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ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក/អ.ជ.ត.ក
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Before: Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MWACHANDE-MUMBA
Judge MONG Monichariya
Judge Phillip RAPOZA
Judge YA Narin

Greffiers: Peace MALLENI, SEA Mao, PHAN Theoun

Date: 22 September 2022
Classification: PUBLIC

SUMMARY OF THE APPEAL JUDGMENT IN CASE 002/02

Co-Prosecutors
CHEA Leang
Fergal GAYNOR (Reserve)

Accused
KHIEU Samphân

Civil Party Lead Co-Lawyers
PICH Ang
Falguni DEBNATH

Co-Lawyers for
KHIEU Samphân
KONG Sam Onn
Anta GUISSÉ

1. PROCEEDINGS

2. Court Opens at 0930 Hours.

3. **Mr. President:** Today, the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea pronounces the final judgment on the appeals by KHIEU Samphân and the Co-Prosecutors in Case 002/02. Before proceeding, I would like to request that the Greffier please report the attendance of the parties and counsel present.

4. **Greffier reports the attendance of the parties and the counsel.**

5. **Mr. President:** The present case, known as “Case 002/02”, involves some of the most heinous events that occurred during one of the most tragic and catastrophic periods in human history. Between 17 April 1975 and 6 January 1979, the Communist Party of Kampuchea (CPK), also known as the Khmer Rouge, ruled Cambodia, which was then known as Democratic Kampuchea (DK). After seising power, the CPK launched a nationwide socialist revolution through a “great leap forward” aimed at building the country, defending it from enemies, and radically transforming the population into an atheistic and homogeneous Khmer society of worker-peasants. During the DK era, the civilian population was denied basic freedoms and subjected to widespread acts of extreme cruelty. A culture of fear prevailed through mass killings, torture, violence, persecution, forced marriage, forced labour, enforced disappearances, and other inhumane treatment. The CPK’s rule was marked by some of the worst excesses of any regime in the twentieth century, during which an estimated 1.5 to 2 million Cambodians died.

6. This case has been fraught with difficulties. A severance of the Closing Order in Case 002 necessitated two consecutive trials on separate charges for the same four Accused. That step was taken for trial management purposes and in light of the frail health and advanced age of all four Accused. Three of those charged have since died. The majority of the case file material has been translated or interpreted into three languages. In addition to those challenges, the world was struck by the COVID-19 pandemic. This necessitated a Herculean effort, creativity, and resilience on the part of every staff member of each organ of the Court. As a result, the case successfully moved forward, and the judgment was completed.

7. Accordingly, all procedural, factual and legal issues subject to appeal have been duly considered and decided by all the Judges of the Supreme Court Chamber. Furthermore, the Chamber, mindful of the Accused's continued frail health and advanced age, considers it judicially prudent to ensure that the judgment is pronounced expeditiously.

8. The judgment in this case concerns KHIEU Samphân, who was found criminally responsible for his role in events involving the Khmer Rouge following a lengthy trial. The appeal judgment is several hundred pages long. I will now pronounce a summary that highlights only the key findings and rulings of the Supreme Court Chamber in its disposition of this case. The full text of the judgment will be made available in due course after the editorial and translation process is completed. Only the full written judgment is authoritative.

9. KHIEU Samphân was born in Svay Rieng Province in 1931 and had a long and significant political career in Cambodia. He became a member of the circle of leftist Khmer intellectuals studying in Paris in the 1950s while pursuing university and doctoral studies in France. He eventually rose to prominence both in the run-up to and during the DK era, holding various high-level positions in the CPK, including President of the State Presidium, and in the government of DK.

10. On 16 November 2018, the Trial Chamber of the ECCC rendered its judgment in Case 002/02 in summary form and notified its full written judgment on 28 March 2019. In that judgment, the Trial Chamber found KHIEU Samphân guilty of the crimes against humanity of murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political, religious, and racial grounds, and other inhumane acts comprising conduct characterised as enforced disappearances, forced transfer, forced marriage, and rape in the context of forced marriage and attacks against human dignity. KHIEU Samphân was also convicted of both genocide by killing members of the Vietnamese population and grave breaches of the Geneva Conventions, namely wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving prisoners of war or civilians the rights of fair and regular trials, and the unlawful confinement of civilians.

11. The Trial Chamber found that, although KHIEU Samphân did not commit these crimes with his own hands, he was criminally liable for most of them as part of a joint criminal enterprise, and for some of them by aiding and abetting their commission. The Trial Chamber imposed a sentence of life imprisonment on KHIEU Samphân, merged it with the life sentence

imposed on him in Case 002/01, and ordered that the sentences be served concurrently. It also partially granted the Civil Parties' requests for moral and collective reparations, and endorsed thirteen specific communal memorial projects.

12. KHIEU Samphân and the Co-Prosecutors filed appeal briefs and separate responses, and the Civil Party Lead Co-Lawyers made written submissions on behalf of the Civil Parties.

13. On appeal, KHIEU Samphân alleges that the Trial Chamber committed approximately 1,824 errors and challenges the bulk of the trial judgment. In doing so, he alleges error in the issuance and pronouncement of the judgment by the Trial Chamber and also alleges errors relating to the fairness of the proceedings, the scope of the judicial investigation and trial, the underlying crimes, and the issue of individual criminal responsibility. He asserts that the alleged errors require that his conviction be reversed and his sentence be vacated. The Supreme Court Chamber notes, however, that KHIEU Samphân makes no apparent challenges to the Trial Chamber's specific findings regarding the charge of grave breaches of the Geneva Conventions. Although his appeal cites a number of errors that call into question the general integrity of the proceedings before the Trial Chamber, that would also apply to its consideration of that charge, his appeal relating to the grave breaches of the Geneva Conventions is limited to those alleged errors.

The Co-Prosecutors advance a single ground of appeal, challenging the Trial Chamber's ruling that forced sexual intercourse in the context of forced marriage did not constitute the crime against humanity of other inhumane acts in the case of male victims.

14. The Supreme Court Chamber heard the parties' oral submissions on the appeals from 16 to 19 August 2021. The Chamber then retired to deliberate, and today it renders its judgment on both appeals, which I shall address together as is done in the full written judgment. Due to the significant number of appeal challenges raised by KHIEU Samphân, at this hearing I shall pronounce only a summary of our findings and rulings, along with the disposition. The Supreme Court Chamber's findings and rulings with respect to both appeals are set out in its full written judgment, which will be notified in due course. I reiterate that it is the full written judgment that is authoritative.

15. A summary of the challenges on appeal are addressed sequentially as follows.

Alleged Errors Related to Fairness of Proceedings

16. As a preliminary matter, KHIEU Samphân contends that, by failing to issue the full written judgment on the day that it was announced in summary form, the Trial Chamber committed a serious error of law that rendered the pronouncement of the judgment procedurally defective and thus void. Moreover, he argues that the subsequent issuance of the full written judgment did not cure the defect. He asserts that the trial judges were *functus officio* when the full written judgment was notified, and that the rest of his appeal is therefore rendered moot because his guilt or innocence was never lawfully adjudicated.

17. The Supreme Court Chamber notes that KHIEU Samphân was fully aware of the Trial Chamber's intention to deliver a summary of the judgment with the full written judgment to follow. The Trial Chamber publicly provided notice of its intention to do so and provided ample opportunity to the parties to raise any objections, and none were raised. Internal Rule 102(1) provides that judgments shall be issued and announced during a public hearing, and that a summary of the findings and disposition shall be read aloud by the President or other Judge of the Chamber. The same rule also provides that the Greffier shall distribute a copy of the judgment to the parties and ensure that it is published by the Office of Administration by appropriate means. Nothing in this rule specifies, however, that such distribution or publication of the judgment must take place on the same day as the public hearing. In fact, it is not uncommon in international criminal cases of such magnitude to issue an oral summary of the judgment with written reasons to follow to allow for completion of the editorial and/or translation processes.

18. A trial judgment was thus lawfully issued and announced on 16 November 2018 in summary form, although the full written version was distributed and published on 28 March 2019. KHIEU Samphân's right to review the judgment underpinning both his convictions and his sentence remained wholly intact pending the distribution and publication of the judgment, as evidenced by the present adjudication of his appeal against the Trial Chamber's judgment. His submission in this respect is accordingly dismissed.

