the International Commission of Jurists under Commission on Human Rights decision 9 (XXXIV)* (ECOSOC), 20 December 1978, ENG 00075939 (It was a decision of the Central Committee to wipe out former Khmer Republic officials in 1975 and 1976); **E3/419.1** Ieng Phan Interview Transcript, 3 November 2009, ENG 00912383 (He was instructed to look for Lon Nol soldiers); **E1/222.1** Stephen Heder, T. 11 July 2013, pp. 60-61 (Beginning in the latter half of 1976, the security services received signals from the Party leadership that they had to augment their efforts to identify former Khmer Republic officials who had escaped).

<sup>1521</sup> Judgment, fns 2575, *citing* Judgment paras 662-663, 2576, *citing* **E3/89** Ieng Sary Interview by Stephen Heder, 17 December 1996, ENG 00417606, 2577, *citing* **E3/832** Execution Order, 4 June 1975, ENG 00068915, 2578, *citing* **E3/813** Division 164 Meeting Minutes, 9 September 1976, ENG 00143487; **E3/5762** Duch Interview Record, 18 February 2008, ENG 00164329, 2579, *citing* **E3/511** DK Telegram, 2 April 1976, ENG 00182658 (Ke Pauk reported to Pol Pot, Nuon Chea and Son Sen on the enemy situation in the North Zone, including former soldiers posting pictures of Lon Nol and his announcement of 18 March 1970); **E3/4141** Report to Tram Kak District, 30 April 1977 ("After the consecutive instructions were provided by the Angkar to be cautious with the enemies and to sweep cleanly away the enemy ranking soldiers, the following names have been tracked and found"); **E3/1144** DK Telegram, 5 September 1977, ENG 005179243-4 (Sector 801 reported to Pol Pot, Nuon Chea, Ieng Sary, Vorn Vet and Son Sen that former officials, police and soldiers had been identified and only a few remained undercover); **E3/995** DK Telegram, 19 March 1978, ENG 00185583 (Pol Pot, Ieng Sary, Nuon Chea and Vorn Vet received a report concerning undercover enemy "rennants" including police, soldiers and civil servants who had disguised themselves as new people. They had been discovered, some "swept" away and the rest fled); **E3/996** DK Telegram, 19 March 1978, ENG 00436995-6 (The North Zone Secretary reported to 870, copying Pol Pot, Nuon Chea, Ieng Sary and Vorn Vet, that enemy remnants were re-emerging and were being systematically purged, although some police, soldiers and government officials escaped); **E3/2450** DK Letters of Confirmation, 17-19 September 1977, ENG 00322161 (Informing Ann that two 1st lieutenants and one 2nd lieutenant were brought to Ann because it was decided by the party due to their ranks; they were arrested because they were high ranking), ENG 00322162 (A 2nd lieutenant and two members of the air force were brought to Ann because Angkar decided that they should be), ENG 00322163 (According to the advice of Angkar, the widow of a Lieutenant-Colonel was arrested, she had said things were easier under the former regime); **E312048** Commune Reports, 28 March-8 May 1977, ENG 00276565 (Requesting to send former soldiers to a security centre); **E3/4103** DK Reports, 11 April 1977, ENG 00322133 (With high commitment to destroy and smash the enemy "to its total extinction", ranking former officials would be sent to the District and advice was requested as to other former soldiers and teachers).

<sup>1522</sup> See *infra*, XVII.C (Pattern of targeting Khmer Republic soldiers); *supra* IX.B (Murder during Phase I).

<sup>1523</sup> NC Appeal, paras 575-576.

369. First, Nuon Chea mischaracterises Khoem Samhuon’s evidence and the Chamber’s reference thereto elsewhere in the Judgment.<sup>1524</sup> Contrary to what Nuon Chea suggests,<sup>1525</sup> Khoem Samhuon’s evidence shows that cadres were ordered to arrest not only high-ranking Lon Nol officials who did not leave Phnom Penh, but also Khmer Republic soldiers being treated at the hospital.<sup>1526</sup> Samhuon went on to state that those former Lon Nol officers and their servants “were killed and thrown into a well in Tuol Kok”.<sup>1527</sup> When citing Khoem’s evidence, the Chamber did not find that he did not know where the order to arrest high-ranking Lon Nol soldiers came from, but instead summarised his evidence as indicating that the order came from the upper echelon, which was “likely Son Sen who controlled all divisions”.<sup>1528</sup> Accordingly, the Chamber reasonably relied on this evidence to support the finding that orders existed to arrest and kill former Khmer Republic soldiers ‘around the time of liberation’.

370. Second, the Chamber reasonably relied on Ieng Pahn’s evidence as corroboration for the existence of orders to target Khmer Republic officials and soldiers. Ieng Pahn indicated that he was instructed to search for soldiers and officials during the expulsion of the population from Phnom Penh.<sup>1529</sup> Contrary to Nuon Chea’s suggestion,<sup>1530</sup> the Chamber’s reliance on Phan’s evidence corroborates the general finding that former Lon Nol officials were targeted. As Nuon Chea concedes,<sup>1531</sup> the Chamber elsewhere cited Phan’s evidence in support of a similar finding, namely that there were orders to target and arrest former Khmer Republic soldiers after “liberation”.<sup>1532</sup> Nuon Chea fails to establish how the Chamber acted unreasonably.

371. Third, the Chamber reasonably relied on Stephen Heder’s evidence to support the finding that, according to Ieng Sary, “there was also a decision of the Party Centre [around 20 April 1975] to kill former Khmer Republic officials to ensure that it was impossible to stage a counter-revolution”.<sup>1533</sup> Ieng Sary’s evidence was inconsistent, given that he first denied knowing about the decision to kill former Lon Nol officers, government officials, and “the power-holding class”. However, Ieng Sary clearly had a reason to downplay his involvement in the decision to kill

<sup>1524</sup> NC Appeal, para. 560, *citing* Judgment, fn. 1530.

<sup>1525</sup> NC Appeal, para. 560.

<sup>1526</sup> **E3/3962** Khoem Samhuon Interview Record, 6 March 2009, ENG 00293365.

<sup>1527</sup> **E3/3962** Khoem Samhuon Interview Record, 6 March 2009, ENG 00293365.

<sup>1528</sup> Judgment, fn. 1530.

<sup>1529</sup> **E3/419.1** Ieng Phan Interview Transcript, 3 November 2009, ENG 00912383.

<sup>1530</sup> NC Appeal, para. 561.

<sup>1531</sup> NC Appeal, para. 561.

<sup>1532</sup> See Judgment, fn. 1516.

<sup>1533</sup> Judgment, fn. 2576, *citing* **E3/89** Ieng Sary Interview by Stephen Heder, 17 December 1996, ENG 00417606.

former Khmer Republic officials. Moreover, just a few minutes after Heder interrupted him, Ieng Sary admitted being told of a decision to kill officers in April 1975.<sup>1534</sup> These two statements are not mutually exclusive as the first question from Heder was much broader, not just covering officers, but officials and the “power-holding” class.

372. It is well-established that the Chamber is entitled to rely on any evidence it deems to have probative value and it may accept a witness’s testimony only in part if it considers other parts of his or her evidence not reliable or credible.<sup>1535</sup> Accordingly, the Chamber was reasonable in attributing low probative value to his answers that he was not involved in this decision-making process. Moreover, the Co-Prosecutors have demonstrated elsewhere that it was within the Chamber’s discretion to rely on Heder’s evidence and that Nuon Chea had ample opportunity to question Heder on any issue he deemed relevant.<sup>1536</sup>

373. Fourth, other than repeating arguments that were unsuccessful at trial,<sup>1537</sup> Nuon Chea fails to establish how the Chamber abused its discretion by relying on the ‘Execution Order’ dated 4 June 1975.<sup>1538</sup> Moreover, Nuon Chea’s alternative interpretations of the evidence are insufficient to call into question the Chamber’s findings.<sup>1539</sup> He has failed to establish how the Chamber acted unreasonably in relying on this document or in reaching its findings generally.<sup>1540</sup>

374. Fifth, the Chamber reasonably relied on the refugee account recorded by the International Commission for Jurists as further corroboration for the finding that orders were given to target former Khmer Republic soldiers, including by killing them.<sup>1541</sup> Contrary to Nuon Chea’s suggestion,<sup>1542</sup> the refugee account expressly provides that the decision to “wipe out the soldiers in 1975-1976” was taken by the Central Committee.<sup>1543</sup> There is nothing contradictory in the

<sup>1534</sup> E3/89 Ieng Sary Interview by Stephen Heder, 17 December 1996, pp. 6-8.

<sup>1535</sup> See *Karemera*, AJ, para. 468.

<sup>1536</sup> See *supra*, VI.C (Scope of questioning), VI.F.ii (Reliance on Heder’s evidence). See also NC Appeal, para. 562.

<sup>1537</sup> NC Appeal, para. 563, citing E1/233.1 T. 24 October 2013 (final submissions), pp. 41-42.

<sup>1538</sup> See *supra*, II.B (Standard of Review).

<sup>1539</sup> *Karemera* AJ, para. 235.

<sup>1540</sup> See *supra*, II.B (Standard of Review).

<sup>1541</sup> Judgment, fn. 2574, citing E3/3327 *Further Submission from the International Commission of Jurists under Commission on Human Rights decision 9 (XXXIV)* (ECOSOC), 20 December 1978, ENG 00075939 (It was a decision of the Central Committee to wipe out former Khmer Republic officials in 1975 and 1976). The Co-Prosecutors have elsewhere addressed Nuon Chea’s irrelevant and unsubstantiated contention of the “uncontroverted evidence before the Chamber [which] establishes that the large majority of killings did not originate in the Party center, and indeed rarely went as high as the zone. See NC Appeal, para. 565. See also *supra*, XIII (CPK Structure).

<sup>1542</sup> NC Appeal, para. 565.

<sup>1543</sup> See E3/3327 *Further Submission from the International Commission of Jurists under Commission on Human Rights decision 9 (XXXIV)* (ECOSOC), 20 December 1978, ENG 00075939.

Chamber's reliance on certain evidence from former CPK cadres, while rejecting other evidence.<sup>1544</sup> It is within a chamber's discretion to do so.<sup>1545</sup>

375. Nuon Chea's further disagreements with the Chamber's conclusions and alternative interpretations of the evidence are insufficient to call into question the Chamber's findings.<sup>1546</sup> It is well-established that a trier of fact shall decide which witness's testimony to prefer, without necessarily articulating every step of its reasoning in reaching this decision.<sup>1547</sup> Moreover, a review of the Judgment reflects that the Chamber was seised of Phy Phuon's evidence,<sup>1548</sup> and is therefore presumed to have taken his evidence into account.<sup>1549</sup> Contrary to Nuon Chea's suggestion,<sup>1550</sup> the fact that not all lower-ranking Khmer Republic soldiers were executed does not raise doubt about the Chamber's finding that former Khmer Republic soldiers were targeted, including by arrest, detention and execution.

376. Lastly, Nuon Chea's argument that the Chamber failed to consider evidence from an OCIJ statement that was taken after the close of evidence in Case 002/01 is without merit.<sup>1551</sup> Nuon Chea admits the statement was disclosed to him in September 2013, a month before closing arguments and almost a year before the Judgment was issued, yet he never made a motion to put the evidence before the Chamber.<sup>1552</sup>

*iv. CPK Instructions to target Khmer Republic officials in 1976 or later*

377. As demonstrated above, contrary to Nuon Chea's contention,<sup>1553</sup> the Chamber concluded on the basis of ample evidence that the policy to target Khmer Republic soldiers and officials was ordered by the Party leadership and continued throughout the DK era.<sup>1554</sup> Moreover, as stated above, there is ample contextual evidence which provides circumstantial support for the fact that

<sup>1544</sup> See NC appeal, paras 565-566.

<sup>1545</sup> See *Karemera*, AJ, para. 468.

<sup>1546</sup> See NC Appeal, paras 566-572.

<sup>1547</sup> *Karemera* AJ, para. 230.

<sup>1548</sup> See, e.g., Judgment, fns 256-258, 284, 296, 307, 377, 2580.

<sup>1549</sup> *Zigiranyirazo* AJ, para. 45; *Halilović* AJ, para. 121.

<sup>1550</sup> NC Appeal, para. 568.

<sup>1551</sup> NC Appeal, paras 567-572.

<sup>1552</sup> NC Appeal, para. 567. See also *supra*, V (Right to present a defence).

<sup>1553</sup> NC Appeal, paras 574, 577.

<sup>1554</sup> See *supra*, IX.B (Murder and extermination), XII (Tuol Po Chrey), XVII.A (Policy to kill Khmer Republic soldiers).

former Khmer Republic officials who were targeted were in fact killed.<sup>1555</sup> Nuon Chea's attempt to separate out the evidence by providing his own assessment of the reliability or credibility of just a few of these sources do not call into question the Chamber's findings.<sup>1556</sup> Moreover, Nuon Chea's challenges to a few sources are without merit.

378. Specifically, the Chamber reasonably cited a U.S. National Security Council memorandum, in addition to all the other evidence on the record.<sup>1557</sup> The memorandum is based on journalists' accounts with refugees and it was within the discretion of the Chamber to rely on this evidence as further corroboration for its finding that a Khmer Rouge order went out to target and kill former Khmer Republic soldiers.<sup>1558</sup> Nuon Chea fails to demonstrate how the Chamber abused its discretion.<sup>1559</sup>

379. Contrary to Nuon Chea's suggestion,<sup>1560</sup> the Chamber reasonably relied on a telegram from Ke Pauk to Pol Pot, dated April 1976, in support of its finding that some reports regarding the identification and targeting of, *inter alia*, former Lon Nol soldiers, were "addressed or copied to Pol Pot, Ieng Sary, Nuon Chea, Vorn Vet and/or Son Sen and to Office or Committee 870".<sup>1561</sup> Nuon Chea's alternative interpretation of the minutes of a military meeting involving Son Sen in 1976 is misleading and insufficient to demonstrate an error on the part of the Chamber.<sup>1562</sup> Indeed, it is clear from a plain reading of this document that Son Sen gave instructions to continue collecting biographies and that "soldier elements must be rounded up".<sup>1563</sup> This is consistent with the Chamber's finding elsewhere that orders existed to target for arrest, detention

<sup>1555</sup> See *supra*, IX.B (Murder and extermination), XII (Tuol Po Chrey), XVII.A (Policy to kill Khmer Republic soldiers). See also *infra*, XVII.C (Targeting of Khmer Republic soldiers on or after 17 April 1975).

<sup>1556</sup> See NC Appeal, paras 575-580. See also *Karemera* AJ, paras 235, 269, 467.

<sup>1557</sup> NC Appeal, para. 575, *citing* Judgment, fn. 2574, *referring to* E3/3472 U.S. National Security Council Memorandum, Subject: Assessment of Developments in Indochina Since the End of the War, 15 July 1976, ENG 00443170 (Reports that a Khmer Rouge order went out to kill all army officers and civilian officials of the Lon Nol government).

<sup>1558</sup> E3/3472 U.S. National Security Council Memorandum, Subject: Assessment of Developments in Indochina Since the End of the War, 15 July 1976, ENG 00443170.

<sup>1559</sup> The Co-Prosecutors have elsewhere demonstrated that Nuon Chea fails to demonstrate that the Chamber unreasonably relied on Stephen Heder's evidence. VI.F.ii (Reliance on Heder's evidence). Nuon Chea provides no additional arguments that establish how the Chamber abused its discretion in this regard. NC Appeal, para. 576. See also *supra*, IV (Impartiality of the Chamber).

<sup>1560</sup> NC Appeal, para. 578, *citing* Judgment, fn. 2579, *referring to* E3/511 DK Telegram, April 1976, ENG 00182658 (Ke Pauk reported to Pol Pot, Nuon Chea and Son Sen on the enemy situation in the North Zone, including former soldiers posting pictures of Lon Nol and his announcement of 18 March 1970).

<sup>1561</sup> Judgment, para. 817.

<sup>1562</sup> See NC Appeal, para. 579, *citing* Judgment, fn. 2578, *referring to* E3/813 Division 164 Meeting Minutes, 9 September 1976, ENG 00143487.

<sup>1563</sup> Judgment, fn. 2578, *citing* E3/813 Division 164 Meeting Minutes, 9 September 1976, ENG 00143487.

and execution former Khmer Republic soldiers.

380. The remainder of Nuon Chea's challenges to the Chamber's reliance on various sources of evidence are general in nature and fail to call into question the reasonableness of the Chamber's finding.<sup>1564</sup> Specifically, a plain reading of the few telegrams cited to by Nuon Chea all reflect that the upper echelon were copied on reports demonstrating that former Khmer Republic soldiers were being identified, arrested and/or eliminated.<sup>1565</sup>

**C. The Chamber reasonably found that a pattern of targeting Khmer Republic soldiers and officials existed on or after 17 April 1975 (NC Ground 208; KS paras 354-356)**

*i. Alleged killings across the country: April and May 1975*

381. The Chamber found that the targeting of Khmer Republic officials through arrests, killings and disappearances continued in late April and May 1975, before, during or after evacuations, including evacuations of Battambang, Kampong Cham, Pursat, Kampong Chhang, Kandal, Takeo and Siem Reap.<sup>1566</sup> A plain reading of the Judgment reveals that the Chamber did not intend for this list of locations to be exhaustive.<sup>1567</sup> The fact that the Chamber discussed a number of examples, rather than exhaustively list every single location in which Khmer Republic officials were targeted does not detract from the fact that this was a DK policy that continued nationwide in late April and May 1975.

382. Nuon Chea fails<sup>1568</sup> to establish how the Chamber acted unreasonably in coming to its determination. The Chamber relied on a vast amount of reliable evidence<sup>1569</sup> to support its

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<sup>1564</sup> NC Appeal, para. 580.

<sup>1565</sup> Judgment, fn. 2579, *citing, inter alia*, E3/1144 DK Telegram, 5 September 1977, ENG 005179243-4 (Sector 801 reported to Pol Pot, Nuon Chea, Ieng Sary, Vorn Vet and Son Sen that former officials, police and soldiers had been identified and only a few remained undercover); E3/995 DK Telegram, 19 March 1978, ENG 00185583 (Pol Pot, Ieng Sary, Nuon Chea and Vorn Vet received a report concerning undercover enemy "rennants" including police, soldiers and civil servants who had disguised themselves as new people. They had been discovered, some "swept" away and the rest fled); E3/996 DK Telegram, 19 March 1978, ENG 00436995-6 (the North Zone Secretary reported to 870, copying Pol Pot, Nuon Chea, Ieng Sary and Vorn Vet, that enemy remnants were re-emerging and were being systematically purged, although some police, soldiers and government officials escaped).

<sup>1566</sup> Judgment, para. 832 (and references therein).

<sup>1567</sup> See Judgment, para. 832. The Chamber stated that the targeting of Khmer Republic officials continued in the locations "including" the list it referred to. See also NC Appeal, paras 581-582.

<sup>1568</sup> See NC Appeal, paras 583-585.

<sup>1569</sup> The Co-Prosecutors have elsewhere demonstrated that it is within the Chamber's discretion to rely on hearsay evidence and out-of-court statements in support of its findings. See *supra*, paras VI.D.i-E (Out-of-court statements and hearsay evidence). The Co-Prosecutors have similarly shown elsewhere that the Chamber reasonably rejected Nuon Chea's request that numerous witnesses be called for testimony. See *supra*, V.A (Right to present a defence). See also NC Appeal, para. 584. Accordingly, Nuon Chea fails to establish that the Chamber erred in law by relying on the out-of-court statements.

finding that the Khmer Republic soldiers and officials continued to be targeted through executions, arrests and disappearances.<sup>1570</sup> Moreover, Nuon Chea mischaracterises the few sources of evidence it cherry-picks to show that the evidence upon which the Chamber relied is “unreliable or inadequate”.<sup>1571</sup> For instance, Nuon Chea’s reference to Toeng Sokha’s evidence<sup>1572</sup> does not take into account the later testimony that former soldiers “were relocated to a new location and they were nowhere to be found again”.<sup>1573</sup> Similarly, while Hun Chhunly did not see the execution of Lon Nol soldiers, he testified he heard that they were transported elsewhere and executed.<sup>1574</sup>

383. Additionally, the examples to which Nuon Chea refers, demonstrates that the Chamber did not mischaracterise or misinterpret the evidence.<sup>1575</sup> For example, Nuon Chea’s references to Yuos Phal and Prum Sarun support the fact that Khmer Republic officials were separated from the rest of the group<sup>1576</sup> and killed.<sup>1577</sup> Similarly, Nuon Chea’s reliance on Chhea Leanghorn is even more puzzling, as Nuon Chea himself explains that the Witness’s brother was killed “for having been a Lon Nol soldier”.<sup>1578</sup> Accordingly, it is clear that a reasonable trier of fact could have concluded based on the plethora of evidence that the Khmer Rouge continued to target Khmer Republic soldiers and officials between April and May 1975.

*ii. Alleged killings around the country: 1976 onwards*

384. Contrary to Nuon Chea’s assertions,<sup>1579</sup> a reasonable trier of fact could have found that “[i]n late 1975, 1976 and thereafter, the Khmer Rouge, through arrest, execution, and/or disappearance, continued targeting former Khmer Republic officials and their families, including in Battambang, Kandal, Takeo, Siem Reap/Oddar, Menchey, Kampong Cham, Pursat, Svay Rieng and Prey Veng”.<sup>1580</sup> The Chamber relied on a vast quantity of evidence in support of this

<sup>1570</sup> See Judgment, fns 2635-2641. See also Judgment, paras 678-681.

<sup>1571</sup> NC Appeal, para. 583.

<sup>1572</sup> NC Appeal, para. 583.

<sup>1573</sup> E1/147.1 Toeng Sokha, T. 4 December 2012, p. 81.

<sup>1574</sup> See Judgment, fn. 2635, *citing, inter alia*, E1/149.1 Hun Chhunly, T. 6 December 2012, p. 39.

<sup>1575</sup> NC Appeal, para. 585.

<sup>1576</sup> NC Appeal, para. 585, *citing* Judgment, fn. 2638, *referring to* E3/4611 Yos Phal Interview Record, ENG 00455376-7.

<sup>1577</sup> NC Appeal, para. 585, *citing* Judgment, fn. 2635, *referring to* E3/5187 Prum Sarun Interview Record, ENG 00274179.

<sup>1578</sup> NC Appeal, para. 585.

<sup>1579</sup> NC Appeal, paras 586-587.

<sup>1580</sup> Judgment, para. 833 (internal citations omitted).

finding.<sup>1581</sup> As Nuon Chea concedes,<sup>1582</sup> the Chamber considered the probative value and weight to be assigned all this evidence.<sup>1583</sup> Nuon Chea's contention that there are only a few sources of evidence which support the fact that the arrests, executions, and/or disappearances of the Khmer Republic soldiers occurred in late 1975, does not raise doubts about the Chamber's finding that the Khmer Republic soldiers were targeted in late 1975, 1976 and thereafter.<sup>1584</sup> Moreover, Nuon Chea simply refers to the many different categories of evidence upon which the Chamber relied,<sup>1585</sup> which certainly does not establish any abuse of discretion.<sup>1586</sup>

*iii. Alleged killings in Phnom Penh*

385. Contrary to the Appellants' contentions,<sup>1587</sup> the Chamber reasonably found that there was "a deliberate, organised, large-scale operation to kill former officials of the Khmer Republic, even if not all such officials shared this fate", after searches within Phnom Penh, at various checkpoints or in response to radio announcements.<sup>1588</sup> The Co-Prosecutors have elsewhere demonstrated that the Chamber correctly found that Khmer Republic soldiers and officials were killed during the forced transfer of the population from Phnom Penh.<sup>1589</sup> Indeed, there is a vast body of evidence referenced throughout the Judgment, which supports the Chamber's finding that Khmer Republic soldiers were killed following the expulsion of the population from Phnom Penh.<sup>1590</sup> Further corroborating this finding, the Chamber concluded that Khmer Rouge soldiers reported that they were instructed to kill all identified Khmer Republic soldiers.<sup>1591</sup>

386. Contrary to Appellants' suggestions,<sup>1592</sup> the Chamber correctly analysed the evidence as a whole, and it was within its discretion to rely on, *inter alia*, hearsay evidence, out-of-court statements, and civil party statements and applications.<sup>1593</sup> Additionally, the few sources of

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<sup>1581</sup> See Judgment, fns 2643-2652.

<sup>1582</sup> See NC Appeal, para. 587.

<sup>1583</sup> Judgment, para. 34.

<sup>1584</sup> NC Appeal, para. 586.

<sup>1585</sup> See NC Appeal, para. 587.

<sup>1586</sup> See *supra*, II.B (Standard of Review).

<sup>1587</sup> NC Appeal, paras 588-596; KS Appeal, paras 354-356.

<sup>1588</sup> Judgment, para. 561.

<sup>1589</sup> See *supra*, IX.B (Murder of Khmer Republic Soldiers during Phase I Movement).

<sup>1590</sup> See also Judgment, fns 1510, 1517, 1518, 1521, 1530, 1532. See also Judgment, fns 1537-1538, 1542-1543, 2653, 2658-2659 (and citations therein).

<sup>1591</sup> Judgment, para. 509, fn. 1523. See also Judgment, fn. 1529.

<sup>1592</sup> See NC Appeal, paras 592-596; KS Appeal, para. 355. See *supra*, IX.B (Murder of Khmer Republic Soldiers during Phase I Movement).

<sup>1593</sup> See *supra*, VI (Assessment of the evidence).



evidence cited to by Nuon Chea to demonstrate that the Chamber acted unreasonably in fact misrepresent the totality of the substance of these sources.<sup>1594</sup> Contrary to Nuon Chea's suggestion,<sup>1595</sup> he had ample opportunity to question these witnesses or raise objections to the content of the evidence.<sup>1596</sup>

387. Similarly, the fact that the Chamber also found that Khmer Republic soldiers were forcibly transferred from Phnom Penh alongside the civilian population or arrested and detained, does not contradict or detract from the fact that Khmer Republic officials were killed as part of a deliberate, organised and large-scale operation.<sup>1597</sup> Contrary to Nuon Chea's contention,<sup>1598</sup> the Chamber was under no obligation to analyse the proportion of Khmer Republic soldiers arrested or how many were killed within Phnom Penh during ongoing hostilities. Similarly, Khieu Samphan's assertion that the operation against Khmer Republic soldiers could not be large-scale unless the instructions for the operation were communicated perfectly<sup>1599</sup> is illogical. As noted above, the Judgment is replete with evidence regarding Khmer Republic officers, who were *hors de combat* when killed by the Khmer Rouge during the forced transfer of the population from Phnom Penh.

388. Lastly, an appeal is not a trial *de novo*.<sup>1600</sup> Accordingly, Nuon Chea's request that the SCC call ██████████ to testify is without merit.<sup>1601</sup> Nuon Chea has made no request under Rule 108(7) to hear this additional evidence as any such application would fail to satisfy the requirement that the evidence could have been a "decisive factor" in the Judgment. Nuon Chea does not demonstrate how the Chamber acted unreasonably in rejecting his request to call ██████████ for testimony, other than reiterating arguments already raised at trial.<sup>1602</sup>

*iv. Alleged pattern in the way Khmer Republic officials were identified*

389. The Chamber found that "the Khmer Rouge used deception to lure former Khmer Republic officials and soldiers into revealing their identities by telling them they would be taken to meet

<sup>1594</sup> See NC Appeal, paras 593-596. See *supra*, IX.B (Murder of Khmer Republic Soldiers during Phase I Movement).

<sup>1595</sup> NC Appeal, para. 594.

<sup>1596</sup> See *supra*, V.C (Right to present a defence – questioning of witnesses), VI.C (Scope of questioning).

<sup>1597</sup> See NC Appeal, paras 589-591.

<sup>1598</sup> NC Appeal, para. 589.

<sup>1599</sup> KS Appeal, para. 355.

<sup>1600</sup> See *supra*, II.B (Standard of Review).

<sup>1601</sup> ██████████.

<sup>1602</sup> ██████████. See also *supra*, II.B (Standard of Review).

Norodom Sihanouk, educated or re-integrated into the new armed forces”.<sup>1603</sup> Nuon Chea fails to demonstrate how the Chamber acted unreasonably.<sup>1604</sup> The Chamber relied on the evidence of an eyewitness, as well as other corroborating evidence to substantiate its finding.<sup>1605</sup> Additionally, the Chamber referred to an abundance of evidence elsewhere in the Judgment, which further corroborates the Chambers finding.<sup>1606</sup> Based on the totality of the evidence, a reasonable trier of fact could have come to the finding that the Khmer Rouge used deception to lure the Khmer Republic soldiers and officials to reveal their identity in order to kill them.

**D. The Chamber reasonably found that the JCE amounted to or involved the crimes committed at Tuol Po Chrey (NC Ground 209)**

390. The Chamber reasonably found that “there was a policy to target former Khmer Republic officials which involved the murder and extermination of former Khmer Republic officials at Tuol Po Chrey. This policy was also demonstrated by a consistent pattern of conduct, of which the murders and extermination at Tuol Po Chrey formed part”.<sup>1607</sup> Nuon Chea submits that the Chamber committed three independent errors of law and fact in so finding.<sup>1608</sup>

*i. Findings as to CPK policy and Tuol Po Chrey*

391. As established above, the Chamber relied on a vast amount of evidence in support of its finding that there existed a CPK policy to target former Khmer Republic officials and soldiers for arrest, disappearance and/or execution.<sup>1609</sup> Contrary to Nuon Chea’s suggestion there is nothing “deliberately vague” about this finding, nor is it relevant whether Nuon Chea had specific knowledge of the occurrence of the executions to find that the Tuol Po Chrey executions formed part of the general policy to target former Khmer Republic officials.<sup>1610</sup> The Chamber explicitly found that the murder and extermination of former Khmer Republic officials at Tuol Po Chrey can be imputed to participants of the JCE who acted to further the common

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<sup>1603</sup> Judgment, para. 834, *citing* E3/4590 Refugee Accounts, ENG 00820331 (All the refugees gave the same answer, that people disappeared or were executed); E1/136.1 Chum Sokha, T. 22 October 2012, p. 70 (those people who had a connection with the previous Lon Nol regime, including military officers, agents, or intelligence officers, or high-ranking officers, were detained).

<sup>1604</sup> See NC Appeal, paras 598-599. See also *supra*, VI (Assessment of the evidence).

<sup>1605</sup> See Judgment, fns 2655-2659.

<sup>1606</sup> See, *e.g.*, Judgment, fns 344-347, 1368, 1501, 1508, 1528-1530, 1541-1543.

<sup>1607</sup> Judgment, para. 835.

<sup>1608</sup> NC Appeal, para. 600.

<sup>1609</sup> See *supra*, XVII.A-C (Targeting of Khmer Republic soldiers).

<sup>1610</sup> NC Appeal, para. 601.

purpose.<sup>1611</sup>

392. A plain reading of the Judgment reflects that the Chamber found that the former Khmer Republic officials and soldiers that were targeted experienced different fates, including arrest, disappearance and/ or execution.<sup>1612</sup> The Chamber did not find that *every single* former Khmer Republic official and soldier was executed, as Nuon Chea appears to suggest.<sup>1613</sup> For example, the Chamber found with respect to the killing of former Khmer Republic officials identified after searches within Phnom Penh at various checkpoints or in response to radio announcements, that “the only reasonable conclusion [it] can reach on the basis of the evidence is that there was a deliberate, organised, large-scale operation to kill former officials of the Khmer Republic, *even if not all such officials shared this fate*”.<sup>1614</sup>

393. Irrespective, the Chamber relied on an abundance of evidence to conclude that former Khmer Republic officials were specifically and systematically targeted and killed as part of a CPK policy and therefore reasonably concluded that the executions at Tuol Po Chrey formed part of the JCE.<sup>1615</sup> Further contextual evidence was provided by the pattern of targeting Khmer Republic soldiers before 1975.<sup>1616</sup> Nuon Chea’s mere disagreement with the Chamber is insufficient to call into question the Chamber’s finding regarding the Tuol Po Chrey executions, which formed part of the JCE’s common purpose.

*ii. Victims included former Khmer Republic officials and soldiers*

394. Contrary to Nuon Chea’s contention, the CPK policy did not target just senior officials for execution, but also included “ordinary Khmer Republic soldiers and officials”.<sup>1617</sup> As detailed above, the Chamber relied on a vast quantity of evidence in finding that Khmer Republic officials and soldiers were either arrested, executed, and/or disappeared, and that this policy was instituted upon orders from the Party Centre.<sup>1618</sup> The Chamber considered the fact that not all

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<sup>1611</sup> Judgment, para. 835.

<sup>1612</sup> See, e.g., Judgment, paras 122, 127, 172, 515, 561, 815, 817, 821, 825, 827, 829, 832-833, 853-854.

<sup>1613</sup> NC Appeal, paras 601-602.

<sup>1614</sup> Judgment, para. 561 (emphasis added).

<sup>1615</sup> Judgment, para. 835. See also *supra*, XVII.A-C (Targeting of Khmer Republic soldiers) IX.B (Murder of Khmer Republic Soldiers during Phase I Movement), XII (Tuol Po Chrey).

<sup>1616</sup> Judgment, para. 830.

<sup>1617</sup> NC Appeal, para. 606.

<sup>1618</sup> See *supra*, XVII.A-C (Targeting of Khmer Republic soldiers) IX.B (Murder of Khmer Republic Soldiers during Phase I Movement), XII (Tuol Po Chrey).

Khmer Republic officials and soldiers suffered the same fate,<sup>1619</sup> but this does not detract from the fact that a large amount of Khmer Republic lower-ranking officials and soldiers *were* executed. Nuon Chea's attempt to focus only on certain sources of evidence,<sup>1620</sup> amongst the vast quantity relied upon by the Chamber, does not demonstrate how the Chamber erred in reaching its conclusion.

395. Nuon Chea further mischaracterises the evidence relied upon by the Chamber.<sup>1621</sup> For example, while Ieng Sary did reply to Heder's question that there was no documentation about ordinary soldiers and lower-ranking civil servants, he went on to state that "that decision was not made in advance. It was decided afterwards".<sup>1622</sup> Nuon Chea's example of the Chamber's "worst misrepresentation" is similarly misleading.<sup>1623</sup> While François Ponchaud recognised during his testimony that treatment varied across Cambodia during the Khmer Rouge, it is clear from his testimony that he is referring to the treatment of those who were evacuated and made to work.<sup>1624</sup> Ponchaud did not refer to the information he got from a number of witnesses, whom he deemed credible, regarding "the massacre of civil servants and military personnel from the Lon Nol regime throughout the country".<sup>1625</sup> Moreover, Ponchaud's evidence was corroborated by Philip Short and David Chandler,<sup>1626</sup> and elsewhere in the Judgment.<sup>1627</sup>

396. Nuon Chea's focus on but a few of the vast quantity of sources<sup>1628</sup> cited by the Chamber in support of the nation-wide pattern of targeting Khmer Republic officials and soldiers similarly does not demonstrate how the Chamber was unreasonable in finding that Khmer Republic officials and soldiers were targeted for execution, including "ordinary" soldiers and officials.<sup>1629</sup>

<sup>1619</sup> See Judgment, paras 508, 513, 555.

<sup>1620</sup> NC Appeal, paras 607-609.

<sup>1621</sup> NC Appeal, para. 607.

<sup>1622</sup> Judgment, fn. 2576, *citing* E3/89 Ieng Sary Interview by Stephen Heder, 17 December 1996, ENG 00417606.

<sup>1623</sup> NC Appeal, para. 608.

<sup>1624</sup> E1/178.1 François Ponchaud, T. 9 April 2013, pp 100-101; E1/180.1 François Ponchaud, T. 11 April 2013, pp. 43-44.

<sup>1625</sup> Judgment, fn. 2657, *citing* E3/370 François Ponchaud Interview Record, ENG 00333955.

<sup>1626</sup> Judgment, fns 2658, *citing* E1/191.1 Philip Short, T. 8 May 2013, pp. 130-131 (The targeting across the country was pretty uniform with slight variations in certain places); E1/190.1 Philip Short, T. 7 May 2013, pp. 87-88 (there was a pattern across the country of killing former Lon Nol officials), 2659, *citing* David Chandler, T. 18 July 2012, p. 22 (in the early stages of the DK regime, the primary enemies were those who had anything to do with the former Khmer Republic regime or army); E1/93.1 David Chandler, T. 20 July 2012, pp. 8-9 (the executions of those in the former regime were widely accepted as the first phase by various writers. This policy continued and was fully documented in refugee accounts and DK documents).

<sup>1627</sup> See, e.g., Judgment fns 2635-2641.

<sup>1628</sup> NC Appeal, para. 609.

<sup>1629</sup> See Judgment, fns 2635-2652.

Nuon Chea's reference to "considerable evidence [which] establishes that loudspeaker announcements used to gather Khmer Republic officials were limited to military officers and high-ranking civil servants"<sup>1630</sup> is misleading and ignores the evidence cited throughout the Judgment that proved Khmer Republic officials and soldiers alike were encouraged to reveal their identity.<sup>1631</sup>

*iii. Only reasonable inference possible*

397. Contrary to Nuon Chea's suggestion, the Chamber is under no obligation to discuss every alternative interpretation of the evidence suggested by him.<sup>1632</sup> Rather, the Chamber need only determine that an inference drawn with respect to a finding of guilt is the only reasonable inference from the evidence.<sup>1633</sup> Specifically, the Chamber considered various possible inferences throughout the Judgment, and came to the conclusion that the only reasonable inference is that Lon Nol officials transported to Tuol Po Chrey around 25 or 26 April 1975 were executed.<sup>1634</sup>

398. Nuon Chea's repetition of alternative interpretations of the evidence or disagreements with the Chamber's findings are insufficient to call into question the Chamber's findings regarding the existence of a CPK policy to target former Khmer Republic officials and soldiers, which

<sup>1630</sup> NC Appeal, para. 609.

<sup>1631</sup> See, e.g., Judgment, fn. 1528, *citing, inter alia*, **E1/140.1** Sum Chea T. 5 November 2012, pp. 16-17, 30-31 (*citing E3/3961* Sum Chea Interview Record, ENG 00223346, seven or eight days after liberation, loudspeaker announcements called for Lon Nol soldiers of whatever rank to return to their duty stations; people were told to reveal their background - for example, what rank they held before, so that they could be offered the same titles when they joined the Khmer Rouge; the broadcasts were for everyone, irrespective of their prior rank), 33 (it was four or five days after the liberation of Phnom Penh), 63 (he heard from people in Koeun's group that loudspeakers broadcast the announcements), 73-74 (Koeun, a former regiment commander, was fierce and implemented the order straight away); **E1/144.1** Meas Saran, T. 14 November 2012, pp. 112-114 (four or five days after the evacuation of Phnom Penh, an announcement was made via loudspeaker calling on civil servants, soldiers and senior military officials to return to Phnom Penh to help rebuild the country because the war had ended; although some people decided to return to Phnom Penh based on this announcement, Meas, a former civil servant, did not as he suspected something was wrong); **E3/1747** Khoem Nareth Interview Record, 6 July 2008, ENG 00243009 (at Thai Tortoeng Khmer Rouge soldiers announced by loudspeaker that those who previously had been soldiers, PMs and police officers, with any ranks, were needed and would be accepted for work with the party; he saw the soldiers gather in a group but did not know where they were taken as he continued his journey); **E3/5614** Seng Mardi Interview Record – Annex (book excerpt), undated, ENG 00519569 (announcements requesting the return of all former civil servants and military personnel to central Phnom Penh blared through loudspeakers as their assistance was needed; Angkar promised to take care of the families of those who went).

<sup>1632</sup> NC Appeal, paras 612-615.

<sup>1633</sup> See *Karemera* AJ, para. 313.

<sup>1634</sup> Judgment, para. 681.

included the executions at Tuol Po Chrey.<sup>1635</sup> Accordingly, a reasonable trier of fact could have come to the conclusion, based on all the evidence before it,<sup>1636</sup> that there was a plan or policy to target former Khmer Republic officials, that the murder and extermination of former Khmer Republic officials at Tuol Po Chrey was committed pursuant to this plan or policy,<sup>1637</sup> and that participants in the JCE were responsible for the commission of the massacre.<sup>1638</sup>

**E. Khieu Samphan fails to demonstrate that the Chamber erred in finding that a CPK policy to target Khmer Republic soldiers and officials existed before during and after 17 April 1975 (paras 156-158, 202-223, 235-236, 420-428, 434-435, 644-645)**

399. Khieu Samphan generally alleges that the Chamber erred in law and fact in finding that there existed a CPK policy to target Khmer Republic officials and soldiers.<sup>1639</sup> Khieu Samphan's submissions disagreeing with the Chamber's findings or providing alternative interpretations of the evidence<sup>1640</sup> are insufficient to call into question the Chamber's conclusions regarding the CPK policy to target Khmer Republic officials and soldiers.<sup>1641</sup> Similarly, Khieu Samphan's arguments<sup>1642</sup> that do not have the potential to invalidate the verdict or do not occasion a miscarriage of justice should be summarily dismissed.<sup>1643</sup> Khieu Samphan's general assertions regarding the Chamber's reliance on hearsay evidence are meritless,<sup>1644</sup> as it is well-established that it is within the Chamber's discretion to rely on hearsay evidence.<sup>1645</sup>

400. The Co-Prosecutors have elsewhere demonstrated that the Chamber did take into account the war against the Lon Nol regime,<sup>1646</sup> contrary to Khieu Samphan's contention.<sup>1647</sup> The Chamber, however, reasonably concluded on the basis of the totality of the evidence, including

<sup>1635</sup> See *Karemera* AJ, paras 206, 235. See also *supra*, XIII (CPK structure).

<sup>1636</sup> See *supra*, XII (Tuol Po Chrey), XIII (CPK structure).

<sup>1637</sup> Judgment, para. 835.

<sup>1638</sup> Judgment, para. 836.

<sup>1639</sup> KS Appeal, paras 156-158, 202-223, 235-236, 420-428, 434-435. To the extent that Khieu Samphan's arguments in any way overlap with Nuon Chea's grounds of appeal in relation to the Chamber's findings regarding the CPK policy target former Khmer Republic officials and soldiers (See, e.g., KS Appeal, paras 158, 202-206, 209, 212-213, 216-223, 235-236, 420-421, 423-427, 434-435), the Co-Prosecutors incorporate by reference their responses herein. See *supra*, XVII (Targeting Policy) XIII (CPK Structure).

<sup>1640</sup> See KS Appeal, paras 204-206, 211-213, 214-216, 422, 428, 425, 644-645.

<sup>1641</sup> *Karemera* AJ, paras 206, 235.

<sup>1642</sup> See KS Appeal, paras 157, 210-211, 214-215.

<sup>1643</sup> See *supra*, II.B (Standard of Review).

<sup>1644</sup> KS Appeal, paras 203, 211, 424.

<sup>1645</sup> See *supra*, VI.E (Assessment of hearsay evidence).

<sup>1646</sup> See *supra*, XV.D (Policy to forcibly transfer).

<sup>1647</sup> KS Appeal, paras 156, 204, 216, 428.

the killing of Khmer Republic civilian officials and soldiers who were *hors de combat*,<sup>1648</sup> that the war could not serve as a justification for the policy.<sup>1649</sup> Similarly,<sup>1650</sup> the Chamber relied on ample evidence, which demonstrates that there was a pattern of conduct regarding the targeting of former Khmer Republic officials and soldiers.<sup>1651</sup>

401. Contrary to Khieu Samphan's suggestion, the Chamber did not rely on evidence of indoctrination sessions to demonstrate that the Party policy regarding the targeting of Khmer Republic soldiers was disseminated before April 1975.<sup>1652</sup> Instead, the Chamber took this evidence into account when finding that the Party policy concerning "enemies" was disseminated through these sessions, after April 1975.<sup>1653</sup> Khieu Samphan does not demonstrate how the Chamber erred in this regard. Lastly, the Chamber further reasonably relied on a refugee's account as recorded by Stephen Heder of the killing of 500 Khmer Republic soldiers in 1972 by the Khmer Rouge at the village of Phloeng Chhes.<sup>1654</sup> It was within the Chamber's discretion to take this evidence into account as further contextual support for the existence of a pattern of executing Khmer Republic soldiers.

## XVIII. ROLE OF NUON CHEA

### A. Nuon Chea had considerable influence on DK military policy and its implementation (NC Ground 42)

402. Nuon Chea's argument on Ground 42 patently fails to meet the standard of review for errors of fact.<sup>1655</sup> Nuon Chea does not explain how the Chamber's alleged error in finding that he "had considerable influence on DK military policy and its implementation"<sup>1656</sup> creates a reasonable doubt as to his guilt on any count for which he was convicted and has occasioned a miscarriage

<sup>1648</sup> See *supra*, XVII.A-C (Targeting of Khmer Republic soldiers) IX.B (Murder of Khmer Republic Soldiers during Phase I Movement), XII (Tuol Po Chrey).

<sup>1649</sup> Judgment, paras 827-828, 830-834.

<sup>1650</sup> KS Appeal, para. 204.

<sup>1651</sup> Judgment, paras 830-834.

<sup>1652</sup> KS Appeal, paras 207-208, *citing* Judgment, para. 818.

<sup>1653</sup> Judgment, para. 818.

<sup>1654</sup> Judgment, para. 830, *citing* E3/1714 Report by S. Heder and M. Matsushita: *Interviews with Kampuchean Refugees at Thai Cambodia Border*, February-March 1980, ENG 00170758; E1/221.1 Stephen Heder, T. 11 July 2013, pp. 31-32. See also KS Appeal, para. 203.

<sup>1655</sup> See *supra*, II.B (Standard of Review).

<sup>1656</sup> Judgment, para. 341. Nuon Chea does not challenge the Chamber's finding that he received detailed information about military policy and its implementation.

of justice.<sup>1657</sup>

403. Moreover, the Chamber's finding is amply supported by several mutually reinforcing sources of evidence that demonstrate both the depth and breadth of Nuon Chea's involvement in creating and implementing military policy. As the Chamber found,<sup>1658</sup> Nuon Chea was one of the senior party leaders who regularly met with military commanders in the months, weeks and days before the attack on Phnom Penh in order to plan and approve its 'liberation' and the forcible expulsion of the population in April 1975. This conclusion was supported by testimony from Nuon Chea himself<sup>1659</sup> and a detailed account from a cadre present at those meetings.<sup>1660</sup> A

<sup>1657</sup> See *supra*, II.B (Standard of Review).

<sup>1658</sup> Judgment, paras 133, 143, 144-6, 335, 735, 807, 816.

<sup>1659</sup> Judgment, fns 377, 378, 415, 1019, *citing* E1/14.1 Nuon Chea, T. 22 November 2011, pp. 103-104, 108, 110 (describing in detail the agenda of the extraordinary session of the Standing Committee in mid-1974 including the political and military aspects of the liberation and evacuation of Phnom Penh discussed and decided upon); E1/21.1 Nuon Chea, T. 13 December 2011, pp. 26-30 (confirming his attendance at a series of meetings of the Central Committee which took place from 1973 onwards, and in which strategy and timing for the attack and evacuation of Phnom Penh were discussed and the policies decided upon); E1/22.1 Nuon Chea, T. 14 December 2011, pp. 2-3; see also pp. 5-6 (confirming an extraordinary meeting of Standing and Central Committees in mid-1974 to discuss the evacuation of Phnom Penh and other provincial towns. Members of the Standing Committees except Ieng Sary participated in the meeting as well as some members of the Central Committee); E1/35.1 Nuon Chea, T. 30 January 2012, pp. 14-21 (confirming his attendance at a three-day mid-1974 extraordinary meeting of the Central Committee on the Chinit River along with representatives from the zones including, *inter alios*, Pol Pot, Ta Mok, So Phim, Son Sen and Koy Thuon at which the decision was made to evacuate Phnom Penh); E1/36.1 Nuon Chea, T. 31 January 2012, pp. 37-38 (confirming his part in decision to evacuate Phnom Penh); E1/202.1 Nuon Chea, T. 6 June 2013, pp. 37-41 (confirming that the decisions to 'liberate' and evacuate Phnom Penh were taken by the Standing Committee, including Nuon Chea himself, and the CPK more generally in consultation with the "chairmen of all zones"); E3/3 Nuon Chea Interview by Khem Ngun, undated, ENG 00184673 ("in 73 we were preparing to attack, 73-75, preparing to attack Phnom Penh").

<sup>1660</sup> Judgment, fns 377, 378, 379, 380, 416, 417, 425, 1019, *citing* E1/97.1 Phy Phuon, T. 26 July 2012, pp. 10, 11, 12, 13, 14-16, 17, 23-25, 39, 43-44; E1/99.1 Phy Phuon, T. 31 July 2012, pp. 11, 44-45. See also pp. 12-20; E3/24 Phy Phuon Interview Record, 5 December 2007, ENG 00223581; E3/63 Phy Phuon Interview Record, ENG 00231409-10 (series of accounts stating that Pol Pot, Nuon Chea and Khieu Samphan would convene regular meetings at B-5 – the command centre for the attack on Phnom Penh - with zone commanders, including Son Sen, Ta Mok, Vorn Vet, Cheng An, Koy Thuon, Ke Pauk, So Phim, and Ta Phuong. The meetings could be as frequent as every five days or every fortnight, depending on circumstances in the battlefield. Other regular meetings were held in the Northwest and the West with Koy Thuon and Vorn Vet. The witness confirmed that the Central Committee including Pol Pot, Nuon Chea, Khieu Samphan, So Phim, Koy Thuon, Ta Mok, Vorn Vet, Ros Nhim, Son Sen, Ieng Sary met in Phum Meak village for more than a fortnight in **June 1974** to discuss updates on the battlefield situation from the zones and to focus on the attack to liberate Phnom Penh. One morning in early **April 1975**, there was a large meeting between Pol Pot, Nuon Chea, Khieu Samphan, Ta Mok, Son Sen, Koy Thuon, Vorn Vet, Cheng An and So Phim to discuss and agreed upon the attack on and evacuation of Phnom Penh, "including both the military measures as well as the evacuation measure". During the course of the meeting, the battlefield commanders reported on the situation in their respective battlefields. Military instructions were also given to the attendees: "certain targets would be identified, the targets for each zone and each division before they reached their main target to liberate Phnom Penh completely".). See also E3/5593 Heng Samrin Handwritten Interview Notes by Stephen Heder, 3 December 1991, ENG 00419396-97 (reporting a planning meeting of the Centre before the liberation of Phnom Penh at which it was decided to attack, liberate and then evacuate Phnom Penh); E3/27 Khieu Samphan Interview Record, 13 December 2007, ENG 00156743.



witness who was directly informed by an attendee<sup>1661</sup> and CPK publications<sup>1662</sup> provided yet further corroboration. Importantly, the evidence on which the Chamber relied shows Nuon Chea's *active* participation in these critical policy-making meetings, such as in April 1975<sup>1663</sup> and his personal endorsement of the plan to evacuate Phnom Penh.<sup>1664</sup>

404. Contrary to Nuon Chea's assertion,<sup>1665</sup> the Chamber did not mischaracterise his testimony regarding the final attack on Phnom Penh. Far from concerning only the decision to evacuate Phnom Penh and other urban centres,<sup>1666</sup> his evidence dealt unequivocally with both his participation in strategic decisions for the attack on Phnom Penh and the procurement of weapons for the offensive.<sup>1667</sup> This argument is also contradicted by his admissions in his Appeal that he "participated in decisions to liberate the country"<sup>1668</sup> and that he testified to his involvement in that same arms shipment.<sup>1669</sup>

405. Moreover, as Nuon Chea acknowledges elsewhere in his Appeal,<sup>1670</sup> the attack on Phnom Penh was the *sine qua non* for its subsequent evacuation. Nuon Chea's attempt to tease apart these two inextricably linked events is both illogical and futile. The evidence on which the Chamber relied clearly demonstrates that both aspects of the CPK's strategy were discussed at each of the major meetings.<sup>1671</sup> Further, the evacuation of Phnom Penh was itself a military operation that the Chamber found was conducted by units under the command of *inter alios* Son

<sup>1661</sup> Judgment, para. 335, *citing* E1/129.1 Meas Voeun, T. 3 October 2012, p. 93 and E1/130.1 Meas Voeun, T. 4 October 2012, pp. 10-11 (reference to pp. 8-9 is a typographical error) (stating that his division commander returned from a meeting of the General Staff - Nuon Chea, Ta Mok and Son Sen - about a week before the attack on Phnom Penh with plans for that attack which he disseminated to, *inter alios*, the witness. To his knowledge, the General Staff had the overall command of the divisions across DK).

<sup>1662</sup> Judgment, fn. 377 *citing* E3/11 *Revolutionary Flag*, September 1977, p. 36, ENG 00486247; E3/747 *Revolutionary Flag*, August 1978, p. 20, ENG 00499785.

<sup>1663</sup> E1/97.1 Phy Phuon, T. 26 July 2012, p. 16 ("I noted that Om Nuon Chea was on his feet and raised this first. He said that it was necessary and needed approval and it the evacuation was noted to be necessary and he expressed his position that he agreed with the plan."); p. 23 ("Om Nuon Chea also stood out and agreed to the [evacuation of Phnom Penh]"); p. 24 ("Om Nuon Chea also made that presentation regarding the good points from the experimenting with liberating those towns and cities in order to protect the forces" and confirming that Pol Pot and Nuon Chea discussed the evacuations of other cities). See also E3/63 Phy Phuon OCIJ Statement, 21 September 2008 ENG 00231410 ("Mr. Nuon Chea also provided his impressions and agreed to the plan.").

<sup>1664</sup> See *supra* fn. 1659.

<sup>1665</sup> NC Appeal, para. 251

<sup>1666</sup> NC Appeal, para. 251.

<sup>1667</sup> For example, Nuon Chea testified to his involvement in making strategic decisions regarding the timing of the attack on Phnom Penh (E1/21.1 Nuon Chea, T. 13 December 2011, pp. 26-27); and the procurement of weapons for that final attack (E1/21.1 Nuon Chea, T. 13 December 2011, pp. 27-28).

<sup>1668</sup> NC Appeal, para. 263.

<sup>1669</sup> NC Appeal, para. 252.

<sup>1670</sup> NC Appeal, para. 537.

<sup>1671</sup> See *supra* fns 1659-1660.

Sen, Sao Phim, Koy Thuon, Ta Mok and Vorn Vet,<sup>1672</sup> who all attended both the June 1974 and April 1975 meetings.<sup>1673</sup> The Chamber was therefore entitled to rely on evidence of Nuon Chea's admission of involvement in its planning to make its finding.

