



## Extraordinary Chambers in the Courts of Cambodia



### Summary of the Supreme Court Chamber Appeal Judgement Pronounced on 23 November 2016

Case 002/01  
Nuon Chea and Khieu Samphân

**Summary of Supreme Court Chamber Judgement**  
**on appeals in Case 002/01**

23 November 2016

1. On 7 August 2014, the Trial Chamber of the ECCC rendered its judgment in Case 002/01, finding the Accused, NUON Chea and KHIEU Samphân, guilty of the crimes against humanity of extermination (encompassing murder), persecution on political grounds; and other inhumane acts (comprising forced transfer, enforced disappearances and attacks against human dignity).

2. The Trial Chamber found that these crimes had been committed in the course of three sets of events, which were the subject of Case 002/01, namely: during the evacuation of Phnom Penh immediately after the fall of the city on 17 April 1975 (so-called Population Movement Phase One); during population transfers that had occurred between 1975 and 1977 (so-called Population Movement Phase Two); and the execution of former LON Nol soldiers and officials at a locality called Tuol Po Chrey, in Pursat Province, in late April 1975. The Trial Chamber found that, although neither of the Accused had committed any of these crimes with their own hands, they were, nevertheless, criminally responsible for them based upon the mode of liability called “joint criminal enterprise”, as well as because they had planned, instigated, aided and abetted and – in case of NUON Chea, ordered – these crimes.

3. The Trial Chamber sentenced both Accused to life imprisonment. The Trial Chamber also granted, in part, the requests for moral and collective reparations of the Civil Parties; and endorsed eleven projects in this regard.

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4. NUON Chea and KHIEU Samphân, as well as the Co-Prosecutors, filed appeal briefs and responses thereto. The Civil Parties also made written submissions. The Supreme Court Chamber held a hearing on 2, 3 and 6 July 2015 to examine three additional witnesses. On 17 November 2015 and from 16 to 18 February 2016, it held hearings to hear the oral submissions on the appeals. The Supreme Court Chamber then retired to deliberate on the appeals.

5. Today, the Supreme Court Chamber is delivering its judgement on the three appeals. At this hearing, I shall summarise the reasons of the Supreme Court Chamber and read out the Supreme Court Chamber's disposition. The summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgement of the Court is the only authoritative document.

6. The appeals brought by NUON Chea and KHIEU Samphân comprise 223 and 148 grounds of appeal respectively, which often overlap. For that reason, I shall address the two appeals together, as is done in the written judgment. The Co-Prosecutors' appeal will be addressed separately.

7. I would like to emphasise that, because of the large number of grounds of appeal that have been raised, I shall at this hearing summarise only the findings in relation to those grounds that were particularly contentious or significant, or of particular interest to the public at large. Of course, the Supreme Court Chamber has also analysed all other grounds of appeal that have been raised. The Supreme Court Chamber's findings in respect of all these grounds are set out in written judgement. The full written judgement will be notified to the parties shortly after the hearing is closed. It is the full written judgement, and not my summary, that is authentic.

## **1. APPEALS OF NUON CHEA AND KHIEU SAMPHÂN**

8. The grounds of appeal raised by NUON Chea and KHIEU Samphân may be divided into five thematic groups. I shall address each of them, in turn.

### **1.1. Fairness of the proceedings**

9. The Accused raise several arguments challenging the fairness of the proceedings against them. I shall limit my summary to two sets of arguments.

#### ***1.1.1. Right to an independent and impartial tribunal***

10. Notably, the Accused submit that their right to be tried before an independent and impartial tribunal has been violated.

11. The Supreme Court Chamber is not persuaded by the argument that the Trial Chamber's purported bias is demonstrated by, what are alleged to have been, erroneous and illogical findings. Nor is the Supreme Court Chamber of the view that the interview Judge Cartwright gave in 2013 discloses bias on her part. As to the argument of a lack of

independence, based on the statements made by former Co-Investigating Judge Marcel LEMONDE in his book, the Chamber notes that those comments are of a general nature and were not stated in relation to Case 002. Turning to the allegation by THET Sambath – that potential witnesses did not testify due to security concerns – the Supreme Court Chamber notes that, while this is a serious allegation, it is unrelated to the question of whether the Trial Chamber lacked independence. With reference to the argument that the reasoning of the Cambodian judges for not calling HENG Samrin as a witness disclosed their lack of independence, the Supreme Court Chamber considers that it is not obvious that this could be the only possible conclusion, since it could have been genuinely motivated by the apprehension of the irrelevance of his expected testimony.

### ***1.1.2. Right to an effective defence***

12. NUON Chea and KHIEU Samphân raise several arguments in support of their claim that their right to an effective defence was violated, for example by the Trial Chamber's failure to summons certain witnesses.

13. With regards to HENG Samrin, NUON Chea had requested several times that he be summoned to testify, including before the Trial Chamber. The Trial Chamber could not reach the requisite majority for calling HENG Samrin as a witness. While three judges considered that summoning him was not warranted, two judges were of the view that HENG Samrin was a relevant witness and should be called.