19. KHIEU Samphân further submits that, over the course of the trial proceedings in Case 002/02, his "fundamental rights, as recognised under the legal framework of the ECCC, have not been respected as a result of the Trial Chamber's biased approach to the guiding principles of criminal proceedings and the rule of evidence". He argues that this fundamentally flawed approach led the Trial Chamber to repeatedly violate the majority of his fair trial rights and prevented it from making its findings and rulings in a fair and reasonable manner, resulting in

numerous errors during the trial. His allegations of bias further extend to the Trial Chamber's severance of Case 002. He argues that the cumulative effect of these errors rendered the entire trial unfair, and he asks the Supreme Court Chamber to reverse his convictions and his sentence.

20. The Supreme Court Chamber notes that with respect to his claim of bias on the part of the Trial Chamber, KHIEU Samphân repeats his previous allegation that the Case 002/01 trial judgment pre-judged his guilt in Case 002/02, asserting that it would be impossible for the Trial Chamber to ignore its verdict in the previous case when deciding how to adjudicate the subsequent one. These are not novel issues and have previously been the subject of KHIEU Samphân's applications for disqualification of the Trial and Supreme Court Judges in 2014 and in 2019, respectively. A specially appointed panel of judges fully considered and dismissed the allegations of bias. In the absence of new, substantiated allegations sufficient to rebut the Judges' presumption of impartiality, these claims of bias are summarily dismissed.

21. KHIEU Samphân's additional allegations that the Trial Chamber was not impartial as to the manner in which it examined the evidence and committed other violations of his fair trial rights and the fairness of the proceedings, are similarly dismissed as being without foundation, for reasons explained in the full written judgment.

Alleged Errors Related to the Scope of the Judicial Investigation and Trial

22. Turning to his allegations concerning *saisine*, KHIEU Samphân raises five main challenges relating to the scope of the judicial investigation and trial, namely that the Trial Chamber erred by (i) characterising his requests relating to the scope of the investigation as belated preliminary objections under Rule 89 and finding them inadmissible; (ii) dismissing his arguments concerning the insufficiency of the charges against him due to their lack of clarity; (iii) ignoring his arguments that it could not adjudicate facts that were not accepted and not legally qualified by the Co-Investigating Judges, causing it to exceed the scope of its referral; (iv) delivering judgment on facts that it had already adjudicated in Case 002/01 or on facts that it excluded from Case 002/02 and for which the proceedings were terminated; and (v) considering the "out-of-scope but relevant evidence" about facts of which it was not seized. I will summarise the Supreme Court Chamber findings regarding those five challenges sequentially.

23. Concerning his first argument, the Supreme Court Chamber agrees with the Co-Prosecutors that since KHIEU Samphân challenges the *saisine* of the Trial Chamber based on alleged defects in the Closing Order and not the jurisdiction of the ECCC itself, his challenges do not fall within the remit of absolute jurisdiction and are thus subject to cure through adequate notice of the charges. Accordingly, the Trial Chamber did not err in holding that KHIEU Samphân's objections were subject to the deadline prescribed by Internal Rule 89(1).

24. As to his second argument, for reasons explained in the full written judgment, the Supreme Court Chamber finds no error in the Trial Chamber's dismissal of his submission concerning the insufficiency of the charges against him due to their alleged lack of clarity.

25. Regarding his third argument, the Supreme Court Chamber finds that the Trial Chamber did not err in law in determining its *saisine* of the facts contained in the Closing Order. It has considered KHIEU Samphân's arguments concerning the scope of the Trial Chamber's referral and finds that he has not demonstrated any error on the part of the Trial Chamber, for reasons explained in the full written judgment.

26. Relative to his fourth argument, the Supreme Court Chamber is not persuaded that the Trial Chamber erred by delivering judgment on facts that it had already adjudicated in Case 002/01 or on facts that it excluded from Case 002/02 and for which the proceedings were terminated, for reasons explained in the full written judgment.

27. Finally, as to his fifth argument that the Trial Chamber erred in law by taking a "historical" approach to considering the "out-of-scope but relevant evidence" about facts of which it was not seised, the Supreme Court Chamber finds no error in the Trial Chamber's conclusion that it may rely on the evidence outside the temporal or geographic scope of the Closing Order for the limited purposes of clarifying a given context, establishing by inference the elements of criminal conduct occurring during the material period or demonstrating a deliberate pattern of conduct.

Alleged Errors Related to the Underlying Crimes

28. I will now turn to the findings relevant to the substance of the case against KHIEU Samphân, namely the crimes of which he was convicted.

Murder as a crime against humanity

29. The Chamber observes that the Trial Chamber applied a *mens rea* standard of *dolus eventualis* when assessing the facts relevant to the crime against humanity of murder, as it did in Case 002/01, and as this Chamber upheld on appeal in that case. KHIEU Samphân argues that this standard was incorrect, claiming it did not exist in customary international law in 1975, and, further, that such a definition was not foreseeable or accessible to him at the time. The Supreme Court Chamber disagrees and concludes that the Trial Chamber did not err.

30. KHIEU Samphân asserts that the Trial Chamber erred in finding that murder as a crime against humanity was established at Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam Worksite, and Kampong Chhnang Airfield Construction Site based partly on culpable omissions without first finding that there was a duty to act. The Supreme Court Chamber concludes that the Trial Chamber did not err.

31. *As to whether murder was established at the following sites:*

(i) *Tram Kak Cooperatives*: KHIEU Samphân argues that the Trial Chamber erred in fact by finding that there were deaths due to starvation and rudimentary medical care at Tram Kak Cooperatives and erred in finding that the requisite level of intent had been established. The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate error on the part of the Trial Chamber.

(ii) *Trapeang Thma Dam Worksite*: KHIEU Samphân argues that the Trial Chamber erred in assessing whether the authorities acted with the requisite level of intent concerning the deaths at Trapeang Thma Dam Worksite, as there were factors beyond their control that could have led to the conditions causing death at that location. The Supreme Court Chamber has analysed his arguments and the Trial Chamber's findings and concludes that KHIEU Samphân has failed to demonstrate error on the part of the Trial Chamber.

(iii) *1st January Dam Worksite*: KHIEU Samphân argues that the Trial Chamber erred in finding that murders had occurred at the 1st January Dam Worksite due to the living and working conditions imposed, including the lack of medicine, and that workers died due to accidents. He also argues that the Trial Chamber erred in finding that the perpetrators knew there was a lack of sufficient food and medicine but nevertheless continued to push the workers to complete the work. The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate error on the part of the Trial Chamber.

(iv) Kampong Chhnang Airfield Construction Site: KHIEU Samphân argues that the Trial Chamber erred in finding that the deaths due to the conditions imposed were committed with the requisite level of intent, because there were factors beyond their control that could have caused the underlying conditions, causing death at that location. The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate error on the part of the Trial Chamber.

(v) Phnom Kraol Security Centre: The Trial Chamber found that two deaths occurred at Phnom Kraol Security Centre that amount to murder as a crime against humanity. The first involved an inmate named Heus, who the Trial Chamber found had been killed by prison guards. The second involved an inmate named Touch, who died as a result of the poor conditions of detention he experienced. KHIEU Samphân argues that the Trial Chamber erred by finding that both of these murders had been established beyond reasonable doubt. The Supreme Court Chamber concludes that the Trial Chamber erred in its findings concerning the deaths of Heus and Touch, as they were clearly based on the written statements of deceased witnesses who KHIEU Samphân was unable to confront. Accordingly, we reverse the Trial Chamber's findings concerning the crime against humanity of murder at Phnom Kraol Security Centre.

Extermination as a Crime Against Humanity

32. *Extermination of the Cham*: The Trial Chamber found that murder as a crime against humanity was established in relation to intentional killings of Cham at the Wat Au Trakuon Security Centre in 1977 and the Trea Village Security Centre in 1978. It was unable to establish a definite number of victims but was satisfied that a great number of Cham civilians were taken to and killed at both security centres. It found that these murders satisfy the requirement of killings on a massive scale and formed part of the same murder operation. The Trial Chamber determined that the crime against humanity of extermination subsumed that of murder and entered a conviction only for extermination. KHIEU Samphân challenges the sufficiency of the evidence that killings occurred at Trea Village and at Wat Au Trakuon. However, the Supreme Court Chamber does not consider the Trial Chamber's findings to be unreasonable. He further challenges whether a numerical threshold for extermination had been met since the Trial Chamber was unable to establish a definite number of victims, but the Supreme Court Chamber concludes that the facts support the Trial Chamber's determination that killing on a massive scale occurred. Finally, KHIEU Samphân challenges whether there was intent to kill on a large scale, but the Supreme Court Chamber discerns no error in the Trial Chamber's findings.