406. The Chamber demonstrated that Nuon Chea's intimate involvement in internal military policy was complemented by his involvement in external military and security matters, particularly concerning the rising tensions with Vietnam<sup>1674</sup> and through systematic involvement in the procurement of arms for the regime.<sup>1675</sup> Nuon Chea now seeks to minimise and distort the significance of the Standing Committee meeting on 26 March 1976 in which he spoke in Pol Pot's absence,<sup>1676</sup> but as the Chamber established,<sup>1677</sup> the evidence in fact shows that Nuon Chea gave strategic political and military advice and instructions concerning the border situation with Vietnam.<sup>1678</sup> This was not the isolated incident that Nuon Chea portrays.<sup>1679</sup> Nuon Chea was a full rights member of the Standing Committee<sup>1680</sup> and attended all meetings for which attendance records survive. As the Chamber demonstrated, the Standing Committee regularly discussed military and national security matters,<sup>1681</sup> and Nuon Chea's contribution to those discussions is manifest.<sup>1682</sup> Indeed, the CPK Statute expressly subordinated the RAK to the Party Centre.<sup>1683</sup>

<sup>1672</sup> Judgment, paras 141, 148-151, 739, 881. See also **E1/35.1** Nuon Chea, T. 30 January 2012, p. 18.

<sup>1673</sup> See *supra* fn. 1660.

<sup>1674</sup> Judgment, para. 336, *citing* **E3/218** Standing Committee Meeting Minutes, 26 March 1976, ENG 00182656-57; **E3/217** Standing Committee Meeting Minutes, 11 March 1976; **E3/221** Standing Committee Meeting Minutes, 14 May 1976, ENG 00182695, 00182697-99 and 00182705.

<sup>1675</sup> Judgment, para. 335, *citing* **E1/14.1** Nuon Chea, T. 22 November 2011, pp. 94-95; **E1/21.1** Nuon Chea, T. 13 December 2011, pp. 18-20, 28-29; **E1/40.1** Nuon Chea, T. 8 February 2012, pp. 10, 13-17.

<sup>1676</sup> NC Appeal, para. 252.

<sup>1677</sup> Judgment, para. 336.

<sup>1678</sup> **E3/218** Standing Committee Meeting Minutes, 26 March 1976, ENG 00182656-57.

<sup>1679</sup> NC Appeal, para. 252.

<sup>1680</sup> Judgment, paras 304, 315, 847, 878.

<sup>1681</sup> Judgment, paras 336 and 338 and fns 1024, 1025, *citing* **E3/217** Standing Committee Meeting Minutes, 11 March 1976, ENG 00182635-37; **E3/221** Standing Committee Meeting Minutes, 14 May 1976, ENG 00182693-705; **E3/222** Standing Committee Meeting Minutes, 15 May 1976, ENG 00182665-66; **E3/229** Standing Committee Meeting Minutes, 22 February 1976, ENG 00182625-27; **E3/224** Standing Committee Meeting Minutes, 30 May 1976, ENG 00182667-70. See also Judgment, para. 768, *additionally citing* **E3/227** Standing Committee Meeting Minutes, 2 November 1975, ENG 00183409-14; **E3/232** Standing Committee Meeting Minutes, 8 March 1976, ENG 00182631-34. See also **E3/216** Record of the Standing [Committee's] visit to the Northwest Zone, 20-24 August 1975, ENG 00850973-74, 00850976-77; **E3/228** Standing Committee Meeting Minutes, 9 January 1976, ENG 00182615.

<sup>1682</sup> See, e.g., Judgment, para. 336, *citing* **E3/221** Standing Committee Meeting Minutes, 14 May 1976, ENG 00182695, 00182697-99 and 00182705. Nuon Chea's decision-making role in military affairs is further supported by **E3/89** Ieng Sary DC-Cam Interview, 17 December 1996, ENG 00417608 ("There were some matters that Pol Pot, Nuon Chea, and Son Sen decided among themselves without asking SAO Phim ... Whether it was security affairs or military affairs").

407. Nuon Chea's analysis also overlooks the significance of the Chamber's detailed consideration<sup>1684</sup> of surviving DK telegrams and reports that establish his responsibility for and involvement in numerous aspects of military policy and implementation, including reports concerning the situation on the battlefields, as well as on the border with Vietnam and Thailand,<sup>1685</sup> and telegrams concerning the activities of the military, particularly Division 164 of the RAK.<sup>1686</sup> As the Chamber noted,<sup>1687</sup> many of these communications were distributed outside of Division 164 only to 'Brother Nuon' (Nuon Chea) and 'Brother Khieu' (Son Sen, Chief of RAK General Staff),<sup>1688</sup> the two members of the CPK elite responsible for military policy and implementation. Moreover, the evidence of Nuon Chea's advice to subordinates<sup>1689</sup> and the explicit request from Son Sen to Nuon Chea for assistance in searching for persons connected to a purged CPK cadre<sup>1690</sup> belie Nuon Chea's contention<sup>1691</sup> that he was merely a passive recipient of military reports and telegrams.

408. The Chamber reasonably rejected Nuon Chea's assertions at trial that he did not give the speech commemorating the founding of the RAK in Cambodia.<sup>1692</sup> His continuing denial<sup>1693</sup> is

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<sup>1683</sup> Judgment, para. 241, citing **E3/130** CPK Statute, undated, Article 27, ENG 00184046. See also Judgment, fn. 2331: "Generally, throughout the revolution, Pol Pot, Nuon Chea, SON Sen and the Central Committee oversaw military campaigns". See further, **E3/5** *Revolutionary Flag*, August 1975, ENG 00401498; **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, ENG 00396426-27.

<sup>1684</sup> Judgment, paras 337-338.

<sup>1685</sup> Judgment, para. 337, citing **E3/893** DK Telegram, 26 January 1976; **E3/871** DK Telegram 21 March 1976; **E3/240** DK Military Telegram, 15 June 1977; **E3/882** DK Telegram, 12 August 1977; **E3/885** DK Telegram 24 September 1977; **E3/895** DK Telegram, 12 November 1977; **E3/908** DK Telegram, 25 December 1977; **E3/243** DK Telegram, 19 January 1978; **E3/1021** DK Telegram, 3 March 1976; **E3/976** DK Telegram, 6 November 1977; **E3/998** DK Telegram, 23 March 1978; **E3/155** DK Telegram, 23 April 1978; **E3/892** DK Telegram, 29 October 1977; **E3/867** DK Telegram, 20 March 1978; **E3/1144** DK Telegram, 5 September 1977; **E3/974** DK Telegram; **E3/883** DK Telegram, 27 August 1977. See also Judgment, para. 773, citing **E3/918** DK Telegram, 12 January 1978; **E3/889** DK Telegram, 27 October 1977 (requesting that Angkar's forces be reinforced immediately); **E3/910** DK Telegram, 24 December 1977 (requesting instruction regarding attacking a location); and Judgment, para. 817, citing **E3/996** DK Telegram, 19 March 1978.

<sup>1686</sup> Judgment, para. 338, citing **E3/519** DK Telegram, 29 March 1978; **E3/915** DK Telegram, 31 December 1977; **E3/928** DK Report, 1 April 1978, as well as telegrams noted in fns 1688 and 1690 *infra*.

<sup>1687</sup> Judgment, fn. 1026.

<sup>1688</sup> Judgment, fn. 1026, citing **E3/1222** DK Telegram, 24 September 1976; **E3/1223** DK Telegram, 27 September 1976; **E3/1224** DK Telegram, 6 October 1976; **E3/1225** DK Telegram, 6 October 1976; **E3/1226** DK Telegram, 8 October 1976.

<sup>1689</sup> Judgment, para. 337, citing **E3/58** Kham Phan Interview Record, E3/58, 21 November 2008, ENG 00250089 **E3/16** Book by Khieu S.: *Considerations on the History of Cambodia From the Early Stage to the Period of Democratic Kampuchea*, ENG 00498267.

<sup>1690</sup> Judgment, fn. 1026, citing **E3/1135** DK Telegram.

<sup>1691</sup> NC Appeal, para. 252.

<sup>1692</sup> Judgment, para. 339.

<sup>1693</sup> NC Appeal, fn. 698.

untenable and simply repeats his position at trial<sup>1694</sup> without showing any error on the part of the Chamber. Faced with incontrovertible evidence of his involvement, Nuon Chea now desperately downplays the significance of that speech. Yet, far from “demonstrat[ing] how limited his role was”,<sup>1695</sup> this speech contained instructions and endorsements regarding CPK policy, past and present. It highlights the prominent and extensive role Nuon Chea played in crafting military policy and his detailed knowledge of the RAK’s capabilities, in terms of both materiel and personnel, and its military operations.<sup>1696</sup>

409. The Chamber’s failure to find beyond reasonable doubt that Nuon Chea was a member of the Military Committee<sup>1697</sup> is not dispositive in light of the abundant evidence it cited of Nuon Chea’s considerable influence on military policy and its implementation.

410. Nuon Chea alludes to testimony from Oeun Tan<sup>1698</sup> and, elsewhere, Philip Short<sup>1699</sup> on this issue, and which he asserts that the Chamber should have taken into consideration<sup>1700</sup> in reaching its conclusions. Yet Nuon Chea fails to demonstrate that the Chamber did not consider this evidence or how the Chamber’s conclusion, based on the evidence as a whole, was unreasonable. It is well established that a Chamber is presumed to have considered all the relevant evidence before it.<sup>1701</sup> Further, a trial chamber “is not required to articulate every step of its reasoning for each particular finding it makes”<sup>1702</sup> nor is it “required to set out in detail why it accepted or rejected a particular testimony”.<sup>1703</sup> In any event, as Nuon Chea concedes,<sup>1704</sup> it is clear that the Chamber did consider the relevant portion of Philip Short’s evidence. Moreover, the remainder of Short’s testimony demonstrates that this statement was limited to the minutiae of military deployments and strategy rather than military policy more generally and that, in Short’s opinion,

<sup>1694</sup> **E1/25.1** Nuon Chea, T. 11 January 2012, pp. 33-34; **E1/41.1** Nuon Chea, T. 9 February 2012, pp. 24-27; **E1/232.1** Nuon Chea Closing Statements, T. 22 October 2013, pp. 91-92.

<sup>1695</sup> NC Appeal, para. 252.

<sup>1696</sup> Judgment, fns 1027, 1029, *citing E3/25 Revolutionary Flag*, December 1976-January 1977, ENG 00491406-37; **E3/147** *Nuon Chea Speaks on Cambodian Army Anniversary* (in FBIS Collection), 17 January 1977, ENG 00168465-70; **E3/544** *9th Anniversary of Founding of Revolutionary Army*, 28 January 1977, ENG 00005866; **E3/191** *Nuon Chea’s speech at Army Anniversary Meeting* (in SWB Collection), 20 January 1977, ENG 00004073.

<sup>1697</sup> Judgment, paras 204, 333.

<sup>1698</sup> NC Appeal, fn. 696, *citing E1/232.1* Nuon Chea Closing Statements, T. 22 October 2013, pp. 96-97, *originally citing E1/87.1* Oeun Tan, T. 14 June 2012, pp. 16, 41.

<sup>1699</sup> NC Appeal, para. 264, *citing E1/189.1* Philip Short, T. 6 May 2013 [not 8 May 2013], p. 81.

<sup>1700</sup> Or, in Philip Short’s case, which it deliberately disregarded.

<sup>1701</sup> *Krajišnik* AJ, para. 141, *citing Kvočka* AJ, para. 23.

<sup>1702</sup> *Krajišnik* AJ, para. 139, *citing Musema* AJ, para. 18, *Brđanin* AJ, para. 39.

<sup>1703</sup> *Krajišnik* AJ, para. 139, *citing Musema* AJ, para. 20.

<sup>1704</sup> NC Appeal, para. 264 (“it is clear that the Chamber read that page and made a conscious decision not to mention it”).

Nuon Chea *did* exercise control over the military through his political leadership.<sup>1705</sup>

**B. The Chamber did not err in finding that Nuon Chea had a role in discipline and internal security (NC Ground 41)**

411. Nuon Chea's responsibility for "the discipline of cadres and other internal security matters" could not be clearer. The Chamber's finding on this point was amply supported by substantial witness testimony and contemporaneous documentation, which demonstrated that Nuon Chea's responsibilities within the CPK extended to discipline as well as the formulation, teaching and execution of CPK policy on internal security. Nuon Chea fails to demonstrate how the Chamber erred.

412. Nuon Chea's self-confessed responsibility for "propaganda-related matters as well as for education of peasants, cadres and other Party members"<sup>1706</sup> was not preclusive of these additional roles. Rather, the Chamber found that his role encompassed training in vigilance against internal enemies.<sup>1707</sup> Nuon Chea instructed cadres in the identification of enemies and

<sup>1705</sup> Judgment, para. 332, *citing* E1/189.1 Philip Short, T. 6 May 2013, pp. 82-84; E3/192.1 Philip Short T. 9 May 2013, pp. 37-38.

<sup>1706</sup> Judgment, para. 324, *citing* E1/14.1 Nuon Chea, T. 22 November 2011, p. 95; E1/23.1 Nuon Chea, T. 15 December 2011, pp. 68-71; E1/17.1 Nuon Chea, T. 6 December 2011, pp. 4-5; E1/22.1 Nuon Chea, T. 14 December 2011, p. 26; E1/40.1 Nuon Chea, T. 8 February 2012, p. 38 and E3/54 Nuon Chea Initial Appearance Record, 19 September 2007, ENG 00148817.

<sup>1707</sup> Judgment, para. 325, fn. 997, *citing*, with regard to vigilance against internal enemies, E1/113.1 Em Oeun, T. 23 August 2012, pp. 81-84; E1/194.1 Prum Som, T. 21 May 2013, pp. 32-36; E1/184.1 Ruos Suy, T. 25 April 2013, pp. 52-58. See also pp. 77-78, 94-95 (confirming "vivid memory" that tape recording of Koy Thuon confession was played by Nuon Chea at study session). See also Judgment, para. 818 and fns 2580, 2583, *citing*, with regard to Nuon Chea, E1/215.1 Pech Chim, T. 1 July 2013, pp. 37, 41; see also pp. 38-40 (Describing a study session in December 1975 at Borei Leila lasting over 20 days and attended by 800 participants including representatives from sector and district committees. Nuon Chea instructed on the topic of internal and external enemies. "Without having covered this subject of enemies, people would never know how to identify enemies from friends."); E1/113.1 Em Oeun, T. 23 August 2012, pp. 79-85; E1/115.1 Em Oeun, T. 27 August 2012; pp. 27-28; E1/124.1 Chea Say, T. 20 September 2012, pp. 32-37, 71; E1/96.1 Rochoem Ton *alias* Phy Phuon, T. 25 July 2012, pp. 75-78. See also E1/115.1 Em Oeun, T. 27 August 2012, pp. 41-43 (Nuon Chea identified Koy Thuon, Keo Meas and Chan Chakrey as traitors, and "we were told not to follow the footsteps of those individuals. Otherwise, we also would be - end up being executed"); pp. 44-45 (Nuon Chea talked about "spy networks" including CIA, KGB and "Yuan agents" operating within DK); E3/1729 Em Oeun Civil Party Application, 29 January 2010, ENG 00751867; E1/64.1 Saut Toeung, T. 19 April 2012, p. 31 (Nuon Chea "educated us to protect ourselves from the enemy"); E3/423 Saut Toeung Interview Record, 2 December 2009, ENG 00414606 (Nuon Chea talked about 'traitors' at study sessions); E1/182.1 Chhouk Rin, T. 23 April 2013, pp. 33-34 (subjects at study sessions included "elimination of the enemy, burrowing from within"), pp. 69-72 (Nuon Chea lectured about "the purge of the enemy" at study sessions attended by witness); E3/421 Chhouk Rin Interview Record, 26 November 2009, ENG 00766412 (Nuon Chea "taught how to follow the enemy's trail and when we found one enemy we had to cleanse that enemy"); E1/217.1 Ek Hen, T. 3 July 2013, pp. 49-52 ("I just heard that he referred to people being traitors in the North Zone, and that Koy Khuon was a traitor ... He gave us advice and he said, if we knew that we were affiliated with these networks, we had to be mindful and then stop our association with them before it's too late"); E3/474 Ek Hen Interview Record, 5 March 2008, ENG 00205049-50 (Nuon Chea discussed "the North Zone group's treason; about

repeatedly warned them against following in the footsteps of Koy Thuon and his associates after they were purged.

413. Further, the Chamber demonstrated that Nuon Chea's role in education and propaganda was complemented by intimate involvement in executing internal security measures both against cadres and other internal enemies of the CPK. He was one of the key Party Centre representatives to whom the regional CPK cadres and commanders regularly reported<sup>1708</sup> and from whom they requested<sup>1709</sup> and received<sup>1710</sup> instruction on security matters. Additionally, eyewitness testimony and contemporaneous documentation were corroborated by Saloth Ban, Norng Sophang and Duch, each recounting Nuon Chea's involvement in discipline and internal security.<sup>1711</sup>

414. Given that Nuon Chea cannot find an error in this holistic approach taken by the Chamber, he again tries to establish that the Chamber should have looked at the evidence in a piecemeal fashion. He unsuccessfully attempts to challenge the evidence of Saloth Ban, Norng Sophang

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Koy Thuon's treason; not letting workers to join in the treason ... he told us about the purge of those connected to Koy Thuon"); **E3/469** Ruos Suy Interview Record, 14 March 2008, ENG 00205112-13; **E3/69** Chea Say Interview Record, 11 September 2007, ENG 00233152 (cadre instructed by Nuon Chea and Khieu Samphan on "preventing the hidden enemy" and told to "watch the activities of one another").

<sup>1708</sup> Judgment, para. 325, fn. 998, *citing*, with regard to internal security and discipline, **E3/874** DK Telegram, 18 July 1976, ENG 00185060; **E3/1209** DK Telegram, May 1978 (incomplete), ENG 00522888; **E3/1222** DK Telegram, 24 September 1976, ENG 00143522; **E3/1221 (aka E3/956)** DK Telegram, 25 June 1977, ENG 00182769; **E3/953** DK Telegram, 2 April 1976, ENG 00182658; **E3/1097** DK Telegram, 29 March 1978, ENG 00377841; **E3/1144** DK Telegram, 5 September 1977, ENG 00517923-00517924; **E3/156** DK Telegram, 23 April 1978, ENG 00185184 (with handwritten annotation – "Uncle Nuon"). See also Judgment, para. 773, *citing*, with regard to Nuon Chea, **E3/1120** DK Telegram, 6 November 1977; and Judgment, para. 818, *citing* **E3/996** DK Telegram, 19 March 1978. See also **E3/33** Oeun Tan Interview Record, 9 October 2008, ENG 00235132-33 ("Pol Pot sent all the telegrams he received on to Nuon Chea"); **E3/359** Kaing Guek Eav *alias* Duch, Written Statement, 20 November 2009, ENG 00434339 ("Zone Secretaries reported all work to 870 every week by using the Zone messengers to take the documents and hand them over to K-17, the Central Messenger Office").

<sup>1709</sup> See Judgment, fn. 998, *citing* **E3/874** DK Telegram, 18 July 1976, ENG 00185060 (see, in particular, FR 00623912); **E3/1097** DK Telegram, 29 March 1978, ENG 00377841; **E3/1221 (E3/956)** DK Telegram, 25 June 1977, ENG 00182769.

<sup>1710</sup> See Judgment, para. 337, *citing* **E3/58** Kham Phan *alias* Phan Van Interview Record, 21 November 2008, ENG 00250089 and **E3/16** Book by Khieu S.: *Considerations on the History of Cambodia From the Early Stage to the Period of Democratic Kampuchea*, ENG 00498267. See also **E1/60.1** Kaing Guek Eav *alias* Duch, T. 5 April 2012, p. 104 ("Security across the country reported to the Central Standing Committee... All documents from the zones came to Brother Nuon, and he made the decisions"); **E3/1194** Telegram No. 10 from Laing (Chhan), 19 October 1976 (telegram copied to "Brother Nuon" indicating that the Sector had received the "4-year plan" and instructions). **E3/367** Sao Sarun Interview Record, 17 December 2008, ENG 00278696 (describing two meetings in Phnom Penh: one with Pol Pot, Nuon Chea, Khieu Samphan and Son Sen at which they were advised to strengthen the economy and resist against Vietnam and the other with Pol Pot, Nuon Chea and Son Sen at which they were advised to strengthen their forces and strategies to resist Vietnam); **E3/383** Sao Sarun Interview Record, 29 June 2009, ENG 00350263 ("the senders [of telegrams] from M-870 included Nuon Chea"). See also **E3/1192** DK Telegram, 12 October 1976.

<sup>1711</sup> Judgment, para. 328.

and Duch, but also fails to explain why the finding should not stand on the basis of the remaining evidence. Since he has patently failed to meet the burden on challenging factual findings, this ground of appeal should be dismissed.<sup>1712</sup>

415. In any event, Nuon Chea fails to demonstrate that the Chamber's reliance on the evidence of Saloth Ban, Norng Sophang and Duch was unreasonable. The three witnesses provide mutually corroboratory accounts. Nuon Chea misconstrues Norng Sophang's evidence, which the Chamber correctly concluded provided evidence of Nuon Chea's role in discipline of cadres, in this instance for violation of the moral code.<sup>1713</sup> In any event, this evidence is clearly corroborated by Duch<sup>1714</sup> who testified to Nuon Chea's responsibility for "the recruitment of new members and how disciplinary actions [were] implemented or imposed on members of the Party who committed wrongdoings".<sup>1715</sup>

416. A reading of the Judgment as a whole further reveals that the Chamber made a number of other findings pertaining to Nuon Chea's responsibility for internal security and discipline. Importantly, Nuon Chea was heavily involved in the purge of Khmer Rouge cadres and military officials.<sup>1716</sup> Further, the Chamber showed that the remit of the Standing Committee, of which Nuon Chea was a full-rights member,<sup>1717</sup> included the arrest and interrogation of 'enemies'<sup>1718</sup>.

<sup>1712</sup> *Dorđević* AJ, para. 20.

<sup>1713</sup> The fact that Norng Sophang had not seen the telegram before is irrelevant; he provided direct evidence of Nuon Chea's role based on his own knowledge **E1/120.1** Norng Sophang, T. 3 September 2012, p. 28 ("based on my knowledge, the reason the message had to be sent to Om Nuon Chea because he was in charge of social affairs and culture. So, when it comes to the violation of moral code, it should be Uncle Nuon Chea who would be the person [to whom] the message was sent") and **E1/117.1** Norng Sophang, T. 29 August 2012, p. 50 ("But as for cultural affairs, for example if there was any moral issues among people in society, I believe it was Nuon Chea who was the person in charge.").

<sup>1714</sup> Judgment, para. 328, *citing* **E1/60.1** Duch, T. 5 April 2012, pp. 98-99; and **E1/52.1** Duch, T. 21 March 2012, p. 74.

<sup>1715</sup> **E1/60.1** Duch, T. 5 April 2012, pp. 98-99. The matter of Nuon Chea's effective control over Khmer Rouge soldiers will be addressed in the Co-Prosecutors' response regarding Nuon Chea's responsibility as a superior for the crimes charged. See *infra* XX.H (Nuon Chea Superior Responsibility – Effective Control).

<sup>1716</sup> Judgment, para. 340, *citing* **E1/181.1** Chhouk Rin, T. 22 April 2013, pp. 27-28; **E1/182.1** Chhouk Rin, T. 23 April 2013, pp. 48-49, 95-96; **E1/192.1** Philip Short, T. 9 May 2013, p. 25; **E1/184.1** Ruos Suy, T. 25 April 2013, pp. 52-58. See also **E3/2782** Ke Pauk Autobiography, undated, ENG 00089713 (Central [old North] Zone Secretary Ke Pauk describing being called to a meeting in Phnom Penh in early 1977 by Nuon Chea and Pol Pot to discuss the purge of his zone, at which the "upper brothers" presented Pauk with detailed documents listing the Zone cadres "accused of being CIAs"). See also **E3/89** Ieng Sary DC-Cam Interview, 17 December 1996, ENG 00417608 ("There were some matters that Pol Pot, Nuon Chea, and Son Sen decided among themselves without asking SAO Phim ... Whether it was security affairs or military affairs ..."), 00417617 ("Koe was arrested ... but later on I learned that three people, Nuon Chea, Non Sen, and Pol Pot had made the decision.").

<sup>1717</sup> Judgment, paras 304, 315, 847, 878.

<sup>1718</sup> Judgment, para. 847. See **E3/216** Record of the Standing [Committee's] visit to the Northwest Zone, 20-24 August 1975; **E3/182** Standing Committee Meeting Minutes, 9 October 1975; **E3/227** Standing Committee Meeting Minutes, 2 November 1975; **E3/228** Standing Committee Meeting Minutes, 9 January 1976; **E3/229** Standing

Similarly, *Revolutionary Flag* and *Revolutionary Youth* publications, of which the Chamber found Nuon Chea to be one of the principal authors,<sup>1719</sup> praised the elimination of enemies, including former Khmer Republic officials.<sup>1720</sup> Lastly, Nuon Chea's role at S-21 is highly probative of his responsibility for discipline and internal security.<sup>1721</sup>

417. The Co-Prosecutors recall that a trial chamber is not required to refer to the testimony of every witness or every piece of evidence on the trial record.<sup>1722</sup> A further review of the record also demonstrates that Nuon Chea was one of the CPK leaders who had authority to provide orders to S-71 Chairman Pang and his deputy Khan Lin *alias* Ken.<sup>1723</sup> S-71 was tasked by the Party leaders to assist in “monitor[ing] suspected members of the party”, to supervise the K-7 office, which received prisoners transferred from the zones, and to coordinate the arrest and transfer of prisoners to S-21.<sup>1724</sup> A number of other sources confirm that he and Pol Pot shared

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Committee Meeting Minutes, 22 February 1976; **E3/217** Standing Committee Meeting Minutes, 11 March 1976; **E3/218** Standing Committee Meeting Minutes, 26 March 1976; **E3/236** Standing Committee Meeting Minutes, 19-21 April 1976; **E3/221** Standing Committee Meeting Minutes, 14 May 1976; **E3/222** Standing Meeting Committee Minutes, 15 May 1976; **E3/224** Standing Committee Meeting Minutes, 30 May 1976.

<sup>1719</sup> Judgment, paras 264, 311, 845.

<sup>1720</sup> Judgment, para. 818, fn. 2581, *citing* **E3/742** *Revolutionary Flag*, April 1977, ENG 00478496, 00478501, 00478502; **E3/135** *Revolutionary Flag*, June 1977, ENG 00446861-62; *Revolutionary Youth*, **E3/726** February 1978, ENG 00278714; **E3/727** *Revolutionary Flag*, May-June 1978, ENG 00185342-43.

<sup>1721</sup> See *supra* VII.B (Nuon Chea's Role at S-21).

<sup>1722</sup> *Karemera* AJ para. 648, *citing* *Rukundo* AJ, para. 102; *Nchamihigo* AJ, para. 121; *Karera* AJ, para. 20, *originally citing* *Kvočka* AJ, para. 23.

<sup>1723</sup> **E1/61.1** Duch, T. 9 April 2012, p. 26 (“Pang was a person who was assigned by Bong Nuon to come and go to the S-21 and he would also have access to the confessions of the prisoners”); **E3/65** Duch Interview Record, 7 August 2007, ENG 00147521-22 (Pang and Lin assigned by Nuon Chea to help with S-21's work); **E3/357** Duch Interview Record, 27 November 2008, ENG 00242931-32 (stating that Pang and Lin delivered arrest lists to Duch after 15 August 1977, and occasionally picked up S-21 confessions for Nuon Chea); **E3/451** Duch Interview Record, 5 May 2008, ENG 00204347 (stating that after he began directly reporting to Nuon Chea, “Pang and Lin could come to my house at any time”); **E3/60** Duch Interview Record, 3 June 2008, ENG 00195603 (stating that Nuon Chea would send Pang to Duch with questions regarding S-21 confessions); **E1/156.1** Sa Vi, T. 8 January 2013, pp. 42-43 (K-1 cadres sometimes received orders from Pang and Lin, and other times “directly from the top” from “Pol Pot and Nuon Chea”); **E3/464** Tha Sot Interview Record, 19 January 2008, ENG 00226110 (“Pang received the joint order from all uncles such as Pol Pot, Ieng Sary, Khieu Samphan, Nuon Chea in accordance with their expertise (tasks and directions)”).

<sup>1724</sup> See Judgment, para. 214 and fn. 664. See also **E1/55.1** Duch, T. 28 March 2012, p. 68 (“Pang was the secretary of S-71” and was “in charge of a division protecting the Central Office”); **E3/106** Duch Interview Record, 1 April 2008, ENG 00177636 (stating that Lin arrested Vorn Vet and Cheng An at the Standing Committee headquarters); **E3/5790** Duch Interview Record, 3 December 2009, ENG 00414348 (“All the prisoners brought in from the Zones were transferred via K-7”); **E3/358** Kaing Guek Eav *alias* Duch Interview Record, 28 November 2008, ENG 00244242-43 (stating that Lin arrested Ministry of Social Affairs' cadre); **E3/24** Rochoem Ton *alias* Phy Phoun Interview Record, 5 December 2007, ENG 00223584-85 (all contacts between the Zones and Office 870 were made through K-7); **E1/121.1** Norng Sophang, T. 4 September 2012, pp. 17-18 (“S-71...is under the supervision of 870 Committee”), p. 20 (“S-71 was a small unit of the Party Centre”); **E3/67** Norng Sophang Interview Record, 28 March 2009, ENG 00483967-68 (“S-71 ... was a unit under the guidance of 870 with Pang as chairman, Phum as deputy chairman, and Ken as member and chief of security unit at K-1.... I knew S-71 [was] under 870”); **E3/811** Minutes of Meeting with the Organisation's Office, Division 703 and S-21, 9 September 1976, ENG 00178150



responsibility for internal security.<sup>1725</sup> Moreover, Nuon Chea's own statements establish that he was in a position to discipline cadres and at times, did so.<sup>1726</sup>

**C. The Chamber did not err in characterising Nuon Chea as the ultimate decision-maker with Pol Pot (NC Ground 43)**

418. The Chamber's conclusion that Nuon Chea with Pol Pot "exercised the ultimate decision-making power of the Party"<sup>1727</sup> was reasonable. Nuon Chea's arguments to the contrary are vague, without merit and founded upon a mischaracterisation of the evidence relied on by the Chamber.

419. Contrary to Nuon Chea's contention,<sup>1728</sup> the Chamber's finding was not based solely upon the evidence of experts David Chandler and Philip Short.<sup>1729</sup> As the section heading<sup>1730</sup> and holistic reading of Judgment paragraphs 347 and 348 make clear, it was a conclusion reached on

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(Pang assigned to "firmly grasp biographies and ideologies" and to "liaise with the various ministries" in relation to possible internal enemies in Divisions 170 and 703); **E1/55.1** Duch, T. 28 March 2012, pp. 65-68 (discussing 9 September 1976 meeting and stating that Pang was "embedded with heavy duties to track" persons who distributed leaflets criticising the DK regime).

<sup>1725</sup> **E3/94** Ieng Sary Interview by Elizabeth Becker, 22 July 1981, ENG 00342501-02 ("I was not in charge of security ... [QS Who was in charge of security?] Three or four very top leaders discussed the matter – then reported to the standing committee. QS. Who were those 3 or 4 leaders? Pol Pot, Nuon Chea, So Phim and Son Sen"); **E3/190** Ieng Sary Interview Notes by Stephen Heder, 4 January 1999, ENG 00081571 ("authority to order an arrest... decisions were made by Pol Pot, Nuon Chea, Son Sen"); **E3/93** Ieng Sary Interview by ABC Australia Television, 28 August 1996, ENG 00078610 ("there was a committee which considered all questions about security, which comprised four people: Pol Pot, Nuon Chea, Son Sen, and ... Yun Yat. .. All decisions were made by the committee of the four."); **E3/456** Duch Interview Record, 25 June 2008, ENG 00198883 ("Amongst the seven members of the Standing Committee, three were responsible for security: Pol Pot Nuon Chea and Son Sen"); **E3/1699** Suong Sikoeun Interview Record, 19 December 2007, ENG 00223642 ("there was a Party Security Committee consisting of Pol Pot, Nuon Chea, and Son Sen."); **E3/86** Democratic National Union Movement (Ieng Sary), *The True Fact about Pol Pot's Dictatorial Regime*, 8 September 1996, ENG 00081215 ("the secret Security Committee [was] composed of Nuon Chea head of the Secret Committee, Son Sen called Khieu and Son Sen's advisor, his wife Yun Yat"); **E3/1714** Masato Matsushita and Stephen Heder, *Interviews with Kampuchean Refugees at Thai-Cambodia Border* (Chap Lonh Statement), February-March 1980, ENG 00170748 ("These attacks were under [the] control of the Central Committee Military Committee, Pol Pot and Nuon Chea.").

<sup>1726</sup> **E3/108** Khieu Samphan and Nuon Chea Interviews by Meng-Try Ea and Sopheak Loeung, 9-11 June 2006, ENG 00000932 ("Meng-Try: How did you deal with the bad comrades? Nuon Chea: I reeducated them. It was hard job. Meng-Try: What did you do? Nuon Chea: I reeducated them and did not allow them to stay in their positions."); **E3/4001R** *Enemies of the People*, Additional Footage: One Day at Po Chrey ("had I known then, we would have taken measures to stop that kind of killing"), cited in NC Closing Brief, para. 448; **E3/26** Nuon Chea Interview by Japanese Journalist, October 2006, ENG 00329518 (asserting that members of the army known to have committed crimes were "taken for re-education, criticism, or were punished"). See also **E3/4202** Book by G. Chon and Thet Sambath: *Behind the Killing Fields: A Khmer Rouge Leader and One of His Victims*, ENG 00757494.

<sup>1727</sup> Judgment, para. 348.

<sup>1728</sup> NC Appeal, para. 262.

<sup>1729</sup> Indeed, in the same paragraph as he makes this assertion (para. 262), Nuon Chea agrees that "the Chamber's analysis consists of two paragraphs which notes [*sic*] Nuon Chea's 'seniority within the leadership' and reiterates its untenable findings concerning Nuon Chea's role in military affairs, internal security and discipline".

<sup>1730</sup> Judgment, heading 7.7 'Conclusions'.

the basis of the Chamber's earlier findings regarding Nuon Chea's status and role within the party,<sup>1731</sup> his role in DK military and security policy and implementation,<sup>1732</sup> his responsibility for propaganda and education,<sup>1733</sup> as well as Party discipline and internal security matters.<sup>1734</sup> Nuon Chea does not dispute his responsibility within the DK for propaganda and education.<sup>1735</sup> As for his role in military, discipline and security matters, as demonstrated above,<sup>1736</sup> the Chamber's findings were reasonably reached. The expert evidence of David Chandler and Philip Short simply provides yet further confirmation of their veracity.

420. Moreover, Nuon Chea is unequivocal in his admissions that alongside Pol Pot, he was a key Party policy-maker.<sup>1737</sup> The evidence of his attendance at and contribution to Standing Committee meetings, at which the gamut of Party policy was decided,<sup>1738</sup> is similarly testament to this role.

421. Nuon Chea's vague reference to an alleged error in the Chamber's finding that he "held and exercised the power to make and implement CPK policies and decisions"<sup>1739</sup> fails to meet the standard of review. This ground of appeal does not appear in his Notice<sup>1740</sup> and is only inserted at the end of an allegation as to a different error of fact. Moreover, he fails to articulate how this alleged error invalidates any conviction.<sup>1741</sup> In any event, the Judgment is replete with well-supported findings relating to Nuon Chea's role in the creation and implementation of *inter alia*

<sup>1731</sup> Judgment, paras 202, 313-6.

<sup>1732</sup> Judgment, paras 335, 336, 337, 338, 341.

<sup>1733</sup> Judgment, paras 324, 326 and fn. 995.

<sup>1734</sup> Judgment, paras 325, 328-9, 340, 342-345.

<sup>1735</sup> See NC Appeal, para. 263 and fns 710. See also **E1/14.1** Nuon Chea, T. 22 November 2011, p. 95; **E1/23.1** Nuon Chea, T. 15 December 2011, pp. 68-71; **E1/17.1** Nuon Chea, T. 6 December 2011, pp. 4-5; **E1/22.1** Nuon Chea, T. 14 December 2011, p. 26; **E1/40.1** Nuon Chea, T. 8 February 2012, p. 38. See also, **E3/54** Nuon Chea Initial Appearance Record, 19 September 2007, ENG 00148817.

<sup>1736</sup> See *supra*, XVIII.A (Nuon Chea's Role in Military Policy and Implementation).

<sup>1737</sup> NC Appeal, para. 250: "Nuon Chea has never denied his rank in the Party and admits that as Deputy Secretary he played a key role in formulating Party policy along with Pol Pot."; NC Appeal, para. 263: "As said before Nuon Chea has never denied that he helped define the political and strategic lines of the Party and was responsible with Pol Pot for setting its political objectives. Necessarily this involved decisions which ran the gamut of Party policy. Thus, Nuon Chea participated in decisions to liberate the country, to evacuate Phnom Penh, to abolish money, to achieve three tons of rice per hectare, to defend the country against military threats, to establish cooperatives, to improve irrigation, to build dams".

<sup>1738</sup> Judgment, para. 768.

<sup>1739</sup> NC Appeal, para. 265, *citing* Judgment, para. 348.

<sup>1740</sup> The Co-Prosecutors note that pursuant to Internal Rule 110(1), the SCC should disregard the Defence Appeal's development of any issues not encompassed by the initial Notice of Appeal. See Internal Rules, rule 110(1) ("The scope of the appeal shall be limited to the issues raised in the notice or in the immediate appeal.").

<sup>1741</sup> See *supra*, II.B (Standard of Review).

educational,<sup>1742</sup> economic,<sup>1743</sup> military,<sup>1744</sup> agricultural,<sup>1745</sup> propaganda<sup>1746</sup> and security policies including the discipline and purging of cadres.<sup>1747</sup>

**D. The SCC should summarily dismiss Nuon Chea’s appeal of the findings that he was commonly known as Brother Number Two and was the Acting Prime Minister of DK (NC Ground 44)**

422. Nuon Chea fails to demonstrate any compelling reason why the SCC should entertain his request for review of the Chamber’s findings that “several witnesses confirmed that” the alias ‘Brother Number Two’ was used to refer to him<sup>1748</sup> and that he was the Acting Prime Minister of DK<sup>1749</sup> between September 1976 and 1977 when Pol Pot resumed his duties. With regard to the former, Nuon Chea “readily concedes that this finding did not cause a miscarriage of justice”<sup>1750</sup> and as to the latter, that it is “equally of no significance for criminal liability.”<sup>1751</sup> As such, these grounds do not meet the standard of review on appeal for errors of fact.<sup>1752</sup> The alleged errors do not create a reasonable doubt as to his guilt<sup>1753</sup> and, as Nuon Chea concedes, did not therefore cause a miscarriage of justice. The findings of the Chamber were also amply supported by the evidence.

**XIX. ROLE OF KHIEU SAMPHAN**

423. Khieu Samphan alleges that the Chamber made errors of fact in its evaluation of his role prior to 17 April 1975,<sup>1754</sup> at the time of the first forced transfer of the population (Phase I),<sup>1755</sup> at the time of the events at Tuol Po Chrey,<sup>1756</sup> and, finally, at the time of the second phase of forced

<sup>1742</sup> See Judgment, paras 304, 311, 317, 324, 325, 326, 329 and fns 955, 978, 995, 996-9, 1000.

<sup>1743</sup> See Judgment, paras 324-5 and fns 995, 996-7.

<sup>1744</sup> See Judgment, paras 330, 335, 336, 337, 338, 339 and fns 1013, 1014, 1017, 1019-1026, 1027, 1029.

<sup>1745</sup> See Judgment, paras 317, 325, 338 and fns 978, 998, 1025.

<sup>1746</sup> See Judgment, paras 304, 311, 324, 326, 327, 329, 840 and fns 958, 995, 999, 1000, 1001, 1002.

<sup>1747</sup> See Judgment, paras 325, 328, 329, 340, 343-5 and fns 998, 1004-1006, 1030, 1032-1042.

<sup>1748</sup> NC Appeal, paras 266-267, *citing* Judgment, para. 312.

<sup>1749</sup> NC Appeal, para. 267, *citing* Judgment, paras 321-323.

<sup>1750</sup> NC Appeal, para. 266. Indeed, Nuon Chea also stated that the finding ‘has no bearing whatsoever on his criminal liability’.

<sup>1751</sup> NC Appeal, para. 267.

<sup>1752</sup> See *supra*, II.B (Standard of Review).

<sup>1753</sup> See *supra*, II.B (Standard of Review).

<sup>1754</sup> KS Notice, paras 82-88; KS Appeal, paras 237-285.

<sup>1755</sup> KS Notice, paras 101-104; KS Appeal, paras 374-396.

<sup>1756</sup> KS Notice, paras 114-115; KS Appeal, para. 437, in which Khieu Samphan indicates his reliance on the alleged errors of fact set out in relation to Phase I of the “displacement” of the population.

transfers of the population (Phase II).<sup>1757</sup> Khieu Samphan does not establish how the Chamber erred in applying the facts to the applicable standard of law – or even which standard of law he takes issue with – and does not demonstrate how the alleged errors invalidate the verdict or occasion a miscarriage of justice.<sup>1758</sup> Instead, he focusses on either a few isolated sources of evidence,<sup>1759</sup> while ignoring the vast quantity of factors considered by the Chamber, or simply disagrees with the Chamber’s findings and provides his own alternative interpretations of the evidence.<sup>1760</sup> On other occasions, Khieu Samphan merely refers to his final brief, thereby impermissibly expanding his appeal brief,<sup>1761</sup> or repeats arguments raised at trial without demonstrating how the Chamber erred in rejecting them.<sup>1762</sup> These arguments should be summarily dismissed. The relevant arguments raised by Khieu Samphan are addressed below.

### A. Khieu Samphan’s role from 1970-1975

#### i. *Khieu Samphan’s connections with the CPK and its members, pre-1975*

424. With respect to Khieu Samphan’s contact with the City Committee of Phnom Penh,<sup>1763</sup> Philip Short testified that while members of the Committee disguised their contact through a large number of intermediaries, Khieu Samphan had contact with the members of the Committee as early as the 1960s. By the time he arrived in Mount Aural, Khieu Samphan had become one of Pol Pot’s most trusted associates.<sup>1764</sup> Khieu Samphan directly assisted the activities of the Committee, having been selected by the Committee members to rally public support.<sup>1765</sup> Khieu

<sup>1757</sup> KS Notice, paras 132-138; KS Appeal paras 522-587.

<sup>1758</sup> See KS Appeal, paras 237-240, 242-256, 258-260, 624, 267, 269, 275, 283, 285, 329, 377, 393-396. In his Notice, Khieu Samphan makes broad and undefined allegations challenging numerous aspects of the Judgment. He alleges the Chamber was “mistaken” on his “movements”, “nature and extent” of his contact, collaboration and trust with “other members of the Party” over a period of five years. To the extent that these allegations are unsupported by any further argumentation in his Appeal, the Co-Prosecutors respectfully submit the allegations ought to be considered as abandoned. See KS Notice, para. 85 (challenging Judgment, para. 52).

<sup>1759</sup> See, e.g., KS Appeal, paras 238-239, 247, 253-254, 263, 267-268, 271-274, 280.

<sup>1760</sup> See KS Appeal, paras 150-152, 238, 240-243, 246-256, 266-268, 271, 281-283, 285, 377, 394.

<sup>1761</sup> KS Appeal, paras 239, 246, 249, 264, 267, 273-275, 279, 281. See *Mladić* Decision on Appeal, para. 14; *Šainović* Decision on Appeal, para. 18; *Galić* AJ, para. 250; *Lubanga* Judgment on Appeal of PTC Decision, para. 29.

<sup>1762</sup> KS Appeal, paras 246, 250, 264, 267-268, 274-275, 281, 394.

<sup>1763</sup> KS Appeal, paras 240-241.

<sup>1764</sup> Judgment, para. 84, *citing* E1/190.1 Philip Short, T. 7 May 2013, pp. 24-25, 42. Regarding the fact that Khieu Samphan received substantial assistance from the underground network of the Party in 1966, see the sources under E295/6/1.4 Khieu Samphan’s Chronology, p. 6 (September 1966 – April 1977).

<sup>1765</sup> See Judgment paras 84-85, 225. With respect to Khieu Samphan’s active collaboration with communists see also: E3/1684 David Chandler, *Voices from S-21: Terror and History in Pol Pot’s Secret Prison*, ENG 00192740 (“In 1960 [Koy Thuon] worked with Khieu Samphan on Samphan’s short-lived weekly, *L’Observateur*”); E3/1683

Samphan fails to cite the testimony in which Short goes on to detail the reasons Khieu Samphan was selected for rallying intellectuals and sympathisers to the cause.<sup>1766</sup> Contrary to what Khieu Samphan argues,<sup>1767</sup> the Chamber correctly found that by 1969 when he joined the CPK Khieu Samphan was well aware of the Party's common purpose and assented to it.<sup>1768</sup>

*ii. Khieu Samphan's liaison with Norodom Sihanouk and his diplomatic functions*

425. Contrary to Khieu Samphan's assertion,<sup>1769</sup> the Chamber did not exaggerate the importance of his liaison role with Norodom Sihanouk and his diplomatic activities between 1970 and 1975.<sup>1770</sup> The alleged exaggeration on the part of the Chamber does not support any alleged error in an impugned finding of *fact* but is rather Khieu Samphan's complaint about his perception of the Chamber's findings.<sup>1771</sup> Moreover, it is not substantiated on its merits.

426. Khieu Samphan acknowledged in a statement before the Court, his book, and in an interview, that he served as the link between Norodom Sihanouk and the CPK. He claims he did so in order to contribute to "the battle for the salvation of our country" and to take advantage of the fact that he had a personal relationship with Sihanouk.<sup>1772</sup> He described the role as

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David Chandler, *The Tragedy of Cambodian History*, ENG 00193382 ("[Koy Thuon] had worked as a journalist with Khieu Samphan in 1959-60."); **E1/21.1** Khieu Samphan, T. 13 December 2011, pp. 76-77 ("Regarding the newspaper '*L'Observateur*' ... The friends who I know while I was in France, and who returned to the country before I did ... proposed that I should publish a newspaper as a voice"); **E3/18** Khieu Samphan, *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, ENG 00103726; **E1/150.1** Hun Chhunly, T. 7 December 2012, 15.26.16 to 15.27.24 ("I have known Mr. Khieu Samphan in his capacity as ... the chief of the '*L'Observateur*' newspaper."). Ieng Thirith, Bou Phat and Thiounn Prasith were among the contributors of "*L'Observateur*": see the 18 sources under **E295/6/1.4** Khieu Samphan's Chronology, p. 3 (22 Sept. 1959-13 August 1960)

<sup>1766</sup> KS Appeal, paras 240-241. See **E1/190.1** Philip Short, T. 7 May 2013, p. 25. "And if I might just add, there's a little bit you didn't read that followed. It said Khieu Samphan was well-suited for this role: "He was an idealist, in whom personal morality and social conscience were indissolubly linked." And I think that is – I'm going slightly outside your question, but it seems to be important. Khieu Samphan was, still is, rigid, doctrinaire, but very consistent. He was, at that time, an upright man, and he continued to hold, without asking himself too many questions, to what he believed in. Now, without asking himself very many questions, of course, is the downside of those characteristics I have described".

<sup>1767</sup> KS Appeal, paras 243-245.

<sup>1768</sup> See Judgment para. 965, fn. 2933-2935, *citing* Judgment, paras 95, 362, 728, 733.

<sup>1769</sup> KS Appeal, para. 253.

<sup>1770</sup> See also KS Notice, para. 84 in which he challenges the findings of the Chamber in 52 paragraphs of the Judgment and KS Appeal, paras 253-256. Khieu Samphan alleges wide-sweeping "errors of fact" relating to the "nature and extent" of his actions or complains the Chamber exaggerated or failed to take "sufficient consideration" of certain facts. Additionally, he does not particularise his "grounds" or cite with precision to errors of fact allegedly made by the Chamber but rather challenges the bulk of its findings during this timeframe.

<sup>1771</sup> See *supra*, II.B (Standard of Review).

<sup>1772</sup> Judgment, para. 98, *citing* **E1/21.1** Khieu Samphan, T. 13 December 2011, pp. 90-91; **E3/18** Khieu Samphan, *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, ENG 00103744; **E3/27** Khieu Samphan Interview Record, ENG 00156745.

“important, if not indispensable” and claimed that maintaining a connection with Sihanouk was necessary for the Khmer Rouge to win international support.<sup>1773</sup> Nuon Chea also admitted that the Khmer Rouge supported Sihanouk because of his influence on the world stage.<sup>1774</sup>

427. Similarly, Suong Sikoeun testified that Sihanouk was influential internationally while the CPK was responsible for the armed struggle in Cambodia.<sup>1775</sup> Domestically, the CPK needed Sihanouk as his prestige helped the CPK to attract broad segments of the population and motivated many to join the CPK-controlled military forces. Khieu Samphan himself stated the establishment of FUNK was intended to unite the communists and Sihanouk, to attract peasants to join the CPK, and specifically that the Cambodian people gave their support to the Khmer Rouge because of their opposition to Lon Nol, who took power after Sihanouk was disposed.<sup>1776</sup> This evidence provides a reliable basis for the Chamber’s findings that Khieu Samphan was responsible for securing the support of Sihanouk and that his liaison role with Sihanouk contributed significantly to the aims of the CPK.

428. The Chamber’s findings in respect to Khieu Samphan’s diplomatic roles, are also well-supported. Pol Pot’s 1970 agreement on the formation of a joint front with Sihanouk was negotiated in Khieu Samphan’s name.<sup>1777</sup> Khieu Samphan was the most senior CPK representative in Sihanouk’s government in exile, serving as Deputy Prime Minister and Minister of National Defence of GRUNK, as well as Deputy Chairman of FUNK.<sup>1778</sup>

429. Khieu Samphan’s suggestions that there is no evidence that Sihanouk knew that he was serving as a link with the CPK and that Sihanouk supported the CPK for his own political

<sup>1773</sup> Judgment, paras 98, 365, citing **E3/18** Khieu Samphan, *Cambodia’s Recent History and the Reasons Behind the Decisions I Made*, ENG 00103744; **E1/21.1** Khieu Samphan, T. 13 December 2011, pp. 92-93.

<sup>1774</sup> Judgment, para. 731, citing **E3/26** Nuon Chea Interview by Japanese Journalist, 7 October 2006, p. 7, ENG 00329510.

<sup>1775</sup> Judgment, para. 100, citing **E1/104.1** Suong Sikoeun, T. 8 August 2012, p. 41; **E1/108.1** Suong Sikoeun, T. 15 August 2012, pp. 60-61.

<sup>1776</sup> Judgment, para. 100, citing **E1/15.1** Khieu Samphan, T. 23 November 2011, pp. 12-13.

<sup>1777</sup> **E1/21.1** Khieu Samphan, T. 13 December 2011, pp. 88-89; **E3/16** Khieu Samphan, *Considerations on the History of Cambodia*, ENG 00498259; **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, ENG 00396400.

<sup>1778</sup> Judgment, para. 365. He was also was nominated Commander-in-Chief of the Cambodian National Liberation Forces (CPNLAF) in June or July 1971 (see, e.g., **E3/1717/E3/3508**, U.S. Embassy in Phnom Penh, *New FUNK/GRUNK Personalities*, 30 September 1971, ENG 00419034, 39, 00525774, 79; **E3/3169**, S. Heder, *Pol Pot and Khieu Samphan*, 1991, ENG 00002750; **E3/27**, Khieu Samphan Interview Record, ENG 00156745. In addition to receiving a South Vietnamese National Liberation Front delegation in June 1973 (**E3/9**, Philip Short, *Pol Pot: The History of a Nightmare*, ENG 00396451), he headed a FUNK / GRUNK official visit to the DRV in March 1973 (**E3/488**, FBIS, *AKI hails DRV-RGNUM relations*), 14 February 1975, ENG 00166754; As head of a GRUNK delegation, he also visited 11 countries in Asia, Europe and Africa between 27 March and mid-June 1974 (see Judgment, para. 136, fns 388-390 and para 368, fn. 1112-13).

benefit<sup>1779</sup> are irrelevant to the Chamber's conclusions. The Chamber's conclusions deal with the benefit conferred *on the CPK* through its association with Sihanouk and Khieu Samphan's own acts and conduct in fostering and maintaining the association. Sihanouk acknowledged that all power in the FUNK was with the Khmer Rouge, stated that he gave up everything to the Khmer Rouge, and acknowledged Khieu Samphan as the leader of the resistance within Cambodia.<sup>1780</sup> Sihanouk was prescient and perceptive in predicting that when they gained power, the Khmer Rouge would "spit him out like a cherry pit."<sup>1781</sup> There is no foundation to Khieu Samphan's complaint that because the Chamber found Sihanouk also interacted with other members of the CPK, it erred in concluding that he personally exercised influence in the international sphere and as a diplomat. There is no contradiction in making both of these findings.

*iii. Khieu Samphan's contribution through FUNK propaganda and his speeches*

430. Khieu Samphan asserts that the Chamber erred in its determination of the nature and extent of his contribution to the elaboration and diffusion of FUNK propaganda and the speeches that he made.<sup>1782</sup> This vague allegation is insufficient to demonstrate any error.<sup>1783</sup> Additionally, Khieu Samphan raises arguments in his Appeal that challenge the Chamber's findings on his *reputation* and the effect it had on the commission of crimes.<sup>1784</sup> The findings made by the Chamber were reasonable.

431. The Chamber found that leading up to the offensive against Phnom Penh on 17 April 1975, Khieu Samphan contributed to the commission of crimes through his appeals on FUNK radio, his speeches and other public statements.<sup>1785</sup> He praised the Khmer Rouge,<sup>1786</sup> called for people

<sup>1779</sup> KS Appeal, para. 254.

<sup>1780</sup> Judgment, para. 100, *citing* E3/482 Report by L. Trivière: *China and Cambodia*, ENG 00524000.

<sup>1781</sup> D108/28.141 *Washington Post*, 5 January 1978, ENG 00166177.

<sup>1782</sup> KS Notice, para. 84; KS Appeal, paras 257, 261-262.

<sup>1783</sup> In alleging the Chamber erred in the nature and extent of his contribution, Khieu Samphan fails to identify an alleged error of fact. It amounts to a broad and unsupported complaint which ought to be summarily dismissed. See *supra*, II.B (Standard of Review).

<sup>1784</sup> See in particular KS Appeal paras 257, 261-262. In paragraph 84 of his Notice, Khieu Samphan sets out an extensive number of alleged errors relating to his movements, roles and activities but does not raise the very distinct argument of his reputation and the impact this had on the commission of crimes.

<sup>1785</sup> Judgment, paras 981-982, 1008, 1046, 1048.