14. The Supreme Court Chamber considers that the Trial Chamber's exercise of discretion regarding HENG Samrin was unreasonable. Notably, the three judges who did not consider that he should be called stated that calling him to testify might cause considerable delays. In the view of the Supreme Court Chamber, this was erroneous because there was no indication on the record that HENG Samrin would not appear if asked to do so. Furthermore, the request to call HENG Samrin had been made early in the proceedings and there is no indication that, whatever issues may have arisen, they could not have been resolved in the course of the proceedings before the Trial Chamber.

15. The Supreme Court Chamber reaches the same conclusion in respect of OUK Bunchhoen, whose appearance as a witness NUON Chea had also requested.

16. The next question for the Supreme Court Chamber to address is whether the Accused were actually prejudiced by the Trial Chamber's error. In this regard, the Supreme Court Chamber notes that neither of the two witnesses appeared to be in the possession potentially

exonerating information that other witnesses did not have. To the extent that HENG Samrin, in a previous interview, had made statements regarding the Khmer Rouge's policy toward LON Nol soldiers, the Supreme Court Chamber considers that the notes of this interview indeed raise issues that could have been clarified through testimony. Nevertheless, the interview notes were before the Trial Chamber and could be taken into account. In sum, the Supreme Court Chamber considers that it has not been established that the Trial Chamber's failure to call HENG Samrin and OUK Bunchhoen resulted in a "grossly unfair outcome in the judicial proceedings", warranting a reversal of the Accused's conviction.

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17. The Accused have raised numerous other issues in relation to the fairness of proceedings and have also argued that the Internal Rules were unconstitutional. Having considered the parties' submissions, the Supreme Court Chamber has rejected all these arguments, for the reasons set out within the written judgement.

## **1.2. Trial Chamber's approach to the evidence**

18. The second thematic area concerns the grounds of appeal relating to the Trial Chamber's approach to the evidence.

### ***1.2.1. Limiting opportunities for investigations at trial***

19. The Accused argue that the Trial Chamber erred by limiting their opportunities for investigations at trial.

20. The first issue is whether the Trial Chamber erred when confirming that the Defence was not entitled to investigate. The Supreme Court Chamber finds that, while the ECCC's procedural framework does not envisage fully-fledged party-driven investigations, there is no statutory basis or compelling practical reason for prohibiting the Defence from undertaking, subject to certain conditions, actions aimed at discovering relevant evidence, in particular to allow the Defence to make substantiated requests for investigative action by the relevant organ of the ECCC.

21. The second issue is whether the Trial Chamber erred in its disposal of requests for investigative action. The Supreme Court Chamber sees no unreasonableness in the Trial Chamber's overall approach, considering also that any procedural defects during the investigation were cured by the Closing Order.

### ***1.2.2. Permitting witnesses to review prior statements and to confirm their contents***

22. The next issue concerns the Trial Chamber's decision to allow witnesses to review their prior statements before they appear to give testimony.

23. The Supreme Court Chamber considers that it would have been more consistent with the Cambodian practice not to adopt such procedure. Nevertheless, the Supreme Court Chamber does not find that the Trial Chamber abused its discretion, given the circumstances of the case.

### ***1.2.3. Admission and use of written evidence in lieu of oral testimony***

24. The Accused also challenged the Trial Chamber's approach to the use of written statements in lieu of oral testimony. In particular, the Trial Chamber decided that, under certain conditions, evidence in the form of written statements or transcripts is admissible even if the Defence did not have the opportunity to examine their authors. The Trial Chamber consequently admitted 1,124 written statements and transcripts.

25. Firstly, the Supreme Court Chamber considered that the right to confront witnesses is not absolute. An entirely unfettered right to examine witnesses against the accused would bear the risk of compromising a court's ability to render justice in a case with the size and complexity as the case at hand.

26. Secondly, the Accused contest the weight that the Trial Chamber assigned to the written statements. The Supreme Court Chamber notes that written statements must generally be afforded lower probative value, since the parties could not examine the witnesses who provided them. The Trial Judgement did indeed state that the Trial Chamber took this principle into consideration in the evaluation of evidence and therefore no error was made in this respect. However, a more complex issue is whether the Trial Chamber relied too heavily on out-of-court written statements, in respect of certain findings it made. The Supreme Court Chamber will analyse this question in respect of the specific findings.

### ***1.2.4. Reliance on Civil Party evidence***

27. As to the next set of grounds of appeal concerning the Trial Chamber's reliance on evidence provided by Civil Parties, the Supreme Court Chamber is not persuaded by the arguments put forward by the Accused in this respect. Firstly, while Civil Parties have a special status in the proceedings, this does not mean that they cannot testify. The weight

given to their testimony will be assessed on a case-by-case basis, also taking into account the fact that they were not required to swear an oath.

28. Additionally, the Trial Chamber did not err by relying on so-called Statements of Suffering or Victim Impact Testimony, since it was clear that they could contain information relevant to the guilt of the Accused.

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29. The Accused have raised several other arguments in relation to the Trial Chamber's approach to the evidence, for instance, its reliance on expert witnesses; and certain practices in the courtroom when witnesses were asked to comment on documents. These, and all other arguments, have been carefully assessed by the Supreme Court Chamber and its findings are set out in the written judgement. I have now completed the summary relating to the topic of the Trial Chamber's to approach the evidence. I will move on to set out the findings relevant to the substance of the case, namely the crimes for which the Accused were convicted.