33. *Extermination of the Vietnamese*: KHIEU Samphân alleges multiple factual and legal errors in the Trial Chamber's findings with respect to the killing of Vietnamese in Svay Rieng, in DK waters, in Kampong Chhnang Province, at Wat Khsach, and in Kratie, as well as at Au Kanseng Security Centre, submitting that the crimes against humanity of murder and extermination could not be established in relation to any of these killings.

34. The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate that the Trial Chamber erred in finding that killings occurred at the abovementioned locations. As to whether they amounted to extermination, the Supreme Court Chamber discerns no error in the Trial Chamber's aggregation of the killings committed in multiple areas due to its finding that they were part of the same murder operation.

Enslavement as a Crime Against Humanity

35. KHIEU Samphân challenges whether enslavement as a crime against humanity occurred at Phnom Kraol Security Centre, alleging that the Trial Chamber was only seized of enslavement at one location, known as K-11, within Phnom Kraol Security Centre and that the evidence of enslavement at K-11 was insufficient. The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate any error on the part of the Trial Chamber with respect to this issue.

Deportation as a Crime Against Humanity

36. The Trial Chamber found KHIEU Samphân guilty of the crime against humanity of deportation of the Vietnamese from Tram Kak Cooperatives and from Prey Veng Province. KHIEU Samphân challenges the Chamber's conclusion that Vietnamese were deported from Tram Kak Cooperatives across a national border as well as from Prey Veng. He also challenges the Trial Chamber's finding that there was an intent to deport the Vietnamese. The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate any error on the part of the Trial Chamber.

Torture as a Crime Against Humanity

37. KHIEU Samphân challenges the sufficiency of the evidence relied upon by the Trial Chamber to establish the crime against humanity of torture of the Cham at Trea Village. The Supreme Court Chamber discerns no error on the part of the Trial Chamber and concludes that

KHIEU Samphân has failed to demonstrate that its finding that Cham were tortured was one that no reasonable trier of fact could make.

Persecution as a Crime Against Humanity

38. KHIEU Samphân asserts that, under customary international law in 1975, persecution as a crime against humanity required an objective to remove the targeted persons from the community in which they live alongside the perpetrators, or even from human society itself. In the Case 001 appeal judgment, the Supreme Court Chamber addressed this issue and concluded that such an objective was not an element of persecution under customary international law in 1975. KHIEU Samphân, however, urges a departure from our previous ruling which was based on an analysis of post-World War II jurisprudence. This we decline to do. Consequently, KHIEU Samphân has failed to demonstrate error on the part of the Trial Chamber.

39. KHIEU Samphân also alleges that the Trial Chamber erred in law by characterising undifferentiated treatment that has a particular impact on a class of individuals as discrimination in fact. He argues that indirect discrimination is a recent human rights concept that was not considered discrimination in fact in customary international law in 1975. With respect to this claim, the Supreme Court Chamber concludes, in summary, as follows:

Political Persecution of the Cham

40. The Trial Chamber found that the Cham were targeted on political grounds and were dispersed to break up their communities. KHIEU Samphân challenges this finding, claiming that the Trial Chamber failed to establish that the population transfers affected the Cham exclusively or at least primarily and were therefore discriminatory. Similarly, KHIEU claims that the evidence fails to establish that in the course of the transfer the Cham were treated differently from others, which, he asserted, was the test the Supreme Court Chamber used in Case 002/01 concerning “New People”. The Supreme Court Chamber concludes that KHIEU Samphân has misinterpreted its jurisprudence in Case 002/01. It finds that the Trial Chamber applied the correct legal test to determine whether persecution occurred. KHIEU Samphân also challenges whether the *mens rea* was properly established by the Trial Chamber, claiming that there were non-discriminatory grounds for the movement of the Cham. The Supreme Court Chamber concludes that his arguments fail to demonstrate that the Trial Chamber’s finding with respect to this issue was unreasonable. KHIEU Samphân further submits that the Trial Chamber erred in its assessment as to whether the severity of the discriminatory acts amounts

to persecution. The Supreme Court Chamber concludes that the acts rise to the requisite level of severity to amount to political persecution as a crime against humanity. KHIEU Samphân's arguments concerning political persecution of the Cham are dismissed.

Political Persecution of Other "Real or Perceived Enemies"

41. KHIEU Samphân challenges the discernibility of the targeted group of "real or perceived enemies of the CPK" in relation to the findings of political persecution at S-21 and Au Kanseng Security Centres. The Supreme Court Chamber addressed this issue in Case 001 and Case 002/01 and concluded that political persecution was understood as encompassing situations where the perpetrators designated targeted groups in broad strokes without inquiry into the political views held by the individuals concerned. It "thus confirm[ed] the possibility that persecution as a crime against humanity might target aggregated groups without any common identity or agenda." Accordingly, the Supreme Court Chamber rejects KHIEU Samphân's argument that "real or perceived enemies of the CPK" is not a sufficiently discernible group for a finding of political persecution.

Political Persecution at Cooperatives and Security Centres

42. (i) Tram Kak Cooperatives: KHIEU Samphân argues that the evidence was insufficient to find that former Khmer Republic soldiers and officials and New People were persecuted at the Tram Kak Cooperatives on political grounds. The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate any error on the part of the Trial Chamber with respect to this issue

(ii) Trapeang Thma Dam Worksite: KHIEU Samphân submits that the only acts of persecution in question at the Trapeang Thma Dam Worksite were the exclusion of New People from leadership positions and their being monitored by Base People, which he argues is insufficient to find that any fundamental rights were violated or that the gravity requirement to constitute persecution as a crime against humanity was satisfied. The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate any error on the part of the Trial Chamber with respect to this issue.

(iii) 1st January Dam Worksite: KHIEU Samphân argues that the Trial Chamber erred in fact by concluding that there was discrimination against New People at the 1st January Dam Worksite; (2) erred in law by asserting that there was a fundamental right to equal treatment;

(3) erred in law and in fact by finding that the treatment violated the fundamental right of New People to equal treatment; and (4) erred in law by failing to set out the requisite level of gravity that needed to be met for the underlying acts to be characterised as persecution. As explained in the full written judgment, the Supreme Court Chamber concludes that the Trial Chamber erred in finding that during the relevant time period there was a fundamental right to equal treatment laid down in international customary or treaty law that had been infringed or violated, and accordingly reverses KHIEU Samphân conviction for political persecution against New People at the 1st January Dam Worksite.

KHIEU Samphân also argues that there was insufficient evidence to find that former Khmer Republic soldiers and officials were persecuted on political grounds at the 1st January Dam Worksite. The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate any error on the part of the Trial Chamber with respect to this issue.

(iv) *S-21 Security Centre*: KHIEU Samphân argues that the Trial Chamber erred in finding that the acts directed at “real or perceived enemies of the CPK” were discriminatory in fact, claiming that the massive scale of the arrests show that they were indiscriminate. He argues that in Case 001, the Supreme Court Chamber reversed the Trial Chamber’s finding on persecution on political grounds since it found that no discernible criteria were applied in targeting the victims. KHIEU Samphân asserts that the evidence in Case 002/02 evinced nothing new that would support a different finding in this case. The Supreme Court Chamber concludes that the fact that people were arrested *en masse* does not preclude a finding of persecution on political grounds, as long as members of the targeted group were arrested because they belonged to the targeted group. The Supreme Court Chamber’s reversal of the conviction of persecution on political grounds in Case 001 was specific to Duch. KHIEU Samphân has not demonstrated that the Trial Chamber erred in finding that the acts were discriminatory.

(v) *Au Kanseng Security Centre*: KHIEU Samphân claims that the Trial Chamber erred in finding that political persecution occurred at Au Kanseng Security Centre, arguing mainly that the evidence relied on does not show discriminatory treatment. The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate error on the part of the Trial Chamber.