<sup>1786</sup> See, e.g., Judgment, fn.1107, *citing* E3/30 FBIS *Khieu Samphan 14 Jan Message to CPNLA Fighters*, 16 January 1975, ENG 00166709 ("This is a very brilliant victory and has a most favourable impact on the powerful attacks of our people and CPNLA on every front"). See also E3/637 Statement of Khieu Samphan, Hu Youn and Hu Nim, January 1973, ENG 00740938 ("All in all up to mid-January 1973, the Kampuchean people's liberation armed forces and our people have obtained great victories...Bravo! The brave people of Kampuchean people's liberation armed forces throughout the country! Bravo! Great victories to our people and the Kampuchean People's

to join,<sup>1787</sup> celebrated attacks on villages,<sup>1788</sup> falsely claimed the internal resistance movement was committed to upholding human rights,<sup>1789</sup> and called for repeated attacks on, and the strangulation of Phnom Penh.<sup>1790</sup> Among other announcements, in January 1975, he called for people to kill supporters of Lon Nol and later, in early March, he publically supported a resolution likely taken at a National Congress in February 1975, which declared that the seven “super-traitors” would be killed but that other Khmer Republic officials would be spared if they joined the resistance.<sup>1791</sup>

432. The Chamber found that Khieu Samphan’s reputation added credence to his false claims that “only” the seven “super-traitors” would be killed. It held that due to the perception that he was a “moderate capable of unifying the Khmer people”, he was called upon by the Khmer Rouge leaders to make these “deceptive assurances”.<sup>1792</sup> It also found that through his reputation, official positions, and unreserved support of the Khmer Rouge, he aided and abetted the crimes committed during Phase I of the forced transfers.<sup>1793</sup> Philip Short agreed that the speeches Khieu Samphan gave during this period were important: it was his role as the public face of the communist core of FUNK to reassure and convey the message that only the seven were going to be executed.<sup>1794</sup> Khieu Samphan merely offers his own alternative interpretation of the evidence

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liberation armed forces in every battlefield”); **E3/120** FBIS *Khieu Samphan Hails Fighters on Neak Luong, Mekong Fronts*, 22 March 1975, ENG 00166863.

<sup>1787</sup> Judgment, para. 820, citing **E3/117** FBIS *Khieu Samphan Chairs NUFC Congress Session: Communique Issued*, 26 February 1975, ENG 00166772-73. See also **E3/116** Statement of Khieu Samphan, Hou Youn and Hu Nim, 9 September 1972, ENG 00485282-83.

<sup>1788</sup> **E3/637** Statement of Khieu Samphan, Hu Youn and Hu Nim, January 1973, ENG 00740933-34, 36-37.

<sup>1789</sup> See, e.g., Judgment, para. 785, citing **E3/18** Khieu Samphan, *Cambodia’s Recent History and the Reasons Behind the Decisions I Made*, ENG 00103738 (Declaring that when human rights and defence of one’s country contradict, (“defence of one’s country’s independence and sovereignty is always and ever legitimate and necessary”). See also Judgment, para. 1008.

<sup>1790</sup> Judgment, para 1008. See also Judgment, paras 147, 162, citing **E3/30** FBIS, *Cambodian’s urged to unite in New Year’s Offensive*, 2 January 1975, ENG 00166659 (“The area under [the enemy’s] temporary control has been shrinking...Phnom Penh is reduced to a 10 square kilometer enclave under constant siege...The enemy attempted to expand...was completely defeated.”), 00166660 (“The enemy cannot use the Tonle Sap River...has no...finance or rice...Our CPNLAF is now launching heavy attacks...causing worst difficulties to the transportation of US imperialist aid to Phnom Penh.”). See also **E3/30** FBIS *Khieu Samphan Addresses 26 December Meeting for Phat Delegation*, ENG 00166661 (“the CPNLAF, as well as all brother compatriots at the front, are asked to launch the most vigorous and powerful offensive against the enemy...around Phnom Penh and in Phnom Penh”).

<sup>1791</sup> Judgment, para. 981.

<sup>1792</sup> Judgment, para. 120.

<sup>1793</sup> Judgment, para. 1009.

<sup>1794</sup> Judgment, para. 372, citing **E1/191.1** Philip Short, T. 8 May 2013, p. 35. Short also testified that the foundations of Khieu Samphan’s reputation arose in part because of his humiliation by Sihanouk in the 1960s which together with his convictions, accorded him a reputation as a man of probity and honour, who was not easily intimidated and who believed in a better and “juster” system for the country. See **E1/189.1** Philip Short, T. 6 May 2013, pp. 51-52.



when he asserts, without any support, that the Chamber “omitted” consideration of the context of war in its findings on the importance of his reputation, and suggests that in fact, he was not seen as a moderate in the eyes of the Khmer Republic, but rather as a military leader.<sup>1795</sup>

*iv. Khieu Samphan’s assistance in the organisation of educational sessions pre-1975*

433. The Chamber found that in the early 1970’s, Khieu Samphan assisted with the preparation of FUNK propaganda materials and helped to conduct political training sessions<sup>1796</sup> and that his attendance at and participation in instructional meetings continued after 17 April 1975.<sup>1797</sup> Its findings were based, in part, on the evidence of Phy Phuon who testified that when he knew Khieu Samphan at S-71, he conducted study sessions during which he discussed the importance of the “National Liberated Front” forces and the measures to be taken.<sup>1798</sup> Khieu Samphan’s allegation that the Chamber erred in relying only on the testimony of this witness<sup>1799</sup> both misrepresents the full evidentiary record and also misstates the standards on the evaluation of evidence. Evidence from a single witness the Chamber believes need not be corroborated.<sup>1800</sup>

434. Khieu Samphan’s allegation fails to consider the evidence as a whole.<sup>1801</sup> The Chamber’s findings concerning Khieu Samphan’s participation in political education sessions before and after 17 April 1975 are set out in great detail by the Chamber.<sup>1802</sup>

*v. Khieu Samphan’s “convictions and intentions”*

435. Khieu Samphan alleges the Chamber did not take “sufficient consideration” of the prevailing context of war, the role played by Sihanouk and the “true” convictions and intentions

<sup>1795</sup> KS Appeal, paras 257, 261-262. Khieu Samphan suggests that the Chamber “made a choice” to find his reputation had importance, but then fails to cite any evidence which would contradict this finding). See KS Appeal, para. 262.

<sup>1796</sup> Judgment, para. 367.

<sup>1797</sup> Judgment, para. 973.

<sup>1798</sup> Judgment, para. 367, *citing* E1/96.1 Phy Phuon T. 25 July 2012, pp. 93-94, 96-97. Phy Phuon testified further that Khieu Samphan taught that the Front was to gather the forces both inside and outside the country, the forces inside the country were to include not just the worker and the peasant classes, but also all classes of society. This is supported generally by Kim Vun, who testified that in 1971, Khieu Samphan used to speak to the people about the Lon Nol regime and the Front and asked the people to be vigilant and careful. E1/112.1 Kim Vun, T. 22 August 2012, pp. 85-86. See also the February 1970 study meeting chaired by Khieu Samphan in Kampong Speu province with 300-500 attendees to debate how the movement should approach Sihanouk; E3/1815, Ben Kiernan, *How Pol Pot Came to Power*, ENG 00487407-08 (fn. 235).

<sup>1799</sup> KS Appeal, para. 263.

<sup>1800</sup> See VI.F (Probative Value of Fact Witnesses).

<sup>1801</sup> See *supra*, II.B (Standard of Review). See also *Lubanga* AJ, para. 22; *Ntagerura* AJ, para. 174. See also *Ngirabatware* AJ, paras 202, 208; *Taylor* AJ, para. 55. *Martić* AJ, para. 233.

<sup>1802</sup> See Judgment, paras 379, 757, 772, 818, 975.

of Khieu Samphan.<sup>1803</sup> The Chamber found Khieu Samphan was disingenuous in promising to spare Khmer Republic soldiers and functionaries who surrendered.<sup>1804</sup> The Chamber relied on ample evidence pointing to the radicalisation of the CPK policy to target and kill Khmer Republic soldiers from 1970 through 1975, noting in particular Oudong in March 1974, where the CPK mercilessly executed thousands of Khmer Republic soldiers following the town's capture.<sup>1805</sup> In a FUNK publication, Khieu Samphan personally announced the elimination of over 5,000 "enemies" in Oudong".<sup>1806</sup> The Chamber found that the CPK's actual policy was "in marked contrast" with the public policy disseminated by FUNK.<sup>1807</sup>

436. Similarly, there is no logic to Khieu Samphan's suggestion that the Chamber contradicted itself in finding that while Sihanouk had been rendered powerless in Cambodia by the CPK leadership, the CPK benefitted from associating itself with Sihanouk. The two propositions are not mutually exclusive. Finally, Khieu Samphan provides no notice and no support for his suggestion that the alleged errors raise doubt on the nature and extent of *information* which he had access to through his diplomatic activities.<sup>1808</sup>

*vi. Khieu Samphan's collaboration with members of the Party pre-1975*

437. Khieu Samphan takes issue with the finding that he was trusted by the Party, repeating the arguments he raised at trial,<sup>1809</sup> which were rejected by the Chamber.<sup>1810</sup> Philip Short confirmed that Khieu Samphan's election as an alternate member of the Central Committee in 1971 was reflective of the trust Pol Pot had in him,<sup>1811</sup> because Khieu Samphan would do what he was told. From the early 1970s, Khieu Samphan lived in the same leadership compound as Pol Pot and Nuon Chea near Kampong Cham. They worked together continuously right up to the final

<sup>1803</sup> KS Notice para. 84. KS Appeal, paras 258-262.

<sup>1804</sup> For example, from March through April 1975, he announced publically that only the seven "super-traitors" would be killed and guaranteed the safety of other Khmer Republic officials if they joined the resistance. Judgment, paras 980-982.

<sup>1805</sup> Judgment, paras 121-127.

<sup>1806</sup> Judgment, para. 125, *citing* E3/167 FUNK Publication: *Nouvelles du Cambodge No. 698*, 11 April 1974, ENG 00280586.

<sup>1807</sup> Judgment, para. 127.

<sup>1808</sup> See KS Appeal, para. 256 (where Khieu Samphan makes this allegation in the last line of the paragraph without providing any particularised argumentation in support of it, without citing to any finding of the Chamber and without citing to any evidence). Nor was this argument included in Khieu Samphan's Notice. See para. 84 in which Khieu Samphan extensively alleges errors by the Chamber but makes no mention of the exchange of information. See *supra*, II.B (Standard of Review).

<sup>1809</sup> KS Appeal, para. 264, *citing* the Defence closing statements and Final Trial Brief.

<sup>1810</sup> Judgment, para. 408.

<sup>1811</sup> Judgment para. 408, *citing* E1/191.1 Philip Short, T. 8 May 2013, p. 33.

offensive in Phnom Penh.<sup>1812</sup> The Chamber also determined that Khieu Samphan had the trust of the Party as he attended and participated in meetings of the Central and Standing Committees, lived and worked closely with senior leaders of the CPK and publically represented FUNK, GRUNK and the DK regime.<sup>1813</sup> The Chamber concluded that although Khieu Samphan claimed that his status as an intellectual alienated him from the inner circle of the CPK, in truth “his roles during the DK period prove that he had the confidence and trust of other members of the party.”<sup>1814</sup> The Chamber’s findings are reasonable.

438. Khieu Samphan argues that the limitations of the CPK’s trust in him is demonstrated by his slow “evolution” into the core of the Party and his nominations to “fictitious roles,” but provides no evidence in support of this assertion.<sup>1815</sup> Khieu Samphan suggests that his nominations to the Central Committee were for the sole purpose of giving an apparent legitimacy to his representative roles, yet in support he only cites to arguments previously raised and rejected by the Chamber.<sup>1816</sup> He ignores the Chamber’s findings that Khieu Samphan’s reputation brought legitimacy to the roles he was given. Whereas his nominations to representative roles were broadly publicised for the consumption of the international community and general public, his nomination to the Central Committee was closely guarded within the Party.

439. Khieu Samphan similarly takes Philip Short’s evidence out of context when he suggests it supports a conclusion that he was “merely” a figurehead.<sup>1817</sup> Short testified that during the 1970-1975 period, Khieu Samphan was an “an extremely useful figurehead for the Kampuchean Communist Party”.<sup>1818</sup> Short stated that Khieu Samphan’s election as an alternate member of the Central Committee was reflective of a general relationship of trust with Pol Pot and that by the time he joined Pol Pot and Nuon Chea in Phnom Penh after 17 April 1975, Khieu Samphan while not yet a member of the inner circle, was trusted by them.<sup>1819</sup> There is a wealth of evidence, including eyewitness evidence, contemporaneous documentary material, and Khieu Samphan’s own admissions that prove Khieu Samphan held a leadership position within the

<sup>1812</sup> Judgment para. 408, *citing* **E1/189.1** Philip Short, T. 6 May 2013, pp. 47-50. See also the 12 sources listed in **E295/6/1.4** Khieu Samphan’s Chronology, p. 10 (September 1970 – April 1975).

<sup>1812</sup> Judgment, paras 408-409, 964-967.

<sup>1813</sup> Judgment, paras 408-409, 964-967.

<sup>1814</sup> Judgment, para. 408.

<sup>1815</sup> KS Appeal, para. 267. See *supra*, XIX.D (Khieu Samphan’s Role in Phase II Movement).

<sup>1816</sup> KS Appeal, fn. 627, *citing* **E295/6/4** paras 214, 226, 278-279.

<sup>1817</sup> KS Appeal, para. 265.

<sup>1818</sup> **E1/189.1** Philip Short, T. 6 May 2013, pp. 47-48.

<sup>1819</sup> **E1/189.1** Philip Short, T. 6 May 2013, p. 53. See also **E1/191.1** Philip Short, T. 8 May 2013, p. 33.

CPK,<sup>1820</sup> worked and lived together with the other leaders,<sup>1821</sup> and contributed to the development and implementation of CPK policies.<sup>1822</sup>

440. Khieu Samphan confuses the Chamber's findings on the symbolic and strategic value of the positions he held with its findings on the lack of power inherent in the positions. Khieu Samphan cites to the Chamber's findings in which it held that his positions in FUNK/GRUNK were part of a façade.<sup>1823</sup> However, the Chamber also clearly held that despite Khieu Samphan's assertions to the contrary, it was satisfied that the titles were not meaningless and that GRUNK/FUNK retained propaganda functions and was influential, especially overseas.<sup>1824</sup> Nuon Chea stated that Khieu Samphan had influence in foreign affairs, and that with respect to Khieu Samphan's power, what was important was "whether the people accepted us or not."<sup>1825</sup> The Chamber's finding that "while [Khieu Samphan's] titles and positions were part of a façade, they did serve an important practical purpose as they were used to endorse CPK policies and to deceive people"<sup>1826</sup> is reasonable.

441. In support of his contention that he adhered to the Party for his own protection and not because of his convictions, Khieu Samphan points to the Chamber's findings that the Party

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<sup>1820</sup> See, e.g., Judgment, para. 365, citing **E3/18** Khieu Samphan, *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, ENG 00103744-45, ("Would the Prince agree to cooperate with the C.P.K. leaders? Certainly not! This is where my social origins and my old and fairly good relations with key figures in the country gave me and important, if not indispensable, role. But before taking this duty, I had to agree to assume the role as an important leader of the country's internal resistance...it was a sacrifice I could not refuse if I wanted to contribute...I want our compatriots to better understand the reasons why I chose to become a representative of the interior resistance.").

<sup>1821</sup> Judgment, para. 92, citing **E1/21.1** Khieu Samphan, T. 13 December 2011, p. 87; **E1/96.1** David Chandler, T. 25 July 2012, pp. 40-41; **E1/132.1** Meas Voeun, T. 9 October 2012, pp. 40, 44; **E3/581** Khieu Samphan Interview by Radio Free Asia, 6 December 2007, ENG 00659103; paras 364, 368, citing **E3/18** Khieu Samphan, *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, p. 39, 49, ENG 00103742, 00103747.

<sup>1822</sup> See for example: **E1/209.1** Nou Mao, T. 19 June 2013, pp. 39-40 ("Mr Khieu Samphan...he was in favour of evacuating the people. Hu Youn did not agree with the idea...these people died at Tuol Sleng prison") ("Q: Your understanding was that Hou Youn was against the evacuation, and Khieu Samphan was in favour? A: Yes, it is correct.") ("Now, how had you found out or discovered that Khieu Samphan was in favour of the evacuation? A: I learned about this during the assembly held at Wat Taing Pho (phonetic)."); **E3/4625** Nou Mao (Mouk) Statement, ENG 00419458 ("Mok and Khieu Samphan were in favour of the evacuation, 1974"); **E1/97.1** Phy Phuon, T. 26 July 2012, p. 32 ("I learned it...each study session. Either Nuon Chea, Pol Pot, or Khieu Samphan presented this idea...that was the experience they learned...and we should draw... in order to finally liberate Phnom Penh."); **E1/99.1** Phy Phuon, T. 31 July 2012, p. 11 ("So can you confirm, first, that these three...presented to you...the positive experience...of evacuation? A: I already confirmed...these three people remained permanently at the office ... Phnom Penh.").

<sup>1823</sup> KS Appeal, para. 265, citing Judgment, paras 98, 100, 365, 987, 1018.

<sup>1824</sup> Judgment, paras 98, 365.

<sup>1825</sup> Judgment fn. 410, citing **E3/26** Nuon Chea Interview by Japanese Journalist, undated, ENG 00329512.

<sup>1826</sup> Judgment, para. 987.

targeted intellectuals,<sup>1827</sup> thereby conflating the Chamber's findings as to intellectuals in general with those relating to Khieu Samphan in particular.<sup>1828</sup> Other senior leaders of the CPK, including Pol Pot, Nuon Chea, Ieng Sary, and Ieng Thirith, were also arguably intellectuals. Asserting that although he was living with CPK leaders he was left aside<sup>1829</sup> is not only illogical but inconsistent with the fact that he attended Standing Committee meetings and with his key roles in Office 870 and in relation to Commerce.

### **B. Khieu Samphan's participation in the decision-making of the Central Committee**

442. The Chamber found that Khieu Samphan joined the Central Committee as a candidate member in 1971 and became a full-rights member in 1976.<sup>1830</sup> As a candidate member, Khieu Samphan had the right to attend meetings of the Central Committee and to participate in debates of the Committee pursuant to the principle of democratic centralism,<sup>1831</sup> but had no formal "decision rights" by virtue of this status.<sup>1832</sup> Khieu Samphan alleges that the Chamber erred in fact in concluding that by virtue of democratic centralism he could take part in decision-making or the debates of the Central Committee.<sup>1833</sup>

443. The Chamber relied on the evidence of Nuon Chea who testified that collective decision-making was implemented at the meetings of the Central and Standing Committees and that, according to this principle, if members of the Party were not satisfied with a decision, they would express their objections until a unanimous agreement was reached.<sup>1834</sup> Nuon Chea described the Party leadership as unified and that the democracy process was functioning from the time of the Third Party Congress (held in 1971) right up until the 'liberation' of Phnom Penh.<sup>1835</sup> Nuon Chea also explained that even when Khieu Samphan was not yet a full-rights member of the Central

<sup>1827</sup> KS Notice, para. 85; KS Appeal, para. 266. This is also contradicted by the fact that he remained within the CPK leadership until 1998, a fact that leads to conclude that it was because of his convictions and not for his protection.

<sup>1828</sup> Indeed, if they had not been leaders, most of the core members of the CPK would have been targeted for being educated intellectuals. Khieu Samphan's claims of being an outsider because of his education are accordingly specious.

<sup>1829</sup> KS Appeal, para. 266.

<sup>1830</sup> Judgment, paras 202, 363, 961.

<sup>1831</sup> Judgment, para. 997. The Chamber also held that later, as a Central Committee member and candidate member of the Standing Committee, Khieu Samphan had the capacity to influence the decision-making process in particular because of democratic centralism, but also because other CPK leaders, including Pol Pot, placed great trust in him. See Judgment, para. 1006.

<sup>1832</sup> Judgment, para. 997. See also Judgment, para. 202, *citing* E3/130 CPK Statute, undated, Article 24, ENG 00184045.

<sup>1833</sup> See also KS Appeal, paras 281-283.

<sup>1834</sup> Judgment, para. 224, *citing* E1/23.1 Nuon Chea, T. 15 December 2011, pp. 33-36.

<sup>1835</sup> Judgment, para. 142, *citing* E3/3 Nuon Chea Interview by Khem Ngun, ENG 00184673.

Committee, he had power with respect to various duties and he “pushed on the perimeters, helped with opinions, helped things.”<sup>1836</sup> Khieu Samphan himself stated that “if there had been a single voice against the evacuations, there could have been no evacuations.”<sup>1837</sup> As the public face of the Khmer Rouge and a man seen by Khmer Rouge cadres as one of the top leaders, Khieu Samphan’s support for the decision to evacuate Phnom Penh was critical.

444. Khieu Samphan reiterates his argument, considered and rejected by the Chamber,<sup>1838</sup> that the Central Committee was nothing but the place where decisions already taken by the Standing Committee were communicated.<sup>1839</sup> Khieu Samphan argues he had no right to participate in decision-making, pointing to Articles 5 and 24 of the CPK statute. However, Article 5 relates to the CPK’s aspirational criteria for the selection of cadres “into the various leadership committees of the Party” and does not speak to the powers of candidate members. Article 24 was expressly considered by the Chamber<sup>1840</sup> and does not undermine its findings on Khieu Samphan’s ability to participate in decision-making as a candidate member as a result of the roles he played and his closeness with other core members of the Party in the context of collective decision-making.<sup>1841</sup>

445. Khieu Samphan further asserts the Chamber’s findings on collective decision-making by the Central Committee are contradicted by its finding that the Central Committee only had “theoretical” decision-making power, with real power held by the Standing Committee.<sup>1842</sup> The Chamber found that although the CPK Statute provided that the Central Committee was nominally the highest operational unit throughout the country, effective control was exercised by the Standing Committee, all of whose members were also members of the Central Committee.<sup>1843</sup> Khieu Samphan neglects the Chamber’s detailed findings concerning the Central Committee’s direct exercise of power and decision-making,<sup>1844</sup> and ignores the Chamber’s findings expressly rejecting his argument that the Central Committee merely discussed the implementation of Standing Committee policies in light of his own admission that the Central

<sup>1836</sup> Judgment, fn. 410, *citing* E3/26 Nuon Chea Interview by Japanese Journalist, ENG 00329511-12.

<sup>1837</sup> Judgment, fn. 410, *citing* E3/4051 Khieu Samphan Interview Transcript, pp. 1-2, ENG 00788872-73.

<sup>1838</sup> Judgment, paras 223-228, 384.

<sup>1839</sup> KS Appeal, para. 268. See also *supra*, XIII (CPK Structure).

<sup>1840</sup> Judgment, para. 997. See also Judgment, para. 202, *citing* E3/130 CPK Statute, undated, p. 24, Article 24, ENG 00184045.

<sup>1841</sup> See Judgment, paras 997, 1006.

<sup>1842</sup> KS Appeal, para. 282, *citing* Judgment para. 203. See also *supra*, XIII (CPK Structure).

<sup>1843</sup> Judgment, paras 202-203.

<sup>1844</sup> See, *e.g.*, Judgment paras 113, 842 947 (where the decision to close markets was taken by the Central Committee); paras 133-134, 235, 240, 242, 271, 732, 735, 739, 749, 760, 764, 807-808, 816, 859, 879, 881, 902, 914, 918, 1039.

Committee had the power to issue various directives.<sup>1845</sup>

446. While as of June 1974, Khieu Samphan was only a candidate member of the Central Committee,<sup>1846</sup> he was one of the most important leaders of the Party and was capable of influencing its decisions. This is demonstrated by the position he held as the CPK representative in FUNK/GRUNK,<sup>1847</sup> his actual influence over Party cadres,<sup>1848</sup> and his extremely close relationship with Pol Pot and Nuon Chea.<sup>1849</sup>

447. Khieu Samphan further alleges the Chamber erred in finding that the Central Committee collectively took the decision to evacuate Phnom Penh citing Philip Short's testimony that Khieu Samphan was not in a position to object to the policies of the leadership without exposing himself to serious trouble,<sup>1850</sup> and claiming that the Judgment was contradictory, because the Chamber found Pol Pot and Nuon Chea held "final" decision-making power.<sup>1851</sup> However, the

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<sup>1845</sup> Judgment, para. 384, citing **E3/18** Khieu Samphan, *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, ENG 00103752 ("During the Central Committee's successive meetings, however – particularly during the first year – certain abuses were noted and severely criticised. Directives were given to correct them."). See also Judgment, para. 749.

<sup>1846</sup> See KS Appeal, paras 281-283.

<sup>1847</sup> Judgment, paras 365, citing **E3/27** Khieu Samphan Interview Record, 13 December 2007, p. 5, ENG 00156745 ("My official title was deputy chairman of the National United Front of Kampuchea and commander in chief of the People's Liberation Army of Kampuchea"); **E1/100.1** Phy Phuon, T. 1 August 201, p.98 ("I knew that, after the *coup d'état* and after the organization of the FUNK, he was commander-in-chief of the military"); 376, citing **E3/118** FBIS *Special National Congress' Retains Sihanouk, Penn Nouth*, 28 April 1975, ENG 00167012-13 ("Khieu Samphan, RGNUC deputy prime minister, minister of national defence and CPNLF commander in chief.").

<sup>1848</sup> See, e.g., Judgment, paras 389, citing **E1/130.1** Meas Voeun, T. 4 October 2012, pp. 73-75 ("Why did you have to report to Khieu Samphan?" You said: "Because there was a telegram sent from Khieu Samphan to me instructing that I had to report about any situation to him." Is that a correct summary of your statement to the investigators; that you had received a telegram from Mr. Khieu Samphan instructing him to report to him? A. As for the telegram, yes, he did send me a telegram instructing me so. And I reported to him the situations from Siem Reap, particularly people who were imprisoned and those who were later released by Ta Soeung, including his in-law as well, and he was later on attached to the division in Siem Reap."); 367, citing **E1/96.1** Phy Phuon, T. 25 July 2012, p. 94 ("And sometimes he also gave lectures in study sessions regarding the forces of the National Liberated Front and measures to be taken, the importance of that Front, for instance both inside and outside the country. He made it clear regarding this point.").

<sup>1849</sup> Judgment, paras 386, citing **E289.1.1** Khieu Samphan Interview by France Culture August 2007, ENG 00923077 ("I was always living in close quarters with the Cambodian leaders. They could see me. And Pol Pot trusted me, I am telling you."); 373, citing **E1/156.1** Sa Vi, T. 8 January 2013, pp. 12, 85 ("K1 was a place where Pol Pot lived...permanently...It is my observation that he [Khieu Samphan] went there more frequent than other leaders."). See also **E1/21.1** Khieu Samphan, T. 13 December 2011, p. 89 ("I, myself, at that time, I was at the Aural Mountain; that was the headquarters of Ta Mok together with Hou Yuon, Hu Nim, and Pok Deuskomar."); **E152.1.46.1** Khieu Samphan Interview, ENG 00789478 ("Mr. Pol Pot had very clear ways and work formalities of his own, and we all understood and knew Mr. Pol Pot...when I was in place, I had no reason to fear...Knowing each other well, we would talk as normal").

<sup>1850</sup> KS Appeal, para. 282, citing **E1/189.1** Philip Short, T. 6 May 2013, pp. 45-46.

<sup>1851</sup> KS Appeal, para. 282.

Chamber took Short's evidence into consideration<sup>1852</sup> and while it found that Nuon Chea and Pol Pot exercised the ultimate decision-making power of the Party,<sup>1853</sup> Khieu Samphan omits that it was clearly demonstrated and accepted by the Chamber that decision-making authority was shared. The Chamber noted Nuon Chea's evidence that collective decision-making was implemented "at every stage, at all...times" specifically at the meetings of the Central and Standing Committees he attended<sup>1854</sup> and rejecting the proposition that Pol Pot had a monopoly on power.<sup>1855</sup> Khieu Samphan admitted that key decisions were made collectively, including the decision to evacuate Phnom Penh.<sup>1856</sup>

*i. Khieu Samphan's participation in the June 1974 meeting*

448. Contrary to Khieu Samphan's suggestion,<sup>1857</sup> the Chamber did not find that the decision to invade Phnom Penh was only made at the June 1974 meeting. Rather, relying in part on Nuon Chea's evidence that the preparation for the attack on Phnom Penh began in 1973<sup>1858</sup> and involved a series of meetings,<sup>1859</sup> the Chamber reasonably concluded that "the CPK Central Committee, over a series of meetings starting in 1973, decided collectively to forcibly evacuate Phnom Penh's inhabitants".<sup>1860</sup>

449. The Chamber's finding that a meeting was held in June 1974 concerning the decision to empty Phnom Penh was based on ample evidence.<sup>1861</sup> The Chamber noted a Revolutionary Flag magazine issued in September 1977 that declared that "our Party's Central Committee, in the course of its June 1974 conference, resolved to mount the decisive offensive to liberate Phnom Penh and the entire country."<sup>1862</sup> Phy Phuon testified that he was at this meeting, which was held in Meak village during the rainy season and lasted more than a fortnight,<sup>1863</sup> and that the focus

<sup>1852</sup> See, e.g., Judgment, para. 152.

<sup>1853</sup> Judgment, para. 348, cross-referenced, Judgment, paras 861, 884, 887, 893, 907-908, 924, 926, 1079.

<sup>1854</sup> Judgment, para. 224, citing **E1/23.1** Nuon Chea, T. 15 December 2011, pp. 33-36.

<sup>1855</sup> Judgment, para. 224, citing **E3/26** Nuon Chea Interview by Japanese Journalist, ENG 00329511.

<sup>1856</sup> Judgment, para. 225.

<sup>1857</sup> KS Appeal, paras 271-274.

<sup>1858</sup> Judgment, para. 132, citing **E1/21.1** Nuon Chea, T. 13 December 2011, p. 27; **E1/35.1** Nuon Chea, T. 30 January 2012, pp. 14-17.

<sup>1859</sup> Judgment, para. 132, citing **E1/21.1** Nuon Chea, T. 13 December 2011, p. 27.

<sup>1860</sup> Judgment, para. 132.

<sup>1861</sup> Judgment, paras 132-143.

<sup>1862</sup> Judgment, para. 133, citing **E3/11** *Revolutionary Flag*, September 1977, p. 36, ENG 00486247.

<sup>1863</sup> **E1/97.1** Phy Phuon, T. 26 July 2012, pp. 39-41.



was the “liberation” of Phnom Penh.<sup>1864</sup> More importantly, Nuon Chea admitted that there was an extraordinary meeting of the Central Committee in mid-1974 in which “we” decided that people would be evacuated temporarily from Phnom Penh.<sup>1865</sup> He stated that a committee chaired by Son Sen and comprised of members of the zones was established to carry out the evacuation.<sup>1866</sup>

450. During a political indoctrination session for subordinates of the Party Centre at CPK headquarters, Khieu Samphan described the forced evacuation of Oudong as a good example to be followed in the case of Phnom Penh.<sup>1867</sup> Moreover, the Chamber found that the expulsion of the population was *part of* the military, economic, and ideological strategy to allow the leadership to better control the people and prevent enemies from destabilising CPK forces.<sup>1868</sup> This policy had already been demonstrated in other villages and towns, such as Oudong.<sup>1869</sup> Therefore it was reasonable for the Chamber to conclude that discussions of the liberation of Phnom Penh would perforce include discussions of the tactical strategy of evacuation.

451. Khieu Samphan reiterates arguments he raised in his Final Brief and final submissions regarding the testimony of Phy Phuon<sup>1870</sup> and Nuon Chea<sup>1871</sup> that were addressed by the Chamber in the Judgment.<sup>1872</sup> Moreover, on its merits, the evidence cited by Khieu Samphan does not support his suggestion that the Chamber confused Phy Phuon’s evidence of the June 1974 meeting with his evidence regarding the April 1975 meeting.<sup>1873</sup>

<sup>1864</sup> Judgment, para. 133, *citing* E1/97.1 Phy Phuon, T. 26 July 2012, pp. 43-44.

<sup>1865</sup> Judgment, para. 132, *citing* E1/35.1 Nuon Chea T. 30 January 2012, pp. 15 -18.

<sup>1866</sup> Judgment, para. 132, *citing* E1/35.1 Nuon Chea, T. 30 January 2012, pp. 15 -18.

<sup>1867</sup> E1/97.1 Phy Phuon, T. 26 July 2012, pp. 32-33. See also Judgment, paras 133-134.

<sup>1868</sup> Judgment, para. 534.

<sup>1869</sup> Judgment, paras 104-112.

<sup>1870</sup> KS Appeal, para. 273.

<sup>1871</sup> KS Appeal, para. 274.

<sup>1872</sup> Judgment, paras 133-147.

<sup>1873</sup> Khieu Samphan cites the testimony of Phy Phuon in which he states that he did not think that the evacuation of Phnom Penh was discussed at the June 1974 Congress. See E1/98.1 Phy Phuon, T. 30 July 2012, p. 56, and his evidence that the first time he understood the term “evacuation” was at B-5. See E1/99.1 Phy Phuon, T. 31 July 2012, p. 11. This is consistent with his testimony that what he heard discussed at the June 1974 meeting related to the ‘liberation’. See Judgment, para. 133, *citing* E1/97.1 Phy Phuon, T. 26 July 2012, p. 43. The Chamber relied on this evidence together with admission by Nuon Chea that the evacuation was agreed upon at the June, 1974 meeting in coming to its findings. Khieu Samphan also cites to the testimony of Phy Phuon that Pol Pot and the rest agreed to the evacuation of the city at the April 1975 meeting. See E1/98.1 Phy Phuon, T. 30 July 2012, p. 84. Again, this is consistent with Phy Phuon’s further evidence on the April 1975 meeting as is discussed in more detail below. Khieu Samphan also points to footnote 380 of the Judgment in which the Chamber cites Phy Phuon’s evidence relating to the April 1975 meeting in support of a conclusion relating to the June 1974 meeting. This appears simply to be an inadvertent transposition of a citation. Given that the Chamber relied on many other sources of evidence, even if the

452. Similarly, the evidence cited by Khieu Samphan does not support his allegation that the Chamber was unreasonable in concluding that Nuon Chea and Phy Puon were discussing the same meeting.<sup>1874</sup> Indeed, the Chamber explicitly took this evidence into consideration it coming to its findings.<sup>1875</sup>

a. Khieu Samphan was in Cambodia at the time of the June 1974 meeting

453. Contrary to Khieu Samphan's suggestion,<sup>1876</sup> the Chamber relied on direct witness testimony and an extensive body of documentary evidence including US State Department telegram, other diplomatic reports, media reports and a FUNK publication and an Australian Embassy telegram determining that he was back in Cambodia by the time the meeting was held.<sup>1877</sup> Specifically, the Chamber accepted Suong Sikoeun's detailed evidence that after his wife's birthday on 25 May 1974, Ieng Sary and Khieu Samphan remained in Hanoi for one week. They then travelled to Laos for two days before returning to the liberated zone of Cambodia by way of the Ho Chi Minh Trail.<sup>1878</sup> This is supported by news articles that indicate that Khieu Samphan and Ieng Sary were overseas from March through May 1974 and that they were in Laos in June<sup>1879</sup> and by an Australian Embassy cable that indicated Khieu Samphan was in Laos from 2-8 June.<sup>1880</sup> It is further supported by direct evidence of Khieu Samphan's presence and participation at the meeting.

454. Khieu Samphan's challenges to the evidence upon which the Chamber relied to find that he

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reference were excised from the Judgment, it would have no impact on the finding that the evacuation was discussed at the June 1974 meeting.

<sup>1874</sup> Khieu Samphan cites to the following parts of Nuon Chea's testimony: responding to a question about the "mid-1974 Extraordinary Meeting of the Central Committee" where the decision to evacuate Phnom Penh was made, Nuon Chea testified that the meeting was held "somewhere along Chinit River" and "to [his] recollection, it lasted for three days". It was attended by representatives from all the zones, including Pol Pot, himself, Ta Mok, So Phim, Koy Thuon and Son Sen were there but he could not recall all the people who attended. **E1/35.1** Nuon Chea, T. 30 January 2012, pp. 15-18; Nuon Chea testified that Ieng Sary and Khieu Samphan were not present at the mid-1974 meeting; **E1/22.1** Nuon Chea, T. 14 December 2011, p. 2; Nuon Chea testified that the decision to evacuate the "dwellers" of Phnom Penh was done through a series of meetings. Starting from 1973, the situation was analysed. The Central Committee's (as corrected in the transcript) meeting was an extraordinary one, **E1/21.1** T. 13 December 2011, p. 26; T. 22 November 2011, **E1/14.1**, pp. 121-122 refers to procedural arguments which do not have bearing on the issue.

<sup>1875</sup> See Judgment, paras 132-135. The oral proceedings from 22 November 2011 are not cited by the Chamber (as they are irrelevant).

<sup>1876</sup> KS Appeal, paras 275-278.

<sup>1877</sup> Judgment, paras 132-142.

<sup>1878</sup> Judgment, para. 137.

<sup>1879</sup> Judgment, para. 136.

<sup>1880</sup> **E282.1.14** Australian Embassy Telegram, Subject: More Information from Australian Ambassador's Visit to Pathet Lao Headquarters in Sam Neua, 19 June 1974, EN 00899053.

was present in Cambodia fail. Contrary to Khieu Samphan's suggestion,<sup>1881</sup> the fact that the Chamber refrained from making findings on the exact dates in June 1974 for this meeting does not undermine its conclusion that he had returned to Cambodia by the time the meeting was held.<sup>1882</sup> Khieu Samphan further ignores<sup>1883</sup> the fact that the Chamber expressly considered and rejected Nuon Chea's and Ieng Sary's evidence that he did not take part in the meeting.<sup>1884</sup> Furthermore, Ieng Sary's denial of having participated in the June 1974 meeting does not impact upon his evidence about having discussed the evacuation of Phnom Penh with Pol Pot upon his return from China nor on the Chamber's reliance on this evidence with respect to the timing of Khieu Samphan's return.

b. Khieu Samphan's participation in the June 1974 meeting and support of the evacuation

455. Contrary to Khieu Samphan's contention,<sup>1885</sup> the Chamber's finding that he supported the decision to forcibly transfer the population of Phnom Penh during the June 1974 meeting is reasonable and based on ample evidence. Nuon Chea testified that at the June 1974 meeting, all the members of the Standing and Central Committees agreed with the decision to empty Phnom Penh.<sup>1886</sup> Khieu Samphan himself stated that "if there had been a single voice against the evacuations, there could have been no evacuations."<sup>1887</sup> Similarly, Nou Mao, a former Khmer Rouge cadre testified that Hou Youn discussed the decision to transfer people from Phnom Penh in 1974<sup>1888</sup> and indicated that Khieu Samphan was in favour.<sup>1889</sup> Phy Puon testified that prior to the June 1974 meeting, Khieu Samphan described the forced evacuation of Oudong as a good example to be followed in the case of Phnom Penh.<sup>1890</sup> Further, the Chamber found that Khieu Samphan's comprehensive understanding of the decision-making process that led to the emptying of Phnom Penh is indicative of the fact that he took part in the decision-making process.<sup>1891</sup>

<sup>1881</sup> KS Appeal, paras 275-276.

<sup>1882</sup> Judgment, para. 136.

<sup>1883</sup> KS Appeal, para. 277.

<sup>1884</sup> Judgment, para. 134.

<sup>1885</sup> KS Appeal, paras 270, 278.

<sup>1886</sup> Judgment, para. 526, *citing* E1/35.1 Nuon Chea, T. 30 January 2012, p. 21.

<sup>1887</sup> Judgment, para. 142, fn. 410, *citing* E3/4051 Khieu Samphan Interview Transcript, pp.1-2, ENG 00788872-73.

<sup>1888</sup> See Judgment, fns 309, 340, 359, 360, 1787, 1822, 1836, 1930.

<sup>1889</sup> E1/209.1 Nou Mao, T. 19 June 2013, pp. 38-40. See also E3/4625 Nou Mao (Mouk) Statement, ENG 00419458.

<sup>1890</sup> E1/97.1 Phy Phuon T. 26 July 2012, p. 32; E1/99.1 Phy Phuon, T. 31 July 2012, p. 11.

<sup>1891</sup> Judgment, para. 147. The Chamber also acknowledged there were conflicting accounts as to whether Khieu

ii. *Khieu Samphan participated in the April 1975 meeting at B-5 and supported the evacuation of Phnom Penh*

456. Contrary to Khieu Samphan's contention,<sup>1892</sup> the Chamber relied on ample evidence in finding that in April 1975, he attended a meeting at B-5 to discuss the forcible transfer of the inhabitants of Phnom Penh,<sup>1893</sup> and that he participated by expressing his opinion supporting the decision to transfer the population of Phnom Penh.<sup>1894</sup> Specifically, the Chamber relied on: (i) Phy Puon's testimony that Nuon Chea raised the issue of the evacuation of Phnom Penh, stating that it was necessary and needed approval, that Khieu Samphan agreed with the plan, everyone at the meeting applauded and approved the idea,<sup>1895</sup> and that Pol Pot and Nuon Chea both discussed the earlier experiences of having liberated other towns;<sup>1896</sup> (ii) Khieu Samphan's own admissions that he arrived at Pol Pot's headquarters west of Oudong in March 1975 in order to follow the last offensive against the capital more closely; he followed the battle closely on the radio,<sup>1897</sup> and that he was occasionally briefed on the events by Pol Pot;<sup>1898</sup> (iii) Ieng Sary's evidence placing the meeting in late March or early April, confirming that the evacuation was discussed;<sup>1899</sup> and (iv) Meas Voeun's statement that the commanders conducted a meeting with division commanders from all the Zones before the attack on Phnom Penh<sup>1900</sup> and that the army was tasked to attack Phnom Penh by the "Upper Echelon", which included Khieu Samphan, Ta Mok

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Samphan attended the meeting. It explicitly rejected the assertions of Nuon Chea and Khieu Samphan that he was not present and preferred the evidence of other witnesses including Phy Phuon who directly confirmed that Khieu Samphan, together with Pol Pot and Nuon Chea were there. See Judgment, para. 135, *citing E1/97.1 Phy Phuon*, T. 26 July 2012, p. 16.

<sup>1892</sup> KS Notice, para. 87; KS Appeal, para. 279.

<sup>1893</sup> Judgment, paras 144-145.

<sup>1894</sup> Judgment, paras 997, 1000.

<sup>1895</sup> Judgment, para. 146, *citing E1/97.1 Phy Phuon*, T. 26 July 2012, p. 16.

<sup>1896</sup> Judgment, para. 146, *citing E1/97.1 Phy Phuon*, T. 26 July 2012, p. 24; **E3/63** Phy Phuon Interview Record, 21 September 2008, ENG 00231410, ("A. The meeting focussed only on the plan to evacuate people from Phnom Penh...Q. What were Mr. Khieu Samphan's opinions during this meeting? A. Mr. Khieu Samphan gave his opinions and impressions and agreed to the plan to evacuate the people...Q. Aside from the evacuating Phnom Penh, was there any discussion of evacuating the cities and other population centres? A...they told all the commanders to set up meetings when they returned to their sectors and make plans to evacuate the people from the cities under their responsibilities."), 531, *citing E1/98.1 Phy Phuon*, T. 30 July 2012, pp. 67-68 ("once they liberated any zone, then they would evacuate and relocate the people. It would be easier from the management perspective, because the element was not that complicated.").

<sup>1897</sup> Judgment, para. 144. See also Judgment, paras 145, 735, *citing E3/18 Khieu Samphan, Cambodia's Recent History and the Reasons Behind the Decisions I Made*, p. 54, ENG 00103750.

<sup>1898</sup> Judgment para. 144, *citing E3/27 Khieu Samphan Record of Interview*, ENG 00156743.

<sup>1899</sup> Judgment, para. 146, *citing E3/89 Ieng Sary Interview by Stephen Heder*, 17 December 1996, ENG 00417603.

<sup>1900</sup> Judgment, para. 144, *citing E3/424 Meas Voeun, Interview Record*, ENG 00421070.

and Son Sen.<sup>1901</sup>

457. Contrary to Khieu Samphan's assertion,<sup>1902</sup> the Chamber considered Phy Puon's evidence, including his knowledge of certain matters, but concluded that Phy Puon's evidence was reliable and supported by other evidence on the record.<sup>1903</sup> Khieu Samphan asserts that any discussion he had with Pol Pot on the subject of the evacuation of Phnom Penh occurred after the fact, citing to arguments he raised at trial and an excerpt from a book where he wrote that he discussed the reasons for the evacuation of the city with Pol Pot only in the weeks following the evacuation.<sup>1904</sup> These arguments were considered and rejected by the Chamber. His assertion is contradicted by his own 1982 admission that he took part in the collective decision to evacuate Phnom Penh.<sup>1905</sup>

*iii. Khieu Samphan could have opposed the evacuation of Phnom Penh*

458. Contrary to Khieu Samphan's contention,<sup>1906</sup> the full excerpt of his statement "if there had been a single voice against the evacuations, there could have been no evacuations", supports the Chamber's finding that there was no disagreement with respect to the decision to carry out the evacuations in April 1975 and that he could have opposed the decision. Similarly,<sup>1907</sup> the full excerpt of Nuon Chea's statement supports the Chamber's finding that Khieu Samphan had power and the right to participate in collective decision-making.<sup>1908</sup> Other than providing his own

<sup>1901</sup> E1/130.1 Mean Voeun, T. 4 October 2012, pp. 12-13.

<sup>1902</sup> KS Appeal, para. 280, *citing* E1/99.1 Phy Phuon, T. 31 July 2012, pp. 10-11 (he heard the term "evacuation" but did not know any other details about this topic).

<sup>1903</sup> Judgment, paras 144-146.

<sup>1904</sup> KS Appeal, para. 281, *citing* his Final Brief and E3/18 Khieu Samphan, *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, p. 69-70, FR 00595428-29 (in which Khieu Samphan states that in the course of the weeks that followed April 17, 1975, the Secretary General and the other members of the Permanent Committee gave him a number of reasons for the evacuation).

<sup>1905</sup> E3/687 New York Times, 3 *Unlikely Cambodian Allies Map war on Vietnam*, 9 July 1982, ENG 00122289.

<sup>1906</sup> KS Appeal, paras 283, 285 *citing* Judgment, para. 142, fn. 410 (wherein the Chamber relies on E3/4051 Khieu Samphan Interview Transcript, pp. 1-2, ENG 00788872-73; E152.1.52R Video of Khieu Samphan Interview).

<sup>1907</sup> KS Appeal, paras 283, 285, *citing* Judgment, fn. 410 (wherein the Chamber relies upon E3/26 Nuon Chea Interview by Japanese Journalist, pp. 8-9, ENG 003929511-12).

<sup>1908</sup> Nuon Chea, responding to a question as to why Khieu Samphan was not a "Standing member" of the Central Committee together with Pol Pot, himself, Ta Mok, Ieng Sary, Vorn Vet, Sao Phim, Ros Nheum and Son Sen, Nuon Chea responded that it was: "Because he had just joined the Party. His age was not yet sufficient, his Party seniority was not yet sufficient, and he was new. Because those who could join the Party were only those who had gone through the decades of long difficult struggle. But the new people could have any kind of theories." Thereafter, responding to a question about whether Khieu Samphan had no power and was only Head of State, Nuon Chea stated: "He had power as well, he never said he had no power at all. But various and different duties. He was responsible for foreign affairs, those with me had responsibility and uncorrupted. [*sic*] When he was a minister for Prince Sihanouk he did not busy himself about money. He had influence, was clean ... He had some [power], but he

alternative interpretation, Khieu Samphan fails to demonstrate how the Chamber erred.

**C. Khieu Samphan's role with respect to Phase I and Tuol Po Chrey (KS paras 280-285, 375-381, 393-396)**

459. Khieu Samphan alleges errors of fact and law in respect of his knowledge of the crimes concurrent with their commission during Phase I and at Tuol Po Chrey. However, he wholly fails to demonstrate how such alleged errors could give rise to a miscarriage of justice. The Chamber's findings in respect of his awareness and knowledge are based on his speeches, conduct of indoctrination sessions, his role in "continuously denying and hiding the reality of the situation", his prior experiences with and involvement in planning the forced transfers, his experience of the patterns of criminal conduct which had emerged, and, critically, his own admissions regarding his knowledge of the policies and crimes of the Khmer Rouge, prior to and during the commission of the Phase I and Tuol Po Chrey crimes.<sup>1909</sup>

*i. B-5 and Phnom Penh Central Station*

460. Contrary to Khieu Samphan's contention,<sup>1910</sup> the Chamber relied on ample evidence, including his own admissions,<sup>1911</sup> Nuon Chea's evidence,<sup>1912</sup> and Phy Puon's testimony<sup>1913</sup> to conclude that he had access to information concerning the commission of crimes during the week he was participating in meetings at B-5. In arguing he was at B-5 only to listen to "military" reports, Khieu Samphan attempts to draw a false distinction, ignoring that the Chamber found

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had no power on his own. He pushed on the perimeters, helped with opinions, helped things. ... The important view was whether the people accepted us or not. It was not a matter of having power or not having power. The revolution serves the people. If we serve the people, then the people accept and recognize us." See also *supra*, XIX.B (Khieu Samphan's participation in decision-making of Central Committee); KS Appeal, paras 281, 285.

<sup>1909</sup> Judgment, paras 945-951, 953-954, 958-959.

<sup>1910</sup> KS Appeal, paras 375-377.

<sup>1911</sup> Judgment, paras 144-145, 735, *citing* E31/97.1 Phy Phuon, T. 26 July 2012, pp.12-13; E1/99.1 Phy Phuon, T. 31 July 2012, p. 11; E3/24 Phy Phuon Interview Record, 5 December 2007, ENG 00233581; E3/63 Phy Phuon Interview Record, 21 September 2008, EN00231409-10. It compared with E3/18 Khieu Samphan, *Cambodia's Recent History and the Reasons Behind the Decisions I made*, July 2004, p. 54, ENG 00103750 where Khieu Samphan wrote ("by the end of March 1975, I was invited to the general headquarters of the [CPK] in Phoum Dong, west of Udong, to follow the last offensive against the capital more closely. Neither Hu Nim ... nor Hou You ... were with me at that time"); Nuon Chea testified that Pol Pot returned to B-5 after the liberation of Phnom Penh; E1/35.1 Nuon Chea, T. 30 January 2012, pp. 37-38. Judgment, fn. 2331, *citing* E1/21.1 Khieu Samphan, T. 13 December 2011, p. 94. See also Judgment, fn. 441, *citing* E3/586 Khieu Samphan Interview by Heng Reaksmei, 15 October 2007, pp. 1-2, EN G00659109-10; E3/27 Khieu Samphan Interview Record, 13 December 2007, ENG 00156747, 00156749.

<sup>1912</sup> E1/35.1 Nuon Chea, T. 30 January 2012, pp. 26-27.

<sup>1913</sup> E1/98.1 Phy Phuon, T. 30 July 2012, pp. 83-84.

that the evacuation was *part of* the military strategy.<sup>1914</sup> Khieu Samphan's assertion that Nuon Chea confirmed that B-5 was a secret place where those responsible for the Zones went to report and not a place where meetings were held<sup>1915</sup> is contradicted by Nuon Chea's own evidence that he went to B-5 to meet with Pol Pot.<sup>1916</sup>

461. Khieu Samphan mischaracterises the Chamber's findings when he alleges that it erred by relying on his mere "presence" alongside the leaders of the CPK from 25 April 1975 in concluding that he had knowledge of the crimes.<sup>1917</sup> Instead, the Chamber relied on his meetings with other senior leaders at B5 and at the Phnom Penh railway station,<sup>1918</sup> as well as his knowledge of the on-going pattern of targeting Khmer Republic officials.<sup>1919</sup> Similarly, the Chamber relied on Phy Phuon's evidence that Khieu Samphan and the other leaders of the Joint Leadership Committee *met with* zone commanders and military leaders every day.<sup>1920</sup> Also contrary to Khieu Samphan's contention,<sup>1921</sup> the Chamber's finding that he had access to military information during the evacuation of Phnom Penh was based on his senior position and his interactions with other senior leaders,<sup>1922</sup> rather than being named on reports or documents.

462. Khieu Samphan's allegation that the committee headed by Son Sen to carry out the evacuation was a "military" committee does not impact on the Chamber's findings on his knowledge. The committee was set up by the senior leaders of the Party, including Pol Pot, Nuon Chea and Khieu Samphan. Contrary to Khieu Samphan's suggestion,<sup>1923</sup> it is clear from the

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<sup>1914</sup> Judgment, para. 534.

<sup>1915</sup> KS Appeal, para. 377, *citing* E1/35.1 Nuon Chea, T. 30 January 2012, pp. 26-27.

<sup>1916</sup> Judgment, paras 144-145, 735.

<sup>1917</sup> KS Appeal, para. 382.

<sup>1918</sup> Judgment, para. 954. The Chamber did not rely on Khieu Samphan's meetings with other senior leaders at the train station in respect of his knowledge concurrent with the Phase I crimes. See Judgment, para. 953.

<sup>1919</sup> Judgment, paras 954-955.

<sup>1920</sup> Judgment, para. 954, *citing* Judgment para. 740, *referring to* E3/24 Phy Phuon, Interview Record, 5 December 2007, ENG 00223582. The Chamber also relied on the evidence of Philip Short in this respect. See Judgment, fn. 2335. Phy Phuon testified that Khieu Samphan met with Ieng Sary, Nuon Chea, Son Sen, Pol Pot, Koy Thuon, Vorn Vet, Ta Mok, Sao Phim and others to discuss the socialist revolution, building and defending the country and building cooperatives.

<sup>1921</sup> KS Appeal, paras 378-381.

<sup>1922</sup> Judgment, para. 739. The Chamber noted that during the week that the evacuation of Phnom Penh was ongoing, military leaders sought and received instructions from senior leaders and members of the Central Committee at B-5. Judgment, para. 953, *citing* Judgment, para. 739. Even at the April 1975 meetings, the "leaders on the battlefield" reported what was happening to all the persons in attendance at that meeting, including Khieu Samphan. Judgment, paras 146-151. The Chamber found that Khieu Samphan was present at B-5 for the purpose of following the evacuation and met regularly with other senior leaders. At the time, he was the Commander-in-Chief of the CPNLAF, as well as FUNK Deputy Chairman, GRUNK Deputy Prime Minister, Minister of National Defence and a candidate member of the Central Committee. Judgment, para. 961.

<sup>1923</sup> KS Appeal, paras 379- 381.

context that a document attributed to Ke Pauk refers to the Central Committee issuing military instructions from 1970-1975.<sup>1924</sup> Regardless, this argument does not undermine the Chamber's finding that Khieu Samphan had access to military reports and ignores the multitude of other sources upon which the Chamber relied in coming to this conclusion.<sup>1925</sup>

*ii. Khieu Samphan's access to information from the foreign press and leaders of resistance*

463. Khieu Samphan claims that the Chamber erred in finding that he gained knowledge of crimes at the time of forced transfer 1 from the foreign press, diplomatic reports or contacts with CPK leaders living abroad.<sup>1926</sup> As detailed above, the most important source of information for Khieu Samphan and other leaders regarding the forced movement were the daily reports provided at B-5 and at the railway station by military leaders whose troops were evacuating the population.<sup>1927</sup> Khieu Samphan's contention that he did not arrive in Phnom Penh until 25 April 1975, given that he was "still in the jungle",<sup>1928</sup> is irrelevant. Indeed, per his own admission, Khieu Samphan was at B-5, which, while in the jungle, was the command centre for the invasion of Phnom Penh.