### **1.3. Findings relevant to the crimes for which the Accused were convicted**

30. As mentioned at the beginning of today's hearing, the charges in Case 002/01 concerned alleged crimes in the course of three sets of events: the evacuation of Phnom Penh, also referred to as Population Movement Phase One; the transfers of people starting in the second half of 1975 and extending into 1977 – the so-called Population Movement Phase Two; and finally the alleged killing of LON Nol soldiers and officials at Tuol Po Chrey. The Trial Chamber found that, in the course of these events, several crimes against humanity had been committed. As stated, the two Accused did not commit these crimes directly. Rather, according to the Trial Chamber, those crimes had been carried out by other Khmer Rouge, but they could be imputed to the Accused

31. As a result, the analysis of the Accused's criminal responsibility may be divided into two broad elements: first, the actual crimes that were committed by the Khmer Rouge; and, second, the question of whether the Accused can be held criminally responsible for these crimes.

#### ***1.3.1. Murder***

##### ***1.3.1.1. Definition of mental element of murder***

32. In relation to the crime of murder, the first issue that I would like to address relates to a legal question – the definition of the mental element. The Accused submit that murder as a

crime against humanity requires that the perpetrator acted with direct intent to kill, in the sense that it was his or her objective to cause the death of another person. It is argued that the Trial Chamber erroneously defined the mental element as encompassing reckless murder or, to use the Civil Law terminology, murder with *dolus eventualis*.

33. The Supreme Court Chamber, after having reviewed the relevant case law, finds that the Trial Chamber did not make an error in this regard. Criminal responsibility for murder, therefore, may arise even if the perpetrator acts with less than direct intent.

#### *1.3.1.2. Factual errors regarding murder*

34. The remainder of the grounds of appeal relate primarily to the Trial Chamber's factual findings as to the incidents of murder committed in the course of Population Movement Phase One – that is, the evacuation of Phnom Penh – and at Tuol Po Chrey.

35. However, first, the Supreme Court Chamber has to address the question of whether the Trial Chamber was obliged to establish individual incidents of killings beyond reasonable doubt – a question the Supreme Court Chamber answers in the affirmative. Accordingly, in order to establish that the Khmer Rouge committed murder, individual instances of killing must be established beyond reasonable doubt.

36. On this basis, the Supreme Court Chamber has carefully reviewed the factual findings that the Accused have challenged. The Supreme Court Chamber concludes that some of the individual findings of murder were not reasonably established, primarily because they were based on out-of-court evidence, or evidence of insufficient probative value. Nevertheless, a sufficient number of killings were reasonably established, based on the evidence that was before the Trial Chamber. Therefore, it was reasonable to conclude that the crime against humanity of murder was committed during the evacuation of Phnom Penh and at Tuol Po Chrey.

#### *1.3.2. Extermination*

37. Turning to the crime of extermination, several grounds of appeal relate to the precise definition of this crime. First, the Accused challenged the Trial Chamber's finding that for this crime's mental element, a showing of *dolus eventualis* is sufficient.

38. There is merit in this argument. Upon a detailed review of the relevant case law, the Supreme Court Chamber concludes that, unlike for murder, extermination requires a



demonstration of direct intent to kill on a large scale. Thus, the Trial Chamber's definition of the mental element of extermination was, in part, incorrect.

39. The Accused also submit that a large number of people would have died in any event and that there was no indication that, during the evacuation of Phnom Penh, the number of deaths exceeded the normal mortality rate. The Supreme Court Chamber rejects this argument, given that, as held by the ICTY, a wrongdoer must take the victim as he finds him.

40. That said, the Supreme Court Chamber considers that it was unreasonable to conclude that the "mass" element of the crime of extermination had been established in relation to the evacuation of Phnom Penh. Based on the evidence that was before the Trial Chamber, only a relatively small number of deaths may be considered as having been established beyond reasonable doubt. Due to the weakness of the evidence before the Trial Chamber, it was not possible to extrapolate that killings had occurred on a massive scale. In addition, the Trial Chamber relied on a *dolus eventualis* standard – which is, as explained before, insufficient for the crime of extermination.

41. As for Population Movement Phase Two, the Supreme Court Chamber considers that several instances of death were reasonably established. Nevertheless, the evidence was insufficient to allow the Trial Chamber to reasonably extrapolate that killings occurred on such a large scale, as is required for extermination. In addition, the Trial Chamber's findings could not establish that the perpetrators acted with direct intent to kill on a large scale, but imply that they acted with *dolus eventualis*, which, as noted before, is insufficient for the crime of extermination.

42. For these reasons, the Supreme Court Chamber concludes that the Trial Chamber erred when it found that the crime of extermination was committed during Population Movement Phase One and Population Movement Phase Two.

43. However, the Supreme Court Chamber recalls that in relation to Phase One of the Population Movement, it has confirmed that the crime of murder was committed. In relation to Phase Two, although the crime of extermination was not established, the facts found to have existed by the Trial Chamber and confirmed on appeal fulfil all ingredients of the crime of murder and the Supreme Court Chamber therefore has decided to enter a conviction on that basis.

44. Turning to Tuol Po Chrey, the Accused challenge the Trial Chamber's finding that at least 250 LON Nol soldiers were killed in April 1975. The Supreme Court Chamber is not

persuaded by these arguments, as the Trial Chamber established the *minimum* number of deaths, in keeping with the principle of *in dubio pro reo*. Also, there can also be no doubt that the perpetrators acted, in this case, with direct intent to kill on a large scale.