Religious Persecution

43. The Trial Chamber made legal findings with respect to persecution on religious grounds in two sections of the trial judgment, the first specifically in relation to the treatment of the Cham at the 1st January Dam Worksite, and the second in relation to the treatment of the Cham generally. Concerning the 1st January Dam Worksite, the Trial Chamber found that Cham workers suffered discrimination because they were forced to eat pork, prevented from worshipping, and prevented from speaking their native language. In relation to the treatment of the Cham generally, the Trial Chamber found that restrictions and cultural restrictions were imposed, included prohibition on daily prayers, forcing Cham to eat pork, forcing Cham to wear the same dress and haircuts as the Khmer people, forcing Cham to speak only the Khmer language, and burning Korans and dismantling mosques or using them for non-religious purposes. It was satisfied that these restrictions were discriminatory and were deliberately perpetrated with the intent to discriminate against the Cham because of their religious and cultural practices.

44. KHIEU Samphân challenges the sufficiency of the evidence that certain persecutory acts occurred at the 1st January Dam Worksite and elsewhere in Cambodia. He also argues that the Trial Chamber erred by failing to consider whether the restrictions on freedom of religion were permissible in law. The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate error on the part of the Trial Chamber with respect to these issues.

45. KHIEU Samphân argues that the persecutory acts did not discriminate because they were applied equally to everyone. The Supreme Court Chamber considers that discrimination in fact can occur when there are unequal consequences for a particular group of an act or omission of general application. The Supreme Court Chamber does not discern any error in the Trial Chamber's conclusion that the Cham were "predominantly and particularly affected" by the religious and cultural restrictions, so as to establish discrimination in fact.

46. KHIEU Samphân argues that the Trial Chamber erred in finding that there had been a breach of fundamental rights as none of the religious and cultural restrictions breach any of the rights the Trial Chamber referred to in its legal findings, noting that the Trial Chamber did not find that the right to freedom of religion had been breached as regards the treatment of the Cham generally, but only at the 1st January Dam Worksite. The Supreme Court Chamber notes that the Trial Chamber stated that the right to personal dignity was violated by the religious and cultural restrictions at issue and considers this finding to be reasonable. Accordingly, the Supreme Court Chamber rejects KHIEU Samphân's arguments.

47. KHIEU Samphân also challenges whether there was intent to discriminate on religious grounds. The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate error on the part of the Trial Chamber with respect to this issue.

48. The Trial Chamber found that the crime against humanity of religious persecution against Buddhists was established at the Tram Kak Cooperatives. In particular, it found that over 100 Buddhist monks were deliberately gathered at Angk Roka Pagoda and forced to defrock. It considered that references to monks as “worms” or “leeches” and announcements dismissing Buddhism as mere superstition and the Buddha as “only concrete” demonstrated the discriminatory intention behind the process. The Trial Chamber further found that Buddhist symbols were destroyed, and pagodas used for a range of non-religious purposes across Tram Kak District. It concluded that the evidence revealed a complete abolition of Buddhist practices constituting an “organised [and] sustained attack against religion,” which was considered to be incompatible with the implementation of the revolution. Based on these considerations, the Trial Chamber concluded that the physical and mental impact of these events infringed fundamental rights to a degree of gravity similar to that of other crimes against humanity.

49. KHIEU Samphân submits that the Trial Chamber erred in finding that religious persecution had been established, claiming there was a lack of evidence regarding the physical or mental effects of the alleged acts of persecution against Buddhists. Moreover, he asserts that because there was no evidence of discriminatory treatment against Buddhist monks and Buddhists, they were treated like the rest of the population. The Supreme Court Chamber disagrees and concludes that KHIEU Samphân has not demonstrated any error on the part of the Trial Chamber with respect to these issues.

Racial Persecution

50. The Trial Chamber found that the crime against humanity of racial persecution of Vietnamese was established at Tram Kak Cooperatives, S-21 Security Centre, Au Kanseng Security Centre, and in Prey Veng and Svay Rieng. It found that this crime was committed as part of a policy of targeting Vietnamese “for adverse treatment throughout the DK period in particular, for deportation before April 1977 and for destruction as a racial group thereafter,” because the Vietnamese were considered to be “the DK’s most dangerous enemy”. KHIEU Samphân challenges whether racial persecution occurred at any of the above-mentioned sites.

The Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate error on the part of the Trial Chamber.

Other Inhumane Acts as Crimes Against Humanity

51. KHIEU Samphân challenges whether the Trial Chamber properly assessed the principle of legality when it found that it was both foreseeable and accessible in general that other inhumane acts were punishable as crimes against humanity by 1975. According to him, it is not enough to say that other inhumane acts were foreseeable since this category can cover numerous types of behaviour. Rather, he asserts that the Trial Chamber should have identified the behaviour at issue and examined whether it could have been defined as criminal at the time. The Supreme Court Chamber is of the view that KHIEU Samphân misunderstands the application of the principle of legality with regard to other inhumane acts. What is required is that the category of other inhumane acts be foreseeable and accessible to the accused, which the Trial Chamber found in this case. Consequently, there was no error.

52. KHIEU Samphân also asserts that conduct must breach a specific prohibition set out in human rights instruments to amount to an inhumane act. In Case 002/01, the Supreme Court Chamber subscribed to the approach taken by the ICTY *Kupreškić* Trial Chamber of “relating ‘other inhumane acts’ to conduct infringing basic rights appertaining to human beings, as identified under international legal instruments”. The Supreme Court Chamber explained, however, that it is not required that the particular conduct must be expressly criminalised under international law, as this would render the concept of other inhumane acts as a residual category unnecessary. KHIEU Samphân’s submission in this regard is accordingly dismissed.

Enforced Disappearances

53. KHIEU Samphân challenges the Trial Chamber’s findings that conduct characterised as enforced disappearances was established at Tram Kak Cooperatives, Kraing Ta Chan Security Centre, and Phnom Kraol Security Centre. For reasons explained more fully in the judgment, the Supreme Court Chamber concludes that the Trial Chamber properly established that the crime against humanity of other inhumane acts through conduct characterised as enforced disappearances occurred in Tram Kak and at Kraing Ta Chan and Phnom Kraol.

Forced Marriage

54. The Trial Chamber found that the regulation of marriage was one of the CPK's policies designed and implemented to achieve a socialist revolution in Cambodia. This policy involved the commission of the crime against humanity of other inhumane acts that occurred through conduct characterised by the Chamber as forced marriage and rape in the context of forced marriage. The Trial Chamber thus found KHIEU Samphân guilty of committing these other inhumane acts as crimes against humanity through a joint criminal enterprise.

55. KHIEU Samphân objects to his convictions for these crimes with respect to the regulation of marriage policy, arguing a violation of the principle of legality, disputing factual findings, and challenging the seriousness of the behaviour. The Co-Prosecutors, in turn, appeal the Trial Chamber's ruling, which effectively excluded males as victims of forced sexual intercourse in the context of forced marriage.

Forced marriage and rape in the context of forced marriage

56. KHIEU Samphân argues that the Trial Chamber erred in relying on international criminal case-law to determine the legality of forced marriage; in allegedly failing to ascertain whether the conduct violated basic rights; in failing to consider the alleged lawfulness of forced marriage under Cambodian and other domestic regimes in 1975-1979; and in allegedly failing to properly consider the principle of *ejusdem generis* in assessing the comparative gravity of forced marriage in other conflicts. As explained in the full written judgment, the Supreme Court Chamber rejects all of these arguments.

57. KHIEU Samphân further argues that the Trial Chamber erred in how it treated rape in the context of forced marriage. The Co-Prosecutors, in turn, have appealed what they assert to be errors in the Trial Chamber's approach with respect to male victims of forced intercourse in the context of forced marriage. Specifically, they cite the Trial Chamber's findings on the elements of other inhumane acts with regard to conduct charged as rape in the context of forced marriage, arguing that the Trial Chamber failed to make proper findings with respect to the experience of male victims of this crime.