464. The Chamber correctly found that Khieu Samphan was in contact with Norodom Sihanouk who received some diplomatic reports concerning the evacuation and that Ieng Sary and Ieng Thirith and other GRUNK officials would have access to some of these diplomatic and public news reports and were in contact with the internal resistance at the time.<sup>1929</sup> Khieu Samphan alleges that the Chamber failed to explain "when and at what moment" Ieng Sary and Ieng Thirith in Hanoi would have "given and received" diplomatic and public reports.<sup>1930</sup> Given Khieu Samphan's role in keeping foreign interference at bay and the enormity of the events occurring on the ground, it was reasonable for the Chamber to conclude there would have been such communication around the time of the expulsion of the entire Phnom Penh's population.<sup>1931</sup>

<sup>1924</sup> See KH 0009554, 0009551, which use the words "Centre" or "Central", which from the context implies the Central Committee. See also KH 0009555 which does not refer to "Centre" but rather "Party", which in the context could imply the "Party Centre". In any case, Khieu Samphan was also part of the Party Centre.

<sup>1925</sup> Judgment, paras 148-152, 739, 953.

<sup>1926</sup> KS Appeal, paras 384- 385.

<sup>1927</sup> Judgment para. 953.

<sup>1928</sup> KS Appeal, para. 386. See Judgement, para. 740.

<sup>1929</sup> Judgment, para. 953, *citing* Judgment, paras. 148-152, 251, 254-256, 365, 367, 371-372, 739, 789, 821.

<sup>1930</sup> KS Appeal, paras 386-387.

<sup>1931</sup> Judgement, para. 953. The Chamber found that Ieng Sary and Ieng Thirith were in contact with the internal resistance via radio and telegram throughout the democratic revolution and following the Khmer Rouge victory.



465. Khieu Samphan emphasises the fact that contemporaneous news agencies and states reports cited by the Chamber were not issued during the evacuation of Phnom Penh itself but weeks or months afterwards. Khieu Samphan mischaracterises the evidence in suggesting that the Chamber erred by relying on systems of communication that were not in place until 1976.<sup>1932</sup> The Chamber cited to the evidence of Khiev En, Sa Siek, Laurence Picq, Chan Youran, and Suong Sikoeun who worked at the Ministry of Foreign Affairs from 1975 through 1977.<sup>1933</sup> The Chamber further relied on the report of the US State Department from May 1975 listing the high-ranking Khmer Republic officials who were executed and the coverage of Norodom Sihanouk’s speech by the Kampuchea News Agency on 2 April 1975, which expanded the list of “super-traitors” to 23.<sup>1934</sup>

**D. Khieu Samphan’s role with respect to Phase II of the population movement  
(KS paras 522-587)**

466. Khieu Samphan alleges that the Chamber erred in fact in its assessment of his role during Phase II of the population movement.<sup>1935</sup> His only specific challenges with respect to his contribution or knowledge of the crimes are confined to citations to where the Chamber discusses his liability pursuant to JCE, aiding and abetting, or planning.<sup>1936</sup> He does not establish how the Chamber erred in applying the facts to the applicable standard of law – or which standard of law he takes issue with – and does not demonstrate how the alleged errors invalidate the verdict or occasion a miscarriage of justice.<sup>1937</sup> Instead, Khieu Samphan focuses on a few sources of evidence, ignoring the vast quantity of factors considered by the Chamber when analysing his liability, or simply disagrees with the Chamber’s findings and provides his own alternative interpretations of evidence.<sup>1938</sup>

467. Khieu Samphan’s contention that the Chamber relied on evidence outside the scope of Case 002/01<sup>1939</sup> ignores the well-established principle that a chamber may rely on evidence outside the temporal scope of the case to serve as corroboration or circumstantial evidence in support of

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<sup>1932</sup> KS Appeal, para. 385.

<sup>1933</sup> Judgment, paras 267-268.

<sup>1934</sup> Judgment, para 953 *citing* to paras 267-268, 503. Judgment, fn. 1510, *citing* Judgment paras 824-826.

<sup>1935</sup> KS Appeal, paras 522-587.

<sup>1936</sup> See, e.g., KS Appeal, fns 1135-1136, 1169, 1193, 1214, 1248.

<sup>1937</sup> See KS Appeal, paras 523-525, 529-531, 571-572, 580-581, 587.

<sup>1938</sup> See KS Appeal, paras 523, 526, 530, 536-539, 561-563, 565, 573-775, 580-583, 586-587.

<sup>1939</sup> See KS Appeal, paras 525, 581-582.

findings regarding events that took place within the temporal scope.<sup>1940</sup>

*i. Khieu Samphan's access to information regarding the crimes*

468. Khieu Samphan first challenges the Chamber's findings regarding his diplomatic activities and his travels abroad up until April 1976, particularly as they relate to his knowledge of the commission of crimes.<sup>1941</sup> Contrary to his submissions,<sup>1942</sup> the Chamber never claimed that his liaison or travels with Sihanouk and diplomatic meetings prior to April 1976 were the primary sources of knowledge arising *after* the commission of crimes.<sup>1943</sup> However Khieu Samphan's travels to the countryside constituted one source among many others cited by the Chamber of his knowledge *concurrent with* the commission of the crimes.<sup>1944</sup> Khieu Samphan simply ignores the fact that the Chamber was satisfied, for all the reasons enumerated, *taken together*, that he had both concurrent and posterior knowledge of the crimes committed during Phase II.<sup>1945</sup> Khieu Samphan appears to argue that each source taken separately does not demonstrate his knowledge,<sup>1946</sup> but ignores most of the evidence presented by the Chamber, including key contemporaneous reports on population movement during Phase II sent by the Zones or

<sup>1940</sup> See *Nahimana* AJ, paras 315-316, 561.

<sup>1941</sup> KS Appeal, paras 522-543.

<sup>1942</sup> KS Appeal, para. 527, *citing* Judgment, para. 958. See also KS Appeal, paras 523-527.

<sup>1943</sup> Judgment, para. 958 (cites evidence showing Khieu Samphan's knowledge of the crimes *after* their commission, including Khieu Samphan and other DK leaders' public statements, CPK policy documents and magazines, access to international reports media, including UN reports, international organisation reports and international press). See *e.g.* Judgment para. 827, fn. 2606. Regarding his diplomatic functions retained after the crimes in 002/01 were committed, they include receiving mail from international organisations such as Amnesty International about reported crimes committed (see Judgment, para. 290, fn. 902-903; para. 825, fn. 2602; para. 827, fn. 2605).

<sup>1944</sup> Contrary to what Khieu Samphan asserts in paras. 524-525, regarding the knowledge of the crimes prior to April 1976, that in video **E3/2348R** *Khmer Rouge History of Genocide (part 2)* V00172506, at 42:28 to 42:45, Sihanouk mentioned that he realized during his travels to the countryside with Khieu Samphan that the people at work had "no freedom" and were subject to "forced labour". He also said that during those visits "My disillusion, my despair came to me when I saw the realities." (Video **E3/2443R** *Cambodge Ière Partie* by Rithy Panh, V00172478, at 44:56 to 45:07). In **E3/3198** Khieu Samphan Interview Record, ENG 00815890, Khieu Samphan stated that while visiting Kampong Puoy Dam West of Battambang, he was excited and delighted to see the workers buildings dams with their *bare hands* and believed that the *people evacuated* from Phnom Penh would understand that Cambodia would no longer be a country with poor agriculture. In addition to two travels mentioned in para. 524, Khieu Samphan accompanied Sihanouk to a textile factory in September 1975 (**E3/271** FBIS Sihanouk visits textile mills, 19 September 1975, ENG 00167468) and to Angkor in February 1976 (**E3/1819**). For Khieu Samphan's knowledge *concurrent with* the commission of the crimes, see other sources of information in the Judgment, paras. 956-957 (reports from zones and autonomous sectors, transit of population in Phnom Penh, Khieu Samphan's public statements about worksites, CPK publications and access to international media).

<sup>1945</sup> Judgment, paras. 957, 959 referring to all the sources of knowledge enumerated in paras 956, 958. See, *e.g.* fns 1128, 1150-1151, 1154, 1157, 2589. See also Judgment, fns 1174-1177, 1239-1243, 2605-2607.

<sup>1946</sup> See, *e.g.*, KS Appeal, para. 528 (access to foreign press articles and reports).

Autonomous Sectors to the Party Centre.<sup>1947</sup>

469. Khieu Samphan questions the Chamber's finding regarding his access to reports by news agencies, international organisations and various foreign states containing reports of atrocities,<sup>1948</sup> but ignores the powerful evidence upon which the Chamber relied.<sup>1949</sup> Beyond his disagreement with the Chamber's finding,<sup>1950</sup> Khieu Samphan fails to demonstrate any error in the Chamber's finding that he attended meetings with other CPK senior leaders, military commanders or Zone or Sector-level officials at which military matters were discussed.<sup>1951</sup> It was within the Chamber's discretion to find Phy Phuon's evidence reliable. Phy Phuon's testimony is clear and unequivocal about the fact that numerous meetings took place in April and May 1975 between the CPK leaders including Khieu Samphan and military commanders.<sup>1952</sup>

<sup>1947</sup> See, e.g., Judgment, para. 956, fn. 2905 citing paras 274-280, 578, 580, 586, including documents **E3/154** and **E3/1679** DK Telegram from East Zone, 30 November 1975; **E3/1181** Sector 5 Report, 27 June 1977. See also **E3/179** DK Report from Northwest Zone Office, 29 May 1977, ENG 00183013-17; **E3/181** DK Report from Northwest Zone, 27 June 1977, ENG 00223175-77. Khieu Samphan had access to all reports as person attending most of the Standing Committee meetings and as one of the two members of Political Office 870 since at least October 1975 (see **E3/37** Khieu Samphan Interview Record, ENG 00156754; **E3/18** Khieu Samphan, *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, ENG 00103755). As the Chamber pointed out "Telegrams marked as having been copied to the "Office went to Office 870". Judgment, para. 279. In addition, the Chamber mentions in paragraph 578 that the Commerce Committee was tasked as early as September 1975 with arranging population movements. As pointed out by the Chamber in paragraph 406, Khieu Samphan had an important role in relation to the DK economy, presumably in his admitted capacity as the member of Office 870 responsible for commerce.

<sup>1948</sup> KS Appeal, para. 528.

<sup>1949</sup> See, e.g., Judgment, fns 844-851, 902-903. See also fns 1735, 2605-2607. See also *supra*, XIX.A (Khieu Samphan's role from 1970-1975).

<sup>1950</sup> See *Karemera* AJ, paras 206, 325, 459.

<sup>1951</sup> KS Appeal, paras 529-531, referring to Judgment, para. 378.

<sup>1952</sup> Judgment, fn. 1141, citing **E1/97.1** Phy Phuon T. 26 July 2012, pp. 64-65, 67-68; Phy Phuon confirmed the presence of Khieu Samphan at meetings with division commanders at both the railway station and the former Ministry of Commerce: (pp. 64-65) "I saw [Pol Pot, Nuon Chea, Khieu Samphan, Ieng Sary, and the other leaders] working at the train station and at the former Ministry of Commerce, they met and had meetings - they met a lot, they met days and nights, and they kept meeting... commanders of each battlefield ... [who] had to come and meet at the place, for example, the former Ministry of Commerce... (pp. 67-68) at the train station military commanders from each respective battlefield - for example, Ta Mok, Vorn Vet, Koy Thuon, So Phim ... these people kept coming to work with them on a regular basis and also their commanders from divisions who came to meet at the train station. Q. Was Khieu Samphan a regular participant in these meetings? A. Yes, he was." See also **E3/27** Khieu Samphan Interview Record, ENG 00156746 ("I was at the railway station with Pol Pot, Nuon Chea and the other persons who frequently visited the place to get instructions from Pol Pot."). *Sao Sarun's evidence* corroborates the presence of Khieu Samphan at such meetings at a later period: **E1/83.1** Sao Sarun, T. 7 June 2012, pp. 52, 55-58 (Sector 105 and division 920 military commanders attended a meeting in 1978 with DK leaders Khieu Samphan, Nuon Chea, Pol Pot and Son Sen "about managing the forces and masses" and received advise to strengthen the defence at the border); **E1/84.1** Sao Sarun T. 11 June 2012, pp. 6-7. See also *other evidence* of Khieu samphan attending Standing Committee meetings in 1975 and 1976 where military issues were discussed: **E3/557** Khieu Samphan OCIJ Adversarial Hearing, ENG 00153270 ("I attended some broader meetings of the Standing Committee, during which only general issues were dealt with, such as national defense...Vietnam"); **E3/27** Khieu

470. Contrary to Khieu Samphan's assertions,<sup>1953</sup> the Chamber had ample evidence to conclude that the Party's policy concerning "enemies" was disseminated through indoctrination sessions conducted by Party leaders, including Khieu Samphan.<sup>1954</sup> For example, Em Oeun and Ek Hen specifically identified Khieu Samphan as a speaker at a study session, where he urged the attendees to identify "people who betray the party",<sup>1955</sup> and spoke of traitors.<sup>1956</sup> Contrary to Khieu Samphan's contention,<sup>1957</sup> Ek Hen identified Khieu Samphan as the speaker during the second session, at which traitors were discussed.<sup>1958</sup> Phy Phuon testified that Khieu Samphan was an instructor at study sessions which discussed "the masses movement throughout the country to oppose our common enemy".<sup>1959</sup> Pech Chim and Philip Short circumstantially corroborate that the Party's policy on enemies was disseminated at study sessions.<sup>1960</sup>

471. Khieu Samphan's complains that the Chamber relied on hearsay evidence to support its finding that he justified urban evacuations during indoctrination sessions,<sup>1961</sup> but it is within the Chamber's discretion to rely on hearsay evidence.

*ii. Khieu Samphan's role in the decision-making process*

472. The Chamber found that Khieu Samphan "had the confidence and trust of the other

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Samphan Interview Record, 13 December 2007, ENG 00156750 ("during the course of those meetings, the issues of national defence ... and conflict with Vietnam... were discussed).

<sup>1953</sup> KS Appeal, paras 532-535.

<sup>1954</sup> Judgment, para. 818, fn. 2580, *citing* E1/215.1 Pech Chim, T. 1 July 2013, p. 37 (at these study sessions they received instructions to assess, track, capture, and 'smash', that is eradicate or kill, the enemy); E1/113.1 Em Oeun, T. 23 August 2012, pp. 79-87; E1/115.1 Em Oeun, T. 27 August 2012, pp. 26-28; E1/217.1 Ek Hen, T. 3 July 2013, pp. 40-48, 63, 78-99; E1/124.1 Chea Say, T. 20 September 2012, pp. 32-37, 71; E1/96.1 Phy Phuon, T. 25 July 2012, pp. 75-78; E1/100.1 Phy Phuon, T. 1 August 2012, pp. 95-96; E1/189.1 Philip Short, T. 6 May 2013, pp. 74-75. See also Judgment, fns 1142-1143; *supra*, XVI (CPK Policy to smash enemies).

<sup>1955</sup> E1/113.1 Em Oeun, T. 23 August 2012, p. 85 (describing how Khieu Samphan explained that misusing needles or pretending to be sick was a sign of opposition or betrayal of the Party). See also E1/115.1, Em Oeun, T. 23 August 2012, pp. 31-54 (where Khieu Samphan explained at pp; 45-54 that to uncover traitors and infiltrated enemies, they had to be given more work less food and less rest; asked participants to pay attention to the New People who had feudalistic ideologies and trends. In addition, Khieu Samphan first endorsed the speeches of Pol Pot and Nuon Chea on the same topics (who at pp 31-45 *e.g.*, stressed the need to "find individuals who burrow within the Party", soldiers of the previous regimes and intellectuals, particularly those who graduated abroad, and to smash the enemies based on each individual's performance, even if they were family members; Nuon Chea also cited the names of the traitors Koy Thuon, Chan Chakrey and Keo Meas and mentioned spy networks, CIA, KGB and Yuon) before addressing the attendees himself. Em Oeun has always been extremely consistent regarding the content of the Boreil Keila political education session he attended.

<sup>1956</sup> E1/217.1 Ek Hen, T. 3 July 2013, pp. 79-82, 91-93.

<sup>1957</sup> KS Appeal, para. 532.

<sup>1958</sup> E1/217.1 Ek Hen, T. 3 July 2013, pp. 79-82, 91-93.

<sup>1959</sup> E1/96.1 Phy Phuon, T. 25 July 2012, p. 79.

<sup>1960</sup> E1/215.1 Pech Chim, T. 1 July 2013, p. 37; E1/189.1 Philip Short, T. 6 May 2013, pp. 74-75.

<sup>1961</sup> KS Appeal, para. 535.

members of the Party Centre”, and that he “had knowledge of the CPK’s policies and access to information about the situation in Cambodia generally.”<sup>1962</sup> Contrary to Khieu Samphan’s contention,<sup>1963</sup> the Chamber reasonably inferred from the evidence that he “continued to attend Standing Committee meetings on a similarly regular basis thereafter”, including: (i) his confirmed attendance at a minimum of 16 Standing Committee meetings between 1975-1976; (ii) his repeated visits to K-1; and (iii) his own admission that Pol Pot trusted him.<sup>1964</sup> Khieu Samphan admitted that during the regime “the Standing Committee met frequently, probably about every 7 to 10 days or more regularly in emergencies.”<sup>1965</sup> Similarly, Khieu Samphan fails to demonstrate that the Chamber erred in concluding that he actively participated in some Standing Committee meetings, based on the minutes of two such meetings.<sup>1966</sup> The Chamber specifically recognised that not all meeting minutes attributed remarks to individual speakers and acknowledged Khieu Samphan’s denials of his active participation, but inferred from the evidence that he did in fact actively contribute.<sup>1967</sup>

473. Khieu Samphan’s general assertion that he lacked influence and authority when it came to the decision-making process is supported only by his own alternative interpretations of the evidence and disagreements with the Chamber’s findings, which, in any case, he does not identify with specificity.<sup>1968</sup> As noted above, the Chamber relied on ample evidence from which it reasonably concluded that Khieu Samphan influenced the decision-making process.<sup>1969</sup> Further evidence referenced throughout the Judgment provides additional circumstantial support for its finding.<sup>1970</sup>

474. Khieu Samphan’s contention that the Chamber erred in finding that he had access to

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<sup>1962</sup> Judgment, paras 408-409. These findings are challenged in KS Appeal, paras 540-550.

<sup>1963</sup> KS Appeal, paras 541-543.

<sup>1964</sup> Judgment, para. 386. See also Judgment, paras 962, 997, 1019.

<sup>1965</sup> E3/27 Khieu Samphan Interview Record, 13 December 2007, ENG 00156750. He would not have known it if he did not take part.

<sup>1966</sup> KS Appeal, paras 544-545, *citing* Judgment, para. 387. See also KS Appeal, para. 251. Khieu Samphan asserts in para. 544 that his oral interventions during two meetings were insignificant. Actually the topics of the “elections” of April 1976 and the resignation of Sihanouk as President were important milestones for the regime as they marked the completion of the CPK strategy to entirely seize the power, the end of the FUNK / GRUNK and the official beginning of the DK era.

<sup>1967</sup> Judgment, para. 387.

<sup>1968</sup> KS Appeal, paras 546-548.

<sup>1969</sup> See *supra*, XIX.B (Khieu Samphan’s participation in decision-making of Central Committee). See also *supra*, XIX.A (Khieu Samphan’s role from 1970-1975).

<sup>1970</sup> See, *e.g.*, Judgment, fns 216, 258, 273-274, 396, 398, 409-410, 417, 419, 425-427, 613, 655, 712, 726-727, 737, 1878, 1885.

information because he was trusted to live and work closely with the CPK senior leaders is also unpersuasive.<sup>1971</sup> The Chamber relied on a wide range of factors to conclude that Khieu Samphan enjoyed the confidence and trust of the other members of the Party Centre,<sup>1972</sup> which in turn provided him with knowledge of the CPK's policies and access to information about the situation in Cambodia generally.<sup>1973</sup> Specifically, the Chamber relied on factors including:<sup>1974</sup> (i) effectively attending and participating in meetings of the Central and Standing Committees, where privileged/secretive information was shared and critical decisions were made;<sup>1975</sup> (ii) living and working with the CPK senior leaders throughout the regime;<sup>1976</sup> (iii) representing the FUNK, the GRUNK, and later the DK regime publically;<sup>1977</sup> (iv) Khieu Samphan's senior position;<sup>1978</sup> (v) his work in Office 870;<sup>1979</sup> (vi) his supervision of the Commerce Committee;<sup>1980</sup> and (vii) the content of his speeches.<sup>1981</sup>

*iii. Khieu Samphan's membership of Office 870 and economic role*

475. Khieu Samphan claims that the Chamber erred in its findings regarding his membership in Office 870 and his important economic role throughout the DK era.<sup>1982</sup> The Chamber relied on ample evidence, including his own admission, that he became one of the two members of Office 870 in October 1975.<sup>1983</sup> The Chamber had ample evidence to conclude that Khieu Samphan played an important economic role, including through his supervision of the Commerce

<sup>1971</sup> KS Appeal, para. 549.

<sup>1972</sup> Judgment, para. 408.

<sup>1973</sup> Judgment, para. 409.

<sup>1974</sup> Judgment, paras 408-409.

<sup>1975</sup> Judgment, paras 384-389.

<sup>1976</sup> Judgment, paras 365-366, 373-374.

<sup>1977</sup> Judgment, paras 364-380.

<sup>1978</sup> Judgment, paras 361-363, 381-383.

<sup>1979</sup> Judgment, paras 390-399.

<sup>1980</sup> Judgment, paras 400-407. See also Judgment, fn. 2363.

<sup>1981</sup> Judgment, paras 367, 371-372.

<sup>1982</sup> KS Appeal, paras 551-559.

<sup>1983</sup> Judgment, para. 390, fn. 1189, *citing* E3/182 Standing Committee Minutes, 9 October 1975, ENG 00183393; E3/37 Khieu Samphan Interview Record, 14 December 2007, ENG 00156754 (where he mentioned being one of the two members and without dating his membership refers to his role assigned to him by the Standing Committee on 9 October 1975); E3/18 Khieu Samphan, *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, ENG 00103755-56 ("Around October 1975, I was assigned a position within an organization called "Office 870" in which I was responsible for ... establishing a price scale for products...implementing the Permanent Committee's decisions regarding the distribution of products *and* working with the Department of Foreign Trade to ensure the importation of specific goods.").

Committee.<sup>1984</sup> Merely referring to arguments that failed at trial and providing alternative interpretations of evidence<sup>1985</sup> does not meet the burden of review on appeal. For example, Khieu Samphan merely states that the Chamber erred in finding that the Commerce Committee frequently sought his instructions and comments based on his interpretation of Sar Kimlomouth's reliability,<sup>1986</sup> while ignoring the multiple other sources of evidence upon which the Chamber relied.<sup>1987</sup> Similarly, Khieu Samphan simply questions how the Chamber could have relied on his encouragement to workers when he was inspecting goods destined for export to conclude that he supervised the Commerce Chamber, without demonstrating how this was erroneous<sup>1988</sup> and overlooking the many other factors the Chamber took into consideration.<sup>1989</sup>

476. Lastly, Khieu Samphan's assertion that the Chamber's errors in finding that he exerted economic control and authority thereby nullifies his significant contribution to the joint criminal enterprise are unpersuasive.<sup>1990</sup> His economic role was but one of many of the manners in which the Chamber found that Khieu Samphan contributed to the common purpose.<sup>1991</sup>

*iv. Khieu Samphan's role in CPK plans made between 1976 and 1977*

477. Khieu Samphan's general submissions that the Chamber committed errors with respect to its evaluation of his role in the development of plans between 1976 and 1977 are without merit.<sup>1992</sup> The Chamber reasonably inferred from abundant evidence<sup>1993</sup> that Khieu Samphan would have been notified soon after his return from abroad of the Standing Committee meeting that took place in late August 1975, including the plans that were made which culminated in the

<sup>1984</sup> See, Judgment, para. 409. See also Judgment, fns 1192-1193, 1216, 1237-1251.

<sup>1985</sup> KS Appeal, paras 555-559.

<sup>1986</sup> KS Appeal, paras 556-557.

<sup>1987</sup> Judgment, fn. 1244, *citing* **E3/1615** Commerce Committee Report addressed to Bang Hem, 27 September 1977, ENG 00234312; **E3/3514** Commerce Committee Report addressed to Bang Hem, 1 December 1977, ENG 00634426, 00634427; **E3/3455** Commerce Committee Report, 24 January 1978; **E3/334** Commerce Committee Letter addressed to Bang Hem, 3 February 1978, ENG 00647721; **E3/3461** Commerce Committee Report addressed to Bang Hem, 28 April 1978, ENG 00711450; **E3/1637** Commerce Committee Report concerning an order of spare parts from Yugoslavia, 12 November 1978, ENG 00711513; **E1/80.1** Sar Kimlomouth, T. 4 June 2012, pp. 10-12 (confirming that Van Rith could not make certain decisions, and had to defer to Vorn Vet and Khieu Samphan). See also Judgment, fns 1245-1247.

<sup>1988</sup> KS Appeal, para. 558. See also KS Appeal, para. 555.

<sup>1989</sup> See Judgment, paras 400-407.

<sup>1990</sup> KS Appeal, paras 559, 568.

<sup>1991</sup> See Judgment, paras 962-963.

<sup>1992</sup> KS Appeal, paras 560-570.

<sup>1993</sup> See *supra*, XIX.B (Khieu Samphan's participation in decision-making of Central Committee).

second forced transfer.<sup>1994</sup>

478. Khieu Samphan simply reiterates his arguments at trial to challenge the Chamber's finding that he regularly attended Standing Committee (or Party Centre) meetings.<sup>1995</sup> Minutes of Standing Committee meetings show him present 16 of the 19 meetings where attendance is recorded.<sup>1996</sup> There is no contradiction in the Chamber's finding that Khieu Samphan had access to information and knowledge of the CPK's policies<sup>1997</sup> and its finding that there existed a CPK policy of secrecy.<sup>1998</sup> The Chamber specifically found that this policy of secrecy affected "ordinary people", who "were simply required to obey without question decisions made by Angkar".<sup>1999</sup>

479. Contrary to Khieu Samphan's assertion,<sup>2000</sup> it was within the Chamber's discretion to rely on a September 1975 CPK document, in addition to other evidence,<sup>2001</sup> to find that a Party leadership meeting took place and that Khieu Samphan took part in the development of the plans set forth in this document.<sup>2002</sup> The Chamber explicitly noted the absence of identifying information for the September 1975 document, but reasonably inferred from additional circumstantial evidence that this document reflected the policy discussed by the Party Leadership during the meeting.<sup>2003</sup>

480. The Chamber relied on ample evidence from which it reasonably inferred that Khieu Samphan took part in the development of the 1977 forced movement plan, which included dividing people according to their class, to ensure that 'New People' were assigned to secondary tasks.<sup>2004</sup> Specifically, the Chamber took into account Khieu Samphan's responsibilities in relation to the economy,<sup>2005</sup> his attendance at Standing and Central Committee meetings in 1975

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<sup>1994</sup> Judgment, para. 747.

<sup>1995</sup> KS Appeal, para. 562.

<sup>1996</sup> Judgment, fn. 1166. See also Judgment, paras 386-387.

<sup>1997</sup> KS Appeal, para. 563. See also Judgment, para. 409.

<sup>1998</sup> Judgment, para. 199.

<sup>1999</sup> Judgment, para. 199.

<sup>2000</sup> KS Appeal, para. 564.

<sup>2001</sup> Judgment, fns 2353-2357.

<sup>2002</sup> Judgment, paras 748-751, *citing* **E3/781** Examination of Control and Implementation of the Policy Line on Restoring the Economy and Preparation to Build the Country in Every Sector, September 1975, ENG 00523569-90.

<sup>2003</sup> Judgment, paras 748-749. The reliability of **E3/781** is based, *inter alia*, on the fact that its content (number of people required to be sent to the Northwest Zone) is entirely consistent with the content of the Standing Committee Decision **E3/216**. See also *supra*, VI.H-I (Chamber's assessment of the evidence). *Cf. Ngirabatware* AJ, paras 59, 149, 162.

<sup>2004</sup> Judgment, paras 770-771.

<sup>2005</sup> Judgment, para. 771, *citing* Judgment, paras 400-407.



and 1976 at which the 1976 plan was established and during which elements of the 1977 plan were established.<sup>2006</sup>

481. The Chamber reasonably found that Khieu Samphan shared the common purpose and policies of the JCE, as evidenced by, *inter alia*, his numerous public statements and his diplomatic functions.<sup>2007</sup> Khieu Samphan's challenges to a small number of the sources of evidence upon which the Chamber relied fail to establish how the Chamber acted unreasonably.

482. Contrary to Khieu Samphan's suggestion,<sup>2008</sup> the Chamber also reasonably inferred, when placing his speech in its proper context, that Khieu Samphan's reference to "as many as 10,000, 20,000 or even 30,000 workers" manning construction sites evinced his knowledge of the second forced movement.<sup>2009</sup> The absence of express reference in Khieu Samphan's speech<sup>2010</sup> to the commission of crimes is inconsequential as the Chamber relied on an abundance of other evidence from which it reasonably inferred Khieu Samphan's knowledge of these crimes.<sup>2011</sup>

## XX. NUON CHEA'S CRIMINAL RESPONSIBILITY

### A. Nuon Chea substantially contributed to the JCE common purpose (NC Ground 210)

483. Nuon Chea's argument regarding his substantial contribution amounts to nothing more than a repetition of his imaginative assertion that "between 1975 and 1979, joint perpetration of a criminal act was a narrower form of individual responsibility limited to joint contributions to *specific* criminal conduct."<sup>2012</sup> The Co-Prosecutors reiterate that JCE I is applicable at the ECCC and that the Chamber set forth the correct legal standard including that "an accused must participate in the common purpose, making a significant, but not necessarily indispensable,

<sup>2006</sup> Judgment, para. 771, *citing* paras 739, 743, 745, 752; **E1/198.1** Khieu Samphan, T. 29 May 2013, pp. 88-89 (he was asked to participate in meetings of the Standing Committee concerning development of the country); **E3/232** Standing Committee Minutes, 8 March 1976, ENG 00182628-34 (Pol Pot, Nuon Chea, Khieu Samphan and Doeun attended a Standing Committee meeting which decided upon the rice export goal for 1977, as well as affirmed that the Sectors should allocate labour strategically according to Party goals).

<sup>2007</sup> Judgment, paras 980-992. The Chamber had ample evidence for its findings, See Judgment, paras 964-992. See also, *e.g.*, Judgment, paras 144-149, 236, 356-358, 360-368, 370, 373-381, 386-388, 390, 400-408, 602, 616, 728, 733, 759, 766, 768, 748, 782-783, 785.

<sup>2008</sup> KS Appeal, para. 584.

<sup>2009</sup> Judgment, para. 581, *citing* **E3/200** *Khieu Samphan's Speech at Anniversary Meeting* (in BBC / SWB Collection), 15 April 1977, ENG S 00004166. See also Judgment, fn. 1910.

<sup>2010</sup> KS Appeal, para. 584.

<sup>2011</sup> See, *e.g.*, Judgment, paras 956-959. See also Judgment, paras 252, 256, 267-268, 274-280, 367, 374, 380, 383, 576-578, 580-581, 584-588, 591, 594-599, 602-606, 608, 610-616, 621, 738, 783, 785-759, 800-803; *supra*, XV.B-D (Pattern of conduct Phase I and II) XIX.C-D (KS receiving information).

<sup>2012</sup> NC Appeal, para. 485 (Ground 198).

contribution.”<sup>2013</sup> Under the correct legal standard, the Chamber’s findings regarding Nuon Chea’s contributions are manifestly sufficient to establish liability.

**B. Nuon Chea had the requisite intent for the commission of crimes committed pursuant to the JCE (NC Grounds 211-212)**

484. The Chamber correctly held that, for JCE I, “an accused must intend to participate in the common purpose and this intent must be shared with the other JCE participants.”<sup>2014</sup> As Nuon Chea concedes,<sup>2015</sup> the Chamber made innumerable findings throughout the Judgment with respect to his intent.

485. The Chamber reasonably found that Nuon Chea, among other participants, intended to advance the common purpose through the implementation of the Party’s criminal policies on population movements and targeting Khmer Republic officials,<sup>2016</sup> intended to be effectuated by the commission of crimes within the jurisdiction of the ECCC<sup>2017</sup> including forced transfers, murders, extermination, attacks against human dignity and political persecution.<sup>2018</sup> Specifically, Nuon Chea’s intent was demonstrated through his key role in formulating the content of the common plan<sup>2019</sup> and in contributing significantly to furthering its realisation,<sup>2020</sup> through his approval of continuous population movements,<sup>2021</sup> advocating class struggle<sup>2022</sup> including against enemies like Khmer Republic officials,<sup>2023</sup> and playing a leading role in propaganda and training of cadre,<sup>2024</sup> including in the publication of the *Revolutionary Flag*.<sup>2025</sup> The Chamber found elsewhere that Nuon Chea also contributed to the implementation of the common plan through instructing military units, District, Sector and Zone Secretaries on the Party’s policies<sup>2026</sup> and

<sup>2013</sup> Judgment, para. 692, citing *Duch* TJ, para. 508; *Brđanin* AJ, para. 430. See also *Tadić* AJ, para. 227. See *supra* XIV.A (JCE existed in 1975).

<sup>2014</sup> Judgment, para. 694.

<sup>2015</sup> NC Appeal, para. 618.

<sup>2016</sup> Judgment, para. 876. See also *supra* XV (Population Movement Policies) and *supra*, XVII (Targeting of Khmer Republic Soldiers and Officials).

<sup>2017</sup> Judgment, paras 791-794, 800-805, 830-835.

<sup>2018</sup> Judgment, paras 804-805, 835. See also Judgment, paras 843, 879-880, 900, 902, 948.

<sup>2019</sup> Judgment, paras 869, 875. See also Judgment, paras 863-868.

<sup>2020</sup> Judgment, para. 875.

<sup>2021</sup> Judgment, para. 875. See also Judgment, paras 133, 143-146, 879-880, 899-904.

<sup>2022</sup> Judgment, para. 875. See also Judgment, paras 324-325, 734, 755, 840 and fns 1923, 1929, 1935, 2485. See also *infra* XX.E (Nuon Chea Instigating).

<sup>2023</sup> Judgment, para. 875. See also paras 324-5 and *infra* XX.E (Nuon Chea Instigating).

<sup>2024</sup> Judgment, para. 875. See also Judgment, paras 324-5, 818, 870-871 and *infra* XX.E (Nuon Chea Instigating).

<sup>2025</sup> Judgment, paras 264, 872-874.

<sup>2026</sup> Judgment, para. 871. See *infra* XX.D (Nuon Chea Ordering)

indoctrinating cadres in hatred for city-people.<sup>2027</sup> The Chamber also found – reasonably and correctly – that Nuon Chea knew that his indoctrinations would *inevitably* lead to violence and the commission of large numbers of crimes against humanity.<sup>2028</sup> Further, in light of his contribution to developing the Party line on class struggle, which the Chamber established referred to the Party’s opposition to New People,<sup>2029</sup> and the policy to target Khmer Republic officials, the Chamber was also satisfied that Nuon Chea shared the requisite intent for the crimes of political persecution.<sup>2030</sup> Nothing in his Appeal casts doubt on the Chamber’s approach.

486. It is clear from a plain reading of the Judgment that the Chamber’s reference to Nuon Chea’s intent to commit murder pursuant to the JCE during phase two of the population is of no consequence.<sup>2031</sup> The Chamber did not convict him of murders committed during the second population movement.<sup>2032</sup>

487. Nuon Chea specifically challenges the Chamber’s finding as to his intent in respect of: (i) murder during the Phase I movement;<sup>2033</sup> (ii) persecution and other inhumane acts during both population movements;<sup>2034</sup> and (iii) the executions (therefore encompassing murder and extermination) at Tuol Po Chrey.<sup>2035</sup> His intention to forcibly transfer the population is not in dispute.

*i. Murders during the Phase I population movement*

488. The evidence both of wilful killings during the evacuation of Phnom Penh and of Nuon Chea’s intent is plentiful<sup>2036</sup> and belies his persistent denials.<sup>2037</sup> The fact that the Khmer Rouge

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<sup>2027</sup> Judgment, paras 787, 873. See *infra* XX.E (Nuon Chea Instigating).

<sup>2028</sup> Judgment, para. 840.

<sup>2029</sup> Judgment, para. 613.

<sup>2030</sup> Judgment, para. 876.

<sup>2031</sup> Cf. NC Appeal, para. 619, *citing* Judgment, para. 876.

<sup>2032</sup> Judgment, para. 877.

<sup>2033</sup> NC Appeal, paras 621-623.

<sup>2034</sup> NC Appeal, paras 624-625. Although Nuon Chea refers to inhumane acts generally, he confines his arguments to attacks against human dignity.

<sup>2035</sup> NC Appeal, para. 626.

<sup>2036</sup> See *supra* IX.A (Murder and Extermination - Civilian murders) and *supra* IX.B (Murder and Extermination - Murders of Khmer Republic soldiers).

<sup>2037</sup> See, in particular, NC Appeal, para. 623, in which Nuon Chea refers to an earlier interview (**E3/26** Interview between Nuon Chea and Japanese Journalist, ENG 00329513) in which he called the deaths during the Khmer Rouge regime “unintentional”.

used deceitful tactics to assist the evacuation is not inconsistent with intent to murder.<sup>2038</sup> Nuon Chea's contention that "CPNLA soldiers testified that they were ordered not to use force"<sup>2039</sup> relies on a misrepresentation of the evidence. In the passage cited, Kung Kim did not testify that he was ordered "not to shoot", rather that he was *not* ordered to shoot as they entered Phnom Penh.<sup>2040</sup> Kung Kim also gave detailed evidence regarding the orders he received to shoot "anyone who remained" in the city.<sup>2041</sup> Ieng Phan's evidence that he was instructed to treat former Khmer Republic soldiers as prisoners of war, whom he then sent to 'the rear', does not preclude intent to murder as this was precisely the start of the process in which the Khmer Rouge ultimately executed those prisoners. The Chamber found that numerous victims who were identified as soldiers or civilian officials of the Khmer Republic during the course of the evacuation were taken aside for execution elsewhere.<sup>2042</sup>

489. Contrary to Nuon Chea's assertion,<sup>2043</sup> the Chamber found evidence that he intended to cause serious bodily harm to civilians. As he concedes<sup>2044</sup> the Chamber correctly articulated the standard as the intention to "cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death."<sup>2045</sup> The Chamber found that, notwithstanding the prior experiences of forcibly transferring the population, that were "characterised by suffering, discriminatory violence against 'New People' and Khmer Republic officials, and deaths resulting from the conditions of movement, use of force and acts of terror," no provision was made to address similar anticipated conditions during the planned transfer of the population during phase one.<sup>2046</sup> The Chamber was satisfied not only that Nuon Chea foresaw these deaths, but that they were part and parcel of the criminal plan he formulated to drive the entire population from Phnom Penh and other urban areas.<sup>2047</sup> In light of his continuous, vicious propaganda regarding

<sup>2038</sup> Indeed, the very paragraph of the Judgment cited by Nuon Chea states that Khmer Rouge forces used threats to secure the evacuation. See NC para. 621, fn. 1668, *citing* Judgment para. 468.

<sup>2039</sup> NC Appeal, para. 621, *referring to* NC Closing Brief, paras 290, 302, *citing*, in relevant part, E1/138.1 Kung Kim, T. 24 October 2012, p. 105 and E1/193.1 Ieng Phan, T. 20 May 2013, pp. 15-16, 36, 66, 68.

<sup>2040</sup> E1/138.1 Kung Kim, T. 24 October 2012, p. 105 ("we were not ordered to shoot").

<sup>2041</sup> E1/138.1 Kung Kim, T. 24 October 2012, p. 102.

<sup>2042</sup> Judgment, paras 508, 511, 513-515, 553.

<sup>2043</sup> NC Appeal, para. 622.

<sup>2044</sup> NC Appeal, para. 622, *citing* Judgment, para. 412.

<sup>2045</sup> Judgment, para. 412.

<sup>2046</sup> Judgment, paras 805, 879-880.

<sup>2047</sup> Judgment, paras 879-880.

enemies<sup>2048</sup> and his knowledge that this propaganda would inevitably lead to violence and crimes,<sup>2049</sup> this conclusion was entirely reasonable.

490. The Judgment paragraph cited by Nuon Chea in support of the contention that he wanted to increase the population<sup>2050</sup> makes reference to the CPK's criminal practices of rape, beatings, murder and forced marriage, including instances where couples wed by *Angkar* were put under surveillance in order to enforce procreation. These widespread practices are indicative of, not inconsistent with, the disrespect the CPK had for the lives of the Cambodian people. Similarly, as the Co-Prosecutors have already highlighted, declarations that the “‘overwhelming majority’ of people in Phnom Penh were good” are not inconsistent with the finding of criminal intent. In any event, the Chamber found, based on plentiful evidence, that Nuon Chea personally spread propaganda vilifying urban people.<sup>2051</sup>

*ii. Persecution during both population movements*

491. The Co-Prosecutors have elsewhere addressed Nuon Chea's contentions regarding the consistency of the CPK's policies and publications showing persecutory intent towards ‘New People’,<sup>2052</sup> and the ongoing pattern of discriminatory intent during the population movements.<sup>2053</sup> With regard to Khmer Republic officials, the Chamber demonstrated that the targeting policy encompassed more than just their arrest and detention.<sup>2054</sup> Rather, the CPK policy, as formulated and implemented, clearly extended to their murder and extermination<sup>2055</sup> and is entirely consistent with the CPK's policy to “smash” its enemies.<sup>2056</sup>

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<sup>2048</sup> See e.g. **E3/783** *Revolutionary Flag*, September- October 1972, ENG 00720206 (“As our class struggle occurs step by step, and within the strategic framework of the national democratic revolution, the class of feudalists, capitalists, and reactionaries persistently oppose us both openly and secretly.... We must recognize their venom and seize the opportunity to dominate them; *we must be unequivocal in attacking them; attack in adherence of the Party's lines*” (emphasis added)); **E3/146** *Revolutionary Youth* August-September 1974, ENG 00538736 (“The party went through many obstacles and countless dangers during the struggle and *try repeatedly to propagandize/educate our Kampuchean male-female youths* so that they could be politically awakening and able to develop the spirit of national solidarity and patriotic, and *have a blazing national anger and class anger toward the enemy* who are the invasive imperialist, and toward the class-enemy who used to oppress, suck blood and chew bone of our poor people” (emphasis added)).

<sup>2049</sup> Judgment, para. 840.

<sup>2050</sup> NC Appeal, para. 622, *citing* Judgment, para. 128.

<sup>2051</sup> See *infra* XX.E (Nuon Chea Instigating). See also Judgment, para. 111.

<sup>2052</sup> See *supra* X (Persecution) and *infra* XX.E (Nuon Chea Instigating).

<sup>2053</sup> See *infra* XX.E (Nuon Chea Instigating) and *supra* X.C-D (Persecution during population movements).

<sup>2054</sup> Judgment, paras 121, 124, 127, 816, 817, 825, 829, 830-835.

<sup>2055</sup> See *supra* XVII (Targeting of Khmer Republic Soldiers and Officials).

<sup>2056</sup> Judgment, paras 117-118.

492. As Nuon Chea makes no further submissions with specific regard to his personal *mens rea*, his arguments are insufficient to call into question the Chamber's reasonable finding that in light of his contribution to developing the Party line on class struggle and the policy to target Khmer Republic officials, he possessed the requisite *mens rea* for political persecution.<sup>2057</sup> This conclusion is further supported by the Chamber's findings regarding Nuon Chea's engagement in propaganda activities and training cadre on vigilance against enemies and the indoctrination of people on class struggle, including the identification of 'New People' and former Khmer Republic officials as enemies.<sup>2058</sup> A failure to act despite knowledge<sup>2059</sup> of the commission of these crimes before, during and after both forced transfers is equally indicative.

*iii. Attacks against human dignity during both population movements*

493. Nuon Chea's intention to cause serious bodily harm to evacuees of the first forced transfer<sup>2060</sup> and knowledge of the commission of crimes during that transfer<sup>2061</sup> are dealt with elsewhere. Evidence that this intent continued during the second forced transfer includes the failure to plan or provide for assistance, medical care or accommodation,<sup>2062</sup> and the failure to discipline direct perpetrators.<sup>2063</sup> Nuon Chea's continuing approval of the phase II forced transfers between 1975 and 1977 despite evidence of his knowledge of the occurrence of crimes throughout<sup>2064</sup> supports the Chamber's findings as to his intent regarding crimes committed during the transfers.

*iv. Tuol Po Chrey*

494. Given Nuon Chea's role in formulating and disseminating<sup>2065</sup> the policy to target Khmer Republic soldiers and officials before April 1975 and his knowledge of the pattern of targeting Khmer Republic officials for arrest, execution and disappearance after an area was liberated,<sup>2066</sup>

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<sup>2057</sup> Judgment, para. 876.

<sup>2058</sup> See, e.g. Judgment, paras 324-5, 840, 870-874, 875, 887, 908, 919, 926.

<sup>2059</sup> See Judgment, paras 842-846, 847-852, 855-857. See also *infra* XX.I (Nuon Chea Superior Responsibility – Knowledge).

<sup>2060</sup> See *supra* para. 489.

<sup>2061</sup> See *infra*, XX.I (Nuon Chea Superior Responsibility – Knowledge).

<sup>2062</sup> Judgment, paras 608, 635, 644, 648, 794, 805, 900, 902.

<sup>2063</sup> See *infra*, XX.J (Nuon Chea Superior Responsibility – Failure to prevent and punish).

<sup>2064</sup> See Judgment, paras 843-848, 850-852, 855-857. See also *infra* XX.I (Nuon Chea Superior Responsibility – Knowledge)

<sup>2065</sup> Judgment, para. 875. See also *infra* XX.E (Nuon Chea Instigating).

<sup>2066</sup> Judgment, para. 854.

Nuon Chea's intent with regard to the executions at Tuol Po Chrey is incontrovertible. Without a single reference to the "uncontroverted" evidence that he did not intend the alleged execution of low-level officials at Tuol Po Chrey,<sup>2067</sup> this unsubstantiated assertion clearly fails to meet the standard of review.

### C. Nuon Chea's acts fulfilled the *actus reus* for planning (NC Ground 214)

#### i. Phase I Population Movement

495. Nuon Chea's arguments can be interpreted as submissions that the Chamber erred in law and fact in two respects in its finding that he planned the evacuation of Phnom Penh, namely as to (i) the level of specificity required in the design or plan; and (ii) the degree to which Nuon Chea contributed to the act of planning.

#### a. The Plan

496. Nuon Chea's repeated criticism of the Chamber for failing to take into account that "no detailed plans *at all* were formulated" in the meetings he attended<sup>2068</sup> is without foundation in law. Contrary to Nuon Chea's apparent assertion,<sup>2069</sup> the Chamber did not have to find that the content of the plan to forcibly transfer Phnom Penh's population expressly made reference to the commission of concrete crimes of murder, political persecution, extermination or attacks against human dignity. The Chamber set forth the correct legal standard, namely that the plan must constitute or involve crimes later perpetrated<sup>2070</sup> and must precede and substantially contribute to the criminal conduct.<sup>2071</sup> The Appeals Chambers of both the SCSL and ICTY have held that where an accused plans conduct that has the predominant purpose of indiscriminately attacking civilians, he has planned conduct that "constitute[s]" crimes.<sup>2072</sup> Numerous accused have, like Nuon Chea, espoused the same overly narrow articulation of the *actus reus* of planning, often

<sup>2067</sup> NC Appeal, para. 626.

<sup>2068</sup> NC Appeal, para. 655 (emphasis in the original). See also NC Appeal, para. 657: "the details of the evacuation were not set until shortly before it took place"; "[e]ven the question of who was to be evacuated had not yet been decided"; "no concrete plans were discussed at the meetings he attended" and para. 658: "no 'concrete form' for the evacuation existed until the last moment".

<sup>2069</sup> NC Appeal, para. 656: "Planning liability requires more: *substantial involvement* 'at the preparatory stage of that crime in the concrete form it took'" (second emphasis added; citing *Brđanin* TJ, para. 357) and a Chamber must establish that 'the Accused was involved in the immediate preparation of the *concrete crimes*'.

<sup>2070</sup> Judgment, para. 698 citing *Duch* TJ, para. 518; *Kordić* AJ, para. 26.

<sup>2071</sup> Judgment, para. 698 citing *Duch* TJ, para. 518; *Kordić* AJ, para. 26; *Nahimana* AJ, fn. 2116.

<sup>2072</sup> *Taylor* AJ, para. 493; *Boškoski* AJ, para. 171.

based on precisely the same passages in the *Brđanin* Trial Judgment. This misinterpretation of the elements of planning liability has been unambiguously rejected by the Appeals Chambers at the ICTY<sup>2073</sup> and at the SCSL<sup>2074</sup> and does not reflect customary international law.

497. The Chamber found that despite (i) being aware of food shortages throughout the country, and in particular in Phnom Penh;<sup>2075</sup> (ii) discussing at the meetings the prior experiences of evacuations, which had been “characterised by suffering, discriminatory violence against ‘New People’ and Khmer Republic officials and deaths resulting from the conditions of movement, use of force and acts of terror”;<sup>2076</sup> and (iii) in particular discussing the “success” at Oudong, where the population was forcibly evacuated, mistreated and many were executed,<sup>2077</sup> the Party leadership, including Nuon Chea, agreed at the June 1974 and April 1975 meetings to evacuate Phnom Penh without providing any measures providing for the consent, health or well-being of those being transferred or making any other provision to address similar readily anticipated conditions during the planned transfer. It concluded that the plan therefore necessarily contemplated and involved the commission of the charged crimes during phase one of the population movement.<sup>2078</sup> Further, it found that the plan to transfer the population of Phnom Penh substantially contributed to those crimes.<sup>2079</sup> The Chamber’s application of the facts to the legal standard is patently reasonable.

498. It also follows that it was not necessary to show that the precise details of the operation were planned at the outset. In any event, evidence relied on by the Chamber established that the

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<sup>2073</sup> *Boškoski* AJ, paras 168-172. The Appeals Chamber rejected Tarčulovski’s argument that the Trial Chamber erred in holding him responsible for planning crimes in the absence of evidence that he planned specific crimes, holding that where the accused planned conduct that had the predominant purpose to indiscriminately attack civilians, the accused planned conduct which constituted crimes. The ICTY Appeals Chamber further held that “the legitimate character of an operation does not exclude an accused’s criminal responsibility for planning, instigating and ordering crimes committed in the course of this operation” if the goal is to be achieved by the commission of crimes. See also, *Kordić* AJ, paras 981-986. The ICTY Appeals Chamber upheld convictions for planning crimes committed in a range of locations and at distinct times on the basis that the accused approved a general plan and the later crimes were committed in furtherance of that general plan.

<sup>2074</sup> See *Taylor* AJ, paras 492-494, rejecting the *Brđanin* jurisprudence and holding that the “*actus reus* of planning liability is that an accused participated in designing an act or omission and thereby had a substantial effect on the commission of the crime”. The accused need not design a crime or underlying offence *per se*. See also *Brima* TJ, para. 768, rejecting *Brđanin* TJ, para. 357 and holding that a sufficient culpable link is established where “the planning was a factor substantially contributing to such criminal conduct”. The Trial Chamber’s articulation of the law was upheld on Appeal - see *Brima* AJ, para. 301.

<sup>2075</sup> Judgment, para. 879.

<sup>2076</sup> Judgment, para. 880.

<sup>2077</sup> Judgment, para. 879.

<sup>2078</sup> Judgment, paras 879, 880.

<sup>2079</sup> Judgment, para. 881.



attendees of the June 1974 and April 1975 meetings did decide upon a number of details of the evacuation plan, including specifics of military manoeuvres during the evacuation.<sup>2080</sup> Further, the Chamber found that the plan was established subsequent to a “consistent pattern of conduct” constituting the forced transfer of the population from urban areas to the countryside<sup>2081</sup> and implemented in a manner consistent with that pattern.<sup>2082</sup> Lastly, Nuon Chea’s current contention that “[e]ven the question of who was to be evacuated had not yet been decided”<sup>2083</sup> is belied by his own admission that it was already decided in June 1974 that *all* people in Phnom Penh would be forced to leave.<sup>2084</sup>

499. Moreover, evidence that some soldiers were not aware of the plans to evacuate Phnom Penh until after its “liberation” does not preclude the prior formulation of a plan. As Nuon Chea concedes,<sup>2085</sup> the Chamber considered this evidence.<sup>2086</sup> It then found that:

[a]lthough certain cadres were not informed of the decision to empty Phnom Penh of its inhabitants prior to the final assault, the Chamber [wa]s satisfied on the basis of evidence concerning the planning of this movement of population and cadres who were informed of the plan in advance, and the consistent manner in which the evacuation was executed throughout the city, that there was in fact a decision to that effect by the senior CPK leaders that was passed down the military hierarchy, albeit imperfectly.<sup>2087</sup>

500. Beyond asserting that the Chamber should have reached a different conclusion, Nuon Chea has failed to demonstrate how this conclusion was unreasonable. The Co-Prosecutors recall that mere assertions that a trial chamber failed to interpret evidence in a particular manner can be summarily dismissed.<sup>2088</sup>

501. The fact that a committee chaired by Son Sen was established in June 1974 in no way detracts<sup>2089</sup> from Nuon Chea’s liability for planning the forced movement<sup>2090</sup>. First, as the

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<sup>2080</sup> E1/97.1 Phy Phuon, T. 26 July 2012, pp. 24-5. The Chamber considered this evidence at fn 1019. (Q: And during this instruction [by Pol Pot and Nuon Chea] - during [the April 1975] meeting, were any instructions given to the military or the zone commanders who were present on what they were to do related to the evacuation? Did you hear any instructions given to them as to what they were to go back and do in their zones? A: I saw them drawing sketches on the board, the targets that everyone were to be in charge of. So the drawing was made by, first, Pol Pot on the blackboard, and then those people who were charged with those spearhead targets need to be responsible for that.)

<sup>2081</sup> Judgment, para. 880.

<sup>2082</sup> Judgment, para. 881.

<sup>2083</sup> NC Appeal, para. 657.

<sup>2084</sup> E1/35.1 Nuon Chea, T. 30 January 2012, p. 18 [Q: When the Central Committee though made its decision in mid-1974, was the decision to evacuate all residents of Phnom Penh? A: That’s correct.]

<sup>2085</sup> NC Appeal, para. 658.

<sup>2086</sup> Judgment, para. 150.

<sup>2087</sup> Judgment, para. 151.

<sup>2088</sup> *Dorđević* AJ, para. 20.

<sup>2089</sup> Cf. NC Appeal, para. 657.

Chamber noted, the committee was established “to *manage* the evacuation”<sup>2091</sup> in accordance with the previously formulated plan. Moreover, the fact that the subsequent April 1975 meeting of the party leadership, including Nuon Chea and Pol Pot, took place demonstrates that this committee was acting under the guidance and leadership of the senior leaders.

b. Nuon Chea’s key role in planning

502. Again, Nuon Chea fails to establish that the Chamber erred in law or fact. Nuon Chea cites the SCSL’s CDF Trial Judgment,<sup>2092</sup> but this case is readily distinguishable given “the absence of any evidence showing how Fofana contributed to the *discussion* and *decision* at this meeting”. Nuon Chea’s role in planning involved more than mere ‘espousal’ of a plan.<sup>2093</sup> By his own admission,<sup>2094</sup> and as found by the Chamber,<sup>2095</sup> Nuon Chea was more than merely present<sup>2096</sup> at

<sup>2090</sup> Indeed, the committee was expressly established by the Central Committee. See Judgment, paras 141, 739.