45. In sum, the deaths and killings occurred during Population Movements Phases One and Two must be classified as the crime against humanity of murder. The killings carried out at Tuol Po Chrey amount to extermination.

### ***1.3.3. Other inhumane acts***

46. The Trial Chamber found that during Population Movement Phases One and Two, the crime against humanity of other inhumane acts in the form of forced transfer and attacks against human dignity had been committed. In addition, the Trial Chamber found that, during Population Movement Phase Two, the crime was committed in the form of enforced disappearances.

#### *1.3.3.1. Trial Chamber's approach to the crime of other inhumane acts*

47. At the outset, the Supreme Court Chamber notes that the Trial Chamber's approach to the crime against humanity of other inhumane acts discloses confusion, in that the Trial Chamber defined elements of forced transfer and enforced disappearances as though they existed as separate categories of crimes. Instead, the Trial Chamber should have focussed on whether, taken as a whole, the conduct in question was similar in nature and gravity to other recognised crimes against humanity. This requires a holistic and case-specific analysis, which the Supreme Court Chamber has carried out on appeal.

#### *1.3.3.2. Circumstances during Population Movement Phase One and its unlawfulness*

48. The Accused disputed the Trial Chamber's findings regarding the conditions and use of force during the evacuation of Phnom Penh. The Supreme Court Chamber considers that, overall, the findings were reasonably made, although certain generalised findings were unreasonable and not sufficiently backed up by the evidence before the Trial Chamber.

49. The Supreme Court Chamber is not persuaded that the Trial Chamber erred in its determinations regarding the purported justifications for the evacuation of Phnom Penh. To a large extent, the Accused's arguments merely present an alternative interpretation of the evidence, which falls short of establishing unreasonableness.

*1.3.3.3. Circumstances during Population Movement Phase Two and its unlawfulness*

50. The Accused also challenge the Trial Chamber's findings with reference to Population Movement Phase Two. The Supreme Court Chamber recalls, in this regard, that Population Movement Phase Two comprised the transfer of people in various parts of the country and over a long period of time. In light of this fact, certain generalised findings of the Trial Chamber were unreasonable because they were based upon an evidentiary basis that was too narrow. Nevertheless, it was not unreasonable to find that there was general lack of food, water and hygiene facilities, as well as a lack of medicine and medical assistance. There was also sufficient evidence before the Trial Chamber to find that some people disappeared and others died because of the conditions of the transfer. In contrast, it was unreasonable to find that the "overwhelming majority" of transferees were so-called "New People", that is, former city dwellers, as there was also evidence referring to the transfer of so-called "Old People".

*1.3.3.4. Whether Population Movements Phases One and Two amounted to inhumane acts in the circumstances*

51. As mentioned before, it falls upon the Supreme Court Chamber to assess whether Population Movements Phases One and Two amounted to the crime against humanity of other human acts.

52. In relation to Population Movement Phase One, the Supreme Court Chamber recalls that it was established that at least two million people were forcibly evicted from Phnom Penh in terrifying and violent circumstances and without prior warning. It was also established that, in the course of the evacuation, people were killed and died because of the conditions that were inflicted upon the population. The Supreme Court Chamber considers that, in these circumstances, the evacuation of Phnom Penh caused serious mental and physical suffering and injury and affected a large number of individuals. It therefore amounts to the crime against humanity of other inhumane acts.

53. During Population Movement Phase Two, at least 300,000 to 400,000 people were forced to move. This finding was not disturbed on appeal. Further, the Supreme Court Chamber upheld the findings that those people who were displaced endured poor conditions resulting from lack of food, water and hygiene facilities. Some families were separated and some deaths occurred during the transfers. The Supreme Court Chamber considers that these circumstances, which affected a large number of people, are sufficient to amount to the crime of other inhumane acts.

### ***1.3.4. Persecution***

54. The Trial Chamber found that the crime against humanity of persecution was committed in the course of Population Movement Phases One and Two, as well as at Tuol Po Chrey. The victims of persecution were LON Nol soldiers and officials, as well as the civilians living in the city of Phnom Penh at the time of its evacuation – so-called “17 April People” or “New People”.

#### *1.3.4.1. Definition of persecution*

55. The Accused challenge the Trial Chamber’s definition of persecution. According to the Trial Chamber, the group that is the object of political persecution may also include groups whose members do not necessarily hold any common political views, but who are persecuted because of the perpetrator’s political agenda or motivation.

56. The Supreme Court Chamber does not consider that the Trial Chamber erred in this regard. It recalls that, in the *Duch* Case, it held that the victims must belong to a sufficiently discernible group that is defined *by the perpetrator* on political, racial or religious grounds. In particular, groups may be made the subjects of political persecution because the perpetrator perceives them as potential opponents, or otherwise as obstacles to the implementation of a political agenda.

#### *1.3.4.2. “New People” as a sufficiently discernible group*

57. The Accused further submit that “New People” were not a sufficiently discernible group and that the Trial Chamber applied an inconsistent definition. The Supreme Court Chamber is not persuaded by these arguments – “New People” included all of those who were living in Phnom Penh on 17 April 1975, irrespective of whether they had been living in the city for long periods of time, or had only recently sought refuge in the city.