58. The Supreme Court Chamber concludes that the Trial Chamber erred in its identification of the elements of rape in its analysis. Rather, the Chamber should have only considered the charged conduct that had occurred, being acts of forced sexual intercourse between male and female victims who had been forcibly married. This Chamber further finds that such forced acts violated the basic rights of physical integrity and human dignity applicable

in 1975-1979 and are of comparable gravity. We thus conclude that this conduct, properly described as forced sexual intercourse in the context of forced marriage, fell within the scope of crime against humanity of other inhumane acts. The Supreme Court Chamber thus clarifies that the victims of forced sexual intercourse comprise both female and male victims. Pursuant to our analysis, we uphold the Co-Prosecutors' appeal regarding errors in the Trial Chamber's approach to male victims.

The nature and implementation of the marriage policy

59. KHIEU Samphân raises various factual challenges to the Trial Chamber's findings on the purposes of marriage policy, namely population increase and the control of sexual interactions. He also alleges a contradiction between those two goals and asserts that to restrict male-female sexual interactions conflicts with the desire to increase the population. KHIEU Samphân also disputes the Trial Chamber's finding that the CPK principle of consent to marriage was not applied in practice, as well as findings about both marriages of disabled soldiers and wedding ceremonies. The Supreme Court Chamber rejects all of these arguments for reasons explained in the full written judgment.

60. As also more fully explained in the full written judgment, the Supreme Court Chamber similarly rejects KHIEU Samphân's assertion that there was no policy of forced sexual intercourse, as well as his denial that sexual intercourse was compelled.

61. KHIEU Samphân also disputes the Trial Chamber's findings regarding instructions from the upper echelon to arrange marriages, reports on marriage to the upper echelon, and reports on monitoring the consummation of marriages, as well as his own personal involvement in the regulation of marriage. The Supreme Court Chamber concludes that, for the most part, KHIEU Samphân mischaracterises both the trial judgment and the evidence with respect to these matters. His submissions are therefore dismissed.

The legal findings on the elements of other inhumane acts

62. The Trial Chamber found that the conduct charged as forced marriage, and the conduct charged as rape in forced marriage, had occurred. With regard to forced marriage, it considered that serious mental or physical suffering was inflicted on individuals through the threat of forcing them to marry strangers and the fear instilled to pressure them to consummate the marriage and found that the conduct was performed intentionally. The Trial Chamber was

therefore satisfied that conduct characterised as forced marriage was established and met the threshold of other inhumane acts. With regard to the conduct charged as rape in the context of forced marriage, the Trial Chamber found that rape had occurred with regard to female victims and had caused serious mental or physical suffering or injury. Consequently, in the manner that it affected female victims, such forced sexual intercourse also constituted an inhumane act.

63. However, with regard to male victims of forced sexual intercourse in the context of forced marriage, the Trial Chamber concluded that given the circumstances, they could not be considered rape victims. The Trial Chamber then considered whether the male victims had experienced another act of sexual violence of comparable gravity. It concluded that while the male victims indeed had experienced sexual violence that had breached their human dignity, there was insufficient evidence concerning the extent of its impact on them. Accordingly, the Trial Chamber concluded that the elements of other inhumane acts as crimes against humanity were not established with respect to the male victims of forced sexual intercourse in the context of forced marriage.

The Supreme Court Chamber has reviewed the evidence that was before the Trial Chamber and concludes that it was in fact sufficient to support the conclusion that male victims experienced an impact comparable to that which female victims experienced when forced to engage in intercourse in the context of forced marriage. It follows that such forced sexual intercourse also constituted an inhumane act as to male victims, a factor that we have also considered in upholding the Co-Prosecutors' appeal regarding the Trial Chamber's approach to male victims.

64. KHIEU Samphân, in turn, asserts that the Trial Chamber erred in the findings it made on the *actus reus* of forced marriage; in failing to consider the context of traditional arranged marriages, which he asserts were akin to marriages under the CPK; and in the findings it made on serious mental or physical suffering or injury in the case of various individuals. The Supreme Court Chamber rejects each of these assertions. Furthermore, there was no merit to any of KHIEU Samphân's challenges to evidence attesting to individual experiences of harm. KHIEU Samphân raised alternative inferences not supported by the evidence, misrepresented the evidence, mischaracterised the trial judgment, or simply disagreed with the Trial Chamber's findings without demonstrating any error.

65. KHIEU Samphân next challenges the Trial Chamber's findings with respect to the female victims of conduct charged as rape in the context of forced marriage. The Supreme Court Chamber discerns no error in the findings of the Trial Chamber in this regard. The Co-Prosecutors, in turn, also challenge the Trial Chamber's findings but with respect to male victims in the context of conduct charged as rape in the context of forced marriage. The Supreme Court Chamber recalls its finding that the Trial Chamber erred in attempting to identify the elements of rape with the respect to male victims, but instead, should have considered only whether the charged conduct of forced sexual intercourse had occurred in the context of forced marriage. Having reviewed the evidence that was before the Trial Chamber, we conclude that it was sufficient to support the conclusion that the charged conduct of forced sexual intercourse in the context of forced marriage did in fact occur.

66. KHIEU Samphân argues that the Trial Chamber erred in its findings on harm experienced by a number of female victims, and also alleges error in the failure to consider certain other evidence. This Chamber considers both of these arguments to be without merit. Indeed, KHIEU Samphân misrepresents the evidence, or merely disagrees with the Trial Chamber's findings without demonstrating any error.

Genocide

67. The Trial Chamber found that the Vietnamese constituted a protected racial, national, and ethnic group during the indictment period. After determining that a number of Vietnamese were among the victims of the crimes against humanity of murder and extermination, and that the CPK targeted them because they were Vietnamese, with the intent to destroy the group, the Trial Chamber was satisfied that genocide had been established. KHIEU Samphân contends that the Trial Chamber erred in concluding that the killings of Vietnamese occurred, or that the killings at Au Kanseng, at S-21, and in Cambodian territorial waters, including at Ou Chheu Teal port, were of members of the protected group. He argues that the Trial Chamber erred in failing to determine whether there was an intent to destroy the protected group "in whole or in part," as well as whether there was an intent to destroy the protected group.

68. The Supreme Court Chamber discerns no error in the Trial Chamber's findings concerning the killing of Vietnamese in Svay Rieng, DK waters, Kampong Chhnang province, Wat Khsach, and Kratie. The Chamber also concludes that the Trial Chamber accurately set out the applicable law as it relates to genocide. Moreover, in determining that the *mens rea* of

genocide by killing was established, the Trial Chamber properly relied on factors in addition to the scale of the atrocities, such as the existence of a policy of targeting the Vietnamese for adverse treatment in DK throughout the relevant period. The Supreme Court Chamber thus finds no merit in KHIEU Samphân's arguments regarding genocide and rejects them as further explained in the full written judgment.

Alleged Errors Relating to Individual Criminal Responsibility

KHIEU Samphân's roles and responsibilities during the DK period

69. KHIEU Samphân challenges the Trial Chamber's findings about his roles and responsibilities during the DK. Many of these findings, combined with other evidence, underpin the Trial Chamber's findings about his JCE contribution, intent, and knowledge. The Supreme Court Chamber has determined that the vast majority of KHIEU Samphân's arguments are unfounded. He merely advances an alternative reading of the facts, one that cherry-picks the evidence and ignores large swaths of relevant evidence and fails to demonstrate that the Trial Chamber's assessment of the evidence was unreasonable.

GRUNK Deputy Prime Minister and President of the State Presidium

70. The Supreme Court Chamber upholds the Trial Chamber's finding that, as GRUNK Deputy Prime Minister, KHIEU Samphân promoted the CPK's agenda by reading press communiques of an April 1975 Special National Congress and December 1975 Third National Congress. That the Trial Chamber was unable to determine whether these events actually took place is immaterial to the undisputed fact that KHIEU Samphân read the communiques for radio broadcast and that these promoted the party line.

71. The Supreme Court Chamber dismisses KHIEU Samphân's argument that the Trial Chamber could not rely on his conduct as President of the State Presidium because this role was "largely symbolic" as he misapprehends the import of the Trial Chamber's description. It also dismisses KHIEU Samphân's arguments that the Trial Chamber ignored evidence that the CPK mistrusted him. The Supreme Court Chamber also rejects his repeated arguments that he could not contribute to the common purpose by exercising diplomatic duties and generally by promoting the CPK party line in his speeches because, he says, this was "not criminal in and of itself" or he supported only benign activities. The Trial Chamber's findings amply demonstrate that KHIEU Samphân's speeches promoted a variety of the CPK's criminal policies.