<sup>2091</sup> Judgment, para. 141. At Judgment, para. 739 the Chamber used the word “supervised”.

<sup>2092</sup> NC Appeal, para. 656, *citing Fofana* TJ, para. 34 (and *Fofana* AJ, para. 61).

<sup>2093</sup> NC Appeal, para. 656, *citing Brđanin* TJ, paras 357-8. The Co-Prosecutors note that an agreement to a plan proposed by another without more in any event satisfies the *actus reus* of planning. See *Semanza* TJ, para. 380: “‘Planning’ envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime. The level of participation in the planning must be substantial such as actually formulating the criminal plan or *endorsing a plan proposed by another*” (emphasis added).

<sup>2094</sup> See NC Appeal, paras 250, 251, 263, 537, 640, 656. See also Judgment, fns 377, 378, 415, 1019, *citing E1/14.1* Nuon Chea, T. 22 November 2011, pp. 103-104, 108, 110 (describing in detail the agenda of the extraordinary session of the Standing Committee in mid-1974 including the political and military aspects of the liberation and evacuation of Phnom Penh discussed and decided upon); **E1/21.1** Nuon Chea, T. 13 December 2011, pp. 26-30 (confirming his attendance at a series of meetings of the Central Committee which took place from 1973 onwards, and in which strategy and timing for the attack and evacuation of Phnom Penh were discussed and the policies decided upon. The decision was made to attack Phnom Penh on 1 January 1975); **E1/22.1** Nuon Chea, T. 14 December 2011, pp. 2-3. See also pp. 5-6 (confirming an extraordinary meeting of Standing and Central Committees in mid-1974 to discuss the evacuation of Phnom Penh and other provincial towns. Members of the Standing Committees except Ieng Sary participated in the meeting as well as some members of the Central Committee.); **E1/35.1** Nuon Chea, T. 30 January 2012, pp. 14-21 (confirming his attendance at a three-day mid-1974 extraordinary meeting of the Central Committee on the Chinit River along with representatives from the zones including, *inter alios*, Pol Pot, Ta Mok, So Phim, Son Sen and Koy Thuon at which the decision was made to evacuate Phnom Penh); **E1/36.1** Nuon Chea, T. 31 January 2012, pp. 37-8 (confirming his part in decision to evacuate Phnom Penh); **E1/202.1** Nuon Chea, T. 6 June 2013, pp. 37-41 (confirming that the decisions to ‘liberate’ and evacuate Phnom Penh were taken by the Standing Committee, including Nuon Chea himself, and the CPK more generally in consultation with the ‘chairmen of all zones’); **E3/3** Nuon Chea Interview by Khem Ngoun, Undated, ENG 00184673 (“in 73 we were preparing to attack, 73-75, preparing to attack Phnom Penh).

<sup>2095</sup> Judgment paras 133, 143, 146, 816. See also **E1/97.1** T. 26 July 2012, Phy Phoun, p. 16 (“I noted that Om Nuon Chea was on his feet and raised this first. He said that it was necessary and needed approval and it the evacuation was noted to be necessary and he expressed his position that he agreed with the plan.”); p. 23 (“Om Nuon Chea also stood out and agreed to the [evacuation of Phnom Penh]”); p. 24 (“Om Nuon Chea also made that presentation regarding the good points from the experimenting with liberating those towns and cities in order to protect the forces.”); and p. 24 (confirming that Pol Pot and Nuon Chea discussed the evacuations of other cities). See also **E3/63** Phy Phoun OCIJ Statement, at ENG 00231410 (“Mr. Nuon Chea also provided his impressions and agreed to the plan.”)

<sup>2096</sup> *Cf.* NC Appeal, para. 656.

the meeting. Rather, as Deputy Secretary, key CPK decision-maker and the closest confidant of Pol Pot, he was a key participant in the discussions and agreed to the plan to evacuate Phnom Penh.

*ii. Tuol Po Chrey*

503. Nuon Chea argues that no plan for the arrest, execution and disappearance of Khmer Republic officials was formulated at the June 1974 Central Committee meeting or confirmed at the April 1975 meeting at B-5 as: (i) no Khmer Republic Soldiers were executed at Oudong;<sup>2097</sup> and (ii) the Chamber erred in finding that those executions were discussed at the June 1974 meeting and that a decision was taken to emulate the practice in future evacuations.<sup>2098</sup>

504. The Co-Prosecutors have already demonstrated that the Chamber's finding that Khmer Republic officials were executed was reasonably reached.<sup>2099</sup> Further, as noted previously,<sup>2100</sup> the Chamber did not find that the execution of Khmer Republic officials at Oudong was discussed at a meeting in June 1974. Rather, it found that the *experience* at Oudong was discussed at this meeting<sup>2101</sup> and, separately, that this experience included the execution *en masse* of Khmer Republic soldiers.<sup>2102</sup>

505. It then found that, based on prior experience, in particular at Oudong, the June 1974 plan to evacuate all the cities after the liberation of the country necessarily also contemplated and involved the targeting of Khmer Republic officials for execution, arrest or disappearance following the liberation of an area.<sup>2103</sup> At the April 1975 meeting the experience of Oudong was again discussed<sup>2104</sup> and the plan for the final offensive was affirmed.<sup>2105</sup> This plan preceded and substantially contributed to the crimes committed at Tuol Po Chrey.<sup>2106</sup>

506. The Chamber's conclusions in this regard were bolstered by subsequent events, the

<sup>2097</sup> NC Appeal, para. 655, *referring to* NC Appeal, para. 536.

<sup>2098</sup> NC Appeal, para. 655, *referring to* NC Appeal, paras 536-540.

<sup>2099</sup> See *supra* XVII.A (Pre-April 1975 Targeting Policy).

<sup>2100</sup> See *supra* XVII.A (Pre-April 1975 Targeting Policy).

<sup>2101</sup> Judgment, para. 918. See also Judgment, paras 127, 134, 816, 879. See also section heading "3.3.4.2: 'The Experience of Oudong'".

<sup>2102</sup> Judgment, para. 918: "Prior experiences, in particular at Oudong where Khmer Republic officials were executed *en masse*, were discussed at this meeting". See also Judgment, paras 127, 134, 816, 830, 879.

<sup>2103</sup> Judgment, para. 918.

<sup>2104</sup> Judgment, para. 146. See also Phy Phuon T. 26 July 2012, p. 14 ("in 1974, Udong was liberated, and the experience was obtained from this liberation. Some people who resided in Tram Khnar, Neak Loeang, Skun, those who engaged in these situations, raised their idea and shared their experience learned from the situation.").

<sup>2105</sup> Judgment, para. 918.

<sup>2106</sup> Judgment, para. 920.

uniformity of which demonstrated the existence of a pre-existing and coordinated plan.<sup>2107</sup> Consistent with the established CPK policy to target Khmer Republic soldiers and officials for arrest, execution and disappearance after they surrendered or were rendered *hors de combat*,<sup>2108</sup> and upon orders disseminated after the June 1974 and April 1975 meetings,<sup>2109</sup> this plan was then executed as part and parcel of the subsequent urban evacuations, including Pursat,<sup>2110</sup> just as it had been in Oudong and other towns in the liberated Zone upon their capture.<sup>2111</sup>

507. It does not therefore follow, as Nuon Chea suggests,<sup>2112</sup> that the absence of evidence as to an express discussion about the killings of Khmer Republic soldiers at Oudong precludes a plan which involved the targeting of the Khmer Republic soldiers captured in Pursat. To the contrary, the Chamber was patently reasonable to conclude, based on the above, that the plan that Nuon Chea formulated and approved in those meetings involved and substantially contributed to the commission of the crimes against humanity of murder, extermination and political persecution of Khmer Republic officials which occurred at Tuol Po Chrey.

508. To the extent that Nuon Chea's arguments regarding his personal contribution to the act of planning extend to the crimes at Tuol Po Chrey, the Co-Prosecutors incorporate by reference their arguments above in relation to the evacuation of Phnom Penh.<sup>2113</sup>

### *iii. Phase II Population Movement*

509. Nuon Chea's argument<sup>2114</sup> on planning for the Phase II movement is founded on a profound misapprehension of the Chamber's findings. Far from being an impromptu decision born of meetings in August and September 1975, the Chamber demonstrated that population movement between rural areas was an integral part of the CPK plans and policies which Nuon Chea continued to mould and hone after the 'liberation' of Phnom Penh in April 1975. These plans were designed "to build and defend a self-reliant, independent and socialist country", "focusing in particular on rice production and irrigation projects"<sup>2115</sup> and included the implementation of

<sup>2107</sup> It is well established that circumstantial evidence may provide proof of the existence of a plan. See *e.g. Brima AJ*, para. 301.

<sup>2108</sup> Judgment, para. 919. See also Judgment, para. 127.

<sup>2109</sup> Judgment, para. 920. See also Judgment paras 141, 148-151.

<sup>2110</sup> Judgment, paras 831-834, 843, 920.

<sup>2111</sup> Judgment, para. 920. See also Judgment, paras 124-127, 830.

<sup>2112</sup> NC Appeal, para. 655.

<sup>2113</sup> See *supra* para. 502.

<sup>2114</sup> NC Appeal, paras 659-660.

<sup>2115</sup> Judgment, para. 900.

collectivisation.<sup>2116</sup> The Chamber amply demonstrated Nuon Chea's intimate involvement in those plans through the April 1975 meetings with other senior leaders<sup>2117</sup> and the May 1975 meeting at the Silver Pagoda.<sup>2118</sup> Moreover, as the Chamber found,<sup>2119</sup> population movements and the creation of collectives facilitated CPK Party policies, which Nuon Chea participated in formulating<sup>2120</sup> and implementing through training<sup>2121</sup> and which mandated the re-education or smashing of New People and enemies. It follows that Nuon Chea was far from merely present<sup>2122</sup> in the planning process.

510. As the Co-Prosecutors noted above,<sup>2123</sup> the Chamber was not obliged to find that the content of the plan expressly made reference to the commission of crimes of forced transfer, extermination, political persecution, attacks against human dignity and enforced disappearance. As the Chamber correctly set out,<sup>2124</sup> it was required to determine that Nuon Chea designed criminal conduct constituting or involving a crime later perpetrated and that this plan preceded and substantially contributed to the criminal conduct. As set out in the jurisprudence above, to plan conduct that has the predominant purpose of indiscriminately attacking civilians is to plan conduct that "constitutes" – within the meaning of this legal definition – crimes.<sup>2125</sup> The Chamber found that forced transfer in the form of population movements between rural areas formed an integral part of these plans, being required in order to supply the manpower needed to accomplish these projects. As such, there had been and there continued to be a consistent pattern of such population movements together with urban evacuations, in the liberated Zones.<sup>2126</sup> The Chamber was further satisfied that this pattern of conduct included the commission of crimes.<sup>2127</sup> Notwithstanding this prior experience, the Chamber found no evidence<sup>2128</sup> that any measures had

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<sup>2116</sup> Judgment, para. 901.

<sup>2117</sup> Judgment, para. 900. See also Judgment, para. 740.

<sup>2118</sup> Judgment, para. 901. See also Judgment, paras 743, 866.

<sup>2119</sup> Judgment, paras 903, 904.

<sup>2120</sup> Judgment, para. 903. See also Judgment, paras 770, 787, 788, 803. See also paras 111-112, 117-118, 588. Note that the criteria for determining New People was designed by the CPK leadership (Judgment, para. 653).

<sup>2121</sup> See *supra* XVIII.B (Nuon Chea's Role in Discipline and Internal Security)

<sup>2122</sup> Cf. NC Appeal, para. 660.

<sup>2123</sup> See *supra* para. 496.

<sup>2124</sup> Judgment, para. 698.

<sup>2125</sup> *Taylor* AJ, para. 493; *Boškoski* AJ, para. 171.

<sup>2126</sup> Judgment, para. 900. That the Party Centre saw their policies as continuations of the pre-April 1975 era is evident from a number of documents on the record. See, for example, **E3/781** Examination of Control and Implementation of the Policy Line on Restoring the Economy and Preparation to Build the Country in Every Sector, September 1975, ENG 00523572 ("We will prepare plans just like we used to.").

<sup>2127</sup> Judgment, paras 800-805.

<sup>2128</sup> Judgment, para. 900.

been taken to provide for the health, well-being or consent of the people to be gathered in co-operatives. As such, this plan contemplated and involved the commission of the crimes committed during the Phase II movement<sup>2129</sup> and substantially contributed to the commission of crimes.<sup>2130</sup>

511. It is apparent from the Judgment that subsequent events serve to demonstrate that: (i) the plan which Nuon Chea formulated and approved in the months after the liberation of Phnom Penh necessarily involved population movements and constituted or involved the commission of crimes; (ii) the plan continued to be developed and refined from late 1975 until late 1977; and (iii) Nuon Chea was intimately involved in the formulation of this evolving plan throughout.

512. As provided for in the plans and consistent with the pattern of conduct, in August 1975 the Standing Committee decided to begin the population movements to increase labour forces in designated areas, starting with the planned relocation of 400,000 to 500,000 people to the Northwest Zone.<sup>2131</sup> In September, the Party Centre determined to move a further 20,000 to Preah Vihear (Sector 103)<sup>2132</sup> and others to Kampong Thom (Central Zone).<sup>2133</sup> Population movements continued throughout the remainder of 1975 until 1977<sup>2134</sup> to provide workforces to fulfil production quotas,<sup>2135</sup> sometimes through seasonal transfers,<sup>2136</sup> to advance the class struggle<sup>2137</sup> and to move and separate the New People on the basis that “enemy agents” were still mixed amongst them.<sup>2138</sup> Crimes were committed throughout these population movements.<sup>2139</sup> The Chamber found that this evolving plan acknowledged the shortages of food<sup>2140</sup> and medicine

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<sup>2129</sup> Judgment, para. 900.

<sup>2130</sup> Judgment, para. 904.

<sup>2131</sup> Judgment, paras 902, 904. See also Judgment, paras 580, 585-586, 800-803.

<sup>2132</sup> Judgment, paras 902. See also Judgment, paras 580, 586.

<sup>2133</sup> Judgment, paras 902. See also Judgment, para. 586.

<sup>2134</sup> Judgment, para. 904. See also Judgment, paras 580, 586-587, 581, 588, 607, 611-2, 630, 638, 644, 796, 802.

<sup>2135</sup> In particular to fulfil the CPK production targets of 3 tonnes per hectare and, later 6 tonnes per hectare in regions able to accommodate two growing seasons per annum. See Judgment, paras 604-609 (three tonnes) and paras 610-612 (three or six tonnes). As the Chamber noted, the October-November 1975 issue of *Revolutionary Flag* indicates that the “Centre Party Congress” had unanimously decided upon the three tonnes per hectare before November 1975. See Judgment, para. 749 citing **E3/748** *Revolutionary Flag*, Oct-Nov 1975, pp. 9-17, ENG 00495808-16. See specifically ENG 00495813.

<sup>2136</sup> Judgment, para. 635.

<sup>2137</sup> Judgment, paras 613, 623, 635, 795.

<sup>2138</sup> Judgment, para. 796, citing Judgment, para. 613. See also Judgment, paras 617, 618, 620, 625-6, 796.

<sup>2139</sup> Judgment, paras 630-657, 900.

<sup>2140</sup> Judgment, para. 902. The Standing Committee was kept informed of food shortages. See, e.g. **E3/232**, Standing Committee Minutes, 8 March 1976, ENG 00182630, 00182631, 00182633.

especially affecting New People, to whose detriment the Base People were rewarded<sup>2141</sup> and despite the Party's extensive experience of the serious problems associated with population movements, no measures were taken for the consent, health or well-being of those moved.<sup>2142</sup>

513. Nuon Chea's continuing involvement in the detail of these plans is manifest. As a full-rights member of both the Central and Standing Committees and central CPK decision-maker, Nuon Chea either participated in or at the very least endorsed the Party leadership's August 1975 planning and ordering of the first movement of population to the Northwest Zone.<sup>2143</sup> Numerous CPK policy documents and *Revolutionary Flag* publications, of which Nuon Chea was a principal author,<sup>2144</sup> referred to the plan to implement population movement<sup>2145</sup> such that "even the ordinary Khmer Rouge soldiers knew or heard about the evacuation plans between mid-1975 and 1977."<sup>2146</sup> Over the course of the DK era, Zone secretaries and officials reported to Party leaders including Nuon Chea on population movements, sometimes requesting further instructions,<sup>2147</sup> and the Party Centre, together with Zone, Sector and District officials, controlled the means and modes of transportation necessary to effectuate population movements.<sup>2148</sup> Furthermore, the leadership, including Nuon Chea planned, designed and implemented Party policy to enable enemies to be identified and re-educated or disappear,<sup>2149</sup> which they intended to implement in part through population movements and the creation of collectives.<sup>2150</sup> Indeed, given Nuon Chea's admission that he did not disagree with Pol Pot on a single decision,<sup>2151</sup> it is inconceivable that he did not participate in planning these population movements.

514. Accordingly, it is clear from the Judgment that the Chamber considered this development in late 1975 of a "specific economic plan"<sup>2152</sup> to be a particular manifestation of the Party's pre-existing plans rather than the extemporaneous decision that Nuon Chea portrays.<sup>2153</sup> The Chamber's finding that "[i]n September 1975, the Central Committee, including Nuon Chea as a

<sup>2141</sup> Judgment, para. 902. See also Judgment, para. 748.

<sup>2142</sup> Judgment, para. 902.

<sup>2143</sup> Judgment, paras 745-746, 749, 902.

<sup>2144</sup> Judgment, para. 264.

<sup>2145</sup> Judgment, paras 577, 581, 748, 753, 904.

<sup>2146</sup> Judgment, para. 577.

<sup>2147</sup> Judgment, paras 580, 586, 798.

<sup>2148</sup> Judgment, para. 904 *citing* Judgment, para. 578.

<sup>2149</sup> Judgment, paras 903-904 (and references therein).

<sup>2150</sup> See, *inter alia*, Judgment, paras 111-112, 118, 613, 796, 800.

<sup>2151</sup> NC Appeal, para. 250. He acknowledges that he and Pol Pot "didn't have any problems, not between 1975 and 1979 ... I can't think of a single argument", *citing* E3/4001R "Enemies of the People", [1:03:58]-[1:04:24].

<sup>2152</sup> Judgment, para. 902.

<sup>2153</sup> NC Appeal, para. 659.

full-rights member, endorsed the August 1975 decision” is therefore far from “the only finding that ... purports to connect Nuon Chea to the Phase II movement”<sup>2154</sup> and not “determinative of his liability for planning.”<sup>2155</sup> As such, Nuon Chea’s arguments regarding the September 1975 meeting<sup>2156</sup> fail to show how the Chamber’s finding with regard to planning would not stand on the basis of the remaining evidence<sup>2157</sup> or to demonstrate an error that would invalidate the verdict or occasion a miscarriage of justice.<sup>2158</sup>

515. In any event, the Chamber relied on several pieces of mutually corroboratory evidence<sup>2159</sup> to conclude that the September meeting occurred, was attended by Nuon Chea, and approved the policies contained in the September 1975 policy document which, as the Chamber points out,<sup>2160</sup> provided *further* particulars on the planned population movements necessitated to implement the party line.

**D. Nuon Chea’s acts fulfilled the *actus reus* of responsibility for ordering (NC Ground 215)**

*i. Phase I Population Movement*

a. Nuon Chea issued orders

516. Nuon Chea argues that he is not responsible for ordering the expulsion of the population of Phnom Penh. He admits that he agreed to the forced transfer as he made collective decisions with the other Party leaders, but contends that this did not constitute ordering because the Zone secretaries implemented these decisions independently by issuing orders to cadres and soldiers.<sup>2161</sup> His repeated criticism of the Chamber for failing to take into account the collective nature of the decision-making that took place at the June 1974 and April 1975 meetings misrepresents the relevant findings.

<sup>2154</sup> NC Appeal, para. 659. See also para. 660 (“the September 1975 meeting constituted the Chamber’s only finding concerning Nuon Chea’s role in planning the Phase II movement.”).

<sup>2155</sup> NC Appeal, para. 660.

<sup>2156</sup> NC Appeal, paras 659-660, *referring to* NC Appeal, para. 518.

<sup>2157</sup> *Dorđević* AJ, para. 20.

<sup>2158</sup> See *supra*, II.B (Standard of Review).

<sup>2159</sup> Judgment, para. 749 *citing* E3/89 Ieng Sary Interview by Stephen Heder, 17 December 1996, ENG 00417600-03; E1/223.1 Stephen Heder, T. 15 July 2013, pp. 63-64 (Heder confirmed the accuracy of the written record of interview E3/89); E3/9 Book by P. Short: *Pol Pot: The History of a Nightmare*, 2004, ENG 00396513-16; E3/748 *Revolutionary Flag*, Oct-Nov 1975, ENG 00495808-16; E1/88.1 David Chandler, T. 19 July 2012, pp. 88-89, 95-96.

<sup>2160</sup> Judgment, para. 749 *citing* E3/781 Examination of Control and Implementation of the Policy Line on Restoring the Economy and Preparation to Build the Country in Every Sector, September 1975, ENG 00523569-90.

<sup>2161</sup> NC Appeal, paras 640-642, 646.



517. Whilst the Chamber found elsewhere that Nuon Chea *made* the decision to evacuate Phnom Penh collectively with other members of the Central Committee, including Zone secretaries,<sup>2162</sup> the *implementation* of that decision was carried out *pursuant to orders* from the Party Centre.<sup>2163</sup> As Nuon Chea himself said, “*after* the [June 1974] meeting, members of the Standing Committee and the Central Committee *were instructed* to disseminate information in their respective zone regarding the decision.”<sup>2164</sup> Consistent with these orders, as well as Nuon Chea’s own confirmation that the CPK’s “political orders” that the super-traitors were to be liquidated were in fact carried out,<sup>2165</sup> the Chamber correctly inferred that after the April 1975 meeting orders were conveyed to military commanders for implementation in the same way.<sup>2166</sup> Therefore, contrary to Nuon Chea’s assertion,<sup>2167</sup> as a member of the Standing and Central Committees, he *did* issue instructions and as such, the freedom of the participants of the June 1974 and April 1975 meetings to reject a collective decision up until the time a consensus was reached is irrelevant.<sup>2168</sup> Once the decision had been taken, the Zone Secretaries were not free to reject the order.<sup>2169</sup> Although the military was organised under the Zones in April 1975 “the Party Centre including Nuon Chea, relied upon the Zones ... and on the CPK’s hierarchical structure, to give

<sup>2162</sup> Judgment, paras 133, 142, 146, 735, 807, 816, 843, 918.

<sup>2163</sup> Judgment, para. 884 *citing* Judgment, para. 141, *citing* E1/22.1 Nuon Chea, T. 14 December 2011, pp. 2-4.

<sup>2164</sup> E1/22.1 Nuon Chea, T. 14 December 2011, pp. 2-4. His alternative interpretations of the meaning of this testimony (NC Appeal, fn. 1724) are insufficient to call into question the Chamber’s findings. The Chamber is entitled to deference in its interpretation of the evidence (*Karemera* AJ, para. 235) and mere assertions that a trial chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner are liable to be summarily dismissed (*Dorđević* AJ, para. 20).

<sup>2165</sup> Judgment, para. 885 *citing* Judgment, para. 824 *citing* Documentary by Thet S. and R. Lemkin: *Enemies of the People*, E3/4001R, 2007 (Additional Footage: *One day at Po Chrey*), at [22.07] - [22.11].

<sup>2166</sup> Judgment, para. 884 *citing* Judgment, paras 148-151. This is also consistent with other orders issued by the Party Centre and followed by Zone Secretaries in the pre-April 1975 era. See, e.g., Judgment, fn. 949 *citing* E3/4017 Khieu Samphan Interview Transcript, ENG 00793527 (indicating that, in 1967, at the time of a rebellion in Samlaut, Nuon Chea instructed Ros Nhim and Kong Sophal, on behalf of the Party leadership, to suspend the armed struggle). See also E3/9 Philip Short, *Pol Pot: The History of a Nightmare*, at ENG 00396366; E3/11 *Revolutionary Flag*, September 1977, ENG 00486239; E1/97.1 Rochoem Ton *alias* Phy Phuon, T. 26 July 2012, pp. 5-6. See also E3/4202 Gina Chon and Thet Sambath, *Behind the Killing Fields*, ENG 00757532-33 (Nuon Chea describing Koy Thuon’s role in leading a student protest in the 1960s: “We told him not to do this again”).

<sup>2167</sup> NC Appeal, para. 640.

<sup>2168</sup> *Contra* NC Appeal, paras 641-642. The case law relied on by Nuon Chea that establishes that liability for ordering requires a “prior positive act” is equally irrelevant (see NC Appeal, para. 643 *citing* *D. Milošević* AJ, para. 267, *Milutinović* TJ, para. 87 and *Dorđević*, TJ, para. 1871). In *Milošević*, the error concerned a lack of evidence of any order, not its nature (*D. Milošević* AJ, para. 267). *Milutinović* and *Dorđević* simply state the well-established position that ordering cannot be committed by omission (*Milutinović* TJ, para. 87 and *Dorđević*, TJ, para. 1871), which is clearly inapposite here.

<sup>2169</sup> As the Chamber found elsewhere (“it would not have been possible for the Zone commanders to act against or outside the broad policy consensus which had been laid down by the Centre”) (Judgment, para. 894).

effect to its policies and decisions”<sup>2170</sup> and instructions were relayed downwards from the Party Centre to the Zones.<sup>2171</sup> Nothing in *Brđanin* or *Stakić* is inconsistent with the Chamber’s analysis.<sup>2172</sup>

518. As the Co-Prosecutors set out in further detail in their response regarding superior responsibility,<sup>2173</sup> there is no question that, far from being the “most senior and most powerful” of those present at the June 1974 and April 1975 meetings,<sup>2174</sup> the Zone secretaries and military commanders who led the evacuation of Phnom Penh,<sup>2175</sup> were subordinate to the Standing Committee.<sup>2176</sup> Nuon Chea, Deputy Secretary of the Party from 1960 and throughout the DK regime<sup>2177</sup>, and full-rights member of both the Central and Standing Committees,<sup>2178</sup> was second in power only to Pol Pot,<sup>2179</sup> and together with Pol Pot, was the driving force behind the Standing Committee. As the Chamber concluded,<sup>2180</sup> Nuon Chea possessed both *de facto* and *de jure* authority over the Zone Secretaries, military commanders and their subordinates.<sup>2181</sup>

519. The Chamber demonstrated that the Zone Secretaries and military commanders accepted the Party Centre’s authority and transmitted the orders, through intermediaries where necessary,

<sup>2170</sup> Judgment, para. 859 *citing* Judgment, para. 269. See also Judgment, para. 223.

<sup>2171</sup> Judgment, para. 859 *citing* Judgment, paras 202, 269, 286.

<sup>2172</sup> *Cf.* NC Appeal, para. 644 *citing* *Brđanin* TJ, paras 175, 231, 236, 237 and fns 628, 631, 634-5 and *Stakić* TJ para. 369. Contrary to Nuon Chea’s contention, there is no requirement in *Brđanin* or *Stakić* that goes beyond the established principle that the order must emanate from a person or entity which is in a ‘position of authority’ to compel another to commit a crime (Judgment, para. 702). No formal superior-subordinate relationship is required (Judgment, para. 702) and as the Chamber held, this order may pass through intermediaries (Judgment, para. 702). In this case, the recipients of the order knew the *exact* provenance of the order, being physically present when it was given after the June 1974 and April 1975 meetings. In any event, Brđanin, President of the ARK Crisis Staff was convicted of ordering persecution based in part on the implementation, by Stojan Župljanin, a member of the Crisis Staff and additionally Chief of the Security Services Centre (CSB), of a decision of the Crisis Staff that posts may be held only by personnel of Serbian nationality (*Brđanin* TJ, paras 213, 236).

<sup>2173</sup> See *infra* XX.H (Nuon Chea Superior Responsibility – Effective Control).

<sup>2174</sup> NC Appeal, para. 642.

<sup>2175</sup> Including Ta Mok, Sao Phim, Koy Thuon, Vorn Vet and Son Sen: *see* Judgment, paras 141, 460-1, 470, 739, 807. Of these, the Chamber found that, in April 1975, only Ta Mok and Sao Phim were full-rights members of the Standing Committee (Judgment, paras 203, 219, 745). Vorn Vet was either a candidate or full-rights member (Judgment, paras 203, 745) and Son Sen was only a candidate or alternate member (Judgment, paras 87, 203, 745). Koy Thuon and Ros Nhim were not members at all. Moreover, in their capacity as Zone Secretaries, Ta Mok and Sao Phim took their orders from the Standing Committee.

<sup>2176</sup> Judgment, para. 203 (“effective control over the CPK was ultimately exercised by ... the Standing Committee”) and para. 223 (“power concentrated in a small Standing Committee to which all other tiers were functionally subordinate”).

<sup>2177</sup> Judgment, paras 87, 89, 202, 304, 308, 312, 313, 316, 326, 348, 726, 727, 847, 861, 863, 868, 875, 893, 913.

<sup>2178</sup> Judgment, paras 315, 847, 868, 875, 878, 893, 902.

<sup>2179</sup> Note that Nuon Chea and Pol Pot agreed that they would work together (Judgment, para. 313) and never argued (NC Appeal, para. 250).

<sup>2180</sup> Judgment, para. 884.

<sup>2181</sup> Therefore when Nuon Chea ordered the evacuation of Phnom Penh he was in a “position of authority ... that would compel another to commit a crime in following the accused’s order” (Judgment, para. 702).

to the lower ranks who implemented expulsion of the population of Phnom Penh.<sup>2182</sup> As the Chamber found, these orders substantially contributed to the commission of crimes.<sup>2183</sup> The implementation of the orders to evacuate Phnom Penh began hours after the city's 'liberation',<sup>2184</sup> resulting in the widespread commission of crimes.<sup>2185</sup>

b. Responsibility for ordering all crimes committed during the first population movement

520. Contrary to Nuon Chea's assertion,<sup>2186</sup> he is responsible for ordering all crimes that occurred during the forced movement of the population of Phnom Penh. The Chamber was not required to find that the order given to carry out the forcible transfer of the population of urban areas made express reference to the additional crimes of murder, extermination, persecution and attacks against human dignity. The Chamber found<sup>2187</sup> that the plan to forcibly transfer the population from Phnom Penh and other urban areas contemplated and involved the commission of these additional crimes. Moreover, it is clear from a plain reading of the Judgment as a whole that the Chamber inferred from the discussions at the June 1974 and April 1975 meetings of the prior experiences of evacuations,<sup>2188</sup> which had been characterised by a consistent pattern of conduct including the commission of crimes,<sup>2189</sup> that the orders issued after those meetings also contemplated and involved the commission of the crimes which occurred during this forced transfer and were understood as such by the Zone Secretaries and military commanders present. This conclusion is bolstered by the Chamber's consideration elsewhere of the fact that Party leadership made no provision for any measures for the consent, health or well-being of those being transferred or to address similar readily anticipated conditions during the planned transfer.<sup>2190</sup>

521. Nuon Chea attempts to rely on the Chamber's finding regarding Khieu Samphan's ability to issue orders.<sup>2191</sup> However, the Appellants were not similarly situated. Khieu Samphan was, at

<sup>2182</sup> Judgment, paras 884-885 *citing* Judgment, paras 148-151.

<sup>2183</sup> Judgment, para. 885.

<sup>2184</sup> Judgment, para. 885. See also Judgment, para. 464.

<sup>2185</sup> Judgment, paras 465-524.

<sup>2186</sup> NC Appeal, para. 648.

<sup>2187</sup> Judgment, paras 879-880.

<sup>2188</sup> Judgment, paras 133-134, 144-146, 879-880.

<sup>2189</sup> Judgment, paras 104-118, 120-127, 791-794, 830, 842.

<sup>2190</sup> Judgment, paras 495, 535, 539-540, 879 and fn. 1419 *citing* E1/35.1 Nuon Chea, T. 30 January 2012, pp. 19-20.

<sup>2191</sup> NC Appeal, para. 647 *citing* Judgment, para. 1007.

this time, only a candidate member of the Central Committee.<sup>2192</sup> He was not a formal member of the Standing Committee. By contrast, Nuon Chea was a full-rights member of both the Central and Standing Committees and second only to Pol Pot in the Party's hierarchy.

*ii. Tuol Po Chrey*

522. The Chamber correctly found that Nuon Chea ordered the murder, extermination and persecution of the soldiers massacred at Tuol Po Chrey. As the Co-Prosecutors have demonstrated above, the Chamber correctly found that Nuon Chea issued orders to evacuate Phnom Penh and other urban areas. It also found that Ros Nhim was present at the June 1974 Central Committee meeting<sup>2193</sup> and, as such, received the instructions to disseminate the decision in his Zone of competence, the Northwest Zone.<sup>2194</sup>

523. Contrary to Nuon Chea's contention,<sup>2195</sup> the Chamber does not "fail to describe" the content of the orders. The Chamber established<sup>2196</sup> that the plan decided upon at the June 1974 meeting of the Central Committee, and affirmed in April 1975, contemplated and involved the arrest, execution and disappearance of Khmer Republic officials in conjunction with the forced transfer of urban populations.<sup>2197</sup> It is clear from a reading of the Judgment as a whole that the Chamber inferred from (i) the discussions of the prior experiences of evacuations,<sup>2198</sup> especially at Oudong, which had been characterised by a consistent pattern of conduct targeting Khmer Republic officials for execution, arrest or disappearance after they surrendered or were rendered *hors de combat*,<sup>2199</sup> and (ii) the pre-existing CPK targeting policy endorsed by Party leaders,<sup>2200</sup>

<sup>2192</sup> Judgment, paras 363, 384.

<sup>2193</sup> Judgment, paras 133, 735, 933.

<sup>2194</sup> Judgment, para. 923. Nuon Chea's assertion that only Ros Nhim could be responsible for ordering the commission of crimes at Tuol Po Chrey (NC Appeal, para. 651) again confuses the collective decision with the subsequent order, which Ros Nhim was *not* free to reject. Moreover, as the Co-Prosecutors discuss in further detail below, as Zone Secretary, Ros Nhim was unequivocally subordinate to the Standing Committee and to Nuon Chea. See *infra* XX.H (Nuon Chea Superior Responsibility – Effective Control)

<sup>2195</sup> NC Appeal, para. 650.

<sup>2196</sup> Judgment, paras 879-880.

<sup>2197</sup> Judgment, para. 923 *citing* Judgment, paras 878-883, 918-922. The Co-Prosecutors have already demonstrated that the Chamber's finding regarding the killings at Oudong was reasonably reached (see *supra* XVII.A (Pre-April 1975 Targeting Policy)) and that the absence of evidence of an express discussion about the killings of Khmer Republic soldiers at Oudong does not preclude a plan which involved the targeting of Khmer Republic soldiers captured in Pursat. See *supra* XX.C (Nuon Chea Planning).

<sup>2198</sup> Judgment, paras 133-134, 144-146, 879.

<sup>2199</sup> Judgment, paras 120-127, 830, 918.

<sup>2200</sup> Judgment, paras 127, 814, 918. The Co-Prosecutors have already demonstrated that the Chamber did not err in finding the existence of a policy to target Khmer Republic soldiers before April 1975 (*contra* NC Appeal, para. 650 *citing* NC Appeal, paras 529-580).

that the orders issued also contemplated and involved the arrest, execution and disappearance of Khmer Republic officials in conjunction with the forced transfer of urban populations and were understood as such by the Zone Secretaries and military commanders present.

524. This analysis is bolstered by subsequent events, the uniformity of which demonstrated that the order involved the targeting of Khmer Republic officials in conjunction with the urban evacuations.<sup>2201</sup> Consistent with the established CPK policy, these orders were executed as part and parcel of many subsequent urban evacuations, including Pursat.<sup>2202</sup> As the Chamber found, it is clear that the orders issued by Nuon Chea, and disseminated by Ros Nhim, substantially contributed to the commission of crimes at Tuol Po Chrey.<sup>2203</sup>

*iii. Phase II Population Movement*

525. Contrary to Nuon Chea's contentions,<sup>2204</sup> the evidence demonstrates that the Chamber was correct to conclude that he "issue[d], pass[ed] down or ... transmitted" orders<sup>2205</sup> for the commission of crimes during the second forced movement of populations. The Chamber found that the Party leadership, including Nuon Chea, decided upon the population movements that occurred between September 1975 and December 1977.<sup>2206</sup> For example, as a full-rights member of both the Central and Standing Committees and central CPK decision-maker, Nuon Chea either participated in or at the very least endorsed the Party leadership's August 1975 planning and ordering the movement of population to the Northwest Zone<sup>2207</sup>. In September, the Party Centre determined to move a further 20,000 to Preah Vihear (Sector 103)<sup>2208</sup> and others to Kampong Thom (Central Zone).<sup>2209</sup> Moreover, the leadership, including Nuon Chea, designed policies which enabled 'enemies' to be identified and re-educated.<sup>2210</sup>

<sup>2201</sup> As the Chamber held, the existence of an order may be proven through circumstantial evidence (Judgment, para. 702).

<sup>2202</sup> Judgment, paras 831-834, 920. See, in particular, Judgment, para. 832. The Khmer Republic soldiers executed at Tuol Po Chrey on or around 25 or 26 April 1975 were only some of those targeted through arrests, killings and disappearances in April and May 1975. Others included those targeted before, during or after evacuations in Battambang, Kampong Thom, Kampong Chhnang, Kandal, Takeo and Siem Reap.

<sup>2203</sup> Judgment, para. 924.

<sup>2204</sup> NC Appeal, paras 652-3.

<sup>2205</sup> Judgment, para. 702. As the Chamber found, such orders may be made individually or collectively (Judgment, para. 884).

<sup>2206</sup> Judgment, para. 905.

<sup>2207</sup> Judgment, paras 745-746, 749, 902.

<sup>2208</sup> Judgment, paras 580, 586, 902.

<sup>2209</sup> Judgment, paras 586, 902.

<sup>2210</sup> Judgment, para. 905. See also Judgment, paras 117-118, 169, 653, 817, 840, 887, 904.

526. The Chamber found that these decisions and policies were conveyed through the administrative and military hierarchy and implemented by Khmer Rouge soldiers.<sup>2211</sup> Specifically, the Chamber found that the orders were issued to Zone, sector, district and regional secretaries, assemblies and committees and disseminated through the Party ranks,<sup>2212</sup> as well as being disseminated through policy documents<sup>2213</sup> and through copies of the *Revolutionary Flag*.<sup>2214</sup> The Party Centre even provided instructions in its directives on how they were to be communicated and implemented.<sup>2215</sup> The Chamber found that Party leaders instructed Zone, Sector and District officials, as well as ordinary cadres, about the identification and elimination of enemies.<sup>2216</sup> The Chamber also found that members of the Party Centre issued orders for the

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<sup>2211</sup> Judgment, para. 905.

<sup>2212</sup> Judgment, para. 577 citing at fn. 1716 evidence of the Party leaders travelling throughout the country, disseminating the Party line to zone and sector secretaries, assemblies and committees; at fn. 1717 evidence of meetings of district and regional secretaries and representatives in Phnom Penh; at fn. 1718 evidence of local level, regular meetings, re-education sessions and self-criticism exercises ensured that the Party line was further disseminated to the cooperatives, cadres and people.

<sup>2213</sup> See, e.g. Judgment, para. 749, citing, at fn. 2352, **E3/781** DK Document: *Examination of Control and Implementation of the Policy Line on Restoring the Economy and Preparations to Build the Country in Every Sector*, September 1975, ENG 00523569-90; and Judgment, para. 586 citing, at fn. 1755, **E3/213** DK Document: *Excerpted Report on the Leading Views of the Comrade Representing the Party Organization at a West Zone Assembly*, June 1976, in *Pol Pot Plans the Future*, ENG 00104010-11.

<sup>2214</sup> Judgment, para. 577 citing paras 261-266; Judgment, fn. 1715, citing *Revolutionary Flag*, **E3/743** July 1977, ENG 00476177 (It was imperative to concentrate on disseminating policies well to “whip up mighty movements” that were correct and follow the party line). See also e.g. Judgment, para. 265 citing at fn. 836, **E3/135** *Revolutionary Flag*, June 1977, ENG 00446875-00446881 (“Instructions of the Party on Several Important Matters during the Second Half of 1977” including “Concentrate on Continuing to Attack the External Enemy and The Embedded Enemy Boring Holes from Within the Ranks of the Revolution and on Destroying and Eliminating Them”). See also **E3/135** *Revolutionary Flag*, June 1977, at ENG 00446857-58 (“Whip up and educate the masses ... and have them clearly see how the internal embedded enemies carry out their activities; have them absorb this so they will become an enemy-seeking and enemy-attacking force.”); **E3/139** *Revolutionary Flag*, November 1976, at ENG 00455286 (“Only when there is struggle to fight to eradicate all opposition forces inside the country can the movement to build our country gain momentum ... we must carry out extremely strong class struggle within ourselves.”); **E3/742** *Revolutionary Flag*, April 1977, at ENG 00478501 (“It is imperative to purge, to clean up, and to sweep clean the no-good elements and the enemy elements by further strengthening and expanding the good elements that successively emerge from the movements.”); **E3/727** *Revolutionary Flag*, May - June 1978, at ENG 00185342 (“Our duty is therefore is to attack absolutely ... enemy is being smashed to smithereins, scattered to the winds and liquidated.”). See also **E1/215.1** Pech Chim T. 1 July 2013, p. 37. (“Q .... Revolutionary Flag ... April 1977 ... instructions ... did you ever receive instructions from the sector to assess, track, capture and smash the enemy? A. We studied about that. The information was relayed by the sector for our implementation, and I used to attend such study sessions.”)

<sup>2215</sup> For example, **E3/764** CPK Central Committee Directive, 20 June 1978, ENG 00275220 (“[i]t is requested to all the regions, sectors, and the military units to take this above Guidance to educate and to conduct meetings inside their respective ... organisations ...”); **E3/193** *Revolutionary Flag*, August 1977, ENG 00399246 (“Propose that every leadership echelon in the Party concentrate on examining, discussing, and studying this presentation conscientiously in order to take it for implementation in their respective Zones and get good results.”)

<sup>2216</sup> Judgment, paras 772, 818.

elimination of enemies during this period.<sup>2217</sup>

527. Throughout the Judgment, the Chamber relied on evidence that Khmer Rouge cadres at all levels accepted the authority of the Party Centre. Representatives of the Party Centre addressed Zone conferences,<sup>2218</sup> and members of the Party Centre also travelled to the zones and sectors throughout the DK period.<sup>2219</sup> Zone secretaries and officials reported to the Party Centre, including Nuon Chea, on population movements, sometimes requesting further instructions<sup>2220</sup> and on the identification, arrest and elimination of enemies.<sup>2221</sup> Moreover, *Revolutionary Flag* made references to the Party Centre.<sup>2222</sup> In the words of one cadre, “everything originated from the [Centre]”.<sup>2223</sup>

528. In showing that the Party Centre’s decisions were uniformly implemented through the continued population movements between late 1975 and 1977<sup>2224</sup> accompanied by the widespread commission of crimes,<sup>2225</sup> including discrimination against New People,<sup>2226</sup> the Chamber demonstrated that lower-level cadres accepted the authority of the Party Centre and implemented its orders. The Chamber therefore correctly concluded that these orders and

<sup>2217</sup> Judgment, para. 817.

<sup>2218</sup> Judgment, paras 885, 924 *citing* at fns 2788, 2849, **E3/193** *Revolutionary Flag*, August 1977, ENG 00399222.

<sup>2219</sup> Judgment, paras 317, 325, 585, 949.

<sup>2220</sup> Judgment, para. 798. See also Judgment, fn. 1760 *citing* **E3/154** DK Telegram, 30 November 1975, ENG 00185064 (East Zone reported to Pol Pot, copying Nuon Chea, concerning the transfer of 50,000 people to the North Zone at Stung Trang and Preah Prasap); **E1/51.1** Kaing Guek Eav, T. 20 March 2012, p. 38 (In November 1975, Sao Phim reported to Pol Pot and Nuon Chea concerning the evacuation of people rejected by Ke Pauk).

<sup>2221</sup> Judgment, para. 817.

<sup>2222</sup> See, e.g. **E3/736** *Revolutionary Flag*, October – November 1977, ENG 00182553. Issues of *Revolutionary Flag* also encouraged adulation of and obedience to the Party leadership. See, e.g. **E3/736** *Revolutionary Flag*, October – November 1977, ENG 00182553 (“The key factor is that of Party leadership”); ENG 00182558 (“It is necessary to build up the Party Center. It is necessary to build up the Party Centre because it is the core of the Party as a whole. As it takes on large responsibilities, acting as a core is a must.”); ENG 00182581 (“Cadres must therefore be constantly built up, strengthened and developed in the Party Center, the Zones, the Sectors, the districts, the cooperatives, the army and in the ministries and offices. Attention must be paid here to Party Center”)

<sup>2223</sup> **E3/430** Iep Duch Interview Record, at ENG 00223512 (“The Khmer Rouge leadership, after it was known that 870 was the Center level, doing anything and everything originated from there.”).

<sup>2224</sup> Judgment, paras 580-581, 586-588, 607, 611-612, 630, 638, 644, 796, 802, 904.

<sup>2225</sup> Judgment, paras 630-657, 900.

<sup>2226</sup> At various stages of movement of the population, Khmer Rouge soldiers and officials questioned people about their history, verifying whether or not people could be qualified as ‘New People’ (Judgment, paras 600, 617, 653, 655). The Chamber demonstrated that New People were identified as such and forcibly transferred and subject to enforced disappearances on the basis of that status. Khmer Rouge soldiers and officials were ordered to administer the ‘New People’ and ‘Base People’ separately (Judgment, paras 621-622, 653). Often, ‘New People’ were targeted for displacement, and sometimes exclusively members of this group were forcibly transferred (Judgment, paras 588, 617-619, 622-623, 655). After some New People were identified at various co-operatives or work-sites, they were transferred and disappeared (Judgment, paras 614, 618, 623, 655.) The actions of the Khmer Rouge soldiers and officials establish that belonging to the ‘New People’ group meant being singled out for differential and harsher treatment (Judgment, paras 600, 617, 621, 655, 803).

instructions preceded and substantially contributed to the commission of crimes.<sup>2227</sup>

**E. The Chamber did not err in finding that the *actus reus* of instigating was satisfied (NC Ground 216)**

*i. Phase I Population Movement*

529. The Chamber’s finding that Nuon Chea instigated the crimes committed during the Phase I population movement accurately reflects his conduct during the relevant period and is amply supported by findings throughout the Judgment and a wealth of supporting evidence.

530. The Chamber found<sup>2228</sup> that Nuon Chea prompted the perpetrators to commit crimes by formulating policies alongside other CPK leaders to forcibly transfer the population,<sup>2229</sup> and to target certain groups such as Khmer Republic Officials,<sup>2230</sup> and when he planned<sup>2231</sup> and issued instructions<sup>2232</sup> to carry out the “evacuation” of Phnom Penh, which as the Chamber had previously demonstrated, followed a consistent pattern of conduct of expelling civilian populations from urban areas<sup>2233</sup> and involved the commission of the crimes of murder, political persecution, extermination and the other inhumane acts of forced transfer and attacks against human dignity.<sup>2234</sup>

531. The Chamber also relied on Nuon Chea’s personal role in the indoctrination of cadres and soldiers over the preceding years, particularly with regard to maintaining vigilance against enemies<sup>2235</sup> and the indoctrination of peasants and cadres on the issue of class struggle.<sup>2236</sup> Such indoctrination included the identification of ‘New People’ and former Khmer Republic officials as enemies.<sup>2237</sup> The Chamber was satisfied that, in view of Nuon Chea’s position of authority<sup>2238</sup> at the time of the evacuation, lower-level Khmer Rouge cadre understood the trainings he

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<sup>2227</sup> Judgment, para. 907.

<sup>2228</sup> Judgment, para. 887.

<sup>2229</sup> Judgment, para. 887. See also Judgment, paras 104-105, 111-112, 146, 534, 786, 788.

<sup>2230</sup> Judgment, para. 887. See also Judgment, paras 118, 120-123, 814-815. The Chamber also found that, in the pre-1975 era, the CPK had a policy to re-educate “bad elements” and to “smash” enemies. See Judgment para. 117.

<sup>2231</sup> Judgment, para. 887. See also paras 878-883.

<sup>2232</sup> Judgment, para. 887. See also paras 141, 148-151, 884-886.

<sup>2233</sup> Judgment, paras 541, 791-794, 804, 880.

<sup>2234</sup> Judgment, paras 104-118, 120-127, 544, 791, 794, 830, 842, 846.

<sup>2235</sup> Judgment, para. 887.

<sup>2236</sup> Judgment, para. 887.

<sup>2237</sup> Judgment, para. 887.

<sup>2238</sup> The Chamber had found that, in the pre-April 1975 period, Nuon Chea was the CPK Deputy Secretary (Judgment paras 87, 202, 304, 308, 313); a full-rights member of the Standing and Central Committees (Judgment, para. 315); and played a leading role in the training of cadres.



conducted, statements he made and involvement in issuing *Revolutionary Flag* as prompting them to commit crimes against those considered enemies.<sup>2239</sup> The Chamber was rightly satisfied that, by all these means, Nuon Chea's conduct substantially contributed to the commission of crimes.<sup>2240</sup>

532. Unable to challenge this holistic approach taken by the Chamber, Nuon Chea extracts for criticism just two aspects of its reasoning,<sup>2241</sup> namely: (i) the finding that his indoctrination included the identification of 'New People' as enemies;<sup>2242</sup> and (ii) the Chamber's alleged failure to make findings in its analysis of the CPK's pre-1975 enemies policy on conduct - indoctrination, training and statements - through which he instigated the commission of crimes before April 1975.<sup>2243</sup> However, Nuon Chea fails to demonstrate how the Chamber's conclusion as to his responsibility for instigating crimes cannot stand on the basis of its remaining findings<sup>2244</sup> and therefore how these alleged errors have the potential to cause the decision to be revised or reversed.<sup>2245</sup>

533. In any event, contrary to Nuon Chea's assertion<sup>2246</sup> the Chamber demonstrated his pre-April 1975 role in training and indoctrinating Khmer Rouge cadres and soldiers. Indeed, it relied on his admissions to that effect.<sup>2247</sup> It also found him to be the principal author of the *Revolutionary*

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<sup>2239</sup> Judgment, para. 887.

<sup>2240</sup> Judgment, para. 887.

<sup>2241</sup> Nuon Chea's arguments regarding the temporal jurisdiction of the ECCC are addressed above. See *supra* VII.A (Temporal Jurisdiction).

<sup>2242</sup> NC Appeal, para. 662.

<sup>2243</sup> NC Appeal, paras 663-9.

<sup>2244</sup> Cf. *Dorđević*, para. 20.

<sup>2245</sup> See *supra*, II.B (Standard of Review).

<sup>2246</sup> NC Appeal, para. 663, fn. 1781, in which Nuon Chea inappropriately isolates two paragraphs in the Judgment that deal with the CPK policy regarding re-education of bad elements and killing of enemies, not his personal role in indoctrination and training.

<sup>2247</sup> Judgment, fn. 995, citing **E1/14.1** Nuon Chea, T. 22 November 2011, p. 95 (Nuon Chea confirmed that in the period before the assault on Phnom Penh as well as at the time it was being liberated, he "was at the back, near Chinit River, offering the regular educational sessions for zone cadres"); **E1/17.1** Nuon Chea, T. 6 December 2011, pp. 4-5 (Nuon Chea confirmed his responsibilities for propaganda since the 1950s in addition to being in charge of education. "I had to do the propaganda, both orally and by printed media, and I also went to the base to do this work among the local people... I was tasked with educating the political line, the revolutionary political line, and the strategic line, and educate people with regard to the love of the nation, and the people, and the revolution among cadres..."); **E1/22.1** Nuon Chea, T. 14 December 2011, p. 26 (Nuon Chea confirmed his responsibility for education between 1970 and 1975); **E1/40.1** Nuon Chea, T. 8 February 2012, p. 38 (Nuon Chea confirmed his role in education in 1973); Judgment, fn. 826 citing **E1/36.1** Nuon Chea, T. 31 January 2012, pp. 8-9 ("[By 1950,] I was a candidate in charge of propaganda and writing articles for the newspapers and in charge of education and by going to the villages to educate people"). See also **E1/26.1** Nuon Chea, T. 12 January 2012, p. 35. See also Judgment, fn. 311: **E1/97.1** Rochoem Ton *alias* Phy Phoun, T. 26 July 2012, p. 32 (describing study sessions chaired by Pol Pot, Nuon Chea or Khieu Samphan discussing the CPK's positive experiences with forced evacuations).

*Flag*,<sup>2248</sup> which, as Nuon Chea concedes,<sup>2249</sup> was published in this period. Every pre-April 1975 edition of both *Revolutionary Flag* and *Revolutionary Youth* was cited in the Judgment.<sup>2250</sup>

534. Nuon Chea's study sessions were attended by large numbers of cadres.<sup>2251</sup> It is abundantly clear, both from evidence relied on by the Chamber and further evidence on the record, that they included identifying as enemies both the urban population<sup>2252</sup> and Khmer Republic officials,<sup>2253</sup> often as incarnations of American imperialism or as American spies, as well as lessons on class

<sup>2248</sup> Judgment, paras 264, 311, 845.

<sup>2249</sup> NC Appeal, para. 663.

<sup>2250</sup> Judgment, fns 314, 865, 866, citing **E3/783** *Revolutionary Flag*, Sept-Oct 1972; fns 288, 331, citing **E3/785** *Revolutionary Flag*, July 1973; fns 838, 2567 citing **E3/146** *Revolutionary Youth*, Special Issue, August-September 1974. See also Judgment, fn. 311, citing **E1/51.1** Duch, T. 20 March 2012, p. 63; **E1/60.1** Duch, T. 5 April 2012, p. 114 (prior to 1975 he learned through *Revolutionary Flag* magazines that people were evacuated to ensure that when the enemy was attacked they would be deprived of people to support them, and this would isolate and render the enemy helpless).