#### *1.3.4.3. Persecution during Population Movement Phase One*

58. The Supreme Court Chamber further considers that the entire population of Phnom Penh was subjected to evacuation (as all were considered to be “New People”). This does not mean, however, that the targeting was indiscriminate and thus incapable of amounting to persecution: “New People” were targeted because of who they were perceived to be and what they were seen to represent. The Accused’s arguments in this regard are therefore rejected.

#### *1.3.4.4. Persecution during Population Movement Phase Two*

59. In relation to Population Movement Phase Two, the Supreme Court Chamber is not satisfied that, as held by the Trial Chamber, the evidence shows that the vast majority of

transferees had been “New People”. As such, it has not been established that the transfer was, in fact, discriminatory. Therefore, the Trial Chamber erred when finding that persecution was committed during Population Movement Phase Two.

### ***1.3.5. Contextual element of Crimes against Humanity***

60. The Supreme Court Chamber also dismisses the grounds of appeal that revolve around the contextual element of crimes against humanity. The detailed reasoning for this finding are contained in the written judgement

## **1.4. Individual criminal responsibility**

61. Turning to the Accused’s individual criminal responsibility, the overarching question is, whether the crimes committed can be attributed to the Accused.

62. The Trial Chamber found that the Accused were criminally liable based on the basic form of joint criminal enterprise (so-called JCE I), as well as liable due to their planning, instigating and aiding and abetting these crimes and, in respect of NUON Chea only, for ordering the crimes and on the basis of superior responsibility.

### ***1.4.1. Joint criminal enterprise***

63. The Accused raise several grounds of appeal in relation to their liability based on JCE.

#### ***1.4.1.1. Existence of liability based on JCE I at the relevant time***

64. Notably, the Accused challenge the existence of liability based upon JCE I. They submit that, under customary international law as it existed at that time, liability was limited to joint contributions to specific crimes, and that merely making a contribution to the implementation of a common purpose was insufficient to give rise to individual criminal responsibility.

65. The Supreme Court Chamber is not persuaded by these arguments. Even though the term “JCE” was coined by the ICTY, the underlying notion had already emerged in the post-World War II case law. Notably, after World War II, accused were convicted of crimes they had not committed with their own hands because these crimes had been encompassed by a criminal common purpose to which the accused had made a contribution.

66. The Supreme Court Chamber underlines that the common purpose must be criminal in character. This means that, either, it must in itself amount to the commission of one or more crimes, or the implementation of the common purpose must involve the commission of one or

more crimes. In this regard, the Supreme Court Chamber notes that the Trial Judgment relied on a somewhat different formulation. Notably, the Trial Chamber inquired whether the common purpose, among other things, *resulted in* the commission of a crime. This suggests that the Trial Chamber was of the view that crimes that generally resulted from the implementation of the common purpose could be imputed to the Accused; even if these crimes had not been part of the common purpose. In the view of the Supreme Court Chamber, this would amount to the type of liability that has been referred to as JCE III or extended JCE liability. The question is thus whether, under customary international law as it existed in 1975, liability could be imputed for crimes that merely resulted from the implementation of a common purpose, but were not encompassed by it.

67. In this regard, the Supreme Court Chamber notes, with approval, the decision of the Pre-Trial Chamber on this question, which found that such liability did not exist at the time. Having considered the relevant jurisprudence, the Supreme Court Chamber concludes that there was, indeed, no basis under customary international law for liability for crimes not encompassed by the common purpose.

68. In light of this finding, it becomes of great relevance to identify the criteria in order to determine which crimes are encompassed by a common purpose. In this regard, the Supreme Court Chamber finds that a common purpose “amounts to” the commission of a crime if the crime is one of the primary objectives of the common purpose. In contrast, a common purpose “involves” the commission of crimes if the crimes are not the immediate goal of the transaction, but are seen as a means to achieve an ulterior objective. Whether a crime was encompassed by the common purpose is primarily a question of fact. Relevant factors will be, for example, the overall objective of the common purpose and the likelihood that it may be attained only at the cost of the commission of crimes

69. In sum, the Trial Chamber made an error in its definition of the legal elements of JCE liability. It falls then on the Supreme Court Chamber to assess whether the elements of JCE liability, properly interpreted, are nevertheless fulfilled.

#### *1.4.1.2. Definition of the common purpose*

70. Turning to the next set of arguments, the Supreme Court Chamber considers that liability under JCE I requires that the common purpose be *criminal* in nature. In contrast, the Trial Chamber found that the Accused agreed to a common purpose which it described as not criminal in itself, that is, the implementation of a rapid socialist revolution in Cambodia.

71. Nevertheless, this common purpose must be seen in the context of the Khmer Rouge policy of population movement and the policy of targeting LON Nol soldiers. These policies, according to the Trial Chamber, were utilised to bring the socialist revolution in Cambodia to fruition. While the Trial Chamber did not state that these policies were actually *part of* the common purpose, it is nevertheless clear that they were considered by the Trial Chamber as the means through which the socialist revolution was to be implemented. Thus, while the Trial Chamber's findings may be perceived to be lacking in precision, there can be no doubt that it was the criminal aspect of the two policies that was at the core of Case 002/01.

72. For that reason, the Supreme Court Chamber rejects the Accused's argument that the purpose which the Trial Chamber had identified was non-criminal and therefore could not give rise to liability under JCE.