72. While the Supreme Court Chamber agrees with KHIEU Samphân that the Trial Chamber erred by attributing to him a speech at the first session of the People's Representative Assembly, these errors did not occasion a miscarriage of justice as they were not indispensable to the Trial Chamber's corresponding conclusions.

Membership in the Central Committee

73. KHIEU Samphân concedes that he was "first an alternate member and then a full member" of the Central Committee. In his view, the Trial Chamber erred by (1) overstating the powers of the Central Committee, (2) attributing decisions of the Standing Committee to the Central Committee, (3) "conveniently" dating KHIEU Samphân's admission as a full member of the Central Committee in order to implicate him in the Central Committee decision of 30 March 1976, and (4) finding that he participated in Party Congresses.

74. The Supreme Court Chamber rejects these arguments for the reasons explained in the full written judgment. The Supreme Court Chamber accepts his argument that not all telegrams sent to the Party Centre reached all the Central Committee members, but concludes he was well-informed by virtue of his membership in Office 870.

75. The Supreme Court Chamber has also considered KHIEU Samphân's submissions with respect to four decisions of the Central Committee: (1) the May 1972 decision to close markets, end the use of money, and organise cooperatives in the liberated zones; (2) the mid-1974 decision to close the door to party membership in order to prevent spies from infiltrating the party; (3) the June 1974 decision to undertake the final assault and evacuation of Phnom Penh in the dry season of 1974-1975; and (4) the 30 March 1976 'Decision of the Central Committee Regarding a Number of Matters'. This Chamber finds no error in the Trial Chamber's findings, or in its conclusion that KHIEU Samphân was aware of the first three of these decisions, which is solidly grounded in the evidence. The Chamber discerns no error in the Trial Chamber's findings that the Central Committee appointed KHIEU Samphân to the role of President of the State Presidium. We similarly see no reason to disturb the Trial Chamber's finding that KHIEU Samphân contributed to the common purpose by assenting to the contents of that decision. Moreover, the conclusion of the Trial Chamber that he did attend the Fourth and Fifth Party Congresses was supported by the evidence

Attendance and participation in meetings of the Standing Committee

76. This Chamber finds no error in the Trial Chamber’s conclusion that KHIEU Samphân’s frequent attendance at meetings of the Standing Committee accorded him “a position of unique standing” within the Party. He merely advances an alternative interpretation of the evidence and repeats arguments from Cases 002/01 and 002/02, without demonstrating that the Trial Chamber’s conclusion was unreasonable. KHIEU Samphân’s arguments that the Trial Chamber erred by holding him responsible based on his participation in meetings of the Standing Committee are unfounded. Contrary to his submissions, the Trial Chamber did not extrapolate from KHIEU Samphân’s active participation in two meetings that he participated on other occasions or took part in decision-making – and did not hold him responsible on this basis.

77. KHIEU Samphân challenges the Trial Chamber’s findings that he contributed to the common plan by attending Standing Committee meetings discussing Kampong Chhnang Airfield. The Supreme Court Chamber concludes that the Trial Chamber erred in finding that he attended the meeting of 9 October 1975, but this error did not occasion a miscarriage of justice. This Chamber finds no error in the Trial Chamber’s characterisation of the evidence pertaining to the two other meetings discussing Kampong Chhnang Airfield. The Supreme Court Chamber also finds no error in the Trial Chamber’s reliance, *inter alia*, on a statement by the late IENG Sary to find that KHIEU Samphân attended a meeting of the Standing Committee in September 1975 where “agriculture, drought and industry” were discussed.

78. KHIEU Samphân argues that the Trial Chamber erred by relying on democratic centralism to find that he could have intervened in the Central and Standing Committees meetings. The Supreme Court Chamber concludes that the Trial Chamber did not rely on democratic centralism to hold KHIEU Samphân responsible for Central Committee decisions, but on his full membership in that body. This Chamber sees no error in that approach. As the Trial Chamber did not find that KHIEU Samphân actively participated in Standing Committee meetings, his submission that he could not intervene in such meetings is moot.

Residual functions

79. KHIEU Samphân challenges the Trial Chamber’s reliance on evidence of EM Oeun and EK Hen to find that he spoke about enemies during political training sessions held at Borei Keila (K-6) and the Khmer-Soviet Friendship Institute of Technology (K-15). The Supreme Court Chamber has reviewed the evidence and finds no error in the Trial Chamber’s

assessment. This Chamber rejects KHIEU Samphân's submission that the Trial Chamber ignored other evidence from witnesses whose accounts support the conclusion that he was involved in politic training. It dismisses his argument that statements "relating to the CPK's general economic project" could constitute a significant contribution to the JCE.

80. The Supreme Court Chamber dismisses the submission of KHIEU Samphân that the Trial Chamber erred in finding that he joined that Office 870 in October 1975. He repeats arguments rejected by this Chamber in Case 002/01, and which fail to persuade us that the Trial Chamber erred. Second, this Chamber rejects KHIEU Samphân's assertion that the Trial Chamber exaggerated the evidence concerning his role in Office 870.

81. KHIEU Samphân disputes the Trial Chamber's findings about his role in DK trade and commerce. A number of similar challenges were dismissed by this Chamber in Case 002/01, since he merely advances an alternative interpretation of the evidence. KHIEU Samphân portrays himself as having played a minor, technical role in the Commerce Committee. These submissions are similarly dismissed. The Supreme Court Chamber finds no error in the Trial Chamber's reliance on the evidence of SAKIM Lmuth (*alias* SAR Kimlomouth), YEN Kuch, or BEIT Boeurn (*alias* BIT Na).

82. The Supreme Court Chamber did not consider it unreasonable that the Trial Chamber concluded that KHIEU Samphân would have been aware of the contents of two letters sent to him by *Amnesty International* in 1977 and 1978, in part due to his connection to both the late IENG Sary and the Ministry of Foreign Affairs.

Joint Criminal Enterprise

83. The Trial Chamber found that, by 17 April 1975, and continuing until at least 6 January 1979, KHIEU Samphân shared the common purpose of rapidly implementing socialist revolution in Cambodia through a "great leap forward". According to the Trial Chamber, this common purpose was criminal because it was intrinsically linked to policies that involved the commission of crimes. These policies were: (1) the establishment and operation of cooperatives and worksites; (2) the establishment and operation of security centres and execution sites; (3) the targeting of specific groups; and (4) the regulation of marriage. The Trial Chamber further determined that KHIEU Samphân made a significant contribution to the commission of crimes perpetrated by CPK cadres within the scope of Case 002/02, and that he shared the intent of other senior leaders in a joint criminal enterprise (JCE) to participate in, and commit the crimes

encompassed by, the common purpose. The Trial Chamber accordingly found KHIEU Samphân guilty of committing, through a JCE, genocide, crimes against humanity, and grave breaches of the Geneva Conventions.

84. KHIEU Samphân submits that the Trial Chamber made several errors of law and fact in defining the common purpose of the senior leaders of DK as criminal. He disputes the application of a criminal label to each of the CPK's policies. He further contends that the Trial Chamber erred when it found that he both shared the criminal aspect of the common purpose and significantly contributed to it, as well as in finding that he intended to participate in the common purpose and in the crimes underlying it.

85. Some of the legal errors alleged by KHIEU Samphân concern the Trial Chamber's statement of the law applicable to JCE. For instance, he submits, among other things, that culpable omission is not sufficient to establish participation in a common purpose, and that the requisite link must be between a JCE member and *all* direct perpetrators of a crime and not just one such perpetrator. For reasons explained in the full written judgment, the Supreme Court Chamber dismisses KHIEU Samphân's assertions in this regard as they fail to demonstrate any appealable error.

Criminality of the common purpose

86. KHIEU Samphân repeatedly objects to how the Trial Chamber concluded that the CPK's plan for socialist revolution was criminal in nature. The Supreme Court Chamber recalls that, in order to give rise to criminal liability, the common purpose that is the object of the planned action among several persons must be of a criminal character, in the sense that it either amounted to or involved the commission of a crime. KHIEU Samphân claims that the common purpose of rapidly implementing socialist revolution in Cambodia was not criminal in nature, but rather was a purely political move. That characterisation ignores the fact that the underlying plan was to use any means necessary to achieve the socialist revolution in the country, including the crimes that were committed on a massive scale against the Cambodian people throughout the implementation process. This Chamber considers that by no stretch of the imagination could it be seriously stated that the CPK revolution was implemented in a benevolent or altruistic manner. While there may have existed socialist revolutions that have taken place without bloodshed or criminal activity, this was not one of them. KHIEU Samphân's claim of

error regarding the Trial Chamber's approach in determining the criminality of the common purpose are accordingly dismissed.