<sup>2251</sup> See, e.g., **E1/97.1** Phy Phoun, T. 26 July 2012, pp. 9-10, 32-4 (the witness attended a large week-long study session in 1971 chaired by Pol Pot and Nuon Chea. “[Pol Pot and Nuon Chea] ... made all the important cadres participate in that big meeting”); **E3/24** Phy Phoun OCIJ Statement, ENG 00223580 (describing political instruction provided by Pol Pot and Nuon Chea before the liberation of Phnom Penh when he was introduced to the Party at a study session attended by “100 persons from the zone, sector and district levels”). **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, ENG 00396427 (stating that 200 district, region and zone cadres attended these training courses); **E1/89.1** Yun Kim, T. 20 June 2012, pp. 78-9 (In 1973, Yun Kim attended a study session in Kratie province along with people from all three districts in the province); **E3/367** Sao Sarun OCIJ Statement, ENG 00278694 (“In 1972, the district chiefs ... went to attend the meeting in Kampong Thom with Pol Pot, Hou Nim, Hou Yun and Nuon Chea ... The attendees in that meeting were also from other provinces. ... Hundreds of cadres from all provinces were also attending that meeting”). See also **E3/49** Timothy Carney, *The Organization of Power*, ENG 00105143 (recording a nationwide “study” session in July 1971).

<sup>2252</sup> Judgment, para. 311 citing, fn. 955, **E1/97.1** Phy Phoun, T. 26 July 2012, pp. 9-10, 32 (the witness attended a large week-long study session in 1971 chaired by Pol Pot and Nuon Chea. Through presentations at each study session, it was explained that the purpose of the evacuation of Oudong was to “foil any attempt by the enemy to destabilize our forces” and to prevent cadres from being politically and ideologically corrupted by the urban population). See also Judgment, para. 112, citing, at fn. 310 **E1/94.1** David Chandler, T. 23 July 2012, p. 49 (By early 1975 the Khmer Rouge had built up a huge reservoir of hatred of city people among their own followers); **E1/179.1** François Ponchaud, T. 10 April 2013, p. 10 (the Khmer Rouge considered city dwellers corrupt and improper because they had long hair and wore improper clothes). See also **E3/196** Nuon Chea Speech to the Communist Workers’ Party of Denmark, July 1978, ENG 00762404 (“It was only after 1960 that we could allocate our forces correctly... In the cities, living conditions were better but there were many enemies”); **E1/24.1** Nuon Chea, T. 10 January 2012, p. 48 (Party selected countryside as its base because “there were no enemies in those areas”); **E3/11** *Revolutionary Flag*, September 1977, at ENG 00486238 (Party’s “operational line was that the countryside was the support base,” because the “networks of the enemy’s repressive apparatus were concentrated” in the cities and “the enemy was everywhere there”).

<sup>2253</sup> Judgment, para. 311 citing, *inter alia*, fn. 955, **E1/88.1** Yun Kim, T. 19 June 2012, pp. 37-38 (At a 1973 meeting, Nuon Chea talked about attacking the enemy, the Lon Nol forces backed by the American Imperialists.); Judgment, fns 951, 1015, citing **E1/89.1** Yun Kim, T. 20 June 2012, pp. 78-79 (In 1973, Yun Kim attended a study session in Kratie province where Nuon Chea gave a lecture about enemies, naming American, Vietnamese and internal enemies). See also **E1/97.1** Rochoem Ton *alias* Phy Phoun T. 26 July 2012 pp. 7-8 (describing education against enemies including American Imperialists, the CIA, and the KGB. Measures taken against the enemies included attacking Lon Nol groups who were “backed by the American group” and “those opposed to the revolution”).

struggle.<sup>2254</sup> Contrary to Nuon Chea's elaborate argument,<sup>2255</sup> pre-April 1975 editions of the *Revolutionary Flag* and *Revolutionary Youth* were replete with material justifying the population movement policy,<sup>2256</sup> fomenting violence against enemies of the CPK and invoking class struggle.<sup>2257</sup> For example, in 1972, the *Revolutionary Flag* reported:

<sup>2254</sup> **E1/82.1** Sao Sarun, T. 6 June 2012, pp. 3-5 (Sao Sarun attended a 10-day meeting in Kampong Thom in 1972 at which Nuon Chea was the "organiser" and presented on the topics of fighting against American Imperialists to liberate the country and against the oppressing classes). See also **E3/367** Sao Sarun OCIJ Statement, ENG 00278694 ("In that meeting, Nuon Chea was the presenter for [a] political session on fighting against the American emperor, national liberation and the eradication of oppressive classes").

<sup>2255</sup> NC Appeal, paras 663-9.

<sup>2256</sup> Judgment, para. 104, citing **E3/785** *Revolutionary Flag*, July 1973, ENG 00713996.

<sup>2257</sup> See, e.g., **E3/783** *Revolutionary Flag*, September-October 1972, ENG 00720204 ("there is no question we will fail to lead the movement towards ultimate success in spite of the correctness of the Party's means, strategies, and tactics; particularly in the national struggle against imperialist America and its followers, and as the class struggle against the feudalists, capitalists, and reactionaries deepens. Thus, it will be impossible for us to meet our revolutionary obligations in upholding our historical responsibility to the Party, classes, and people."); ENG 00720205 ("Currently, imperialist America and traitors Lon Nol, Sirim Matak, and Soeng Ngoc Thanh are failing and we have suppressed them; they can no longer manoeuvre. They are desperately trying to fight back with poisonous politics to disrupt our movement. We, however, must absolutely crush them"); ENG 00720205-6 ("Although our democratic struggle has generated much noise, it remains shallow because its momentum has yet to advance us to our advantage. The immediate danger that the suppressing class has experienced is not significant enough. They can still use demagoguery to deceive us"); ENG 00720206 ("The class struggle this time strikes directly at the heart of the enemy, which embodies the enemy's means of suppression, because it hits the production line ... As our class struggle occurs step by step, and within the strategic framework of the national democratic revolution, the class of feudalists, capitalists, and reactionaries persistently oppose us both openly and secretly.... We must recognize their venom and seize the opportunity to dominate them; we must be unequivocal in attacking them; attack in adherence of the Party's lines; attack them with a sense of responsibility towards the Party and people, and out of great caution for the sake of the revolution"); ENG 00720207 ("Therefore, even though the Party has tried hard to inculcate class-consciousness, the petty bourgeoisie stance still dominates"); ENG 00720208 ("The enemy can burrow from inside"); ENG 00720210 ("We must trust and depend on the base people for leadership. We must care about their livelihood and pay attention to propagandizing, educating and appointing them in addition to persistently leading them in struggle. Doing so is a demonstration of leadership that follows the people's and class lines properly"); ENG 00720221 ("Both now and in the future, quality leadership is needed, more so because our conflicts with the imperialist Americans and the traitors is intensifying."); ENG 00720223 ("In today's class struggle we fight strategically against capitalists, landlords, and reactionaries, but they influence our cadre, soldiers, and farmers constantly, in particular, in economic terms and in their living routines. Even though they have lost authority, they still have many methods and tricks to suppress us. // Therefore, we must eliminate the influence of capitalists and landlords so that they will not dominate us and our people. We must not only undertake class struggle in the economic-political battlefield, but also in the battlefield of perceptions in order to push our struggle forward"); ENG 00720230 ("We must practise indoctrination within and outside the Party; communicate this line of reporting that is our working procedure. Without reports, we cannot lead and work"); **E3/785** *Revolutionary Flag*, July 1973, ENG 00713995 ("Last year, we very well mobilized the popular force throughout the country to fight against the enemy except the traitorous clique of Lon Nol, Sirik Matak, Son Ngoc Thanh, In Tam, and Cheng Heng."); ENG 00713999 ("For example: If the spies are arrested to be executed in the meeting before the people, some people may be frightened of us. They think that we are extremely cruel. The stance to smash the spies is correct but it is inappropriately carried out"); ENG 00713997 ("We must estimate the force of the enemy and our force correctly. If we could objectively analyse, proper measures will be taken. // People, the party's organization, cadres and comrade must objectively and comprehensively analyse the situation by looking at all good points and difficult points of the enemy in order to evaluate their ability and then put practical measures in accordance with their forces. Doing like this enables us to lead and use them. // For example: In the analyses of the spies, sometimes if we just think that their force is so strong and continuously spread the rumours, it will create confused atmosphere. We must analyse their

As our class struggle occurs step by step, and within the strategic framework of the national democratic revolution, the class of feudalists, capitalists, and reactionaries persistently oppose us both openly and secretly.... We must recognize their venom and seize the opportunity to dominate them; we must be unequivocal in attacking them.<sup>2258</sup>

Similarly, the 1974 edition of *Revolutionary Youth* includes the lines:

The party went through many obstacles and countless dangers during the struggle and try repeatedly to propagandize/educate our Kampuchean male-female youths so that they ... have a blazing national anger and class anger toward the enemy who are the invasive imperialist, and toward the class-enemy who used to oppress, suck blood and chew bone of our poor people.<sup>2259</sup>

These samples, among many, entirely undermine Nuon Chea's attempts to present the CPK's position as benign.

535. It is evident that the Khmer Rouge cadres had resoundingly received Nuon Chea's message not only from the crimes they committed, but also the rationale they provided to the victims for doing so. As the Chamber recounted, residents were told that "Angkar needed to "sweep" or "clean" the remaining enemies from the city, organise the city, or disperse the enemy's spy network, which allegedly included American imperialist spies in Phnom Penh."<sup>2260</sup> Another witness recounted how Khmer Rouge soldiers reprimanded the Base People for giving them food, as she and her family were considered "new people" or "17 April people".<sup>2261</sup> Phy Phuong

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strong and weak points and then take measures to resist and eliminate them."'). **E3/146** *Revolutionary Youth*, August – September 1974, ENG 00538735 ("Through this, the American imperialist will make our people and male-female youths drop little by little the patriotic stance, class stance, and class struggle until they all collapse. So, that is why in Phnom Penh and in the zone temporarily controlled by the enemy, there are now some male-female youths actively and unknowingly applying this poisonous trick of the American imperialist ... Some other male-female youths are trained by the American Imperialist before they are sent to work as the commando, male-female spies, and wild bandit to carry out the activity of rooting out and destroying the revolution and people in the liberated zone. They are arrested by our armed forces and people in the liberated zones and subsequently smashed dishonourably"); ENG 00538736 ("The party went through many obstacles and countless dangers during the struggle and try repeatedly to propagandize/educate our Kampuchean male-female youths so that they could be politically awakening and able to develop the spirit of national solidarity and patriotic, and have a blazing national anger and class anger toward the enemy who are the invasive imperialist, and toward the class-enemy who used to oppress, suck blood and chew bone of our poor people"); ENG 00538752 ("The 2<sup>nd</sup> victory is we have liberated new territory and people from the savage-fascist hands of the enemy ... The 3<sup>rd</sup> victory is we have destroyed many more live forces of the enemy, making them to become weaker and further exhausted"). ENG 00538752 ("class-attack... by organizing the low level and high level production cooperatives ... to destroy the economic regime of the feudalist-capitalist ... attacking to eliminate every pacification trick of the enemy who intends to burrow and destroy our revolution and people from within"). See also **E1/52.1** Kaing Guek Eav *alias* Duch, T. 21 March 2012, p. 22 ("The Revolutionary Flag magazine of 1973 ... was mentioning about a special class or two special classes: First, the police and soldiers. ... we were explained that the police and the soldiers were of a special class because they were armed with the enemies' weapons to kill us.")

<sup>2258</sup> **E3/783** *Revolutionary Flag*, September-October 1972, ENG 00720206.

<sup>2259</sup> **E3/146** *Revolutionary Youth*, August-September 1974, ENG 00538736.

<sup>2260</sup> Judgment, para. 469.

<sup>2261</sup> Judgment, para. 517, *citing* **E1/200.1** Bay Sophany, T. 4 June 2013, p. 10.

heard from the base and soldiers that those evacuated from Phnom Penh had been living a luxurious life and so it was fitting that they should have to endure difficulties.<sup>2262</sup> Checkpoints were set up by Khmer Rouge soldiers, at which they searched and interrogated evacuees about their biography and those believed to be Khmer Republic officials were shot, arrested or disappeared.<sup>2263</sup> The Chamber further found that anyone resisting was regarded as an enemy.<sup>2264</sup> 536. Underlying Nuon Chea's argument is the premise that the CPK did not regard New People as enemies, or mistreat and discriminate against them during the evacuation of Phnom Penh. The evidence that the Khmer Rouge on occasions published material<sup>2265</sup> identifying enemies *among* the urban population or "New people" is not inconsistent with the finding that 'well before 17 April 1975 the Khmer Rouge had been fomenting resentment towards city people'.<sup>2266</sup> The Khmer Rouge created a situation in which New People or city dwellers were considered suspect and discriminated against. Indeed, the Chamber also established that Nuon Chea personally despised and mistrusted the urban population.<sup>2267</sup> Moreover, the Chamber demonstrated, based on the evidence of over 20 victims and witnesses, that city-dwellers had already become known as "17 April people" or "New people" at the time of the evacuation and were, in fact, treated more harshly *on that basis*.<sup>2268</sup> Indeed, the evacuation itself was an aspect of the persecution of New People.<sup>2269</sup> This was entirely consistent with the Party's rationale for population movements, namely that "by displacing the people, enemy networks would be separated, particularly those embedded among the always suspect "New People". Rebellion and/or foreign interference could thus be averted,"<sup>2270</sup> since "'New People' could not be trusted until they underwent struggle and hardship in the socialist revolution".<sup>2271</sup> 537. Finally, Nuon Chea's argument<sup>2272</sup> that the Chamber could only rely on documents published before 17 April 1975 is palpably irrational, and the post-April 1975 documents frequently recounted policies from the period leading up to the 17 April forced movement. Later

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<sup>2262</sup> Judgment, para. 517, *citing* E1/98.1 Phy Phuon, T. 30 July 2012, p.71.

<sup>2263</sup> Judgment paras 512-515.

<sup>2264</sup> Judgment, para. 510.

<sup>2265</sup> *Cf.* NC Appeal, paras 662, 666-9.

<sup>2266</sup> Judgment, para. 517, *citing* Judgment para. 112.

<sup>2267</sup> Judgment, para. 111.

<sup>2268</sup> Judgment, para. 517, fns 1548-9.

<sup>2269</sup> Judgment, para. 574.

<sup>2270</sup> Judgment, para. 784.

<sup>2271</sup> Judgment, para. 784. See also Judgment, paras 195, 788, 796.

<sup>2272</sup> NC Appeal, para. 663.

evidence is also probative of CPK policy, motives and intent at the time of the evacuation.<sup>2273</sup> As the Chamber noted, issues of the *Revolutionary Flag* published in the months after the capture of Phnom Penh reveal that the transfer of its population satisfied and furthered the revolution's ideological class goals insofar as "colonialists and imperialists", *i.e.*, city dwellers, intellectuals, government officials and petty bourgeois, were overthrown, turned into peasants and "were scattered shamefully".<sup>2274</sup> The August 1975 edition declared that in 1969, "we fought the Lon Nol traitors".<sup>2275</sup> In 1976, the *Revolutionary Flag* proclaimed "[w]hen we evacuated the people from the cities, we carried out class struggle."<sup>2276</sup>

*ii. Tuol Po Chrey*

538. Aside from the question of the ECCC's temporal jurisdiction, Nuon Chea's only submission relevant to the Chamber's findings regarding his instigation of the crimes at Tuol Po Chrey relates to the alleged lack of findings on his indoctrination, training and statements in the pre-April 1975 period.<sup>2277</sup> As demonstrated above, this assertion is unfounded. The Chamber found ample evidence of indoctrination and training by Nuon Chea, including the identification of former Khmer Republic officials as enemies, both as such and as the incarnation of American imperialism.<sup>2278</sup>

539. Moreover, Nuon Chea does not attempt to demonstrate any error in the findings<sup>2279</sup> that, when he contributed to the adoption and dissemination of policies against Khmer Republic officials, and planned and ordered the evacuation of Phnom Penh and other urban centres, which occurred in the aftermath of similar evacuations during which Khmer Republic officials had been massacred,<sup>2280</sup> his acts prompted and had a substantial effect on the commission of the murder, extermination and political persecution which took place at Tuol Po Chrey.

<sup>2273</sup> **E3/746** *Revolutionary Flag*, July 1978, ENG 00428291-97, 00428301-02.

<sup>2274</sup> Judgment, para. 544 *citing* **E3/5** *Revolutionary Flag*, August 1975, ENG 00401486; **E3/749** *Revolutionary Youth*, August 1975, ENG 00532682; **E3/11** *Revolutionary Flag*, September 1977, ENG 00486249; **E3/196** NUON Chea Speech to the Communist Workers' Party of Denmark, 30 July 1978, ENG 00762404.

<sup>2275</sup> Judgment, fn. 2277, *citing* **E3/5** *Revolutionary Flag*, August 1975, ENG 00401495.

<sup>2276</sup> Judgment, para. 544, *citing* **E3/10** *Revolutionary Flag*, September-October 1976, ENG 00450531.

<sup>2277</sup> NC Appeal, para. 663.

<sup>2278</sup> With regard to the Khmer Rouge elite's association between Lon Nol's regime and "American Imperialism". See Judgment, paras 99, 544, 815, 827-828 and fns 1579, 2255, 2277, 2291.

<sup>2279</sup> Judgment, para. 926.

<sup>2280</sup> Judgment, paras 120-127, 830, 879, 918.

iii. *Phase II Population Movement*

540. The Co-Prosecutors understand Nuon Chea's primary argument<sup>2281</sup> to constitute an assertion that Nuon Chea did not prompt the commission of crimes committed during the Phase II Population Movement because New People were not targeted as enemies. He claims this is reflected in editions of *Revolutionary Flag* published during the relevant period and that the CPK had no other recognizable enemies, with the exception of imperialists, who were targeted during this time. The cited paragraphs from Nuon Chea's Appeal also form part of his broader submissions that New People did not constitute a political group for the purposes of the Chamber's findings on political persecution.<sup>2282</sup>

541. Contrary to Nuon Chea's contention, the Chamber demonstrated that New People were identified by the CPK as a political group<sup>2283</sup> and forcibly transferred and subject to enforced disappearances on the basis of that status. Khmer Rouge soldiers and officials were ordered to administer the New People and Base People separately.<sup>2284</sup> Often, New People were targeted for displacement, and sometimes exclusively members of this group were forcibly transferred.<sup>2285</sup> After some New People were identified at various co-operatives or work-sites, they were transferred and disappeared.<sup>2286</sup> As before, the actions of the Khmer Rouge soldiers and officials establish that belonging to the New People group meant being singled out for differential and harsher treatment.<sup>2287</sup>

542. The Chamber found that Nuon Chea designed policies, which enabled enemies to be identified and re-educated, or to disappear<sup>2288</sup> and planned<sup>2289</sup> and ordered<sup>2290</sup> the Phase II Population Movement, which substantially contributed to the commission of the crimes.<sup>2291</sup> Further, the Chamber found extensive evidence of his instigation of the crimes during training

<sup>2281</sup> Although not explicit on the face of NC Appeal, para. 670, fn. 1802 refers to: (i) NC Appeal, paras 374-80 and (ii) NC Closing Brief, paras 160-164. Both of these deal with Nuon Chea's argument that New People were not considered as enemies by the CPK and, in the latter, that no identifiable group other than imperialists were enemies of the CPK.

<sup>2282</sup> The Co-Prosecutors have already demonstrated that the Chamber did not err in finding that New People constituted a political group. See *supra* X.B (New People constitute a political group).

<sup>2283</sup> Former city-dwellers were also known as "17 April people".

<sup>2284</sup> Judgment, paras 621-622, 653.

<sup>2285</sup> Judgment, paras 588, 617-619, 622-623, 655.

<sup>2286</sup> Judgment, paras 614, 618, 623, 655.

<sup>2287</sup> Judgment, paras 600, 617, 621, 655, 803.

<sup>2288</sup> Judgment, para. 908. See also Judgment, para. 118.

<sup>2289</sup> Judgment, paras 899-904.

<sup>2290</sup> Judgment, paras 905-907.

<sup>2291</sup> Judgment, paras 904, 907, 908.

and indoctrination sessions before the Phase I population movement<sup>2292</sup> through to the end of the Phase II movement.<sup>2293</sup> Similarly, the Chamber referred to numerous editions of *Revolutionary Flag* and *Revolutionary Youth*, published throughout the period and widely distributed to Khmer Rouge cadres<sup>2294</sup> that justified the population movement policy and incited violence and discriminatory treatment, either expressly or implicitly, of enemies, including New People and former Khmer Republic officials.<sup>2295</sup> As the Co-Prosecutors have previously noted,<sup>2296</sup> the distinction that Nuon Chea seeks to draw between New People on the one hand, and capitalists and feudalists on the other, overlooks the implicit connection made in CPK rhetoric and, as the Chamber points out,<sup>2297</sup> “[t]he way in which ‘enemy’ was defined was tactical, remaining vague enough to allow various interpretations and to create an uncertain atmosphere.”

543. The remainder of Nuon Chea’s appeal against the finding that he instigated crimes committed during the second population movement lacks substance and clearly fails to meet the standard of review. A party’s displeasure at the findings made in respect of different matters – in this case, the crimes committed during the evacuation of Phnom Penh and at Tuol Po Chrey – is a patently insufficient basis on which to found an appeal. Nuon Chea fails to identify which findings he considers unreasonable and how, by reference to any reasoning or evidence, the Chamber erred in fact and/or law. It is clear that he can find no error in the Chamber’s approach.

## F. Nuon Chea aided and abetted the commission of crimes (NC Ground 217)

### i. Phase I Population Movement

544. As demonstrated above, the Chamber was correct to find that as the Khmer Rouge leader responsible for propaganda and training of cadres, Nuon Chea disseminated the forced movement and targeting policies to cadres and advocated their implementation. Nuon Chea led indoctrination and training sessions in the pre-April 1975 period,<sup>2298</sup> advocating the class

<sup>2292</sup> See *supra*, XX.E.i (Nuon Chea Instigating – Phase I Population Movement)

<sup>2293</sup> See Judgment, paras 325, 577, 818.

<sup>2294</sup> *Revolutionary Flag* was frequently used for educational purposes at CPK political study or training sessions. (Judgment, para. 265).

<sup>2295</sup> Judgment, paras 108-109, 113, 265, 544-545, fns 329, 332, 339, 496, 1750, 1762, 1869, 1872, 1874, 1877, 1907, 1908, 1923-1925, 1928-1929, 1931, 1933-1936, 1938, 1963, 2261, 2277, 2430, 2485, 2495, 2567, 2581-2582.

<sup>2296</sup> See *supra* X.B (New People constitute a political group).

<sup>2297</sup> Judgment, para. 117.

<sup>2298</sup> Judgment, paras 264, 324, 347, 889. See *supra*, XX.E (Nuon Chea Instigating).



struggle, justifying urban evacuations and praising past crimes.<sup>2299</sup> These sessions included the identification of and vigilance against enemies, including “New People” and Khmer Republic officials.<sup>2300</sup> The same moral support and encouragement continued throughout the DK period.<sup>2301</sup> Moreover, the Chamber’s finding that Nuon Chea aided and abetted the crimes committed during the Phase I population movement is bolstered by its findings that he planned and ordered the forced transfer.<sup>2302</sup>

545. The Chamber correctly concluded that this support and encouragement had a substantial effect on the commission of crimes during the forced exodus from Phnom Penh,<sup>2303</sup> including the targeting of Khmer Republic officials<sup>2304</sup> and discrimination against “New People”.<sup>2305</sup> Anyone resisting the evacuation was regarded as an enemy.<sup>2306</sup> The Co-Prosecutors have already demonstrated that Nuon Chea’s arguments to the contrary are unfounded.<sup>2307</sup>

ii. *Tuol Po Chrey*

546. Nuon Chea makes no meaningful challenge to the Chamber’s finding<sup>2308</sup> that he aided and

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<sup>2299</sup> Judgment, paras 889-890. See also *supra*, XX.E (Nuon Chea Instigating). See also Judgment, para. 104, *citing* **E3/785 Revolutionary Flag**, July 1973, ENG 00713996; Judgment, fn. 311 *citing* **E1/51.1 Duch**, T. 20 March 2012, p. 63 (“I was educated through the “Revolutionary Flag” concerning the evacuation of the population. People shall be evacuated when the enemy attacked. It is of course meant to ensure that the enemies would never have people to be on their side. So they would be isolated and helpless because they would have no people to support them.”); **E1/60.1 Duch**, T. 5 April 2012, p. 114 (“the CPK advised us in the “Revolutionary Flag” of the evacuation of the population from Borei, and when the people were evacuated the enemies were deprived of the people to control, so we had ample opportunity to attack them.”); **E1/97.1 Phy Phuon**, T. 26 July 2012, p. 32 (describing study sessions chaired by Pol Pot, Nuon Chea or Khieu Samphan discussing the CPK’s positive experiences with forced evacuations).

<sup>2300</sup> Judgment, para. 887. See also *supra*, XX.E (Nuon Chea Instigating).

<sup>2301</sup> Judgment, paras 265, 325-329, 347, 544-545, 738, 818. Contrary to Nuon Chea’s contention (NC Appeal, fn. 1805), the Chamber was correct to rely on evidence of conduct both “before and after crimes” (Judgment, para. 889). As the Chamber found, conduct occurring after the commission of a crime can fulfil the *actus reus* of aiding and abetting where such conduct had a substantial effect on the crimes charged (Judgment, para. 713). Only assistance, encouragement or moral support provided *exclusively* after the time of perpetration cannot satisfy this test. As the Chamber later explains, as a result of the pre-existence of the targeting policy to target Khmer Republic officials and Nuon Chea’s role in training and propaganda, the perpetrators anticipated and contemplated that Nuon Chea would continue to justify, encourage and look to win support for the revolution through his propaganda and indoctrination efforts (Judgment, para. 930). In any event, the Chamber’s finding that Nuon Chea aided and abetted the crimes committed during the Phase I population movement stands on the basis of his pre-April 1975 conduct.

<sup>2302</sup> Judgment, paras 878-883 (planning) and 884-886 (ordering).

<sup>2303</sup> Judgment, para. 890.

<sup>2304</sup> Judgment, paras 512-515.

<sup>2305</sup> Judgment, para. 517.

<sup>2306</sup> Judgment, para. 510.

<sup>2307</sup> Nuon Chea expressly incorporated by reference his arguments in relation to instigating. See NC Appeal, para. 672. See *supra*, XX.E (Nuon Chea Instigating)

<sup>2308</sup> Judgment, para. 928.

abetted the murder, extermination and persecution of Khmer Republic soldiers that took place in Tuol Po Chrey. The Co-Prosecutors have demonstrated that the Chamber was correct to find that Nuon Chea produced propaganda materials and led training sessions in the pre-April 1975 period which advocated the identification and elimination of Khmer Republic officials<sup>2309</sup> and that this continued throughout the DK period.<sup>2310</sup> The Chamber's finding that the plan to liberate the country contemplated and involved the arrest, execution and disappearance of Khmer Republic officials in conjunction with urban evacuations was correct.<sup>2311</sup>

*iii. Phase II Population Movement*

547. Nothing in Nuon Chea's Appeal challenges the Chamber's findings that "in propaganda materials and indoctrination sessions, he disseminated, endorsed, praised and encouraged the Party's economic policies providing for the strategic allocation of labour and class struggle".<sup>2312</sup> The Co-Prosecutors have already demonstrated that Nuon Chea failed to establish any error in the finding that "New People" were targeted as enemies during this period.<sup>2313</sup> Moreover, the Chamber cited ample evidence demonstrating that Nuon Chea's propaganda materials and indoctrination sessions supported the population movement policies and promoted the identification of and vigilance against class enemies.<sup>2314</sup> Moreover, the Chamber's finding that Nuon Chea aided and abetted the crimes committed during the Phase II population movement is bolstered by its findings that he planned and ordered the forced transfers between rural areas.<sup>2315</sup> The Chamber was rightly satisfied that Nuon Chea's actions had a substantial effect on the commission of crimes and encouraged lower-level Khmer Rouge officials and soldiers to act zealously in implementing the Party's policies.<sup>2316</sup>

<sup>2309</sup> Judgment, para. 928. See *supra*, XX.E (Nuon Chea Instigating).

<sup>2310</sup> Judgment, paras 265, 325-329, 544, 738, 818. With regard to aiding and abetting after the event, see *supra*.

<sup>2311</sup> See *supra*, XX.C (Nuon Chea Planning).

<sup>2312</sup> Judgment, para. 910, *citing* Judgment, paras 325-326, 738, 818.

<sup>2313</sup> See *supra*, XX.E (Nuon Chea Instigating).

<sup>2314</sup> See, e.g., Judgment, paras 108-109, 113, 265, 325-329, 544-545, 738, 818, fns 329, 332, 339, 496, 1750, 1762, 1869, 1872, 1874, 1877, 1907, 1908, 1923-1925, 1928-1929, 1931, 1933, 1934-1936, 1938, 1963, 2261, 2277, 2430, 2485, 2495, 2567, 2581-2582.

<sup>2315</sup> Judgment, paras 899-904 (planning), 905-907 (ordering).

<sup>2316</sup> Judgment, para. 911.

**G. The Chamber correctly defined the *mens rea* of planning, ordering, instigating, and aiding and abetting (NC Ground 218, KS paras 75-92)**

548. Contrary to the Appellants' contention,<sup>2317</sup> the Chamber's holding that the *mens rea* for ordering, planning, and instigating liability was "awareness of a substantial likelihood" of the commission of a crime is supported by the jurisprudence of post-World War II cases, the jurisprudence of the *ad hoc* tribunals and domestic practice. No jurisdictions, national or international, before or after 1975, limit responsibility for these modes to only those with direct intent and would acquit one who orders, plans or instigates actions aware of the substantial likelihood that a crime will result. The Appellants fail to prove any error in the Chamber adopting the "substantial likelihood standard".

549. The IMT Judgment indicates that the *mens rea* for planning, ordering, and instigating was awareness of a substantial likelihood that a crime will be committed as a result of the defendant's conduct. While the IMT did not precisely outline the modes of liability under which it convicted defendants, several convictions were clearly based on indirect modes of commission and focused primarily or exclusively on defendants' knowledge that conduct would likely lead to the commission of crimes, without a showing of direct intent.

550. In convicting Alfred Rosenberg of, *inter alia*, ordering and planning crimes against humanity and war crimes, the IMT did not find that Rosenberg intended for such crimes to be committed. Indeed, the IMT even conceded that "[u]pon occasion Rosenberg objected to the excesses and atrocities committed by his subordinates."<sup>2318</sup> Rosenberg's convictions rested on the IMT's finding that he issued orders with "*knowledge* of the deportation of laborers from the East, of methods of 'recruiting' and the transportation horrors, and of the treatment Eastern laborers received in the Reich."<sup>2319</sup>

551. Similarly, in finding Albert Speer guilty of ordering and planning crimes connected to the Third Reich's slave labour program, the IMT acknowledged that Speer did not appear to intend the cruelty of the slave labour program but found that he was "aware of [the slave labor program's] existence" and "knew when he made his [labor] demands on [his subordinate] that they would be supplied by foreign laborers serving under compulsion."<sup>2320</sup> Walther Funk was

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<sup>2317</sup> NC Appeal, paras 674-679; KS Appeal, paras 75-92.

<sup>2318</sup> *IMT Volume I*, 1 October 1946, p. 296 (emphasis added).

<sup>2319</sup> *IMT Volume I*, 1 October 1946, p. 296 (emphasis added).

<sup>2320</sup> *IMT Volume I*, 1 October 1946, pp. 331-332.

convicted by the IMT for ordering and planning the receipt by the Reichsbank of belongings taken from victims of the concentration camps, and for ordering and planning the deportation of forced labourers.<sup>2321</sup> The IMT conceded that Funk “did not appear to be particularly interested” in the forced labour program, but was liable nonetheless because he “was aware that the board of which he was a member was demanding the importation of slave laborers and allocating them to the various industries under its control.”<sup>2322</sup> As with Speer and Funk, Fritz Sauckel was convicted for issuing quotas and decrees that he knew would be filled through forced labor. The Tribunal found that Sauckel “was aware of the ruthless methods being taken to obtain laborers,”<sup>2323</sup> and “was informed of the bad conditions which existed.”<sup>2324</sup> Although the Tribunal conceded that Sauckel had not appeared to “advocate ... brutality for its own sake,”<sup>2325</sup> he was convicted.

552. The ICTY *Blaškić* Appeal Judgment held that the *mens rea* for ordering, based on the state practice of a number of common and civil law countries, is awareness of a substantial likelihood that a crime will be committed as a result of the order.<sup>2326</sup> Nuon Chea challenges the applicability of *Blaškić* because most of the national jurisdictions’ codes are dated after 1975,<sup>2327</sup> but he fails to show that any of these jurisdictions had changed their fundamental approach and used different *mens rea* standards before that date.<sup>2328</sup>

553. Finally, there is consistent agreement among the Appeals Chambers of the ICTY and ICTR that awareness of substantial likelihood, and not direct intent, is the requisite *mens rea* for ordering, planning, and instigating.<sup>2329</sup> The SCSL shares this understanding of the *mens rea*,<sup>2330</sup> which has been adopted by the Chamber.<sup>2331</sup> There is no evidence that the *mens rea* agreed upon by the other *ad hoc* tribunals is derived from any new developments in customary international law in the years after the ECCC’s jurisdiction.

<sup>2321</sup> *IMT Volume I*, 1 October 1946, pp. 305-306.

<sup>2322</sup> *IMT Volume I*, 1 October 1946, p. 306.

<sup>2323</sup> *IMT Volume I*, 1 October 1946, p. 321.

<sup>2324</sup> *IMT Volume I*, 1 October 1946, p. 321.

<sup>2325</sup> *IMT Volume I*, 1 October 1946, p. 321.

<sup>2326</sup> *Blaškić* AJ, paras 34-42.

<sup>2327</sup> NC Appeal, para. 678.

<sup>2328</sup> All of the jurisdictions cited in *Blaškić* utilised the substantial likelihood standard before 1975 but page limitations require the OCP to remove those details in this response.

<sup>2329</sup> See, e.g., *Nahimana* AJ, paras 479-81; *D. Milošević* AJ, para. 268; *Nchamihigo* AJ, para. 61; *Kordić* AJ, paras 26-30; *Blaškić* AJ, paras 33-42.

<sup>2330</sup> *Sesay* TJ, paras 268, 271, 274.

<sup>2331</sup> *Duch* TJ, paras 519, 524, 528; Judgment, paras 698, 700, 702.

554. Khieu Samphan further contends that a memorandum submitted by the UN Secretary-General in 1949 points to a *mens rea* of direct intent for planning convictions.<sup>2332</sup> However, the language quoted by Khieu Samphan refers to the elements required for convictions for conspiracy to commit aggressive war and is inapposite in the present context. The crime of aggressive war is distinct from crimes against humanity, and the mode of liability of conspiracy is distinct from planning liability. The requirements for conspiracy to commit aggressive war are not directly applicable to the *mens rea* for planning crimes against humanity. In any event, the language quoted by the Secretary-General indicates only *knowledge*, not intent, as the requisite *mens rea* for conspiracy to commit aggressive war.<sup>2333</sup>

555. Nuon Chea's alternative argument, that the Chamber erred in finding he was aware of the substantial likelihood that crimes would be committed,<sup>2334</sup> is addressed elsewhere in this Response.<sup>2335</sup>

556. Khieu Samphan contends that the Chamber incorrectly articulated the *mens rea* for aiding and abetting<sup>2336</sup> by stating that an accused "must know that a crime would likely be committed and that his conduct assists or facilitates the commission of a crime".<sup>2337</sup> He contends that an accused must *know* that his acts will assist in the commission of a crime.<sup>2338</sup> These arguments are incorrect.

557. The *Duch* Trial Judgment set out the proper standard: "[l]iability for aiding and abetting a crime requires proof that the accused *knew that a crime would probably be committed*, that the crime was in fact committed, and that the accused *was aware that his conduct assisted the commission of that crime*."<sup>2339</sup> Thus, there are two separate elements to the *mens rea*. An accused has to know that the commission of a crime is *probable*, and has *to be aware* that his assistance will facilitate the crime. Khieu Samphan tries to conflate these two elements and argue that an accused must be *certain* that a crime will be committed. As a matter of practice, absolute

<sup>2332</sup> KS Appeal, para. 77, quoting The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum Submitted by the Secretary General, 1949, UN Doc. A/CN.4/5, pp. 53-54.

<sup>2333</sup> KS Appeal, para. 77, quoting The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum Submitted by the Secretary General, 1949, UN Doc. A/CN.4/5, pp. 53-54.

<sup>2334</sup> NC Appeal, para. 680.

<sup>2335</sup> See *supra* XX.B (Joint Criminal Enterprise – Nuon Chea's Intent); and XX.I (Nuon Chea knew or had reason to know that crimes would be, were being or had been committed).

<sup>2336</sup> KS Appeal, paras 87-88.

<sup>2337</sup> Judgment, para. 704.

<sup>2338</sup> KS Appeal, para. 88.

<sup>2339</sup> *Duch* TJ, para. 535 (emphasis added).

certainty as to a crime being committed in the future is impossible, given the possibility of intervening events. And indeed, international jurisprudence does not support Khieu Samphan's position.: the *Blaškić* Appeal Judgment correctly set out that aiding and abetting liability results when an accused "is aware that one of a number of crimes *will probably be committed*, and one of those crimes is in fact committed".<sup>2340</sup> The *Blaškić* Appeals Chamber cited (and quoted) the *Furundžija* Trial Judgment for this proposition; the *Furundžija* Trial Chamber, in turned, reached this conclusion following a lengthy survey of post-World War II cases.<sup>2341</sup> Thus, the *Duch* Trial Chamber's formulation is solidly grounded on customary international law that had crystallised by the post-World War II period.

**H. Nuon Chea exercised effective control over persons responsible for the crimes committed during the population movements and at Tuol Po Chrey (NC Grounds 219, 220)**

558. In Ground 219 of his Notice, Nuon Chea challenges the Chamber's articulation of the elements of superior responsibility but patently fails to meet the standard of review by failing to present any arguments in support of the allegations in his Appeal and failing to explain how the alleged errors invalidate the Judgment.<sup>2342</sup>

559. Contrary to Nuon Chea's argument,<sup>2343</sup> the Chamber explicitly referred to its consideration of the "accused's ability to exercise *effective control* over subordinates, that is *the actual power to take reasonable and necessary measures to prevent or punish the crimes*."<sup>2344</sup> The Chamber found that due to the superior-subordinate relationship between Nuon Chea and Zone Secretaries and military commanders, it was not possible for Zone commanders to act against the policies

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<sup>2340</sup> *Blaškić* AJ, para. 50, citing *Furundžija* TJ, para. 246 (emphasis added). Importantly, in the same judgment, the ICTY Appeals Chamber *also* endorsed the following formulation of the *mens rea* of aiding and abetting: "In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal." *Blaškić* AJ, para. 45. The fact that the ICTY Appeals Chamber endorsed both of these formulations simultaneously makes it clear that what an accused is required to *know* (with something more than probability) is that his act will assist the perpetration of a crime. He is *not* required to *know* that the crime will be committed – he is simply required to appreciate that it is *probable* that the crime will be committed, and that, if it is committed, that his acts will have assisted in the commission of the crime.

<sup>2341</sup> *Furundžija* TJ, paras 236-249.

<sup>2342</sup> As the SCC has determined: "if any ground of appeal is not further substantiated with supporting reasoning it shall be considered as abandoned." F18/3 Decision on Co-Prosecutors' Requests Relating to Khieu Samphan's Appeal Brief, 16 January 2015.

<sup>2343</sup> NC Appeal, paras 682-683.

<sup>2344</sup> Judgment, para. 892 (emphasis added). The word "actual" is not determinative of the test applied.

laid down by the Centre<sup>2345</sup> (establishing the ability to prevent crimes). Further, the Chamber found that and that Nuon Chea had *de facto* and *de jure* authority to discipline military and Party members,<sup>2346</sup> (establishing the ability to punish crimes). There is no question that the Chamber articulated and applied the effective control test and committed no error of law

560. Nuon Chea's argument concerning remoteness<sup>2347</sup> is vague. The sufficiency of the superior's 'link of control' is part and parcel of the effective control assessment, not a separate material element.<sup>2348</sup> Nuon Chea's contention that the Chamber erred in law and fact in failing to "attempt to find how [he], as a civilian leader, exercised control over armed forces similar to that of military commanders"<sup>2349</sup> is equally without merit. Again, this is not an additional material element of superior responsibility that the Chamber had to consider expressly. As the Chamber articulated, "[r]egardless of whether an accused is a civilian or military superior, the duty to act arises from a superior's effective control over his subordinate and his material ability to prevent or punish a crime."<sup>2350</sup> The *degree* of effective control exercised by a civilian superior need only be similar to that exercised by a military superior; it does not need to be of the same *nature*.<sup>2351</sup>

*i. Phase I Population Movement*

561. The Chamber identified two categories of superior-subordinate relationships based on effective control: (i) between Nuon Chea and the Zone Secretaries and military commanders;<sup>2352</sup>

<sup>2345</sup> Judgment, para. 894.

<sup>2346</sup> Judgment, paras 895-896.

<sup>2347</sup> NC Appeal, para. 684.

<sup>2348</sup> When read in context, the excerpt from *Čelebići* relied on by Nuon Chea supports this position. See *Čelebići* AJ, para. 197, quoting *Čelebići* TJ, paras 377-378 ("While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote. Accordingly ... in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.") (Emphasis added).

<sup>2349</sup> NC Appeal, para. 685, quoting *Čelebići* AJ, para. 197 ("the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders").

<sup>2350</sup> Judgment, para. 720, citing, *inter alia*, *Čelebići* AJ, para. 197. See also *Bagilishema* AJ, para. 50: "The effective control test applies to all superiors, whether *de jure* or *de facto*, military or civilian"; *Brima* AJ, para. 257: "The test of effective control is the same for both military and civilian superiors" and *Čelebići* AJ, para. 198: "As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control."

<sup>2351</sup> See also *Bagilishema* AJ, paras 52, 55; *Nahimana* AJ, para. 605; *Kajelijeli* AJ, para. 87.

<sup>2352</sup> Judgment, paras 893-894.

and (ii) between Nuon Chea and Khmer Rouge cadres.<sup>2353</sup>

a. Zone secretaries and military commanders

562. As the Chamber noted,<sup>2354</sup> Nuon Chea's position of authority<sup>2355</sup> within the CPK – as Deputy Secretary from 1960 and throughout the DK regime,<sup>2356</sup> and full rights member of both the Central and Standing Committees<sup>2357</sup> - was second only to Pol Pot.<sup>2358</sup> The Chamber found that Nuon Chea, together with Pol Pot, “exercised the ultimate decision-making power of the Party.”<sup>2359</sup> In this role, he was superior to and exercised effective control over all Zone Secretaries, including those who led the evacuation of Phnom Penh.<sup>2360</sup> Nuon Chea's analysis overlooks that only two Zone Secretaries were members of the Standing Committee,<sup>2361</sup> and that Ta Mok and Sao Phim, although members of the Standing Committee, were obligated to implement orders from the Standing Committee when operating in their capacity as Zone Secretaries.

563. As a member of the Standing Committee, Nuon Chea issued instructions and orders<sup>2362</sup> to Zone Secretaries.<sup>2363</sup> By his own admission, “members of the Standing Committee and the

<sup>2353</sup> Judgment, paras 895-896.

<sup>2354</sup> Judgment, para. 893.

<sup>2355</sup> It is well established that *de jure* authority is a relevant factor in the determination of effective control. See *Čelebići* AJ, para. 197 (“a court may presume that possession of [de jure power] *prima facie* results in effective control unless proof to the contrary is produced.”).

<sup>2356</sup> Judgment, paras 87, 89, 202, 304, 308, 312-313, 316, 326, 348, 726-727, 847, 861, 863, 868, 875, 893, 913.

<sup>2357</sup> Judgment, paras 315, 847, 868, 875, 878, 893, 902.

<sup>2358</sup> Note that Nuon Chea and Pol Pot agreed that they would work together (Judgment, para. 313) and never argued (NC Appeal, para. 250).

<sup>2359</sup> Judgment, para. 348. See *supra* XVIII.C (Nuon Chea as ultimate decision-maker).

<sup>2360</sup> Judgment, paras 460-461, 470.

<sup>2361</sup> *Cf.* NC Appeal, fn. 1854. Although most were members of the Central Committee (Judgment, para. 219), the Chamber demonstrated that effective control of the Party rested *de facto* with the Standing Committee (Judgment, paras 203, 223). The Chamber found that, in April 1975, only Ta Mok and Sao Phim were full-rights members of the Standing Committee (Judgment, paras 203, 219, 745) and Vorn Vet was either a candidate or full-rights member (Judgment, paras 203, 745). Ros Nhim, Koy Thuon and the other Zone Secretaries were not members at all.

<sup>2362</sup> The capacity to issue orders is an indicium of effective control. See, e.g., *Hadžihasanović* AJ, para. 199; *Halilović* AJ, para. 70; *Bemba* Confirmation Decision, para. 417. Nuon Chea's reliance (NC Appeal fn. 1876) on *Hadžihasanović* AJ, para. 200 to support a contention that neither instructions nor sanctions against subordinates suffice to establish effective control, is misplaced. That case established that, in that very specific factual scenario, a single order to the *El Mujahedin* forces which it followed was not, in the context of a previously co-operative relationship, sufficient to establish re-subordination. This is not inconsistent with the well-established position in law that the ability to issue orders and demonstrated ability to discipline troops are important indicia of effective control.

<sup>2363</sup> Judgment, fn. 949, citing **E3/4017** Khieu Samphan Interview Transcript, ENG 00793527 (indicating that, in 1967, at the time of a rebellion in Samlaut, Nuon Chea instructed Ros Nhim and Kong Sophal, on behalf of the Party leadership, to suspend the armed struggle). See also **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, at ENG 00396366. See further **E3/4202** Gina Chon and Thet Sambath, *Behind the Killing Fields*, ENG 00757532-33 (Nuon



Central Committee were *instructed* to disseminate information in their respective zone regarding the decision [to evacuate Phnom Penh]” after the June 1974 meeting.<sup>2364</sup> Zone Secretaries received assignments on military operations from the Party Centre before April 1975.<sup>2365</sup> The same authority structure continued throughout the DK period, with instructions and directives of the Party Centre sent directly to Zone offices for implementation.<sup>2366</sup> Nuon Chea’s July 1977 West Zone Conference speech exemplifies the Party Centre’s supervisory authority over the Zones.<sup>2367</sup>

564. As the Chamber found, zones and autonomous sectors also reported<sup>2368</sup> directly to the Party Centre<sup>2369</sup> including, by Nuon Chea’s own admission, in the pre-April 1975 period.<sup>2370</sup> Notably, at the April 1975 meeting, the leaders reported to Nuon Chea and other senior leaders on the progress of the Khmer Rouge advances.<sup>2371</sup> Nuon Chea fails to effectively impugn Phy Phuong’s

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Chea describing Koy Thuon’s role in leading a student protest in the 1960s: “We told him not to do this again”).

<sup>2364</sup> Judgment, para. 141, *citing* **E1/22.1** Nuon Chea, T. 14 December 2011, pp. 2-4. See also Judgment, fn. 2331 *citing* **E3/2782** Ke Pauk Autobiography, undated, ENG 00089711 (“Koy Thuon was ordered to take charge [of] my troops moving into Phnom Penh.”).

<sup>2365</sup> See Judgment, fn. 2331, *citing* **E3/2782** Ke Pauk Autobiography, undated, ENG 00089710-11 (describing orders given to him and to Koy Thuon between 1972 and 1974).

<sup>2366</sup> See Judgment, para. 280. This is also reflected in the Zones’ requests for instructions: see Judgment, para. 278. See also **E1/117.1** Norng Sophang, T. 29 August 2012, pp. 48-51 (describing directives from the “upper authority” (Office 870, including Nuon Chea) to the “lower authority” (the Zones and autonomous sectors)); **E1/120.1** Norng Sophang, T. 3 September 2012, p. 77; **E3/1734** Instruction of Office 870, 3 January 1978; **E3/67** Norng Sophang Interview Record, ENG 00483968-69, 00483972-73 (describing the Zones being “under Committee 870” (including Nuon Chea) who issued them with directions). Each telegram went to the Zone Secretary. See **E1/154.1** Suon Kanil, T. 14 December 2012, p. 93 (“Every telegram that sent to the zone had to be sent directly to [Ke Pauk], and then, after receiving the telegrams, he would then send them to his telegram decoder so that they could be decoded into letters”).

<sup>2367</sup> **E3/193** *Revolutionary Flag*, August 1977, ENG 00399222 (stating at the very outset that it was a “presentation regarding the instructions of the Party on a number of important matters for implementation in the second semester of 1977”).

<sup>2368</sup> *Cf.* NC Appeal, para. 690. Nuon Chea fails to explain why reporting procedures are irrelevant to effective control. Indeed, in *Hadžihasanović* AJ, para. 211, the ICTY Appeals Chamber considered evidence of reporting to be relevant to its deliberations on effective control.

<sup>2369</sup> Judgment, para. 274. Oeun Tan, the head of the K-I guard unit, testified that all telegrams and letters were first delivered to Pol Pot and then to Nuon Chea: **E1/86.1** Oeun Tan, T. 13 June 2012, pp. 63-65, 100-101; **E3/33** Oeun Tan Interview Record, ENG 00235132-33.

<sup>2370</sup> **E1/17.1** Nuon Chea, T. 6 December 2011, pp. 14-15. See also Judgment, para. 146 and fn. 2289, *citing* **E1/97.1** Phy Phuong, T. 26 July 2012, pp. 9-10 (stating there were regular meetings at the centre level with leaders of the Zones). See also p. 11 (describing reports from the Zones during regular pre-April 1975 meetings at the “centre level”), p. 14 (accounts of prior experience of conducting evacuations) and p. 23 (reports on the battlefield situation). See also **E1/117.1** Norng Sophang, T. 29 August 2012, pp. 59-60 (describing “zones and armies who were reporting to the upper authorities”); **E1/189.1** Philip Short, T. 6 May 2013, p. 67 (“Q ... Did (the revolutionary army) also report to the Standing Committee? A. Yes, commanders and the zone leaders and zone military commanders would send telegrams to 870”). As early as 1972, the Party Centre set out a specific reporting format, requiring reports to cover “the enemy, people, all working activities and resolutions and directions”. See Judgment, para. 275 *citing* **E3/783** *Revolutionary Flag*, September-October 1972, pp. 25, 28.

<sup>2371</sup> Judgment, para. 893, *citing* Judgment, paras 144-6. See also Judgment, para. 739.

evidence,<sup>2372</sup> which is entirely consistent with other evidence relied on by the Chamber demonstrating the reporting during this period. This reporting practice continued throughout the DK era, in the form of reports, telegrams<sup>2373</sup> and meetings.<sup>2374</sup>

565. Nuon Chea had the power to demote and promote<sup>2375</sup> any of these individuals. The Chamber relied on evidence showing that Nuon Chea was in charge of recruitment of new Party members.<sup>2376</sup> It also found that his responsibilities extended to the discipline of cadres and other internal security matters.<sup>2377</sup> Nuon Chea's role in later purging Ros Nhim,<sup>2378</sup> Sao Phim,<sup>2379</sup> Vorn

<sup>2372</sup> The detail with which Phy Phoun described the whole meeting belies any assertion that he was not in a position to describe this reporting. Indeed, Phy Phoun clearly described reports on the battlefield situation (Judgment, para. 146, *citing* E1/97.1 Phy Phoun, T. 26 July 2012, p. 23) as well as accounts of prior experience of conducting evacuations (Judgment, para. 146, *citing* E1/97.1 Phy Phoun, T. 26 July 2012, p. 14). This is sufficient evidence of the reporting that took place and Nuon Chea's assertion that more detail is required is unsupported.

<sup>2373</sup> Judgment, paras 278, 773. Numerous of these telegrams and reports contain distribution lists or annotations specifically confirming that a copy of the document was provided to Nuon Chea (see Judgment, paras 279, 337). See also E3/154 Telegram from Sao Phim (Chhon) to Brother Pol, 30 November 1975 (concerning the transfer of 50,000 people to the Central (old North) Zone); E3/1119 Telegram from Nhim to Angkar 870, 20 October 1977; E3/892 Telegram from Chhon to Office 870, 29 October 1977.

<sup>2374</sup> See, e.g., E3/2782 Ke Pauk Autobiography, ENG 00089713 (Central (old North) Zone Secretary Ke Pauk describing being called to a meeting in Phnom Penh in early 1977 by Nuon Chea and Pol Pot to discuss the purge of his zone, at which the "upper brothers" presented Pauk with detailed documents listing the Zone cadres "accused of being CIAs."); E1/83.1 Sao Sarun, T. 7 June 2012, pp. 55-58 (Autonomous Sector 105 Secretary Sao Sarun describing meetings in Phnom Penh with leaders, including Nuon Chea, at which he reported, *inter alia*, on "the livelihood and welfare of the people in [the] sector"); E1/84.1 Sao Sarun, T. 11 June 2012, pp. 5-9 (describing instructions he received from the leaders, including Nuon Chea, during meetings in Phnom Penh); E3/367 Sao Sarun Interview Record, ENG 00278696 (describing two meetings in Phnom Penh: one with Pol Pot, Nuon Chea, Khieu Samphan and Son Sen at which Sao Sarun reported on "activities at the Sector" and was instructed to strengthen the economy and resist against Vietnam and the other with Pol Pot, Nuon Chea and Son Sen at which he was advised to strengthen his forces and strategies to resist Vietnam); E3/232 Standing Committee, Minutes of Meeting on Base Work, 8 March 1976, ENG 00182630-33 (Autonomous Sector 103 and 106 Secretaries reporting to Standing Committee and receiving "opinions and instructions" from Angkar).

<sup>2375</sup> The power to demote and promote as an indicium of effective control was confirmed in *Ndahimana* AJ, para. 54; *Bemba* Confirmation Decision, para. 417.

<sup>2376</sup> Judgment, para. 328. In practice, the Party Centre would appoint new secretaries, deputy secretaries or members of the Zone Committees (or Autonomous Sectors) when needed. E3/420 Prom Sou Interview Record, ENG 00422380-82 ("Ta Nuon Chea announced the establishment of New North Zone and appointed Ta Kang Chap *alias* Se the secretary of New North Zone and Ta Khim the secretary of Sector 103."); E1/194.1 Prom Sou, T. 21 May 2013, p. 34 ("Nuon Chea made an announcement to appoint Kang Chap as the chairman of the zone"); E1/84.1 Sao Sarun, T. 11 June 2012, p. 26 ("My appointment was announced during the [Party] congress held in September 1978."); E3/424 Meas Voeun Interview Record, ENG 00421072 (Paet Soeung was "nominated" as new North Zone Chairman at meeting in Siem Reap attended by Pol Pot and Ta Mok); E3/409 Seng Soeun Interview Record, 11 November 2009, ENG 00412180 (Last Secretary of autonomous Sector 505 received his appointment papers from the CPK Central Committee prior to transfer to Kratie); E3/367 Sao Sarun Interview Record, ENG 00278695 ("In late 1977 or early 1978 after the death of Ta Laing ... I met with Pol Pot, Son Sen and Nuon Chea and Pol Pot ... convinced me to work and replace Laing"), 00278695-96 ("At the nationwide assembly ... in September ... they declared to appoint me as secretary of Sector 105 ... Pol Pot made the announcement and Ieng Sary, Ieng Thirith, Khieu Samphan and Nuon Chea were also in the chairmanship sitting next to him.").