*1.4.1.3. Existence and content of population movement policy*

73. Several grounds of appeal challenge the Trial Chamber's findings as to the existence and content of the policy to move the population, both from cities to the countryside and from one area to another.

74. As to the policy to evacuate cities, the Supreme Court Chamber cannot see any error in the Trial Chamber's findings that the policy was demonstrated, *inter alia*, by a consistent pattern of evacuations, particularly since the Trial Chamber did not claim that all evacuations followed exactly the same method of operation.

75. Referring to the policy to move people from an area to another, the Supreme Court Chamber also finds that the Accused's arguments are without merit, for the reasons explained in the written judgement.

*1.4.1.4. Crimes encompassed by common purpose in relation to Population Movement Phases One and Two*

76. The next issue to be addressed is which crimes were actually encompassed by the common purpose, in respect of Population Movement Phase One.

77. This summary addresses only the Supreme Court Chamber's findings relating to the crime of murder, as this was the most controversial issue. The Supreme Court Chamber finds that the common purpose encompassed the killing of high-ranking Khmer Republic officials. It also involved the deaths resulting from the conditions that were imposed during the population movement; and the killings of civilians and former soldiers. This is because, in the circumstances, the members of the JCE were aware of the conditions which the evacuees

would have to endure, and that that it was likely that, in particular, the most vulnerable would die. The Supreme Court Chamber recalls that the evacuation concerned the entire population of Phnom Penh, within a short period of time and during the hottest period of the year.

78. As to the killing of civilians and lower-ranking Khmer Republic soldiers and officials, the Supreme Court Chamber notes that the evacuation of Phnom Penh was carried out in a very short time span and by heavily armed troops. These circumstances indicate that, implicitly, the common purpose also encompassed the prospect that deadly force could be used by the troops who were tasked with evacuating the city, should they encounter any resistance. This is the case irrespective of whether specific orders to kill were given, who gave such orders, and whether such orders were only given to troops under certain commanders.

79. The next question is whether murder was among the crimes encompassed by the common purpose in relation to Population Movement Phase Two. Given the circumstances under which the transfers were carried out, there is no indication that there was a policy to provide sufficient care for the transferees or protect them from abuses. The occurrence of deaths among the transferees was therefore likely; yet the members of the JCE engaged in the implementation of the common purpose nonetheless. As such, the policy to move the population encompassed implicitly the crime against humanity of murder.

#### ***1.4.2. Existence and content of the targeting policy***

80. The Trial Chamber found that there had been a Khmer Rouge policy to target former LON Nol soldiers and officials, which involved the killings at Tuol Po Chrey. The Trial Chamber relied on Khmer Rouge statements and orders, as well as the existence of a consistent pattern of executions. The Accused challenge the Trial Chamber's findings in this regard.

81. The Supreme Court Chamber notes that, in respect of a pattern of executions existing before April 1975, the Trial Chamber placed significant emphasis on the alleged killings at Oudong in 1974. However, for the reasons fully explained in the judgement, the Supreme Court Chamber considers that the evidence on record was too weak to support such a finding. The remaining evidence of killings in the period before 1975 was also relatively weak.

82. As to evidence of killings in the period immediately before and after the events at Tuol Po Chrey, the Supreme Court Chamber considers that it was generally weak, except for a few instances. Similarly, in relation to alleged killings in late 1975, the Trial Chamber relied on



evidence that often lacked detail and primarily consisted of uncorroborated out-of-court statements.

83. The Supreme Court Chamber is similarly unsatisfied with the other evidence relied upon by the Trial Chamber, including Khmer Rouge speeches, policy statements and instructions.

84. In sum, the Supreme Court Chamber considers that the evidence before the Trial Chamber was inadequate to reasonably substantiate a finding that, at the time of the events at Tuol Po Chrey, there had been a policy to kill all LON Nol soldiers. Most of the evidence consists of out-of-court statements, which have low probative value. Moreover, the Trial Chamber failed to consider several pieces of evidence, which call into question the existence of a blanket policy to kill. The Supreme Court Chamber recalls, in this context, that as a consequence of the severance of proceedings in Case 002, the scope of Case 002/01 is restricted, as far as it concerns the targeting policy, to the events at Tuol Po Chrey, which took place at the end of April 1975. The final result of the analysis is inevitably affected by this temporal limitation, which caused a large proportion of the evidence to be temporally irrelevant due to the Trial Chamber's inability to demonstrate why instructions issued in 1976 and later imply that a policy had existed in April 1975.

85. For the foregoing reasons, the Supreme Court Chamber finds, based on the evidence that was before the Trial Chamber, that it was not reasonable to find that a policy contemplating the execution of LON Nol soldiers and officials existed at the time of the events at Tuol Po Chrey. Accordingly, the Accused cannot be held criminally liable for the crimes against humanity which were committed at Tuol Po Chrey.

#### ***1.4.3. Legal standard in respect of contribution to the common purpose***

86. Regarding the legal standard in respect of the contribution to the common purpose, the Accused submit that the Trial Chamber failed to establish that they had made a contribution to the commission of criminal acts, but merely found that they had engaged in activities generally aimed at the implementation of a socialist revolution in Cambodia. The Supreme Court Chamber considers that the Trial Chamber generally articulated the correct legal standard, in that an accused's contribution must be "significant, but not necessarily indispensable". The Trial Chamber also correctly considered that a contribution to the JCE may take many forms. Even activities that are *prima facie* unrelated to the commission of crimes may be taken into account when determining whether the accused made a significant

contribution. That said, a determination should always be based on an assessment of *all* activities of the accused person(s) that the Chamber has found to have been established.