87. KHIEU Samphân further submits that the Trial Chamber misconceived the CPK's notion of enemies and wrongly established the existence of a policy to eliminate them at security centres and execution sites. He asserts that the Trial Chamber's errors precluded the conclusion that crimes against humanity were committed at the S-21, Kraing Ta Chan, Au Kanseng, and Phnom Kraol Security Centres, and repeatedly asserts that the Trial Chamber failed to view the evidence in its proper context, namely, that of armed hostilities against the LON Nol regime and, subsequently, Vietnam.

88. This Chamber has thoroughly reviewed the evidence with respect to the Trial Chamber's approach to real and perceived enemies of the CPK and concludes that KHIEU Samphân's arguments are without foundation. The errors alleged by him as to the Trial Chamber's findings regarding the existence and criminality of a policy to establish and operate security centres and execution sites during the DK era are thus dismissed.

89. With respect to establishing cooperatives and worksites, KHIEU Samphân disputes the Trial Chamber's conclusion that this policy was intrinsically linked to the common purpose and involved the commission of crimes against humanity. He contends, *inter alia*, that the Trial Chamber mischaracterised the CPK's political orientation regarding the cooperatives by selectively viewing official CPK documents through an incriminating lens of "enmity" and ignoring exculpatory evidence demonstrating that there was a constant concern for the population. While it is not necessary to refer to every piece of evidence on the trial record, the Trial Chamber did in fact refer to most of the documents to which KHIEU Samphân points and his alternative interpretations of those documents do not suffice to overcome the Trial Chamber's conclusions based on its own fair and reasonable interpretation of those same documents. His allegations of error regarding the existence and criminality of a policy to establish and operate cooperatives and worksites during the DK era are thus dismissed.

Policy of Targeting Specific Groups and Regulating Marriage

90. Turning to the policy of targeting specific groups, the Supreme Court Chamber concludes that KHIEU Samphân has not demonstrated that the Trial Chamber erred in finding that a policy broadly targeted Buddhists, Cham, Vietnamese or former Khmer Republic soldiers and officials for the reasons explained in the full written judgment.

91. As to the policy of regulating marriage, KHIEU Samphân submits that it was not possible to find the existence of a criminal policy regarding the organisation of forced marriage and the commission of rape in this context. For reasons explained in the full written judgment, the Supreme Court Chamber has rejected his assertions. His allegations of error in the findings regarding the existence and criminality of a policy to regulate marriage during the DK era are thus dismissed.

KHIEU Samphân's contribution

92. The two remaining essential JCE issues relate to KHIEU Samphân's contribution to, and intent to participate in, the common criminal purpose. He submits that the Trial Chamber wrongly found that his support for, participation in and/or contribution to the political process for the purpose of implementing a socialist revolution in Cambodia were sufficient to establish his significant contribution to the commission of any crimes such purpose may have involved. The Supreme Court Chamber recalls that contribution to a JCE may take many forms, and, as previously determined by this Chamber, "even activities that are on their face unrelated to the commission of crimes may be taken into account when determining whether the accused made a significant contribution thereto." The Supreme Court Chamber accordingly rejects KHIEU Samphân's argument that the Trial Chamber could not take into account his activities that were, on their face, directed at implementing a socialist revolution as opposed to the commission of specific crimes when determining that he made a significant contribution to furthering the JCE's common criminal purpose.

93. The Supreme Court Chamber similarly rejects KHIEU Samphân's submission that the Trial Chamber essentially imposed on him a form of "collective responsibility" or guilt by association, claiming that the trial judgment clearly shows that it based its conclusions about his significant contribution to the JCE on his own conduct or acts as opposed to those of others. KHIEU Samphân's allegations of error regarding his significant contribution to the JCE's common criminal purpose are thus dismissed.

KHIEU Samphân's knowledge and intent

94. As to whether he knew of and intended the commission of the crimes underlying and encompassed by the common purpose, KHIEU Samphân disputes the Trial Chamber's findings that he did and reiterates that the common purpose was not criminal. KHIEU Samphân does not deny that he and the other members of the enterprise shared a common intent of

transforming Cambodia into a self-sufficient classless agricultural society through a socialist revolution, but he continues to assert that they never intended to commit crimes individually or as a group, and that their common purpose was benign and for the benefit of the population of Cambodia. He argues that any crimes that might have occurred in the process of implementing the common purpose were extraneous thereto and happened without his knowledge or participation.

95. A review of the trial judgment shows that the Trial Chamber fully examined and applied the *mens rea* requirement of the JCE for each of the crimes alleged. Moreover, it conducted this exercise in relation to KHIEU Samphân's imputed knowledge as a senior leader and active participant at the heart of the CPK, and his close relationship with those at the highest level of its leadership. Contrary to his assertion that the Trial Chamber improperly imposed a "vicarious criminal liability" on him, the Supreme Court Chamber finds that the Trial Chamber inferred his intent from his own acts and conduct.

96. The Supreme Court Chamber observes that, in concluding that KHIEU Samphân had the requisite *mens rea* under JCE, the Trial Chamber clearly concluded that he had direct contemporaneous knowledge of the commission of crimes and shared the intent for their commission with other JCE members.

97. The several errors that KHIEU Samphân alleges with respect to the Trial Chamber's findings regarding his contemporaneous knowledge and shared intent to commit crimes at cooperatives and worksites, at security centres and against specific groups, namely the Cham, Buddhists, Vietnamese and former Khmer Republic officials, are dismissed for reasons explained in the full written judgment.

98. The Supreme Court Chamber similarly rejects KHIEU Samphân's assertion that the Trial Chamber erred in concluding that he knew of and intended to commit crimes in regulating marriage. The Supreme Court Chamber has addressed in the full written judgment KHIEU Samphân's arguments in support of these contentions. For the most part, they simply constitute alternative interpretations of the evidence. Khieu Samphan's assertions of error are thus dismissed.

Applicability of JCE liability to crimes committed with dolus eventualis

99. As a final JCE-related matter, the Supreme Court Chamber has determined *proprio motu* that the Trial Chamber erred in its application of the law relating to JCE liability for crimes committed with *dolus eventualis*. Although none of the parties advanced this issue on appeal, the Supreme Court Chamber considers it necessary to address as it is of general significance to the ECCC's jurisprudence.

100. The Trial Chamber determined "that the degree of intent required under JCE I is direct intent" and that "indirect intent (*dolus eventualis*) does not suffice for a finding of JCE before the ECCC." As a result, the Trial Chamber concluded that the crime against humanity of murder committed with *dolus eventualis* fell outside the common purpose of the JCE, and accordingly analysed KHIEU Samphân's responsibility for this crime under the mode of liability of aiding and abetting instead. The Supreme Court Chamber concludes that the Trial Chamber erred when it failed to apply our holding in Case 002/01 that an accused may be held liable for crimes that are not directly intended but are nevertheless encompassed within a JCE's common purpose.

101. In this respect, the Supreme Court Chamber recalls its finding in Case 002/01 that liability under JCE for crimes that fell outside the common purpose (*i.e.*, JCE III) was not part of customary international law in 1975, and that liability under JCE before the ECCC could therefore only arise for crimes falling *within* the common purpose. The Trial Chamber incorrectly concluded that if the commission of a crime is merely foreseeable, that crime automatically falls outside the common purpose. This ignores situations where the probable commission of a crime was jointly and willingly agreed upon or accepted by all JCE participants. In such situations, as the JCE participants share an agreement regarding the commission of a crime with *dolus eventualis* in furtherance of the common purpose, the crime is encompassed by the common purpose.

102. The Trial Chamber's error led it to determine that murders committed with *dolus eventualis* at the following locations fell outside the JCE's common purpose: the Tram Kak Cooperatives; the 1st January Dam Worksite; the Trapeang Thma Dam Worksite; the Kampong Chhnang Airfield Construction Site; the S-21 Security Centre; the Kraing Ta Chan Security Centre; and the Phnom Kraol Security Centre. The Trial Chamber determined that KHIEU Samphân was instead culpable for aiding and abetting those murders with *dolus eventualis*.