<sup>2377</sup> Judgment, para. 329. *Cf.* NC Appeal, para. 693. The Co-Prosecutors have already addressed Nuon Chea's contentions that these findings are erroneous. See *supra* XVIII.B (Nuon Chea's Role in Discipline and Internal Security).

Vet and Koy Thuon<sup>2380</sup> demonstrates the extraordinary power he wielded that allowed him to demote, arrest, detain and execute Zone Secretaries.<sup>2381</sup> S-21 Chairman Duch confirmed the authority of the Standing Committee to order arrests, testifying that decisions to arrest Central Committee members and other “key people”, including Zone Secretaries, were made by the Standing Committee.<sup>2382</sup> The Chamber correctly agreed with expert Philip Short’s testimony that “[i]t would not have been possible for Zone commanders to act against or outside the broad policy consensus which had been laid down by the Centre.”<sup>2383</sup>

566. As the Co-Prosecutors have already established,<sup>2384</sup> Nuon Chea’s claims regarding Zone commanders who were members of the Standing Committee leading an ‘open armed struggle’ have no basis in the evidence. What resistance there was to Centre purges took place long after the crimes in Case 002/01 were committed. Allegations that Nuon Chea was “afraid of Ta Phim” are belied by the Chamber’s finding regarding Nuon Chea’s role in the purge of the entire East Zone in 1978.<sup>2385</sup> Clearly, these unsubstantiated claims could have no impact upon the Chamber’s finding that Nuon Chea exercised effective control over these individuals.

567. Abundant evidence supports the Chamber’s finding that Nuon Chea exercised effective control over military commanders. In the years preceding the attack on Phnom Penh, Khmer Rouge forces acted pursuant to a number of orders emanating from the Party Centre, including

<sup>2378</sup> See *infra* fn. 2380.

<sup>2379</sup> Sao Phim died when his arrest by Party Centre forces was imminent during the purge of the East Zone overseen by Nuon Chea in mid-1978. See Judgment, para. 340.

<sup>2380</sup> Nuon Chea has himself admitted his involvement in the purging of some of the highest-ranking CPK members. See **E3/4202** Thet Sambath, *Behind the Killing Fields*, ENG 00757530 (“‘We never accused any top leader without evidence and witnesses,’ Nuon Chea said. ‘We knew clearly about their betrayal and plans to topple the regime and kill innocent people in the provinces without the center’s orders and knowledge. Pol Pot had evidence and witnesses so he decided to arrest them. I have no regrets because when I read the confessions it was very clear what they were doing.’ ... Nuon Chea does not deny that [Koy Thuon, Vorn Vet and Ros Nhim] were killed in purges ordered by the leadership, and reiterates that they were traitors and needed to be smashed.”); ENG 00757531 (“Nuon Chea said he was not particularly disturbed when his former comrades and friends were executed. ‘The party decided to kill them because they were betraying the party and the nation. I was not scared or sad when they were killed. They had done wrong and betrayed us, so they received the kind of treatment they deserved.’”).

<sup>2381</sup> See also **E3/342** Revised S-21 Prisoner List [OCP Analysis], ENG 00329661 (No. 1509 - West Zone Secretary, Chou Chet *alias* Sy); **E3/1682** S-21 Confession of Chou Chet *alias* Sy, 20 May 1978.

<sup>2382</sup> **E3/453** Duch Interview Record, ENG 00147583; **E3/5799** Case 001 Trial Transcript, Duch, 15 June 2009, pp. 15-16, ENG 00341700-01.

<sup>2383</sup> Judgment, para. 894, *citing* **E1/191.1** Philip Short, T. 8 May 2013, p. 142. *Cf.* NC Appeal, para. 691. The Nuon Chea Defence agreed that, in light of his expertise on the subject, Philip Short could offer general testimony regarding the CPK and the state of affairs in the DK (**E215** Decision on Assignment of Expert, 5 July 2012). Indeed, in his Appeal, Nuon Chea criticised the Chamber for not relying on Short’s view that Nuon Chea had no role in military policy: NC Appeal, para. 264.

<sup>2384</sup> See *supra*, XIII (CPK Structure).

<sup>2385</sup> Judgment, para. 340. *Cf.* NC Appeal, para. 692.

Nuon Chea.<sup>2386</sup> Son Sen, the chief of the General Staff, was only a candidate or alternate member of the Standing Committee,<sup>2387</sup> and the evidence establishes his subordination to Nuon Chea.<sup>2388</sup> Son Sen reported to the Standing Committee on military affairs and matters of national defence,<sup>2389</sup> and forwarded reports received from military commanders to senior CPK leaders, including Nuon Chea, with requests for instructions.<sup>2390</sup>

b. Khmer Rouge cadres

568. In finding that Nuon Chea exercised effective control over Khmer Rouge cadres, the Chamber correctly relied on his responsibility for the discipline of cadres<sup>2391</sup> and his role in the recruitment of new Party members.<sup>2392</sup> The CPK Statute provided for sanctions in the case of a violation of Party discipline by a Party member,<sup>2393</sup> and by his own admission Nuon Chea was in a position to and did discipline Khmer Rouge cadres.<sup>2394</sup> The authority to punish is also shown

<sup>2386</sup> Judgment, para. 893. See also Judgment, para. 739. The Chamber cited evidence showing that, as the attack on Phnom Penh was underway, the Khmer Rouge military leaders were waiting for the arrival of the “top political and governmental leaders” to decide the fate of the officials gathered at the Ministry of Information. See Judgment, fn. 2331 *citing* E1/201.1 Sydney Schanberg, T. 5 June 2013, pp. 46-47. See also E236/1/4/3.1 Sydney Schanberg, Cambodia Diary 1975, ENG 00898278; E3/51 Jon Swain Diary, London Times, 11 May 1975, ENG S 00003278.

<sup>2387</sup> Judgment, paras 87, 203, 745.

<sup>2388</sup> E3/453 Duch Interview Record, ENG 00147584 (“Son Sen was the 7<sup>th</sup> person, but Nuon Chea was the 2<sup>nd</sup> person. Everything had to pass through Nuon Chea even if it was in scope of the military”; “Nuon Chea was the superior of Son Sen”); E3/1579 Duch Interview Record, ENG 00398206 (stating that Nuon Chea was “the superior of my superior”); E1/54.1 Duch, T. 27 March 2012, p. 48 (“Brother Nuon was the – was in higher position than Brother Khieu”); E1/62.1 Duch, T. 10 April 2012, pp. 92-93 (“above Son Sen was Brother Nuon ... and that was commonly known”).

<sup>2389</sup> Judgment, para. 295. Note the request by Son Sen for opinion of Angkar at E3/229 Standing Committee Meeting Minutes, 22 February 1976, ENG 00182625. In the same regard, see E3/217 Standing Committee Meeting Minutes, 11 March 1976, ENG 00182635.

<sup>2390</sup> Judgment, para. 295. See also E3/1135 DK Telegram, cited by the Chamber at fn. 1026 demonstrating that Son Sen needed to report to and obtain the authority of Nuon Chea in order to investigate the security issue raised in Meas Mut’s report; E1/117.1 Norng Sophang, T. 29 August 2012, pp. 59-60 confirming that in the pre-April 1975 period, reports relating to the army were sent by Son Sen, who had “direct communication with the leaders at the upper authorities”.

<sup>2391</sup> Judgment, para. 895, *citing* Judgment, paras 328-329.

<sup>2392</sup> Judgment, para. 328.

<sup>2393</sup> Judgment, para. 895, *citing* Judgment, para. 755, *referring to* E3/130 CPK Statute, Article 4 (Party Discipline), ENG 00184033.

<sup>2394</sup> E3/4001R *Enemies of the People*, Additional Footage: One Day at Po Chrey (“had I known then, we would have taken preventive measures to stop that kind of killing”); E3/108 Khieu Samphan and Nuon Chea Interviews by Meng-Try Ea and Sopheak Loeung, 9-11 June 2006, ENG 00000932 (“Meng-Try: How did you deal with the bad comrades? Nuon Chea: I reeducated them. It was hard job. Meng-Try: What did you do? Nuon Chea: I reeducated them and did not allow them to stay in their positions.”); E3/26 Nuon Chea Interview, October 2006, ENG 00329518 (asserting that members of the army known to have committed crimes were “taken for re-education, criticism, or were punished”); E3/4202 Thet Sambath, *Behind the Killing Fields*, ENG 00757537 (“Nuon Chea said when he read these confessions, he made marks on the documents with a red pen to show they were invalid and that the prisoner was not guilty.”).

by the evidence of purges of Party cadres conducted by the Standing Committee.<sup>2395</sup>

ii. *Tuol Po Chrey*

a. Ros Nhim

569. Nuon Chea's effective control over Ros Nhim before and after the massacre at Tuol Po Chrey was plainly demonstrated by the material relied on by the Chamber, as well as other evidence on the record. The Chamber correctly found that Nuon Chea had authority and control over Ros Nhim long before 17 April 1975, based on their regular meetings,<sup>2396</sup> during which Nuon Chea gave direct orders, for example regarding the 1967 Samlaut rebellion.<sup>2397</sup> Although Ros Nhim was a member of the Central Committee in 1975, he was not a member of the Standing Committee.<sup>2398</sup> As with all Zone Secretaries, this hierarchical relationship played out at many of the major CPK meetings, which Nuon Chea chaired and Ros Nhim attended.<sup>2399</sup>

<sup>2395</sup> **E3/2782** Ke Pauk Autobiography, ENG 00089713 (Central (old North) Zone Secretary Ke Pauk describing being called to a meeting in Phnom Penh in early 1977 by Nuon Chea and Pol Pot to discuss the purge of his zone); **E3/232** Standing Committee Minutes of "Meeting on Base Work", 8 March 1976; **E152.1.27.1** Khieu Samphan Interview, ENG 00792450 (transcript of video E152.1.27R); **E152.1.38.1** Khieu Samphan Interview, ENG 00789052 (transcript of video E152.1.38R) ("the Standing Committee decided to arrest Chan Chakrei"); **E1/61.1** Duch, T. 9 April 2012, pp. 19-20 (stating that the Standing Committee decided to arrest Chhouk); **E3/61** Duch Interview Record, ENG 00195577-78; **E3/5790** Duch Interview Record, ENG 00414345; **E3/1550** Letter from Hu Nim *alias* Phoas, 10 April 1977, ENG 00249844-45 (letter indicates that Hu Nim was arrested when "Pang called me on the phone to work with Angkar"); **E3/1154** Letter from Kol to Bang Pol, Bang Nuon and Bang Phim, 15 March 1977, ENG 00810051-52 ("implicated" cadre writing directly to Pol Pot, Nuon Chea and Sao Phim to assert that he was "not involved with the enemy betraying the Party"); **E3/1870** Note from Pon to Chey Suon *alias* Non Suon, 15 November 1976, ENG 00096849 (when Minister of Agriculture Chey Suon protested his innocence after being sent to S-21, he was informed that his detention was "decided on by the Standing Committee of the Party Centre"); **E3/426** Lonh Dos Interview Record, ENG 00346072 (stating that Son Sen reported to the Party Centre, who approved decisions "to arrest the implicated cadre"); **E3/531** List entitled "Annex 49 - S-21 Prisoners coming from the Northwest Zone" (1,200 Northwest Zone cadres detained and executed at the security office that reported directly to the Standing Committee).

<sup>2396</sup> Judgment, para. 933 *citing* Judgment, paras 89, 95, 133, 309, 727, 733, 735 and fn. 1019.

<sup>2397</sup> Judgment, para. 309, at fn. 949, *citing* with reference to Samlaut: **E3/4017** Khieu Samphan Interview Transcript, ENG 00793527. See also **E3/9** Philip Short, *Pol Pot: The History of a Nightmare*, ENG 00396366 ("At that point Nuon Chea conveyed to Nhim and Kong Sophal a directive from the CPK Standing Committee to stop the war and negotiate with the enemy"). See also **E3/11** *Revolutionary Flag*, September 1977, ENG 00486239; **E1/97.1** Phy Phoun, T. 26 July 2012, pp. 5-6.

<sup>2398</sup> The Chamber found that Ros Nhim was a member of the Central Committee. See Judgment, paras 219, 933. The reference in fn. 2454 to his being a member of the Standing Committee in 1963 is not supported by any evidence or findings, including the evidence cited within that same footnote. As such, this is clearly a typographical error that, based on the findings elsewhere in the Judgment (*e.g.*, paras 203, 219, 933) was intended to be "Central Committee" rather than "Standing Committee."

<sup>2399</sup> Judgment, para. 95 (regarding the 1971 Party Congress) and Judgment, fn. 2341 (regarding the meeting at the Silver Pagoda). See also **E3/24** Phy Phoun Interview Record, ENG 00223582 (identifying Ros Nhim and his deputy Koe as participants in the May 1975 Silver Pagoda meetings at which Nuon Chea was the leader of the discussion group).

Contrary to Nuon Chea's assertion,<sup>2400</sup> the surviving telegrams and reports sent by Ros Nhim to the Party leaders after April 1975 clearly show a continuing supervisory relationship, in which Ros Nhim reported to the Centre and sought direction on how to implement the Party lines.<sup>2401</sup>

570. Nuon Chea's contentions to the contrary are unfounded. Nuon Chea's claim that "the evidence is uncontroverted" that Ros Nhim was engaged in an armed conflict against Pol Pot is simply untrue. There is *no* evidence on the record to this effect. As the Co-Prosecutors have already addressed, the evidence of the witness he relies on<sup>2402</sup> bolsters rather than contradicts the Chamber's conclusions regarding his effective control over Ros Nhim.<sup>2403</sup> Specifically, it establishes that the rift between Ros Nhim and the Party Centre did not occur until 1978, and was *the result of* the Party Centre's purge and arrest of the cadres from the Northwest Zone.<sup>2404</sup> The witness statement relied upon by Nuon Chea supports the Chamber's findings, as it demonstrates that in 1975 Nhim reported to and received instructions from the Party Centre.<sup>2405</sup>

b. Khmer Rouge forces in the Northwest Zone

571. The Chamber's finding that Nuon Chea had effective control of cadres through his responsibility for appointments and discipline applied to all CPK cadres, including those from the Northwest Zone.<sup>2406</sup> The Northwest Zone army was part of the centrally commanded CPK

<sup>2400</sup> NC Appeal, para. 695.

<sup>2401</sup> Judgment, para. 934, *citing* Judgment, para. 773, *citing* fn. 2439: **E3/179** / **E3/180** Report from M-560 to Angkar, 29 May 1977; **E3/1179** Report from M-560, 8 June 1977; **E3/910** Telegram from Nhim to Angkar 870, 24 December (asking for Angkar's decision on whether or not to attack a location at which enemies associated with super-traitor In Tam were present); **E3/950** Telegram from Nhim to Angkar 870, 11 May 1978, ENG 00185215-18 (following a "meeting with Angkar," Nhim reported that he was trying to implement "the recommendations of 870". The telegram ends "Please, Angkar, give ideas and advice. With very high respect ... Nhim"); **E3/863** Zone 560 Report, 17 May 1978 (Nhim to Angkar 870. Nhim requested advice from Angkar as to how to deal with, among other groups, soldiers from the previous regime and reporting on the state of his own health). See also Judgment, para. 337 *citing* at fn. 1022: **E3/974** Telegram from Nhim to Office 870, 10 March; **E3/883** Telegram from Nhim to Angkar 870, 27 August 1977. See also **E3/1183** Weekly Reports from M-560 to Angkar, August 1977; **E3/570** Telegram from Nhim to Angkar 870, 12 August 1977 ("It is up to Angkar to decide on this matter"); **E3/1119** Telegram from Nhim to Angkar 870, 20 October 1977 ("I would like to seek approval from Angkar"); **E3/1208** Telegram from Nhim to Angkar 870, 21 December 1977; **E3/1013** Telegram from Nhim to Office 870, 9 March (deferred to Angkar for a decision regarding the building of a dam).

<sup>2402</sup> NC Appeal, para. 695, *citing* **F2/4** Third Request to consider and obtain additional evidence in connection with the Appeal against the Trial Judgment in Case 002/01, 25 November 2014, para. 11.

<sup>2403</sup> **F2/4/1** Co-Prosecutors' Response to Nuon Chea's Third Request to consider and obtain additional evidence in connection with the Appeal against the Trial Judgment in Case 002/01, 19 December 2004.

<sup>2404</sup> For an example of the submissive communications between Nhim and Angkar as late as May 1978. See **E3/950** Telegram from Nhim to Angkar 870, 11 May 1978, ENG 00185215-16 noted *supra* fn. 2401.

<sup>2405</sup> See **F2/4/1** Co-Prosecutors' Response to Nuon Chea's Third Request to consider and obtain additional evidence in connection with the Appeal against the Trial Judgment in Case 002/01, 19 December 2014, para. 7.

<sup>2406</sup> Judgment, paras 328-329, 893-896, 933.

structure as of April 1975, as evidenced by FUNK radio broadcasts that provided detailed reports on the Northwest Zone battlefields.<sup>2407</sup> The unequivocal nature of this control was confirmed by the subsequent purge of the entire rank and file of the Northwest Zone.<sup>2408</sup>

*iii. Phase II Population Movement*

*a. RAK under Son Sen*

572. Following the 1975 restructuring of the military, the RAK Centre Divisions reported to the Centre through the General Staff, as reflected in the 1976 CPK Statute.<sup>2409</sup> As Nuon Chea concedes,<sup>2410</sup> the Chamber correctly found that Son Sen, who as Chairman of the General Staff had overall command of the military, reported to the Standing Committee on military matters.<sup>2411</sup> Son Sen's subordinate relationship to Nuon Chea is discussed in detail above. His assertion that he '[n]ever once issued a single instruction to or sought to discipline a single soldier' is belied by the evidence<sup>2412</sup> and his own admissions to the contrary.<sup>2413</sup>

*b. Khmer Rouge cadres*

573. Nuon Chea's authority and effective control over Zone Secretaries and other cadres acting within the administrative hierarchy was amply supported by the Chamber's findings and the evidence on the record.<sup>2414</sup> The Chamber found that throughout the Phase II forced movement, the Party Centre issued instructions to Zone Secretaries regarding implementation of the forced transfers.<sup>2415</sup> As a member of the Standing Committee and Party Centre, Nuon Chea was at the

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<sup>2407</sup> See, e.g., **E3/488** FBIS, NUFC Radio Hails Destruction of Maung Township, 20 February 1975, ENG 00166763 (on the 20 February 1975, the Voice of FUNK broadcast a report describing the capture and destruction of the town of Maung in Battambang province by resistance forces). Norng Sophang and Kim Vun testified that FUNK radio broadcasts like this one were based on telegrams received by the Party headquarters from each Zone describing the battlefield situation in their region. The evidence of these FUNK broadcasts therefore demonstrates that the Northwest Zone forces reported to the Party Centre headquarters. See **E1/111.1** Kim Vun, T. 21 August 2012, p. 65; **E1/117.1** Norng Sophang, T. 29 August 2012, p. 63.

<sup>2408</sup> **E3/531** List entitled "Annex 49 - S-21 Prisoners coming from the Northwest Zone" (list of 1,200 Northwest Zone cadres detained and executed at S-21).

<sup>2409</sup> Judgment, paras 913-914, *citing* Judgment, para. 241. See also **E3/405** Chhaom Se Interview Record, ENG 00406211; **E3/182** Standing Committee Meeting Minutes, 9 October 1975.

<sup>2410</sup> NC Appeal, para. 697.

<sup>2411</sup> Judgment, paras 240, 295, 914.

<sup>2412</sup> See *supra* XVIII.B (Nuon Chea's Role in Discipline and Internal Security)

<sup>2413</sup> See *supra* para. 568. See especially **E3/26** Nuon Chea Interview by Japanese Journalist, October 2006, ENG 00329518 (asserting that members of the army known to have committed crimes were "taken for re-education, criticism, or were punished").

<sup>2414</sup> See *supra* paras 562-568.

<sup>2415</sup> Judgment, paras 808-809.

very top of the CPK's hierarchical administrative structure,<sup>2416</sup> pursuant to which the Zones reported to, received instructions from and were under the effective control of the Centre.<sup>2417</sup> His role in discipline and recruitment are discussed above.

**I. Nuon Chea knew or had reason to know that crimes would be, were being or had been committed (NC Ground 221)**

*i. Knowledge or reason to know that crimes would be committed during the Phase I population movement and at Tuol Po Chrey*

574. The Chamber found that Nuon Chea knew or had reason to know that crimes would be committed during the Phase I population movement and at Tuol Po Chrey, based on: (i) his role in formulating CPK policies to target Khmer Republic officials,<sup>2418</sup> to forcibly move the population,<sup>2419</sup> and to 'smash' or eliminate people if they could not be re-educated;<sup>2420</sup> (ii) his knowledge of a pattern of criminal conduct prior to 17 April 1975, including executions of Khmer Republic soldiers and officials by Khmer Rouge forces during their capture of other cities;<sup>2421</sup> and (iii) knowledge within the CPK hierarchy of the differential treatment of the urban population and the Party's instructions to eliminate and maintain vigilance against all elements of the Khmer Republic.<sup>2422</sup> It found that the plan formulated in the June 1974 and April 1975

<sup>2416</sup> Judgment, para. 913. See also Judgment, paras 223, 269-288.

<sup>2417</sup> Judgment, para. 337, *citing* E3/58 Kham Phan Interview Record, 21 November 2008, ENG 00250089; E3/16 Khieu Samphan, Considerations on the History of Cambodia, ENG 00498267. See also E1/60.1 Duch, T. 5 April 2012, p. 104 ("Security across the country reported to the Central Standing Committee... All documents from the zones came to Brother Nuon, and he made the decisions"); E3/1194 Telegram No. 10 from Laing (Chhan), 19 October 1976 (telegram copied to "Brother Nuon" indicating that the Sector had received the "4-year plan" and instructions). E3/367 Sao Sarun Interview Record, ENG 00278696 (describing two meetings in Phnom Penh: one with Pol Pot, Nuon Chea, Khieu Samphan and Son Sen at which they were advised to strengthen the economy and resist against Vietnam and the other with Pol Pot, Nuon Chea and Son Sen at which they were advised to strengthen their forces and strategies to resist Vietnam); E3/383 Sao Sarun Interview Record, ENG 00350263 ("the senders [of telegrams] from M-870 included Nuon Chea"). See also E3/1192 DK Telegram, 12 October 1976.

<sup>2418</sup> Judgment, paras 844; 936, *citing* paras 815, 835-836. See also Judgment, paras 118, 120-123, 814, 840, 842-846.

<sup>2419</sup> Judgment, paras 842-844. See also Judgment, paras 782-794.

<sup>2420</sup> Judgment, para. 844. See also Judgment, paras 117-118, 815.

<sup>2421</sup> Judgment, paras 842-846, 936-937, *citing* paras 822, 918. See also Judgment, paras 117-118, 120-127, 791-794, 830, 840 and paras 134, 146, 879 (Nuon Chea's participation in discussions of prior forced evacuations). Based on the previous executions, the Chamber established Nuon Chea's knowledge of the perpetrators' discriminatory intent and that their acts would constitute political persecution.

<sup>2422</sup> Judgment, para. 845. The Chamber found that these were discussed, praised and encouraged during education sessions, conferences and congresses, which Nuon Chea led and/or attended (see *supra* XX.E (Nuon Chea Instigating) as well as in *Revolutionary Flag* and *Youth* magazines (See, e.g., paras 261, 544-545) of which Nuon Chea was one of the principal authors (see Judgment, paras 264, 311). Further, it found that Nuon Chea attended meetings where these matters were discussed and instructions given (see Judgment, paras 133, 144-145, 309-310, 531, 732).



meetings contemplated and involved the commission of such crimes.<sup>2423</sup> The Chamber concluded that Nuon Chea knew his indoctrination of Khmer Rouge cadres in vigilance against internal and external enemies, as well as the indoctrination of peasants in class struggle,<sup>2424</sup> would inevitably lead to violence<sup>2425</sup> in implementation of the Party line<sup>2425</sup> and deaths due to conditions during the forced transfer.<sup>2426</sup>

575. Nuon Chea incorrectly asserts that the Chamber's findings regarding a consistent pattern of conduct during pre-April 1975 population movements are "supported by no citations to relevant evidence prior to the evacuation of Phnom Penh."<sup>2427</sup> In fact, the Chamber relied on ample evidence establishing a pattern of criminal conduct prior to 17 April 1975.<sup>2428</sup> Nuon Chea is wrong to assert that there was "no evidence of death *at all*" occurring during those forced population movements.<sup>2429</sup> As Nuon Chea later concedes,<sup>2430</sup> François Ponchaud himself testified to the execution of commune chiefs,<sup>2431</sup> and there is further evidence of deaths during those forced transfers, including mass executions of Khmer Republic officials.<sup>2432</sup>

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<sup>2423</sup> Judgment, para. 843 *citing* Judgment, paras 132-133, 144-145, 547, 735, 788. See also Judgment, paras 879-880. Nuon Chea cannot contest his knowledge of the forced movement, itself a crime, given his participation in the decision to 'evacuate' Phnom Penh and other urban areas. See NC Appeal, paras 250-251, 263, 537, 640, 656 and *inter alia* E1/202.1 Nuon Chea, T. 6 June 2013, pp. 37-41). The Chamber demonstrated that Nuon Chea's contention that the forced transfer was a legitimate population movement is unfounded and did not represent the true beliefs of the CPK leadership at the time. See Judgment, paras 525-545.

<sup>2424</sup> Including the identification of capitalists and feudalists, including Khmer Republic officials, as enemies: Judgment, para. 840. See also para. 842, *citing* Judgment, paras 113, 115. See also *supra* XX.E (Nuon Chea Instigating).

<sup>2425</sup> Judgment, para. 840. The Chamber noted Nuon Chea's admission that over time, due to suffering and hardship, the party line concerning class struggle and hatred was engrained in the people in the liberated zones. See Judgment, paras 734, 840, *citing* E3/196 Nuon Chea Speech to Communist Workers' Party of Denmark, July 1978, ENG 00762395.

<sup>2426</sup> Judgment, para. 840.

<sup>2427</sup> NC Appeal, para. 698.

<sup>2428</sup> In support of its conclusion in paragraph 842 regarding a consistent pattern of conduct, the Chamber referred to paragraph 791, which discusses the evidence establishing a pre-April 1975 pattern of forced transfers, and paragraph 794 (fns 2529, 2530), which discusses evidence of crimes during those early forced population movements. Other sections of the Judgment also refer to the extensive evidence of crimes, including forced transfer, murder, extermination, persecution and other inhumane acts, committed during the pre-April 1975 forced transfers. See Judgment, paras 104-118, 120-127, 830.

<sup>2429</sup> *Cf.* NC Appeal, para. 699.

<sup>2430</sup> NC Appeal, fn. 1884.

<sup>2431</sup> Judgment, para. 107 *citing* E1/178.1 François Ponchaud, T. 9 April 2013, p. 61; E1/178.1 François Ponchaud, T. 10 April 2013, pp. 3-4.

<sup>2432</sup> Judgment, para. 107, *citing* E3/9 Philip Short, *Pol Pot: The History of a Nightmare*, 2004, ENG 00396465 (discussing the evacuation of 15,000 town-dwellers from Kampong Cham in the second half of 1973, stating that some died of hunger and from bombings along the way); Judgment, paras 117-118, 544 and fn. 329; paras 120-127 (describing the mass killings of captured Khmer Republic officials, increased use of revolutionary violence and the execution of Buddhist nuns in the pre-April 1975 period); para. 830 (describing mass executions of Khmer Republic soldiers and officials by the Khmer Rouge in Phloeng Chhes in 1972, during the evacuation of Kampong Cham in

576. The Chamber properly inferred Nuon Chea's knowledge of this pattern of conduct before the Phase I population movement and Tuol Po Chrey, given his access to reports regarding the implementation of Party plans and policies.<sup>2433</sup> These findings were supported by evidence of pre-April 1975 reporting,<sup>2434</sup> and meetings between Nuon Chea and both Zone Secretaries and military commanders.<sup>2435</sup>

*ii. Knowledge or reason to know that crimes were being or had been committed during the Phase I Population Movement*

577. The Chamber correctly concluded that Nuon Chea knew that crimes were being or had been committed during the Phase I population movement,<sup>2436</sup> based on: (i) his receipt of reports that discussed the evacuation of Phnom Penh, food and medicine shortages and illnesses in the countryside and the elimination of enemies, including elements of the Khmer Republic regime;<sup>2437</sup> (ii) his planning of the Phase I population movement;<sup>2438</sup> and (iii) his attendance and participation in meetings and regular contact with other senior Party leaders.<sup>2439</sup> The Chamber was also satisfied that the CPK leadership, including Nuon Chea, received detailed information from military leaders regarding the activities of Khmer Rouge troops on the ground.<sup>2440</sup> After the crimes had been committed, they were discussed during political education sessions, Party conferences and congresses, and in the *Revolutionary Flag* and *Youth* magazines and other CPK policy documents.<sup>2441</sup> Nuon Chea admitted witnessing evacuees travelling with difficulty, as well

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September 1973, after the Khmer Rouge took control of Oudong in March 1974 and in Battambang in July 1974). See also **E1/221.1** Stephen Heder, T. 10 July 2013, pp. 94-95; 98-99 (interviews describing “on the spot” executions “after the partial occupation by Khmer Rouge forces of Kampong Cham provincial town”); **E3/785** *Revolutionary Flag*, July 1973, ENG 00713999.

<sup>2433</sup> Judgment, para. 846.

<sup>2434</sup> See e.g. Judgment, paras 146, 275, citing **E3/783**, *Revolutionary Flag*, September-October 1972, ENG 00720226, 00720229; Judgment, fn. 2289 citing **E1/97.1** Phy Phuon, T. 26 July 2012, pp. 9-10. See also **E1/17.1** Nuon Chea, T. 6 December 2011, pp. 14-15 (“we contacted those cadres [from the Eastern Zone namely So Phim], we asked them for a report of the development at the rural areas.”). See also **E1/117.1** Norng Sophang, T. 29 August 2012, pp. 59-60 (describing “zones and armies who were reporting to the upper authorities”).

<sup>2435</sup> See Judgment, paras 309, 845 and *supra*, paras 563-564, 569.

<sup>2436</sup> Judgment, paras 847-849, 855-857, 898. In its discussion of Nuon Chea's superior responsibility, the Chamber discusses Nuon Chea's knowledge or reason to know of crimes committed during the Phase I population movement in the context of his failure to prevent and punish (Judgment, para. 898).

<sup>2437</sup> Judgment, para. 847 citing Judgment, paras 127, 132-133, 144, 271, 547, 768.

<sup>2438</sup> Judgment, para. 847.

<sup>2439</sup> Judgment, para. 847 citing Judgment, paras 271, 317.

<sup>2440</sup> Judgment, para. 848 citing Judgment, paras 145-146, 338, 807.

<sup>2441</sup> Judgment, para. 855.

as dead bodies in houses in Phnom Penh,<sup>2442</sup> and admitted his knowledge of the murders of the Lon Nol “super-traitors.”<sup>2443</sup>

578. The Chamber also found that the CPK monitored the international media and were therefore aware of reports of mass violence and other atrocities,<sup>2444</sup> including articles on deaths and mistreatment of civilians during the forced evacuation of Phnom Penh,<sup>2445</sup> and reports of the killing of Lon Nol officials.<sup>2446</sup> As a member of the Standing Committee, Nuon Chea received daily reports of news monitored by the Ministry of Propaganda,<sup>2447</sup> and would sometimes go to the Ministry and receive news reports as they were printed from the telex machine.<sup>2448</sup>

579. As consistently articulated by the ICTR and ICTY Appeals Chambers, the ‘reason to know’ standard is met “when the accused had ‘some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates;’ such information need not provide specific details of the unlawful acts committed or about to be committed by his

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<sup>2442</sup> Judgment, para. 849 *citing* para. 785. Contrary to Nuon Chea’s assertion (NC Appeal, para. 703), this admission is highly probative of his knowledge of the commission of crimes during the Phase I Population movement and ‘sufficiently alarming’ to put him on notice of the commission of the crimes of murder, extermination and attacks against human dignity. Judgment, para. 715 *citing* *Duch* TJ, para. 544; *Hadžihasanović* AJ, para. 28. The principle articulated in the *Krnojelac* AJ, para. 155 (cited by Nuon Chea at fn. 1894 of his Appeal) is not relevant here. In that case, the Appeals Chamber refused to accept that evidence the accused had received information about one crime (cruel treatment) necessarily put him on notice that a separate crime (torture) had occurred, where that second crime required the fulfilment of additional material elements.

<sup>2443</sup> Judgment, para. 844, *citing* fn. 2597.

<sup>2444</sup> Judgment, para. 856, *citing* paras 267-268.

<sup>2445</sup> See, e.g., **E3/4157** Washington Post, *Phnom Penh Evacuation Ordered; Cambodians Told to Leave Capital*, 19 April 1975; **E3/3385** Washington Post, *Cambodia Aides Reported Killed and Radio in Cambodia Reports Killings*, 20 April 1975; **E3/3393** Los Angeles Times, *Massive Cambodia Bloodbath Reported*, 4 May 1975; **E3/3368** Chicago Tribune, *Cambodians Flee Red Invaders; It’s Clear ‘Some Won’t Survive’*, 9 May 1975; **E3/4426** Chicago Tribune, *The Murder of Phnom Penh*, 10 May 1975. See also **E3/2704**; **E3/2684**; **E3/3367**; **E3/4157**; **E3/3375**; **E3/2705**; **E3/3392**; **E3/3721**; **E3/3394**; **E3/2685**; **E3/3363**; **E3/4149**; **E3/3365**; **E3/4150**; **E3/3366**; **E3/3987**; **E3/4153**; **E3/4151**; **E3/4154**; **E3/4152**; **E3/4155**; **E3/51**; **E3/4156**; **E3/4428**; **E3/4429**; **E3/4430**; **E3/3372**; **E3/3301**; **E3/4158**; **E3/4433**; **E3/4434**; **E3/4431**; **E3/3374**; **E3/4159**; **E3/4168**; **E3/4458**; **E3/4459**; **E3/4460**; **E3/4167**; **E3/2672**.

<sup>2446</sup> See, e.g., **E3/4425** Los Angeles Times, *Executions of Cambodian Officers, Wives Reported*, 5 May 1975; **E3/3364** Washington Post, *Cambodian Ex-Officers, Wives Reported Slain by Khmer Rouge*, 6 May 1975; **E3/3987** Chicago Tribune, *Inside Cambodia*, 9 May 1975; **E3/4153** Los Angeles Times, *Cambodia Leaders Shot, Doctor Says*, 9 May 1975; **E3/3369** Newsweek, *‘Blood Bath’ in Cambodia*, 12 May 1975. See also **E3/4427**; **E3/3370**; **E3/3371**; **E3/4428**; **E3/4429**; **E3/3372**; **E3/3301**; **E3/4433**; **E3/4439**; **E3/4440**; **E3/4446**; **E3/4447**; **E3/4457**; **E3/4459**; **E3/4167**.

<sup>2447</sup> Judgment, para. 267 and fn. 845. As the Chamber noted, the Standing Committee requested news reports to be delivered to “Angkar every day as normal, ... so that the Standing Committee may take notice and take measures.” **E3/231** Standing Committee Meeting Minutes, 8 March 1976, ENG 00183362. See also **E1/127.1** Khiev En, T. 1 October 2012, p. 19 (foreign news that was monitored at the Ministry of Propaganda included AFP, Reuters, UPE and Xinhua).

<sup>2448</sup> **E1/127.1** Khiev En, T. 1 October 2012, pp. 46-47.

subordinates.”<sup>2449</sup> Based on the above evidence, the Chamber correctly concluded that Nuon Chea had sufficient information to put him on notice of crimes committed during the Phase I population movement.

*iii. Knowledge or reason to know that crimes would be, were being or had been committed during the Phase II population movement*

580. For the same reasons discussed above in relation to the Phase I population movement, the Chamber correctly concluded that Nuon Chea had knowledge that crimes would be, were being, and had been committed during the Phase II population movement. In support of this finding, the Chamber considered Nuon Chea’s role in formulating policies to reallocate labour between rural areas,<sup>2450</sup> and his admissions that: (i) he knew people were being moved during the Phase II population movement;<sup>2451</sup> (ii) the Party was aware people would face hardships as a result of those movements;<sup>2452</sup> and (iii) there were many deaths during the DK period due to illness and starvation, both during evacuations and thereafter.<sup>2453</sup> International media reports also continued to capture the events of the Phase II population movement.<sup>2454</sup> Nuon Chea makes no meaningful challenges to these findings.

**J. Nuon Chea failed to prevent or punish crimes committed during the population movements and at Tuol Po Chrey (NC Grounds 222-223)**

581. Nuon Chea not only failed to prevent or punish the crimes committed during the population movements,<sup>2455</sup> he praised the population movement policies and the elimination of so-called

<sup>2449</sup> *Nahimana* AJ, para. 791, citing *Bagilishema* AJ, paras 28, 42; *Čelebići* AJ, paras 238, 241.

<sup>2450</sup> Judgment, para. 845. See also Judgment, paras 899-904.

<sup>2451</sup> Judgment, para. 850, citing Judgment, para. 628.

<sup>2452</sup> Judgment, para. 850, citing Judgment, para. 785.

<sup>2453</sup> Judgment, para. 850, citing Judgment, para. 785.

<sup>2454</sup> **E3/4170** AFP, *Cambodia: The New York Times Reports New and Forced Movements with a High Death Toll*, 21 January 1976; **E3/2411** Le Monde, *Cambodia Nine Months Down the Road*, 18 February 1976; **E3/4165** New York Times, *Inside Cambodia*, 27 March 1976; **E3/4445** Wall Street Journal, *The Cambodian Horror*, 16 April 1976; **E3/4449** The Economist, *Cambodia: Counting the Cost*, 26 February 1977; **E3/4455** Chicago Tribune, *Extermination in Cambodia*, 2 May 1977; **E3/2672** Phnom Penh Home Service, “*Ministère des affaires étrangères’ revue de presse*”; **E3/3320** Hong Kong Standard, *Cambodia Refutes Human Rights Complaint*, 23 July 1978; **E3/4162** BBC SWB, *Cambodian Home and Foreign Policy: Party Anniversary Speech by Pol Pot and Anniversary Banquet: Sihanouk Present*, 29 September 1978. See also **E3/4441**; **E3/4446**; **E3/4447**; **E3/4451**; **E3/4160**; **E3/4458**; **E3/4459**; **E3/4167**; **E3/4467**; **E3/4468**.

<sup>2455</sup> **E1/22.1** Nuon Chea, T. 14 December 2011, p. 30; **E1/35.1** Nuon Chea, T. 30 January 2012, pp. 27-30 (admitting Standing Committee took no action to renounce call for execution of top 7 Lon Nol leaders).

‘enemies’ in speeches and political training sessions.<sup>2456</sup> The Chamber found that Nuon Chea failed to prevent the crimes that took place at Tuol Po Chrey, despite evidence of killings and persecution of Khmer Republic officials during the prior evacuation of cities, including Phnom Penh.<sup>2457</sup> Nuon Chea fails to effectively challenge any of these conclusions.

## XXI. KHIEU SAMPHAN’S CRIMINAL RESPONSIBILITY

582. Khieu Samphan alleges multiple errors relating to his knowledge, intent and criminal responsibility for planning, instigating, aiding and abetting, and commission through JCE. His arguments are directed at four time periods: prior to 17 April 1975, during Phase I of the forced transfers, during the time of the crimes at Tuol Po Chrey and during Phase II of the forced transfers.<sup>2458</sup>

583. Khieu Samphan’s allegations are both ill-defined and unfounded. He does not indicate whether he is alleging errors of law, fact or combined errors of fact and law,<sup>2459</sup> ignores the required standards of review and utterly fails to establish *how* the arguments he raises could invalidate the Judgment or occasion a miscarriage of justice.<sup>2460</sup> He does not provide citations to evidence, provides no legal authorities and for many assertions provides no substantive

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<sup>2456</sup> **E3/196** Nuon Chea Statement to Communist Workers Party of Denmark, July 1978, ENG 00762402; **E3/451** Duch Interview Record, ENG 00204345 (confirming that Nuon Chea gave speech to visiting Danish delegation and made similar statements “within the Party”); **E3/4601** Lim Sat Interview Record, ENG 00412159 (Nuon Chea statement to cadres: “Only the evacuation of people from the markets to the base could help us to find the internal [enemy]”); **E1/187.1** Lim Sat, T. 2 May 2013, p. 38; **E3/25** *Revolutionary Flag*, December 1976 - January 1977, ENG 00491422-25 (Nuon Chea speech discussing CPK policy to “seize the people”); **E3/147** FBIS, *Nuon Chea Speaks on Cambodian Army Anniversary*, 17 January 1977, ENG 00168465-70 (DK Radio broadcast of excerpts of same speech, expressly attributed to Nuon Chea). See also **E3/94** Ieng Sary Interview by Elizabeth Becker, 22 July 1981, ENG 00342504 (Standing Committee ratification of policy discriminating against non-base people and those “who supported Lon Nol”).

<sup>2457</sup> Judgment, para. 938.

<sup>2458</sup> Khieu Samphan repeats his allegation that the Chamber violated its temporal jurisdiction in convicting him for having planned and incited the crimes and similarly erred in relying on facts prior to 17 April 1975 in respect of his knowledge of the crimes committed during Phase II of the forced transfers. KS Appeal, paras 293, 591. The Co-Prosecutors have addressed this allegation. See *supra* VII.A (Temporal Jurisdiction). Similarly, Khieu Samphan alleges the Chamber “appeared” to rely on culpable omissions as evidence of his contribution to the crimes by way of all the modes of liability and argues that ICL did not sanction them in 1975. KS Appeal, paras 294, 622-623.

<sup>2459</sup> The only indications provided are in the Notice or in introductory paragraphs of the Appeal wherein Khieu Samphan alleges generally that the Chamber committed “errors of fact and of law”. All of his particular arguments allege simply that the Chamber “erred” or “committed an error.” As he does not apply the standards of review in respect of his allegations, it is guess work to determine whether his arguments are raised in support of any particular error of law, fact or combined fact and law.

<sup>2460</sup> KS Appeal, paras 292, 305, 309, 311, 412, 441-444, 609-611, 619, 621.

argumentation.<sup>2461</sup> He fails to connect the arguments raised in his Appeal with the grounds set out in his Notice,<sup>2462</sup> thereby frustrating the intent of Internal Rule 105. In his Appeal, he raises arguments thematically with respect to certain types of conduct and seeks to have them applied across the modes of liability without consideration of the differing standards of law and varied findings of fact. To the extent that it is possible to interpret and respond to these allegations, the Co-Prosecutors do so below.

**A. Contribution to the Crimes (KS paras 73, 93-98, 286-342, 397-418, 438-449, 588-645)**

584. In the face of the overwhelming evidence against him, Khieu Samphan contends that the Chamber committed errors of law and fact in finding that his conduct reached the necessary threshold to find him criminally responsible for crimes through JCE, planning, instigating, and aiding and abetting liability.<sup>2463</sup> He alleges errors in relation to the Chamber's findings on his participation in meetings and indoctrination sessions, his speeches, his contribution to FUNK propaganda documents, and his "reputation" during various periods of time. He further alleges that the Chamber erred in failing to demonstrate that through this conduct, as well as through his liaison role with Sihanouk, his diplomatic functions, and his official roles (during Phase II only), he contributed to the commission of the crimes. Critically, Khieu Samphan ignores that in respect of each of these various types of conduct, the Chamber detailed how he substantially

<sup>2461</sup> KS Appeal, paras 73, 289, 323, 325, 417, 438, 448, 631, 633.

<sup>2462</sup> This is especially apparent in paragraphs 90 to 93 where, without any attempt at particularisation, he alleges that the Chamber erred with respect to his liability for planning, inciting, aiding and abetting, and his participation in the JCE, citing to 72 paragraphs of the Judgment. In so doing, Khieu Samphan failed to give substantive notice of the nature of the errors he alleges. Khieu Samphan cites to paras 724-735, 777-778, 782-791, 800, 804-807, 814-826, 830, 835-836, 960-966, 972-973, 976, 980-982, 988-989, 992-995, 997-1003, 1008-1015, 1033-1036, 1039-1043, 1045-1051.

<sup>2463</sup> For JCE: Prior to 17 April 1975: KS Notice, para. 93; KS Appeal, paras 292, 294; During Phase I: KS Notice, para. 107; KS Appeal, para. 402; During Tuol Po Chrey: KS Notice Para. 118; KS Correct Appeal, para. 441; During Phase II: KS Notice Para. 145; KS Appeal, para. 599. For planning: KS Appeal, paras 292, 294, 327. Consistent with the French version of the Judgment, Khieu Samphan suggests that the required standard of contribution for planning is "determinative". The English version of the Judgment uses the term "substantially contribute". Khieu Samphan also suggests that the term "determinative" is synonymous with both a "significant" or "substantial" contribution and that these terms are used interchangeably by the Chamber yet in support he cites sections in the Judgment which correctly articulate distinct standards for JCE and planning. If Khieu Samphan intends to raise an alleged error of law in suggesting that the contribution should be "determinative" in the sense of requiring a contribution amounting to a cause *sine qua non*, he provides no legal authority to support this nor is such a standard established in the jurisprudence. See KS Appeal, paras 295, 303, 305; Judgment paras 692, wherein the Chamber uses the term "significant"/"significantative" with respect to the law on JCE, and 698 wherein the Chamber uses the term "substantial"/"substantielle" in relation to its findings on planning. For instigation: KS Notice, paras 91, 142.

contributed to the common purpose and the Party's criminal policies.<sup>2464</sup>

## **B. The Chamber correctly set forth the legal standards for modes of liability**

### *i. Joint Criminal Enterprise*

585. From Khieu Samphan's allegations, he appears to be confused about both the elements of modes of responsibility and the Chamber's findings. He suggests JCE requires his contribution be "important."<sup>2465</sup> The Chamber found that Khieu Samphan's contribution was "significant",<sup>2466</sup> the correct standard for establishing JCE liability.<sup>2467</sup> Khieu Samphan also suggests that the term "significant" is synonymous with "substantial" while all jurisprudence makes it clear that a "significant" contribution is a distinct and lower standard than "substantial."<sup>2468</sup> He parses out the Chamber's findings with respect the various manners in which he contributed, failing to acknowledge that the Chamber found his contribution to the JCE was "significant" on the basis of the totality of his contribution.<sup>2469</sup>

586. Contrary to Khieu Samphan's contention,<sup>2470</sup> while it is necessary to demonstrate that the

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<sup>2464</sup> Judgment, paras 962-992. See especially para. 962 wherein the Chamber explains that: "Khieu Samphan stated that he was willing to do whatever he could to help and to refrain from doing anything that might hinder the Khmer Rouge. He attended policy meetings of the Standing and Central Committee, as well as Party congresses, where the common purpose and policies were planned and developed. He attended and participated in meetings where instructions and lessons were given concerning the common purpose and policies. He held economic positions where, drawing on his experience and education, he implemented elements of the common purpose relating to trade, imports/exports and commerce. He made public statements endorsing the common purpose and policies, and encouraging all to build and defend the country according to the Party line. Finally, in his roles as a liaison with Norodom Sihanouk and diplomat, he justified, defended and praised the common purpose and policies, winning support for the Khmer Rouge and facilitating the secret and largely unhindered implementation of the common purpose through radical policies." See also *supra*, XV (Policy to forcibly transfer), XVI (Policy to smash enemies), XVII (Policy of targeting Khmer Republic soldiers).

<sup>2465</sup> KS Appeal, paras 295, 404, 441, 601.

<sup>2466</sup> Judgment para. 692. The English version of which states the standard is "significant" and the French version of which states the standard is "*significative*".

<sup>2467</sup> *Duch* TJ, para 508 ("The contribution of the accused need not be necessary or substantial, but it should at least be a significant contribution to the crimes for which he or she is found responsible); *Brđanin* AJ, para. 431; *Krajišnik* AJ, para. 215 ("The contribution need *not* be necessary *or* substantial, but it should at least be a significant contribution to the crimes for which the accused is found responsible.") [emphasis added]; *Nahimana* AJ, para. 198; *Gotovina*, AJ, para. 149 (the threshold for finding a "significant contribution" to a JCE is lower than the "substantial contribution" required to enter a conviction for aiding and abetting); *Kvočka* AJ, para. 97; *Tadić* AJ, para. 229.

<sup>2468</sup> KS Appeal, paras 295, 303, 305, *citing* Judgment, paras 692 (wherein the Chamber uses the term "significant"/"*significative*" with respect to the law on JCE), 1001 (wherein the Chamber uses the term "substantial"/"*substantielle*" in relation to its findings on planning). With respect to JCE, the Chamber consistently uses the term "significant".

<sup>2469</sup> Judgment, paras 963-996.

<sup>2470</sup> KS Appeal, paras 299, 307, 406, 443, 605.

accused made a significant contribution to the common purpose,<sup>2471</sup> it is not necessary to demonstrate that his or her particular contribution to the JCE was *itself* criminal in nature.<sup>2472</sup> Thus, given that the Chamber found that Khieu Samphan contributed to the common purpose and the criminal policies, his argument that his conduct may have had “legitimate” or non-criminal aspects is of no consequence.

587. The Chamber connected Khieu Samphan’s *actus reus* and *mens rea* to the commission of the crimes. It found that he was one of a plurality of persons who shared a common purpose to “implement rapid socialist revolution through a ‘great leap forward’ and defend the Party against internal and external enemies, by whatever means necessary.”<sup>2473</sup> While the objective of a rapid socialist revolution was not in itself necessarily criminal,<sup>2474</sup> the Party’s policies were the means by which the common plan was brought into fruition and these policies – the “whatever means necessary” – involved the commission of crimes.<sup>2475</sup> The Chamber found that Khieu Samphan shared the intent to bring about the common purpose through the implementation of the Party’s policies and, importantly, that he specifically shared the intent to commit the crimes during Phases One and Two of the forced transfers and at Tuol Po Chrey”.<sup>2476</sup> The Chamber concluded that his contribution amounted to a significant contribution to the crimes for which he was held liable.<sup>2477</sup>

588. Khieu Samphan alleges that the Chamber did not establish that, prior to 17 April 1975, the plan constituted a substantial contribution to the commission of the crimes during Phase I and at Tuol Po Chrey.<sup>2478</sup> Contrary to his argument, the Chamber explicitly connected the plan to the commission of crimes, finding not only that it was disseminated through the chain of command

<sup>2471</sup> *Brđanin* AJ, para. 430.

<sup>2472</sup> *Duch* TJ, para. 508 (“[The accused’s] participation need not involve the commission of a specific crime but may take the form of assistance to, or contribution, to the execution of the common purpose. The contribution of the accused need not be necessary or substantial, but it should at least be a significant contribution to the commission of crimes for which he or she is found responsible); *Kvočka* AJ, para. 99; *Tadić* AJ, paras 191-192, 196, 227; *Vasiljević* AJ, paras 100, 119.

<sup>2473</sup> Judgment, para. 777.

<sup>2474</sup> Judgment, paras 778, 804.

<sup>2475</sup> Judgment, paras 804, 835.

<sup>2476</sup> Judgment, paras 993-995. See also *supra*, XIV (Joint Criminal Enterprise), XV (Policy to forcibly transfer), XVI (Policy to smash enemies), XVII (Policy of targeting Khmer Republic soldiers).

<sup>2477</sup> Judgment, paras 961-992, 996.

<sup>2478</sup> KS Appeal, para. 297. Khieu Samphan cites to his allegation of an error of fact relating to the chain of transmission of the decisions taken at the June 1974 and April 1975 meetings he raised: *Specific Measures and Facts – Phase I Displacement*. The Co-Prosecutors rely on the Responses to these arguments. See *supra* IX.A-C (Murder and extermination), XI.A-C, E (Other inhumane acts).



but that the Khmer Rouge military began implementing the plan only hours after “liberating” Phnom Penh. Further, the Chamber found this was consistent with a pattern of conduct which began before 17 April 1975.<sup>2479</sup>

589. Khieu Samphan asserts that the Chamber erred in finding that an omission can establish liability for a crime pursuant to the modes of liability of JCE, instigating, and aiding and abetting.<sup>2480</sup> His argument, however, fails to convincingly demonstrate that the Chamber’s reliance on three post-World War II cases was incorrect.<sup>2481</sup> In fact, it has been recognised since at least the post-World War II period that liability can be founded on omission in international criminal law.<sup>2482</sup> In any event, Khieu Samphan does not show how the Chamber’s alleged error would invalidate the Judgment.

a. Khieu Samphan’s participation at meetings significantly contributed to the crimes

590. Khieu Samphan alleges the Chamber erred in finding that his participation in the Congress of 1971, the June 1974 meeting, the April 1975 meeting, meetings in the “places of power” starting in 25 April 1975, as well as his “presence” at B-5 and the Phnom Penh train station and his participation at meetings from April 1975 until the end of 1976 amounted to a significant contribution to the commission of crimes.<sup>2483</sup>

<sup>2479</sup> Judgment, paras 1001, 1041. See also Judgment, para. 805.

<sup>2480</sup> KS Appeal, paras 93-98.

<sup>2481</sup> KS Appeal, para. 96 (challenging the Chamber’s reliance on the *Ministries*, *Einsatzgruppen*, and *Essen Lynching* cases). See also Judgment, paras 700, 706.

<sup>2482</sup> See, e.g., Third Geneva Convention, art. 13 (“Any unlawful act *or omission* by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention.” (Emphasis added.)); Commentary to the Third Geneva Convention, p. 626 (Wilful killing, a grave breach, “would appear to cover faults of omission.”); Commentary to the Fourth Geneva Convention, p. 597 (Wilful killing, a grave breach, “would appear to cover cases where death occurs through a fault of omission.” Also, the purpose of providing a list of grave breaches was to give notice to potential offenders: “It was also thought advisable to draw up as a warning to possible offenders a clear list of crimes whose authors would be sought for *in all countries*.” (Emphasis added.)) The Universal Declaration of Human Rights (art. 11(2)) also seems to acknowledge the possibility of omission liability in international criminal law: “No one shall be held guilty of any penal offence on account of any act *or omission* which did not constitute a penal offence, under national *or international law*, at the time when it was committed.”) (Emphasis added).

<sup>2483</sup> KS Appeal, paras 295-296, 298, 405, 441-443, 602-604. In respect of his attendance and participation in meetings, the Chamber found, *inter alia*, that: (i) in June 1974 and April 1975, he planned the final offensive which involved emptying Phnom Penh of its inhabitants and the targeting of Khmer Republic supporters for elimination; (ii) at B-5, the Phnom Penh railway station, the former Ministry of Finance building and Silver Pagoda he was part of the group of CPK leaders who discussed the policies and plans to establish the cooperatives which required the forced transfer of the population and which involved the further elimination of “enemies”; (iii) at K-3 and K-1 he regularly met with senior leaders such as Pol Pot and Nuon Chea; (iv) he regularly attended meetings of the Standing and Central Committees where the criminal policies were discussed; and (v) he participated in the development of plans to forcibly allocate labour resources according to production targets and infrastructure

591. Khieu Samphan asserts that there is no proof of his participation or the positions he took in these meetings,<sup>2484</sup> and therefore the Chamber had no basis for its findings that he had “a key role in formulating the content of the common purpose and the policies.”<sup>2485</sup> The Chamber’s conclusion centred on his repeated and continuous contribution to the plans and policies of the CPK that were developed at these meetings.<sup>2486</sup> The Chamber explicitly held that it relied upon “his attendance at meetings and his contribution to plans of the Party Centre”.<sup>2487</sup> The Chamber’s conclusions on his contribution are fully supported.<sup>2488</sup> Khieu Samphan challenges the Chamber’s conclusion on the significance of his contribution to the JCE in respect of these meetings by isolating references to his presence from findings on his roles, effective authority and the policies of the CPK.