87. In sum, the Supreme Court Chamber finds that the Trial Chamber did not err by taking into account activities of the Accused that were, on their face, not directed at the commission of specific crimes.

***1.4.4. NUON Chea's contribution to the implementation of the common purpose***

88. The Trial Chamber identified two types of contribution by NUON Chea to the implementation of the common purpose. The first is his involvement in the planning of the common purpose. The second lies in his role in activities regarding propaganda, education and public training. NUON Chea raises several grounds of appeal against these findings.

89. The Supreme Court Chamber dismisses some of these grounds of appeals because they do not have the potential to invalidate the judgement, for example his challenge to the designation as Brother Number 2. In respect of other grounds of appeal, the Supreme Court Chamber considers that NUON Chea is merely offering alternative interpretations of the evidence. This concerns, in particular, the finding that he had considerable influence on military policy and that he had, along with Pol Pot, ultimate decision making power within the Party.

90. In contrast, the Supreme Court Chamber considers that the evidence was insufficient to reasonably establish that NUON Chea was in charge of party discipline. Nevertheless, the Supreme Court Chamber does not consider that this error affects the Trial Chamber's conclusion that NUON Chea had made a significant contribution to the implementation of the common purpose.

***1.4.5. Contribution of KHIEU Samphân to the implementation of the common purpose***

91. With reference to KHIEU Samphân's contribution, the Trial Chamber identified the following activities. First, he had attended meetings of the Standing and Central Committees and Party Congresses, as well as meetings to disseminate Khmer Rouge policies to lower cadres. Second, he participated in economic matters within the Khmer Rouge regime. Third, he made public statements in support of the common purpose and policies of the Khmer Rouge. Finally, he acted as a diplomat to garner external support for the Khmer Rouge. KHIEU Samphân alleges several errors in the Trial Chamber's findings.

92. The Supreme Court Chamber considers that most of these findings were reasonably reached. However, it was unreasonable to find that KHIEU Samphân had attended a meeting in June 1974 at which the evacuation of Phnom Penh was discussed, given that the Trial Chamber did not explain why it rejected the detailed testimony of NUON Chea to the contrary. Similarly, the Trial Chamber erroneously attributed a speech that was made in 1976 to KHIEU Samphân.

93. Despite these erroneous findings, the Supreme Court Chamber finds that the Trial Chamber's overall conclusion regarding KHIEU Samphân's contribution was not unreasonable, having regard to the totality of his actions.

***1.4.6. Finding that the CPK was a unified, hierarchical party and that the armed forces involved in the evacuation of Phnom Penh were unified***

94. The Accused argue that the Trial Chamber erred when it found that the CPK was a unified and hierarchical party, given that there were indications that from early on the party was divided into powerful factions which subsequently escalated. They submit that no reasonable trier of fact could have concluded that POL Pot and NUON Chea had shared a common purpose with some of the Zone leaders who were inciting rebellion and treason against them.

95. The Supreme Court Chamber is not persuaded by these arguments. It recalls that the Accused were found to be criminally responsible based on joint criminal enterprise. Therefore, even assuming that secret plots by some of the Zone leaders existed, this would not mean that the crimes imputed upon the Accused could not be imputed on the other members of the JCE as well – as long as it has been established that there was a common purpose, of which the crimes formed part.

***1.4.7. Error of law in respect of requisite intent***

96. As to the requisite intent for JCE liability, KHIEU Samphân submits that the correct standard is “intent to effect the common purpose”. In the view of the Supreme Court Chamber, the Trial Chamber's finding that the intent must cover both the common purpose and the crimes it encompassed is correct.

97. KHIEU Samphân further argues that the Trial Chamber erroneously applied a lower standard, because it assessed whether he had been aware of the substantial likelihood of the commission of crimes. In that regard, the Supreme Court Chamber considers that “substantial

likelihood” is not, as such, the correct standard. However, the appropriate standard needs to be determined based on the specific crimes that are at issue. For instance, for the crime against humanity of murder, the requisite mental element is either direct intent or *dolus eventualis*. Thus, if murder is committed through a joint criminal enterprise, it is sufficient to establish that the accused was aware that the death of the victim was a possible consequence of the implementation of the common purpose, but proceeded to implement it regardless, having accepted the possible occurrence of deaths. Thus, the Trial Chamber’s reference to the standard of “substantial likelihood” was not, *per se*, erroneous, but it will depend upon the crime in question.

#### ***1.4.8. NUON Chea’s intent***

98. As to the specific findings as to NUON Chea’s intent, in respect of the crime against humanity of other inhumane acts, there is no doubt that NUON Chea acted with direct intent. Indeed, he acknowledged that he had participated in the decision to evacuate Phnom Penh.

99. Turning to murder, the Supreme Court Chamber considers that, in respect of the so-called “super traitors”, NUON Chea had specifically admitted his intent to kill them. In relation to the other deaths and killings that had occurred, the Supreme Court Chamber considers that he had acted with *dolus eventualis*, based on the Trial Chamber’s findings regarding his knowledge of the circumstances in which the population movements had taken place.