103. For reasons explained in the full written judgment, the Supreme Court Chamber finds that the crime against humanity of murder with *dolus eventualis* at these locations, was encompassed by the JCE's common purpose, and that KHIEU Samphân made a significant contribution thereto with the shared intent to commit this crime while being aware of the substantial likelihood of deaths. Phnom Kraol Security Centre, is excluded from this analysis because, as previously discussed, the Supreme Court Chamber reversed the Trial Chamber's finding that the crime against humanity of murder was established with respect to that location. The Supreme Court Chamber accordingly recharacterises the form of liability from aiding and abetting to JCE for the crime against humanity of murder with *dolus eventualis* at the Tram Kak Cooperatives, 1st January Dam Worksite, Trapeang Thma Dam Worksite, Kampong Chhnang Airfield Construction Site, S-21 Security Centre, and Kraing Ta Chan Security Centre. It therefore will not consider KHIEU Samphân's remaining challenges related to aiding and abetting.

Sentencing

104. The Supreme Court Chamber recalls that KHIEU Samphân currently serves a life sentence, the maximum sentence permitted at the ECCC, which was imposed by the Trial Chamber in Case 002/01 and upheld by the Supreme Court Chamber on appeal. Cases 002/01 and 002/02 were prosecuted separately but originated from a single indictment that was severed in the interests of trial management and in light of the frail health and advanced age of all the Accused. Although the two cases are thus related, they deal with different facts that were adjudicated in two trials that produced separate dispositions, each of which requires the imposition of a separate sentence after a finding of guilt. For this reason, the Trial Chamber sentenced KHIEU Samphân to life imprisonment for the crimes of which he was convicted in Case 002/02 and we affirm that sentence.

The Supreme Court Chamber considers the life sentence that was imposed in Case 002/02 to be appropriate in light of all the circumstances, including the tragic nature of the underlying events and the extent of harm caused by KHIEU Samphân. In the circumstances, however, in addition to affirming the life sentence in this case, we affirm the decision of the Trial Chamber to have the sentence run concurrently with the one imposed in Case 002/01 as permitted by Article 138 of the Cambodian Criminal Code.

105. Nonetheless, KHIEU Samphân has raised several challenges to the fairness of the sentence imposed by the Trial Chamber in Case 002/02. He argues that the Trial Chamber erred in describing the primary objective of sentencing; that it erred in its assessment of the gravity of the crimes by including in its analysis a crime for which he was not charged; that it erred in its assessment of aggravating factors, including the double counting of his positions of authority and influence as an aggravating factor as to the gravity of the crimes; and finally, that it erred in assessing mitigating factors. The Supreme Court Chamber has thoroughly considered each of those assertions and considers them without merit. The sole exception is the claim that the Trial Chamber erred in both assessing the gravity of the crimes committed by including a crime of which KHIEU Samphân was not charged and impermissibly double counting his position of authority and influence. Although the Supreme Court Chamber decides that doing so constituted error, it also concludes that in the circumstance of this case their consideration does not render the ultimate sentence inappropriate or unfair in any way.

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 submissions of the Parties on appeal and their arguments presented at the hearing from 16 to 19 August 2021;

GRANTS, in part, and **DISMISSES**, in part, KHIEU Samphân's Appeal, and therefore:

Insofar as it relates to facts of deaths that occurred at Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam Worksite, Kampong Chhnang Airfield Construction Site, S-21 Security Centre, and Kraing Ta Chan Security Centre:

REVERSES KHIEU Samphân's conviction for aiding and abetting the crime against humanity of murder with *dolus eventualis*, and, recharacterising the facts, **ENTERS** a conviction for the crime against humanity of murder with *dolus eventualis* through a joint criminal enterprise;

Insofar as it relates to facts of deaths that occurred at Phnom Kraol Security Centre:

REVERSES KHIEU Samphân's conviction for the crime against humanity of murder at Phnom Kraol Security Centre;

Insofar as it relates to facts of persecution at 1st January Dam Worksite:

REVERSES KHIEU Samphân's conviction for the crime against humanity of persecution on political grounds of New People at the 1st January Dam Worksite;

Insofar as it relates to facts of killings of the Cham that occurred at Trea Village and Wat Au Trakuon and killings of the Vietnamese in Svay Rieng, in DK waters, in Kampong Chhnang province, at Wat Khsach, and in Kratie, as well as at Au Kanseng Security Centre:

AFFIRMS KHIEU Samphân's conviction for the crimes against humanity of extermination;

Insofar as they relate to facts of forced labour of prisoners at Phnom Kraol Security Centre:

AFFIRMS KHIEU Samphân's conviction for the crime against humanity of enslavement;

Insofar as they relate to facts of removal of the Vietnamese from Tram Kak district and from Prey Veng province:

AFFIRMS KHIEU Samphân's conviction for the crimes against humanity of deportation of Vietnamese;

Insofar as they relate to facts of physical and mental mistreatment of the Cham at Trea Village:

AFFIRMS KHIEU Samphân's conviction for the crime against humanity of torture;

Insofar as they relate to facts of the treatment of the Cham and of "real or perceived enemies of the CPK", including former Khmer Republic soldiers and officials and "New People" at Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam Worksite (not in relation to "New People"), Kampong Chhnang Airfield Construction Site, S-21 Security Centre, Kraing Ta Chan Security Centre, Au Kanseng Security Centre and Phnom Kraol Security Centre:

AFFIRMS KHIEU Samphân's conviction for the crimes against humanity of persecution on political grounds;

Insofar as they relate to facts of discrimination against the Cham:

AFFIRMS KHIEU Samphân's conviction for the crimes against humanity of persecution on religious grounds;

Insofar as they relate to facts of discrimination against Buddhists and Buddhist Monks:

AFFIRMS KHIEU Samphân's conviction for the crimes against humanity of persecution on religious grounds;

Insofar as they relate to facts of discrimination of the Vietnamese at Tram Kak Cooperatives, S-21 Security Centre, Au Kanseng Security Centre and in Prey Veng and Svay Rieng provinces:

AFFIRMS KHIEU Samphân's conviction for the crimes against humanity of persecution on racial grounds;

Insofar as they relate to facts of disappearances at Tram Kak Cooperatives, Kraing Ta Chan Security Centre, and Phnom Kraol Security Centre:

AFFIRMS KHIEU Samphân's conviction for the crimes against humanity of other inhumane acts through conduct characterised as enforced disappearances;

Insofar as they relate to facts of forcible transfers of the Cham in the course of the Movement of Population Phase Two:

AFFIRMS KHIEU Samphân's conviction for the crimes against humanity of other inhumane acts through conduct characterised as forced transfer;

Insofar as they relate to facts of forced marriage and forced sexual intercourse in the context of forced marriage within the context of the nationwide regulation of marriage:

AFFIRMS KHIEU Samphân's conviction for the crimes against humanity of other inhumane acts through conduct characterised as forced marriage and rape, and additionally categorized as crime against humanity of other inhumane acts in the form of sexual violence, understood to constitute forced sexual intercourse in the context of forced marriage with regard to female victims;

GRANTS the Co-Prosecutors' Appeal; and **ENTERS** a conviction for the crime against humanity of other inhumane acts through conduct characterised as forced marriage and

additionally categorized as crime against humanity of other inhumane acts in the form of sexual violence, understood to constitute forced sexual intercourse in the context of forced marriage with regard to male victims;

Insofar as they relate to wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving prisoners of war or civilians the rights of fair and regular trial and the unlawful confinement of civilians:

AFFIRMS KHIEU Samphân's conviction for grave breaches of the Geneva Conventions;

Insofar as they relate to facts of killings of the Vietnamese:

AFFIRMS KHIEU Samphân's conviction for the crime of genocide;

AFFIRMS KHIEU Samphân's sentence of life imprisonment in Case 002/02, which shall run concurrently with the life sentence imposed in Case 002/01;

ORDERS that KHIEU Samphân remain in the custody of the ECCC pending the issuance of the full written Appeal Judgment and the finalisation of arrangements for his transfer, in accordance with the law, to the prison where he will continue to serve his sentence.