592. Khieu Samphan takes the findings of the Chamber out of context, suggesting it relied only on his mere “presence” at B-5. In its findings on JCE, the Chamber noted Khieu Samphan attended the April 1975 meeting at B-5 in making detailed findings on his contribution to the decision to “liberate” Phnom Penh.<sup>2489</sup> Similarly, the Chamber noted that Khieu Samphan was one of the leaders residing at the Phnom Penh railway station in support of its finding that he was a member of the Joint Leadership Committee, which met on a regular basis to discuss the Party’s policies and plans.<sup>2490</sup>

## ii. Planning

593. Khieu Samphan suggests that the Chamber erred in finding that his “presence” at these

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priorities, rewarding “Old People” to the detriment of “New People” which involved the commission of the Phase II crimes. Judgment, paras 964-972, *referring to* Judgment, paras 133-138, 144-149, 200-201, 203, 233, 356-358, 362, 366, 373, 386-388, 408, 596-587, 610, 621, 728, 733, 735, 740, 748-750, 755, 768, 770-771, 997-1003. XV (Policy to forcibly transfer), XVI (Policy to smash enemies), XVII (Policy of targeting Khmer Republic soldiers).

<sup>2484</sup> See KS Appeal, paras 299 (merely alleging, without any further elaboration or citations at all, that there is no proof of the positions he took at the meetings prior to 17 April 1975), 406 (alleging without any elaboration or citations at all, that the Chamber did not establish that he participated in meetings starting from 25 April 1975), 443 (citing to alleged errors of fact raised with respect to his Role during Phase I and alleges that the Chamber did not establish that he participated in meetings during this period), 605 (alleging, without any further elaboration or citations at all, that there is no proof of the positions he took in the meetings from April, 1975 until the end of 1976). See also KS Appeal, paras 297, 603.

<sup>2485</sup> KS Appeal, paras 299, 406, 443, 605, *citing* Judgment, para. 972.

<sup>2486</sup> Judgment, paras 964-972.

<sup>2487</sup> Judgment, para. 972.

<sup>2488</sup> Judgment, paras 964-972, *referring to* Judgment, paras 133-138, 144-149, 200-201, 203, 233, 356-358, 362, 366, 373, 386-388, 408, 596-587, 610, 621, 728, 733, 735, 740, 748-750, 755, 768, 770-771, 997-1003.

<sup>2489</sup> Judgment, para. 966, fn. 2937, *citing to* Judgment, paras 144-149. The Chamber makes no other reference to B-5 in respect of its findings on Khieu Samphan’s contribution to the JCE through Policy Meetings.

<sup>2490</sup> Judgment para. 967.

meetings substantially contributed “to the crimes committed” during Phases I and II of the forced transfers and at Tuol Po Chrey.<sup>2491</sup> The Chamber found that Khieu Samphan substantially contributed to the design of the plan with others, and having done so, it is not necessary to further demonstrate a direct link between his particular contribution to the development of plan and the criminal conduct committed as a result. Indeed, the applicable law requires that a connection be drawn between the *plan* and the criminal conduct; that is, it must be shown that the plan proceeded and was a factor that substantially contributed to the criminal conduct.<sup>2492</sup> This is exactly how the Chamber evaluated Khieu Samphan’s planning contribution.<sup>2493</sup>

594. Moreover, the Chamber did not rely on Khieu Samphan’s mere presence at meetings in respect of its findings on his liability for planning the crimes. Rather, after considering all of the evidence, the Chamber made its findings based on his attendance, participation and contribution to the development of the plans.<sup>2494</sup> Thus, with respect to the June 1974 meeting, the Chamber relied on his attendance and, given the CPK principle of democratic centralism, found that he had the right to participate in the debates and by his silence indicated his assent. It found that Khieu Samphan, collectively with the other leaders present at the meeting, drew up a plan that contemplated and involved the commission of the crimes.<sup>2495</sup>

595. The Chamber considered this together with the April 1975 meeting, during which Khieu Samphan actively participated by expressing his opinion in favour of the final offensive to liberate the country and empty Phnom Penh. It found that prior experiences with the transfer of the population and the execution of Khmer Republic officials *en masse*, which formed part of a consistent pattern of conduct, were discussed and reviewed at this meeting and that Khieu Samphan, together with the other attendees, affirmed the decision.<sup>2496</sup> On this basis, the Chamber found that Khieu Samphan “thereby *participated* in these meetings and endorsed the resulting

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<sup>2491</sup> KS Appeal, paras 296-297, 602-603.

<sup>2492</sup> See Judgment, para. 698. The Chamber in *Duch* articulated the standard as follows: “Planning requires that one or more persons design the criminal conduct that constitutes one or more crimes that are later perpetrated. It must be demonstrated that the planning was a substantially contributing factor to the criminal conduct”. *Duch* TJ, para. 518. *D. Milošević* AJ, para. 268; *Kordić*, AJ, para. 26; *Sesay* AJ, para. 687; *Brima* AJ, para. 301. See also *Semanza* AJ, para. 380 (holding that: “The level of participation in the *planning* must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another.” (emphasis added)).

<sup>2493</sup> See Judgment paras 1001, 1027, 1041. See also Judgment, paras 788-789, 794, 800-803.

<sup>2494</sup> Judgment, paras 997-1001, 1023-1027. See also Judgment, paras 1039-1040.

<sup>2495</sup> Judgment, para. 999.

<sup>2496</sup> Judgment, paras 997-1007, 1039-1043.

plans”.<sup>2497</sup>

596. Similarly, the Chamber’s conclusion on Khieu Samphan’s liability for planning the crimes committed during Phase II, do not rely on his mere presence at meetings, but rather on his consistent and repeated contributions to the planning. The Chamber relied on Khieu Samphan’s membership in the joint leadership committee formed in April 1975 through which he met regularly with other leaders to discuss policies and plans to build and defend the country, including the establishment of cooperatives.<sup>2498</sup> At the Silver Pagoda in May 1975, Khieu Samphan met with other leaders and representatives of the Zones, justifying the evacuations and prioritizing the need for infrastructure development.<sup>2499</sup> Throughout this period, Khieu Samphan regularly attended Central Committee meetings, in which, *inter alia*, matters of national defence and economy were discussed.<sup>2500</sup> The Chamber found that he took part in the development of a September 1975 policy document which, despite recognising the suffering of the population, nevertheless stressed the importance of the three tonnes per hectare rice production targets and detailed the plan for further forced transfers.<sup>2501</sup> The Chamber also relied on his participation in the development of the economic plans in late 1975 and for 1977 which proposed movements of the population according to the Party’s rice production and infrastructure priorities without any consideration for the consent, health or well-being of the population.<sup>2502</sup>

597. Khieu Samphan’s reliance on the *Mugenzi and Mugiraneza* Appeal Judgment is misplaced.<sup>2503</sup> There, the Appeals Chamber overturned the Trial Chamber’s reliance on the appellants’ mere attendance at a single meeting to draw an inference of their intent to incite genocide,<sup>2504</sup> whereas the findings with respect to Khieu Samphan’s planning liability are based on evidence of his consistent presence, participation and contribution as the plans were

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<sup>2497</sup> Judgment, para 997 (emphasis added).

<sup>2498</sup> Judgment, para. 740.

<sup>2499</sup> Judgment, para. 743.

<sup>2500</sup> Judgment, para. 768.

<sup>2501</sup> Judgment, paras 748-751.

<sup>2502</sup> Judgment, paras 754-755, 769-776, 1025-1026.

<sup>2503</sup> KS Appeal paras 297, 603, *citing Mugenzi* AJ, paras 136-141.

<sup>2504</sup> The Trial Chamber inferred that the appellants had the requisite shared intent with other members of a JCE for incitement to genocide solely based on their mere presence at a ceremony during which another member of the JCE, Sindikubwabo, incited the killings of Tutsis. It recalled that a conviction may be based on circumstantial evidence, but where a finding of guilt is based on an inference drawn from such evidence, it must be the only reasonable conclusion. The Appeals Chamber held that the Trial Chamber “erred in concluding that the only reasonable inference that could be drawn from the evidence on the record is that Mugenzi and Mugiraneza knew that Sindikubwabo’s speech would be aimed at sparking the killing of Tutsis and that, therefore, their presence at the ceremony demonstrates their shared intent genocidal intent.”

developed and implemented.<sup>2505</sup>

iii. *Instigation*

598. Khieu Samphan mischaracterises the findings of the Chamber, which are not based on his mere presence at meetings in which the plans and policies were developed.<sup>2506</sup> Rather, in finding him responsible for instigation during Phase I and at Tuol Po Chrey, it held that Khieu Samphan prompted the perpetrators to take action in furtherance of the party policy by his presence at meetings, *in particular* his support to the Party Centre in the decisions taken at the meetings to evacuate the city and reaffirming the policy of targeting Khmer Republic officials.<sup>2507</sup> With respect to Phase II, the Chamber makes no direct reference at all to his attendance and participation in these meetings, pointing rather to, *inter alia*, his contribution to planning the movement of the population, his speeches and public statements, and the support he gave to the development of the Khmer Rouge's criminal policies which it held prompted Khmer Rouge soldiers and cadres to forcibly transfer thousands of people to worksite and fields during the movement of the population.<sup>2508</sup>

599. Finally, Khieu Samphan misconstrues the law in suggesting that the existence of a policy prior to 17 April 1975 somehow negates the finding that his conduct substantially contributed to the crimes.<sup>2509</sup> The elements for this mode of liability only require that it be demonstrated that the instigation was a substantially contributing factor to the conduct of the person committing the crime<sup>2510</sup> and not a cause *sine qua non*.<sup>2511</sup>

<sup>2505</sup> See *supra*, XIX (Role of Khieu Samphan).

<sup>2506</sup> KS Appeal, paras 297, 603.

<sup>2507</sup> Judgment, paras 1014, 1045 (emphasis added). In both paragraphs, the Chamber details his participation and contribution. See also, *Planning*, above.

<sup>2508</sup> Judgment, paras 1031-1032.

<sup>2509</sup> KS Appeal, para. 297.

<sup>2510</sup> *Duch* TJ, para. 522 (“Instigating also requires more than merely facilitating the commission of a crime, which may otherwise suffice for its aiding and abetting. The instigation must be a substantially contributing *factor* to the criminal conduct that was later perpetrated.”) (Emphasis added). *Karera* AJ, para. 317; *Kordić* AJ, para. 27.

<sup>2511</sup> *Orić* TJ, para. 274 (“The necessary link between the instigating conduct and the principal crime committed, commonly described as ‘causal relationship’, is not to be understood as requiring proof that, in terms of a ‘*condicio sine qua non*’, the crime would not have been committed without the involvement of the accused. Because the commission of a crime may depend on a variety of activities and circumstances, it suffices to prove that the instigation of the accused was a substantially contributing factor for the commission of the crime.”); *Nahimana* AJ, para. 480.

iv. *Khieu Samphan disseminated the common purpose through his participation in indoctrination sessions, his speeches and FUNK propaganda*

600. The Chamber found that through his attendance and participation in indoctrination sessions, his speeches and FUNK propaganda, Khieu Samphan disseminated Khmer Rouge policies and contributed to the common purpose and policies during the civil war and after 17 April 1975. Of note, it found that he justified the forced transfer of urban populations and forced movements of the population in the countryside via the creation of cooperatives. He lectured on and encouraged the identification and elimination of enemies and he appealed to the population, inside and outside of the country to join the resistance against the Khmer Republic, calling on people to annihilate the “traitorous” Lon Nol clique and falsely promising that only the seven “super-traitors” would be killed.<sup>2512</sup>

601. Khieu Samphan alleges the Chamber improperly “extrapolated” on the nature and meaning of the indoctrination sessions he conducted,<sup>2513</sup> his speeches prior to 17 April 1975, and during Phases I and II of the forced transfers.<sup>2514</sup> Specifically, Khieu Samphan argues that the Chamber erred in concluding that his participation in these indoctrination sessions amounted to a significant contribution as it was never demonstrated that any person who attended subsequently committed a crime or indicated he/she was influenced to commit crimes.<sup>2515</sup> Similarly, he argues that a sufficient link was not established between his speeches and “FUNK propaganda documents”, and the direct perpetrators of the crimes.<sup>2516</sup>

a. Joint Criminal Enterprise

602. The Chamber found that through his participation in indoctrination sessions, speeches and

<sup>2512</sup> Judgment, paras 973-976, referring to Judgment, paras 367, 379, 757, 772, 818, 974, relying on findings made at Judgment, paras 99-100, 147, 164, 233, 236, 367, 370, 377, 381-383, 406-407, 581, 602, 610, 616, 724, 738, 742, 748, 754, 765, 767, 782-783, 785, 828. See also XV (Policy to forcibly transfer), XVI (Policy to smash enemies), XVII (Policy of targeting Khmer Republic soldiers).

<sup>2513</sup> KS Appeal, para. 301, citing generally to the alleged errors raised in respect of his role prior to 17 April 1975; and para. 607, citing generally to “III.1.A.b.; III.5.C.”, which relate to the “Facts from 1970 – 17 April 1975” and “Khieu Samphan at the time of Phase II”, respectively.

<sup>2514</sup> KS Appeal, paras 304, 613. He relies on alleged errors of fact raised previously in his Appeal, some of have no apparent relevance to the issue he raises here. KS Appeal, para. 304, citing generally “Khieu Samphan between 1970-1975 – speeches”; para. 408, citing generally to “Substantial Contribution JCE Phase I” and “Substantial Contribution JCE Phase II”; para. 613, citing generally to III.1.A.b; III.5.C.”, which relate to Facts from 1970 – 17 April 1975” and “Khieu Samphan at the time of Phase II” respectively. All of these arguments have been demonstrated to be unfounded. See *supra*, XIX.A (Role of Khieu Samphan 1970-1975), XIX.D (Role of Khieu Samphan Phase II). See also KS Appeal, paras 300, 407, 442, 606, 612.

<sup>2515</sup> KS Appeal, paras 301, 607.

<sup>2516</sup> KS Appeal, paras 305, 307, 408, 613.

contributions to FUNK propaganda: (i) Khieu Samphan significantly contributed to the common purpose; (ii) that the crimes committed during Phase I and II and at Tuol Po Chrey were undertaken pursuant to the Party leadership's express instructions, decisions and policy; and (iii) that the crimes could be imputed to various participants of the JCE acting in furtherance of the common purpose.<sup>2517</sup> Indeed, the Chamber found that the crimes could also be imputed directly to Khieu Samphan, as there was a sufficient link between his action in planning, instigating, aiding and abetting and the direct perpetrators of the crimes at issue.<sup>2518</sup>

603. Contrary to Khieu Samphan's contention,<sup>2519</sup> the content of his 21 April 1975 speech is entirely consistent with the Chamber's findings on the manner in which his public statements significantly contributed to the common purpose and the Party's criminal policies.<sup>2520</sup> It held that through his public statements, Khieu Samphan praised the policies and conduct of the Khmer Rouge during the "revolution", highlighted past successes and encouraged further action, justified the transfer of the population of Phnom Penh, appealed to the population to join the resistance, called on people to annihilate the "traitorous" Lon Nol clique, falsely promised that only the seven 'super-traitors' would be killed, and "whole-heartedly supported the revolution without a hint of criticism."<sup>2521</sup> Khieu Samphan's speeches and public statements consistently promoted these goals and the Chamber correctly considered his 21 April 1975 speech in the context of all the evidence.

604. With respect to his liability during Phase I, Khieu Samphan further alleges that the Chamber erred in failing to demonstrate that through the resolution adopted after 27 April 1975, he supported the criminal aspects of the common plan.<sup>2522</sup> This allegation rests on an alleged error

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<sup>2517</sup> Judgment, paras 804-810, 835-836, 962-987. Where a principal perpetrator is not a member of the JCE, his or her criminal conduct need not be directly attributable to the specific contribution of the accused to the JCE. Rather, it must be demonstrated that the crime forms part of the common criminal purpose and can be imputed to at least one member of the JCE acting in accordance with the common plan. *Brđanin* AJ, para. 418, 430. See also Judgment, fn. 2930, *citing Krajišnik* AJ, para. 226 (A sufficient link exists when a JCE member explicitly or implicitly requested a non-JCE member to commit a crime, or instigated, ordered, encouraged or otherwise availed himself of the non-JCE member to commit the crime forming part of the common purpose).

<sup>2518</sup> Judgment, para. 963. Contrary to Khieu Samphan's suggestion (KS Appeal, paras 305, 613), aiding and abetting does not require proof that but-for the assistance the crime would not have occurred, but rather, it is only required to show that the assistance had a substantial effect on the perpetration of the crime. See *Blaskić* AJ, para. 48; *Blagojević* AJ, paras 127, 187.

<sup>2519</sup> KS Appeal, paras 389-391, 442.

<sup>2520</sup> Judgment, paras 832, 982.

<sup>2521</sup> Judgment, paras 962-963, 980-982, 987.

<sup>2522</sup> KS Appeal, paras 409-410. See also for aiding abetting: KS Appeal, para. 407, *citing* Judgment para. 982.

of fact demonstrated to be unfounded<sup>2523</sup> and on a false interpretation of the findings of the Chamber, which considered this document as consistent with a series of public statements Khieu Samphan made praising the policies and conduct of the Khmer Rouge revolution and justifying the commission of crimes integral to these policies.<sup>2524</sup>

b. Aiding and Abetting

605. Contrary to Khieu Samphan's suggestion, the Chamber did not rely on the fact that Khieu Samphan's conducted indoctrination sessions alone in finding him responsible for aiding and abetting the Phase I crimes.<sup>2525</sup> Rather, it relied primarily on Khieu Samphan's public speeches during this time.<sup>2526</sup> In regards to Phase II, the Chamber found that Khieu Samphan conducted indoctrination sessions for Cambodians who had returned from abroad in which he justified forced urban evacuations. Taken together with his attendance and participation at other indoctrination sessions, the Chamber found that Khieu Samphan's conduct made a substantial contribution to the commission of crimes.<sup>2527</sup> Khieu Samphan's remaining allegations in respect of indoctrination sessions are unsubstantiated as they rest on general errors of fact demonstrated to be unfounded,<sup>2528</sup> are unsupported by citations to evidence or legal precedent, and fail to demonstrate any miscarriage of justice.

606. The Chamber established that Khieu Samphan's acts and omissions with respect to indoctrination sessions and speeches had a substantial effect on the commission of the crimes. In respect of the Phase I crimes, the Chamber found that Khieu Samphan's speeches, particularly given his prestigious reputation, encouraged the people in the Khmer Republic territory and Khmer Republic officials to join the Khmer Rouge and encouraged the perpetrators of the crimes. It found that Khieu Samphan promoted a false sense of security which made it easier to deceive the urban population and Khmer Republic officials and that his public statements encouraged the perpetrators.<sup>2529</sup>

607. In respect of the crimes at Tuol Po Chrey, the Chamber was satisfied that Khieu Samphan's

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<sup>2523</sup> See *supra*, XIX.C (Role of Khieu Samphan Phase I).

<sup>2524</sup> Judgment, paras 980-987.

<sup>2525</sup> Judgment, para. 1008.

<sup>2526</sup> Judgment, para. 1008.

<sup>2527</sup> Judgment para. 1033, *citing* Judgment paras 379, 757, 975.

<sup>2528</sup> KS Appeal, paras 301, 305, 607, 613. See XIX.A (Role of Khieu Samphan 1970-1975).

<sup>2529</sup> Judgment, paras 1008-1013, *referring to* Judgment, paras 120, 152, 367, 376, 464, 501-515, 831, 980-987.



public statements and instructional meetings before and after the commission of crimes justified and endorsed the Khmer Rouge policies including continued vigilance against and elimination of all elements of the former Khmer Republic regime and excused and denied the crimes, including the executions of Khmer Republic officials. The Chamber was satisfied that the perpetrators, who acted in furtherance of the CPK policy to target Khmer Republic officials for execution, arrest and disappearance, were encouraged by these statements.<sup>2530</sup> Similarly, in respect of the Phase II crimes the Chamber found that through his public statements, Khieu Samphan praised the Khmer Rouge; justified and endorsed their policies; and justified or denied their crimes and that these themes were repeated during indoctrination sessions.<sup>2531</sup>

c. Instigating

608. Khieu Samphan further alleges the Chamber erred with respect to his conduct of indoctrination sessions prior to 17 April 1975 arguing that the Chamber “speculated” that he “knew” this would inevitably lead to the commission of crimes.<sup>2532</sup> He provides no support for this assertion and ignores the factual foundation upon which the Chamber relied with respect to his knowledge. He neglects to address the fact that the Chamber’s findings on “indoctrination” did not rely on his conduct of educational sessions alone, but also on his involvement in political training sessions, preparation of FUNK propaganda, including FUNK radio broadcasts and his speeches.<sup>2533</sup> The Chamber found that the indoctrination contributed to the commission of crimes. They ingrained hatred and distrust of New People and disseminated the Party’s policies which taken together with the Party’s reliance on strictly disciplined peasants who were indoctrinated to hate and given extensive power, contributed to the deception of people during the forced transfers, ill-treatment, discrimination and deaths.<sup>2534</sup>

609. Khieu Samphan alleges the Chamber erred in finding that his speeches during the last offensive and “before and during Phase II” amounted to a substantial contribution to the

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<sup>2530</sup> Judgment, paras 1047-1051 *referring to* Judgment, paras 120, 817-823, 829-834, 947-952, 973-976, 980-987, 988-992.

<sup>2531</sup> Judgment, para. 1033.

<sup>2532</sup> KS Appeal, paras 302-303.

<sup>2533</sup> Judgment, paras 367-371, 945, 973, 1014-1015, 1045-1054. See in particular, the Chamber’s finding that the indoctrination would lead to the commission of crimes and that the only reasonable expectation was that vast numbers of people would suffer and/or die during the forced population movements.

<sup>2534</sup> See, for example, Judgment, paras 787, 818, 945-949.

commission of crimes.<sup>2535</sup> He relies on general arguments related to the Chamber’s factual findings on the meaning of his speeches, which the Co-Prosecutors have demonstrated to be unfounded.<sup>2536</sup> He argues that no direct perpetrator of crimes claimed to have heard the speeches or to have been encouraged or incited to commit the crimes.<sup>2537</sup> While it is necessary to demonstrate that the instigation contributed to the commission of the crimes, it is not necessary to demonstrate that it was exerted directly on the author of crimes by the accused<sup>2538</sup> nor is there a requirement that any specific perpetrator be identified.<sup>2539</sup> The Chamber properly linked Khieu Samphan’s speeches to the commission of crimes during Phase I and at Tuol Po Chrey, holding that his speeches prompted Khmer Rouge soldiers and cadres to take action to implement the policy to forcibly transfer the population of Phnom Penh and to target Khmer Republic officials for mistreatment. Similarly, with respect to Phase II, the Chamber found that his speeches prompted the Khmer Rouge soldiers and cadres to forcibly displace the population, that his public statements whole-heartedly supported the forced movement of the population and that these actions substantially contributed to the commission of crimes during the movements of the population.<sup>2540</sup>

v. *Khieu Samphan mischaracterises the Chamber’s findings regarding his reputation and official titles*

610. Khieu Samphan alleges that the Chamber erred in finding that his “reputation” prior to 17 April 1975 and during Phase II and his official titles amounted to an “important” or “substantial” contribution.<sup>2541</sup> These allegations mischaracterise the Chamber’s findings as it did not conclude that his reputation was the contribution but rather that his reputation magnified the impact of his *public statements*. The Chamber considered his “position of high repute and respect”, and the fact that he was “widely reputed to be a man of probity and honour”.<sup>2542</sup> The Chamber noted his

<sup>2535</sup> KS Appeal, paras 304, 614.

<sup>2536</sup> KS Appeal, paras 305, 615, *relying on* KS Appeal, para. 613. XIX.A (Role of Khieu Samphan 1970-1975), XIX.D (Role of Khieu Samphan Phase II).

<sup>2537</sup> KS Appeal, paras 304-305, 615 adopting the arguments set out in KS Appeal, para. 613.

<sup>2538</sup> *Orić* TJ, paras 271-273.

<sup>2539</sup> *Karera*, AJ, para. 318.

<sup>2540</sup> Judgment, paras 1014, 1031-1032. The Chamber also held that his speeches were widely disbursed and that Khmer Rouge soldiers and cadres would have been encouraged to adhere to the call to violence contained in them. See also, Judgment para. 787 (finding that Khieu Samphan’s speeches endorsed suspicion and distrust and contributed to the ‘apparatus of oppression’).

<sup>2541</sup> KS Appeal, paras 312-313, 608, 616, *citing to* Judgment, paras 976, 980, 988, 1009-1010, 1034, 1048.

<sup>2542</sup> See Judgment, paras 980, 988.

reputation in evaluating the effect of his presence at indoctrination sessions, concluding that Khieu Samphan facilitated the effectiveness of the instructions delivered, by indicating to those in attendance that he had endorsed the common purpose and policies particularly when he delivered the instructions himself.<sup>2543</sup> This finding is both correct in law<sup>2544</sup> and entirely consistent with the Chamber's findings that Khieu Samphan contributed to the common purpose by aiding and abetting the crimes committed.<sup>2545</sup>

611. Finally, Khieu Samphan argues that the Chamber's consideration of his reputation contradicts its prior conclusion on the necessity of rallying Sihanouk to the Khmer Rouge.<sup>2546</sup> The Chamber's findings are entirely consistent. The critical link with Sihanouk was secured and maintained by Khieu Samphan and endorsement of both men of such popular esteem was important to the Khmer Rouge achieving their goals.

*vi. Liaison role with Norodom Sihanouk, diplomatic functions and official roles*

612. Khieu Samphan alleges the Chamber erred with respect to the "nature and extent" of his liaison role with Sihanouk and his diplomatic activities during Phases I and II,<sup>2547</sup> and with respect to the "nature" of his official role during Phase II.<sup>2548</sup> In support, he cites to alleged errors of fact raised previously in his Appeal,<sup>2549</sup> some of which are irrelevant to the issue presently raised, and all of which are unfounded.<sup>2550</sup>

613. Khieu Samphan alleges that the Chamber erred with respect to his liaison role with

<sup>2543</sup> Judgment, paras 972-976, 1009-1010, 1034, 1048.

<sup>2544</sup> See *Furundžija*, TJ, para. 209 (finding that "presence, when combined with authority, can constitute assistance in the form of moral support" constituting the *actus reus* of aiding and abetting).

<sup>2545</sup> Judgment 963, 1009-1010, 1034, 1048.

<sup>2546</sup> KS Appeal, para. 313.

<sup>2547</sup> KS Appeal, paras 308-309, 311, 313, 621, 619.

<sup>2548</sup> KS Appeal, para. 609. In respect of his liaison role with Sihanouk, diplomatic functions and official titles, the Chamber found, *inter alia*, that Khieu Samphan: (i) secured Sihanouk's association with the Khmer Rouge which was "critical" to achieving its goals; (ii) justified the evacuations winning the Khmer Rouge defenders within Cambodia and abroad; (iii) made public statements in which he presented himself as a key leader and encouraged Cambodians to continue implementing the socialist revolution. The Chamber found he endorsed the common purpose and policies to evacuate urban areas, move people between rural areas and target Khmer Republic officials for arrest, execution and disappearance. Judgment, paras 987-992, *referring to, inter alia*, Judgment, paras 98, 360, 365, 368, 374, 380-383, 724, 728, 731-732, 736, 738, 757-759, 817, 827.

<sup>2549</sup> KS Appeal, para. 309, fn. 708, para. 312, fn. 711 (alleging errors raised in respect of his role from 190-1975); para. 609, fn. 1308; para. 619 (wherein he fails to cite to anything at all); para. 621, fn. 1317 (wherein he cites generally to "III.1.A.b ; III.5.C" which relate to the "Facts in the period 1970-1975" and "Khieu Samphan at the time of Phase II").

<sup>2550</sup> XIX.A (Role of Khieu Samphan 1970-1975), XIX.D (Role of Khieu Samphan Phase II).

Sihanouk prior to 17 April 1975.<sup>2551</sup> He relies generally on arguments relating to the Chamber's factual findings on the nature and extent of his role, responded to *supra*.<sup>2552</sup> The Chamber found that the liaison role was part of Khieu Samphan's assistance that had a substantial effect on the commission of crimes. The Chamber noted that this use of Sihanouk gained the Khmer Rouge domestic and international support, and deflected attention and potential interference in their criminal campaign.<sup>2553</sup> Khieu Samphan's argument that Sihanouk's reassurance of local and international observers cannot be imputed to him<sup>2554</sup> misunderstands the Chamber's findings which relied on Khieu Samphan's role in securing Sihanouk's support.<sup>2555</sup>

### C. Knowledge of the crimes

#### i. *The Chamber did not apply a mens rea standard imported from JCE III*

614. Contrary to Khieu Samphan's assertion, the Chamber did not apply a JCE III *mens rea* standard in its findings on his intent.<sup>2556</sup> The Chamber correctly held that with respect to JCE I, the accused must intend to participate in a criminal plan and this intent must be shared with other JCE participants.<sup>2557</sup> In contrast, for JCE III, the crime may be outside the criminal plan agreed to, as long as it is proven that the Accused was aware that the crime was a natural and

<sup>2551</sup> KS Appeal, para. 308-309.

<sup>2552</sup> See *supra*, XIX (Role of Khieu Samphan).

<sup>2553</sup> Judgment, paras 988-992, 1008-1013, 1047-1051. Particularly where the Chamber found that the support of Sihanouk and his praise of the Khmer Rouge reassured local and international observers and that Khieu Samphan's diplomatic efforts, including getting support from Sihanouk, won the Khmer rouge defenders, both in Cambodia and abroad, deflected attention and feared interference.

<sup>2554</sup> KS Appeal, para. 309.

<sup>2555</sup> Judgment, para. 1008.

<sup>2556</sup> KS Appeal, paras 287, 396, 590. Khieu Samphan extends his arguments on the *mens rea* standard for JCE to all the other modes of liability without providing any argument or precedent in support. KS Appeal, para. 73. This allegation has been demonstrated to be wholly unfounded and will not be addressed further here. See *supra*, XIV (Joint criminal enterprise).

<sup>2557</sup> Judgment, para. 694. The Chamber found that the members of the JCE, including Khieu Samphan, intended the crimes to occur as part of the criminal plan of the JCE. Thus, it held that the policies formulated by the Khmer Rouge involved the commission of crimes as a means of bringing the common plan to fruition (Judgment, paras 804, 835. See also XV (Policy to forcibly transfer), XVI (Policy to smash enemies), XVII (Policy of targeting Khmer Republic soldiers), that Khieu Samphan shared the intent with other members of the JCE to bring about the common purpose through the implementation of the Party's policies by means which involved the crimes and that he specifically shared the intent to commit the other inhumane acts of forced transfer and attacks against human dignity during phases one and two of population movements, murder during Phase I of the population movements, as well as murder and extermination at Tuol Po Chrey. Judgment, para. 995. See also XV (Policy to forcibly transfer), XVI (Policy to smash enemies), XVII (Policy of targeting Khmer Republic soldiers). The Chamber also held that Khieu Samphan's "deliberate and continuous participation in the JCE, knowing of the crimes being committed, indicates his criminal intent." Judgment, para. 993.

foreseeable consequence of the criminal plan and willingly took this risk.<sup>2558</sup>

615. Khieu Samphan cites to paragraphs 944 through 951 of the Judgment as the locus of the alleged error.<sup>2559</sup> However, these findings do not show that the Chamber applied a JCE III *mens rea* standard. In this section, the Chamber made general findings on Khieu Samphan's knowledge of the crimes. The Chamber then applied these findings to its evaluation of Khieu Samphan's criminal intent according to each of the modes of liability.<sup>2560</sup> With respect to JCE, the Chamber was satisfied that prior to the commission of the crimes, Khieu Samphan knew of the substantial likelihood that they would result from the implementation of the policies that were part of the common purpose. It was also satisfied that he knew that the crimes were in fact committed in the course of Phases I and II of the forced transfers and at Tuol Po Chrey, and that he had further notice of the crimes after their commission.<sup>2561</sup> In contrast to the Chamber's findings that Khieu Samphan was aware of the substantial likelihood that the crimes would result from the common plan and thus intended the crimes, JCE III only requires an awareness that the crime charged was a *possible* consequence of implementing the plan.<sup>2562</sup>

*ii. The Chamber reasonably found that Khieu Samphan knew of the commission of crimes*

616. Khieu Samphan alleges that the Chamber erred in finding that prior to 17 April 1975, he was aware of the substantial likelihood that crimes would be committed during Phase I and II of the forced transfers and at Tuol Po Chrey, and erred in finding that he knew of the crimes concurrent with their commission.<sup>2563</sup> His allegations rely on two erroneous submissions. First, with respect to each of the time periods, he narrowly and inaccurately describes the factual basis of the Chamber's findings.<sup>2564</sup> A glaring example is his complete omission of the Chamber's

<sup>2558</sup> *Duch* TJ, para. 509. The accused must have sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him. See *Kvočka* AJ, para. 86. The *mens rea* is established where the crime was foreseeable to the accused and where he or she willingly took the risk that the crime might be committed. See *Martić* AJ, p. 83.

<sup>2559</sup> KS Appeal, paras 71-72.

<sup>2560</sup> Judgment, paras 960-1053.

<sup>2561</sup> Judgment, para. 994.

<sup>2562</sup> JCE III *mens rea* does not require an understanding that a deviatory crime would *probably* be committed; it does, however, require that the *possibility* a crime could be committed is sufficiently substantial as to be foreseeable to an accused. See *Karadžić* Decision on JCE III, para. 18.

<sup>2563</sup> KS Appeal, paras 280-286, 397, 440, 588-589, 594.

<sup>2564</sup> Prior to 17 April 1975: See KS Appeal, para. 289. Although no citation is provided in this paragraph, it appears that Khieu Samphan is summarising Judgment, paras 947-949. See also KS Appeal, paras 280-285. Khieu Samphan's omits that the Chamber also relied on the fact that the Central Committee's decision to close markets and establish cooperatives was done *for the purpose of* attacking the power of the classes of feudalists, land owners and

reliance on his own admissions concerning his knowledge of the crimes being committed by the Khmer Rouge.<sup>2565</sup> Furthermore, Khieu Samphan continually mischaracterises the Chamber’s findings. He repeatedly suggests the Chamber relied on the “existence of policies” of which he claims to have been unaware. The Chamber in fact relied on demonstrated “consistent patterns” of the commission of the crimes of which Khieu Samphan was certainly aware.

617. Second, Khieu Samphan’s allegations in respect of his knowledge rest entirely on alleged errors of fact he raised in respect of his role.<sup>2566</sup> However, he fails to identify which of the

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capitalists [emphasis added]; that Ieng Sary publicly described the policy of collectivisation in 1972 in an interview; the existence of CPK circulars which assigned people to collective agricultural productions; that there was a “consistent pattern” of forced evacuations and movements which were accompanied by ill-treatment, discrimination against people taken from enemy territory, deaths and the use of force; that the plan for the forcible transfer Khieu Samphan was involved in designing contemplated and/or involved crimes; that the prior experience of Oudong had involved the commission of the same crimes; the public statements made by members of the Party Centre; and that Khieu Samphan’s knowledge of the crimes on the basis of his diplomatic activities rested in his access to information in these roles rather than simply the position itself. Khieu Samphan also completely ignores the Chamber’s findings in paras 945-950, including critically, his admissions on his general knowledge of the crimes, as well as the Judgments findings in paras 125, 132-152, 843, 981; Concurrent with Phase I: See KS Appeal, paras 381-383, 398. Khieu Samphan fails to acknowledge that the Chamber also relied on news and state reports and did not rely on his mere proximity to other leaders, but rather his access to military reports and his constant meetings with these leaders in its findings. See, e.g., Judgment, para. 953; After Phase I: See KS Appeal, para. 399. Khieu Samphan fails to acknowledge that the Chamber also relied upon his speeches during the Independence Day celebrations, policy documents, his attendance at indoctrination sessions and that with respect to his diplomatic activities, reports were addressed directly to him in his capacity as President of the State Presidium; Prior to Phase II: See KS Appeal, para. 592 which omits that the living conditions experienced by the population throughout the country were characterised by food shortages and disease; that Khieu Samphan planned further forced transfers which contemplated and involved the crimes that would later be committed; and, his attendance at meetings. Khieu Samphan also completely ignores the Chamber’s findings on his knowledge prior to 17 April 1975 and leading up to Phase II (i.e. Judgment, paras 947-951) despite the Chamber’s express indication that this also forms the basis of his knowledge of the Phase II crimes, see Judgment para. 951, where it states “*For all these reasons*, the Chamber finds that Khieu Samphan knew of the policies to evacuate urban areas, move people between rural areas and target Khmer Republic officials before 17 April 1975, and the accompanying patterns of conduct which had emerged. He therefore knew of the substantial likelihood that further implementation of these policies would, consistent with the ongoing patterns of conduct, result in the crimes committed in the course of phases one *and two* and at Tuol Po Chrey (emphasis added); During and after Phase II: See KS Appeal, para. 595, wherein Khieu Samphan omits that the Chamber relied on the “on-going pattern” of forced movements between rural areas which were characterised by ill-treatment, discrimination against “New People” and deaths; that during Khieu Samphan’s visits to the countryside he witnessed the living conditions of tens of thousands working with their bare hands and his *own* public statements that tens of thousands had been collected at work sites; party publications; and reports of news agencies and various foreign states of the crimes.

<sup>2565</sup> KS Appeal, para. 289. See Judgment, para. 946.

<sup>2566</sup> Prior to 17 April 1975: See KS Appeal, para. 290, fn. 686, where he cites generally to all the alleged errors of fact raised with respect to his role between 1970-1975; Concurrent with Phase I and Tuol Po Chrey: See KS Appeal, para. 400, fn. 878, which cites generally to the alleged errors he raises with respect to his role during Phase I and para. 439, fn. 960, where he cites generally to the alleged errors he raises with respect to the Role during Phase I – B-5 and the Phnom Penh Train Station; After Phase I: See KS Appeal, para. 400, fn. 878, wherein he cross-references to errors he alleges relating to his role at the time of Phase I. These alleged errors are not relevant to his knowledge demonstrated after the commission of the crimes; Phase II: See KS Appeal, para. 593, fn. 1293, *citing* “III.5.C” that is, errors raised in respect of his Role during Phase II; After Phase II: See KS Appeal, para. 597, fn. 1296, *citing* “III.3.B” and “III.4.B”, that is errors raised in respect of the “Legal Qualification of the Facts of Phase

alleged errors on his role are, in his estimation, relevant to the alleged errors he raises in relation to his knowledge. He merely asserts that the evidence does not establish that he knew of the crimes or that he knew his acts were part of a criminal context<sup>2567</sup> and/or that, since he did not have knowledge of the crimes, he could not have intended or contributed to them.<sup>2568</sup> Similarly, without providing any citations to evidence or law, he argues that these CPK policies did not exist.<sup>2569</sup> Such broad and unsupported allegations fail to identify any appealable error. In any event, the Co-Prosecutors have demonstrated that the alleged errors of fact on which Khieu Samphan relies are unfounded.<sup>2570</sup>

618. Khieu Samphan alleges the Chamber erred in finding that prior to 17 April 1975, he knew of the substantial likelihood that the crimes would result on a large scale, in part, because of the policy of “strict indoctrination of uneducated peasants on class struggle, including the identification of all ‘New People’ and former Khmer Republic officials as enemies”.<sup>2571</sup> This allegation is wholly unfounded.<sup>2572</sup> First, Khieu Samphan mischaracterises the findings of the Chamber. He cites only to its abbreviated findings in respect of his liability for planning the Phase I and Tuol Po Chrey crimes,<sup>2573</sup> omitting that these paragraphs expressly rely on more detailed findings in other sections of the Judgment.<sup>2574</sup>

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I” and “Legal Qualification of the Facts at Tuol Po Chrey neither of which are relevant to the argument Khieu Samphan raises.

<sup>2567</sup> KS Appeal, paras 290, 400, 593, 596.

<sup>2568</sup> KS Appeal, paras 317, 596.

<sup>2569</sup> KS Appeal, paras 290, 593.

<sup>2570</sup> See *supra*, XIX (Role of Khieu Samphan). See also XV (Policy to forcibly transfer), XVI (Policy to smash enemies), XVII (Policy of targeting Khmer Republic soldiers).

<sup>2571</sup> KS Appeal, para. 288; Judgment, paras 998, 1040. See also KS Appeal, paras 302-303; Judgment, paras 367-371, 973, 1014-1015, 1045-1056. See in particular, the Chamber’s finding that the indoctrination would lead to the commission of crimes and that the only reasonable expectation was that vast numbers of people would suffer and/or die during the forced population movements.

<sup>2572</sup> Khieu Samphan’s arguments (KS Appeal, paras 288, 290) that the policy of identifying enemies is the subject of Case 002/02, that the Khmer Republic soldiers became “ex-KR” only after the fall of the regime on 17 April 1975 and that the term “New People” was not part of the Khmer Rouge lexicon prior to 17 April 1975 are without merit. See *supra*, VII (Scope of trial), XVI (Policy to smash enemies), X (Persecution), XV (Policy to forcibly transfer), XVII (Policy of targeting Khmer Republic soldiers).

<sup>2573</sup> KS Appeal, para. 288, fn. 684, *citing* Judgment, paras 998, 1040.

<sup>2574</sup> Judgment, paras 998, 1040 (stating that it “has already found that” Khieu Samphan knew of the substantial likelihood that crimes would result from these policies and cites back to its findings on his knowledge). In these sections of the Judgment, the Chamber explains that through his speeches and training sessions, Khieu Samphan participated in the indoctrination of people on class struggle and the independence of the country and that this contributed to the identification of feudalists and capitalists as enemies and “New People” as needing to be tempered. Taken together with Khieu Samphan’s agreement that the revolution should rely on strictly-indoctrinated peasants who were given extensive powers to implement the party line and who were taught to deceive people in accordance with the principle of secrecy, the Chamber found that Khieu Samphan knew that this “indoctrination to hate” would lead to violence. Judgment, para. 945-946. See also Judgment, paras 973-976 (detailing Khieu

619. Furthermore, he fails to establish how these issues could demonstrate that the Chamber's findings were unreasonable. Other than some heated rhetoric and a catch-all assertion that all the errors he raises amount to a denial of justice and invalidate the decision, Khieu Samphan fails to demonstrate how this could be the case. Indeed, in light of the Chamber's well-founded and broadly based finding,<sup>2575</sup> he fails to establish any error in relation to the Chamber's findings on his role in indoctrination.

#### **D. Khieu Samphan's *Mens Rea***

620. Khieu Samphan alleges the Chamber erred in finding that, prior to 17 April 1975, concurrent with Phase I and Tuol Po Chrey, and during Phase II, he had the requisite intent to be found criminally liable under JCE, planning, aiding and abetting and instigating. He baldly asserts that as he did not have knowledge of the crimes, it cannot be demonstrated that he had a criminal intent.<sup>2576</sup> It appears that he relies on alleged errors relating to his knowledge which are demonstrated elsewhere to be patently baseless.<sup>2577</sup>

621. Khieu Samphan argues that as the JCE's common plan was not entirely criminal, the Chamber could not conclude from his "mere participation" in the implementation that he had criminal intent.<sup>2578</sup> This allegation entirely misapprehends the Chamber's findings which did not rely on his mere participation in the implementation of the common plan, but found explicitly that Khieu Samphan's "deliberate and continuous participation in the JCE, *knowing of the crimes being committed*", indicated his criminal intent.<sup>2579</sup> The Chamber detailed his awareness and

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Samphan's instructional meetings and indoctrination sessions), 980-987 (speeches). Judgment paras 787, 818, 945-949.

<sup>2575</sup> Judgment, paras 945-946 (considering his speeches and participation in training sessions which indoctrinated people of the lower social class to hate feudalists, capitalists and "New People" and identify them as enemies; his contribution to the decision to evacuate foreigners from Phnom Penh; and his role in continuously denying and hiding the reality of the situation, thereby protecting perpetrators and allowing the commission of further crimes; his admissions that he knew that acts of a violent criminal nature were being perpetrated against the civilian population in implementing the CPK policies; his belief that this was secondary to the achievement of independence and that there was no need to seek the consent of people to suffer for the policies of the Khmer Rouge; his belief and knowledge that coercion was necessary to collectivise society; his expectation that people would die during the population movements; and his awareness that unless eliminated, Khmer Republic officials might stage a counter-revolution following liberation; his public statements during the democratic and socialist revolutions which demonstrated his knowledge of the policies and crimes; as well as his wide-ranging access to information concerning the crimes). See also Judgment, paras 947-949.

<sup>2576</sup> KS Appeal, paras 317, 413, 445, 625.

<sup>2577</sup> See XXI.C (Khieu Samphan's knowledge).

<sup>2578</sup> KS Appeal, paras 318, 414, 446, 626.

<sup>2579</sup> Judgment, para. 993 (emphasis added).



knowledge of the crimes and considered that he “contributed to and approved the progress of the democratic and socialist revolutions”, “planned, disseminated, implemented, endorsed and defended the common purpose which resulted in and involved the policies to evacuate urban areas, move people between rural areas and target Khmer Republic officials for arrest, execution and disappearance”, and “that the crimes during Phases II and II and at Tuol Po Chrey were committed pursuant to and in furtherance of these policies.”<sup>2580</sup>

622. Khieu Samphan further alleges that the Chamber relied solely on his contribution to the common purpose to conclude that he possessed the requisite discriminatory intent for the crime of political persecution and that this contradicts its findings on the non-criminal aspects of the JCE.<sup>2581</sup> The argument is unfounded as the Chamber found that Khieu Samphan shared the intent to discriminate against the evacuated city people on political grounds as demonstrated by his contribution to developing, disseminating, endorsing and defending the Party line on class struggle and the policy to target Khmer Republic officials.<sup>2582</sup>

*i. Planning and Instigation*

623. Khieu Samphan argues that the Chamber failed to provide a reasoned opinion in finding with respect to his intent prior to 17 April 1975 and during Phase II that he intended or was aware of the substantial likelihood that crimes would be committed.<sup>2583</sup> The Chamber correctly identified the *mens rea* standard for planning and instigating, which requires the accused intend *or* be aware of the substantial likelihood of the commission of a crime upon the execution of the plan.<sup>2584</sup> The Chamber then detailed Khieu Samphan’s awareness in the period prior to 17 April 1975, of the substantial likelihood that crimes would be committed and his direct knowledge of the crimes concurrent with their commission<sup>2585</sup> and related these findings to his intent.<sup>2586</sup>

*ii. Aiding and abetting*

624. Khieu Samphan alleges the Chamber erred in finding that he had the requisite intent to be

<sup>2580</sup> Judgment, paras 994-995.

<sup>2581</sup> KS Appeal, paras 319-321, 323, 415, 447, 627.

<sup>2582</sup> Judgment, paras 571, 656, 685-686, 995.

<sup>2583</sup> KS Appeal, paras 320-321, 628-629. Khieu Samphan also repeats his argument that the Chamber erred with respect to his presence and participation in the development of the plans, responded to above.

<sup>2584</sup> Judgment, para. 698. Khieu Samphan does not challenge the correctness of this standard.

<sup>2585</sup> Judgment, paras 947-957.

<sup>2586</sup> Judgment, paras 1002, 1028, 1042.

found liable for aiding and abetting the crimes during Phases I and II and at Tuol Po Chrey.<sup>2587</sup> He notes that the Chamber found that he knew of the “*réelle probabilité*” or substantial likelihood that the crimes would be committed and argues that “such a low standard” does not suffice to establish aiding and abetting liability.<sup>2588</sup> While the term “*réelle probabilité*” is used in the paragraphs of the French version of the Judgment he cites, the English version of the same uses the term “likely”.<sup>2589</sup> Indeed, in setting out the Applicable Law, the Chamber held that the required standard is “*vraisemblablement*” or “likely”.<sup>2590</sup> As the Co-Prosecutors have demonstrated, the Chamber adopted the correct mental standard for aiding and abetting applicable at the time of the events, which is that “an accused must know that a crime is likely to be committed and that his conduct assists or facilitates the commission of a crime.”<sup>2591</sup>

*iii. Khieu Samphan’s awareness of the crimes committed at Tuol Po Chrey*

625. Khieu Samphan argues the Chamber erred in finding he had sufficient knowledge to be culpable of the crimes committed at Tuol Po Chrey given that the Chamber found “there is no evidence that he knew of the specific nature of the crimes being committed at Tuol Po Chrey”.<sup>2592</sup> He does not make reference to the knowledge or intent requirements of any specific mode of liability, or allege any specific legal error, fails to substantiate the allegation and fails to demonstrate how any such error could invalidate the decision.

626. If Khieu Samphan is attempting to allege that specific knowledge of the particular crimes is required to demonstrate his intent, the Co-Prosecutors note that there is no requirement for this in law. The *mens rea* requirements for planning and instigating contemplate liability where the accused is aware of the substantial likelihood that crimes would be committed, or in the case of aiding and abetting, knew that a crime would likely be committed.<sup>2593</sup> Equally, a participant in the JCE may incur liability for crimes committed by direct perpetrators who were not members

<sup>2587</sup> KS Appeal, paras 317, 326, 413, 625.

<sup>2588</sup> KS Appeal, paras 324, 416, 448, 632.

<sup>2589</sup> See Judgment, paras 1012, 1050.

<sup>2590</sup> Judgment, para. 704. See also *Brima* AJ, para 243, *Blaškić* AJ para 50, *Simić* AJ, para 86.

<sup>2591</sup> See *supra* XX.G (*Mens rea* for planning, ordering, instigating, and aiding and abetting).

<sup>2592</sup> KS Appeal, para. 438.

<sup>2593</sup> Judgment, paras 698, 700, 704. Aiding and abetting requires that the accused be aware of the essential elements of the crime committed by the perpetrator, but need not share the perpetrator’s intent to commit the crime, including the specific intent to commit crimes such as persecution. See Judgment, para. 704. It is not necessary for an accused to know the precise crime which was intended nor in which event it was committed. See *Karera* AJ, para. 321; *Nahimana* AJ, para. 482. The Chamber found that with respect to his liability for aiding and abetting, Khieu Samphan knew of the essential elements of the crimes. See Judgment, paras 1012, 1050.

of the JCE where the crimes can be imputed to at least one member of the JCE who used the direct perpetrator in furtherance of the common purpose.<sup>2594</sup>

627. Contrary to Khieu Samphan's contention,<sup>2595</sup> the Chamber correctly found that while Khieu Samphan was located at B-5 and the Phnom Penh railway station he participated in these policy decisions regarding evacuations and executions and celebrated the "success" of those policies, for example at Oudong.<sup>2596</sup> The Chamber held that Khieu Samphan knew Khmer Republic officials were being executed at Tuol Po Chrey *because* he had knowledge of the on-going pattern of targeting of Khmer Republic officials for arrest, execution, disappearance and other ill-treatment after an area was liberated prior to that time.<sup>2597</sup> The Chamber's findings on his knowledge of the crimes concurrent with their commission cannot be isolated from its findings of the demonstrated pattern of such crimes prior to this time.

#### **E. Sentencing (KS paras 647-655)**

628. Khieu Samphan alleges various errors of the Chamber regarding his sentence but he fails to demonstrate that the Chamber abused its considerable discretion.<sup>2598</sup> He first argues that the Chamber failed to consider his individual circumstances.<sup>2599</sup> This claim is belied by the Judgment, which repeatedly focuses its consideration on the particulars of Khieu Samphan and his conduct, finding that he was a "key actor" in the commission of extraordinarily grave crimes.<sup>2600</sup>

629. Further, Khieu Samphan asserts that he received a graver sentence than certain defendants before the Nuremberg tribunal or the ICTY.<sup>2601</sup> The ECCC is not bound, however, to tailor its sentences to those imposed on defendants convicted of very different crimes in different contexts before different tribunals. Moreover, Khieu Samphan does not even attempt to demonstrate any critical similarities between his case and those others. Next, Khieu Samphan claims the Chamber

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<sup>2594</sup> Judgment, para. 693.

<sup>2595</sup> KS Appeal, para. 439.

<sup>2596</sup> Judgment, paras 144, 740, 832-834, 947-951, 954-955.

<sup>2597</sup> Judgment, para. 955.

<sup>2598</sup> The SCC emphasised the Chamber's discretion over sentencing and its own deferential review on appeal. See *Duch* AJ, para. 354.

<sup>2599</sup> KS Appeal, paras 647-649.

<sup>2600</sup> See, e.g., Judgment, paras 1067 ("The sentence must be proportionate and individualised in order to reflect the culpability of the accused based on an objective, reasoned and measured analysis of the accused's conduct and its consequential harm"), 1074-77, 1080.

<sup>2601</sup> KS Appeal, paras 651-652.

erroneously found his abuse of authority to be an aggravating factor.<sup>2602</sup> The jurisprudence he cites holds that a defendant's position is not automatically aggravating at sentencing, but will be if it is found that he abused that position to commit the crimes,<sup>2603</sup> precisely what the Chamber found in this case.<sup>2604</sup>

630. Khieu Samphan also contends that the Chamber considered his advanced education to be an aggravating factor.<sup>2605</sup> The Chamber is entitled to consider that an accused's education contributed to his ability to appreciate the full extent of his actions. This does not represent an abuse of discretion, and is in fact precisely the sort of individualised consideration that elsewhere Khieu Samphan demands. Finally, Khieu Samphan claims that the Chamber failed to give appropriate weight to the evidence of his good character. However, the Chamber credited and considered this evidence, but properly concluded that it provided minimal mitigation of his crimes.<sup>2606</sup>

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<sup>2602</sup> KS Appeal, para. 653.

<sup>2603</sup> See, e.g., *D. Milošević* AJ, para. 302 (“it is settled jurisprudence of this Tribunal that while a position of authority, even at a high level, does not automatically warrant a harsher sentence, the *abuse* of such may indeed constitute an aggravating factor.”).

<sup>2604</sup> Judgment, para. 1087.

<sup>2605</sup> KS Appeal, para. 654.


<sup>2606</sup> Judgment, paras 1099-1103.

## XXII. CONCLUSION

631. Based on the foregoing, the Co-Prosecutors respectfully request that this Chamber:

- (a) Dismiss in their entirety Nuon Chea's and Khieu Samphan's Appeals;
- (b) Affirm their convictions; and
- (c) Uphold their sentences of life imprisonment.

Respectfully submitted,

Date	Name	Place	Signature
24 April 2015	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		