#### ***1.4.9. KHIEU Samphân’s intent***

100. KHIEU Samphân also challenges the Trial Chamber’s findings as to his intent to commit crimes. In particular, he argues that the Party operated under a strict principle of secrecy, which prevented him from acquiring knowledge of the crimes committed.

101. The Supreme Court Chamber finds that KHIEU Samphân has failed to substantiate his arguments. This is because he has failed to engage with the extensive reasoning of the Trial Chamber regarding his knowledge of the crimes; and has failed to substantiate the impact that the alleged errors could have on his criminal responsibility.

102. KHIEU Samphân challenges numerous other findings of the Trial Chamber relevant to his intent. However, for the most part, the Supreme Court Chamber considers that his arguments fail to establish unreasonableness. The Trial Chamber did, however, err to the

extent that it relied on his purported attendance of a Special National Congress held in April 1975.

103. Nevertheless, although some of the Trial Chamber's findings were erroneous, they do not sufficiently call into question the overall conclusion that KHIEU Samphân had acted with the requisite intent.

#### ***1.4.10. Other modes of liability***

104. The Trial Chamber found that the Accused were also criminally responsible for the crimes which it found to have been established based on liability for planning, instigating, aiding and abetting and, in respect of NUON Chea only, ordering. The Accused have raised numerous grounds of appeal in this regard. However, for reasons explained in the written judgement – and given the Supreme Court Chamber's finding in relation to the Accused's liability under JCE – it was unnecessary for the Supreme Court Chamber to pronounce on these grounds of appeal.

### **1.5. Sentencing**

105. The last set of arguments relates to sentencing. KHIEU Samphân, in particular, challenges the sentence that the Trial Chamber has imposed.

106. The Supreme Court Chamber considers that none of KHIEU Samphân's arguments disclose an error in the exercise of discretion on the part of the Trial Chamber.

107. Finally, the Supreme Court Chamber has considered whether the fact that it has found errors in some of the Trial Chamber's conclusions regarding the Accused's criminal responsibility should lead it to revise the sentence that the Trial Chamber has imposed. The Supreme Court Chamber notes that the gravity of the crimes should be reflected in the sentence. In view of the massive scale of the crimes; the complete lack of consideration for the ultimate fate of the Cambodian population, especially the most vulnerable groups; the fact that the crimes were not isolated events, but occurred over an extended period of time; and the significant roles of the Accused, the Supreme Court Chamber considers that the imposition of a life sentence for each of the Accused is appropriate and therefore confirms the sentence imposed by the Trial Chamber.

## 2. THE CO-PROSECUTORS' APPEAL

108. What follows is a brief outline of the Supreme Court Chamber's findings on the Co-Prosecutors' appeal.

109. The Co-Prosecutors questioned the Trial Chamber's finding that the mode of liability of JCE III is not applicable in proceedings before the ECCC. They seek "declaratory relief" only and acknowledge that the outcome of their appeal has no bearing on the Accused's conviction. However, for an appeal to be admissible, it must allege errors of law that would invalidate the decision. In the absence of such a claim, the appeal is inadmissible. Nevertheless, the appeals brought by the Accused have provided the Supreme Court Chamber with an opportunity to analyse the notion of JCE, including aspects which are directly relevant to the questions raised by the Co-Prosecutors.

## 3. DISPOSITION

For the foregoing reasons, **THE SUPREME COURT CHAMBER,**

**PURSUANT TO** Article 4(1)(b) of the ECCC Agreement, Articles 14 new (1)(b) and 36 new of the ECCC Law and Internal Rule 111;

**NOTING** the respective written appeal submissions of the Parties and the arguments they presented at the hearing from 16-18 February 2016;

**GRANTS**, in part, and **DISMISSES**, in part, NUON Chea's and KHIEU Samphân's appeals, and therefore

Insofar as they relate to facts carried out in the course of Population Movement Phase One,

**REVERSES** NUON Chea's and KHIEU Samphân's convictions for the crime against humanity of extermination, and

**AFFIRMS** NUON Chea's and KHIEU Samphân's convictions for the crimes against humanity of murder, persecution on political grounds and other inhumane acts;

Insofar as they relate to facts carried out in the course of Population Movement Phase Two,

**REVERSES** NUON Chea's and KHIEU Samphân's convictions for the crimes against humanity of extermination and persecution on political grounds,

**AFFIRMS** NUON Chea's and KHIEU Samphân's convictions for the crime against humanity of other inhumane acts, and, recharacterising the facts, **ENTERS** a conviction for the crime against humanity of murder; and

Insofar as they relate to facts carried out at Tuol Po Chrey,

**REVERSES** NUON Chea's and KHIEU Samphân's convictions for the crimes against humanity of extermination, murder and persecution on political grounds;

**AFFIRMS** the sentence of life imprisonment imposed by the Trial Chamber on both NUON Chea and KHIEU Samphân;

**DISMISSES** the Co-Prosecutors' appeal as inadmissible; and

**ORDERS** that NUON Chea and KHIEU Samphân remain in the custody of the ECCC pending the finalisation of arrangements for their transfer, in accordance with the law, to the prison in which their sentence will continue to be served.

This judgment is issued today in Khmer and English, with a French translation to follow.



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