ព្រះរាជាណាចក្រកម្ពុជា
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.

Case File/Dossier N° 002/19-09-2007-ECCC/SC

Before:	**Judge KONG Srim, President** **Judge Chandra Nihal JAYASINGHE** **Judge SOM Sereyvuth** **Judge Agnieszka KLONOWIECKA-MILART** **Judge MONG Monichariya** **Judge Florence Ndepele MWACHANDE-MUMBA** **Judge YA Narin**
Greffiers:	**Volker NERLICH, SEA Mao, Paolo LOBBA, PHAN Theoun**
Date:	**23 November 2016**
Original Language(s):	**Khmer/English**
Classification:	**PUBLIC**

APPEAL JUDGEMENT

Co-Prosecutors
CHEA Leang
Nicholas KOUMJIAN

Accused
KHIEU Samphân
NUON Chea

Civil Party Lead Co-Lawyers
PICH Ang
Marie GUIRAUD

Co-Lawyers for NUON Chea
SON Arun
Victor KOPPE

Co-Lawyers for KHIEU Samphân
KONG Sam Onn
Anta GUISSÉ

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1. 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 between 17 April 1975 and 6 January 1979 hereby renders its judgement on the appeals against the judgement of the Trial Chamber issued on 7 August 2014 in Case 002/01[1] against NUON Chea and KHIEU Samphân.

I. PROCEDURAL HISTORY

2. In the Trial Judgement, the Trial Chamber found the Accused guilty of crimes against humanity of extermination (encompassing murder), persecution on political grounds, and other inhuman acts (comprising forced transfer, enforced disappearances and attacks against human dignity) committed within the territory of Democratic Kampuchea between 17 April 1975 and the end of 1977; each of the Accused was sentenced to life imprisonment.[2] The Trial Chamber declared that the civil parties have suffered harm as a direct consequence of the crimes of which the Accused have been convicted and accordingly granted, in part, the civil parties' request for collective and moral reparations, endorsing eleven projects.[3]

3. In the course of the appellate proceedings, NUON Chea filed six requests for additional evidence, the details of which are set out under the relevant section below.[4]

4. On 29 September 2014, having been granted time extension,[5] NUON Chea, KHIEU Samphân and the Co-Prosecutors filed their respective notices of appeal against the Trial Judgement.[6] NUON Chea's Notice of Appeal listed 223 grounds of appeal, claiming that each error of fact, individually or cumulative to other errors, caused a miscarriage of justice and that each error of law invalidated at least part of the Trial Judgement or another decision of the Trial Chamber.[7] KHIEU Samphân's Notice of Appeal advanced 148 grounds of appeal and requested the Supreme Court

[1] *See*, on the severance of Case 002, Decision on Appeal Against Third Severance (E301/9/1/1/3); Decision on Appeal Against Second Severance (E284/4/8); Decision on Appeal Against First Severance (E163/5/1/13). Full references to the decisions, filings and other documents cited in this judgement are contained in Annex A – Designations Chart (F36.1).
[2] Trial Judgement, paras 1060, 1106-1107 and Disposition.
[3] Trial Judgement, paras 1150-1160 and Disposition.
[4] *See below*, para. 17 *et seq*.
[5] Decision on Extension of Time and Page Limits on Notices of Appeal and Appeal Briefs (F3/3).
[6] NUON Chea's Notice of Appeal (E313/1/1); Déclaration d'appel de KHIEU Samphân (E313/2/1) (not available in English); Co-Prosecutors' Notice of Appeal (E313/3/1).
[7] NUON Chea's Notice of Appeal (E313/1/1), para. 2.

Chamber to set aside the Trial Judgement, acquit him and order his immediate release from detention.[8] The Co-Prosecutors declared that they were filing an appeal "in the interests of law" against the Trial Chamber's decision to exclude from consideration in this case the third form of joint criminal enterprise ("JCE") as a mode of criminal liability.[9]

5. On 28 November 2014, the Co-Prosecutors filed their appeal brief.[10]

6. On 29 December 2014, having been granted time and page extensions,[11] NUON Chea filed his appeal brief,[12] in English only, and KHIEU Samphân his appeal brief, in French only.[13] The Khmer versions of NUON Chea's and KHIEU Samphân's appeal briefs were notified on 24 and 25 March 2015, respectively.[14]

7. On 28 January 2015, having been granted time extension,[15] the Accused filed their respective responses to the Co-Prosecutors' Appeal Brief.[16]

8. On 24 April 2015, the Co-Prosecutors filed their response to the Accused's appeal briefs,[17] in English only.[18] The Khmer version thereof was notified on 12 August 2015.

9. On 25 May 2015, having been so authorised,[19] the Civil Party Lead Co-Lawyers filed their response to the Accused's appeal briefs, in English only.[20] The Khmer version thereof was notified on 16 July 2015.

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[8] Déclaration d'appel de KHIEU Samphân (E313/2/1), para. 153 (not available in English).
[9] Co-Prosecutors' Notice of Appeal (E313/3/1).
[10] Co-Prosecutors' Appeal Brief (F11).
[11] Decision on Appeal Brief and Responses Extension Requests (F9); Decision on Extension of Pages Limit and Time to Respond (F13/2). *See also* Decision on NUON Chea's Request to File Addendum (F15/1).
[12] NUON Chea's Appeal Brief.
[13] KHIEU Samphân's Appeal Brief. *See also* Decision on Request for Correction of KHIEU Samphân's Appeal Brief (F18/3).
[14] The English translation of KHIEU Samphân's Appeal Brief was notified on 17 August 2015.
[15] Decision on Extension of Pages Limit and Time to Respond (F13/2).
[16] NUON Chea's Response; KHIEU Samphân's Response.
[17] Co-Prosecutors' Response.
[18] *See* Decision on OCP Request to File Response in English Only (F21/1). *See also* Decision on Time Extension for Response (F23/1).
[19] Decision on Civil Party Standing (F10/2).
[20] Civil Parties' Response.

10. On 2, 3 and 6 July 2015,[21] the Supreme Court Chamber held hearings to examine three witnesses,[22] the summoning of whom had been requested by NUON Chea.[23] In this context, the Supreme Court Chamber ruled that the Parties would not be allowed to use statements that had likely been obtained by means of torture.[24]

11. On 9 October 2015, the Supreme Court Chamber scheduled the appeal hearing for 16-18 November 2015 and notified the Parties of a potential change to the "legal characterisation of the crime", inviting them to file submissions thereupon.[25] The start of the appeal hearing, for logistical reasons, was subsequently postponed to 17 November 2015.[26]

12. On 17 November 2015, the Supreme Court Chamber opened the appeal hearing, but had to adjourn it shortly thereafter, due to the lack of legal representation for NUON Chea resulting from the absence of his Co-Lawyers from the courtroom,[27] which led the Chamber to impose sanctions against NUON Chea's national Co-Lawyer for his misconduct[28] and instruct the Defence Support Section to appoint a standby counsel for NUON Chea.[29]

13. On 23 December 2015, following the appointment of PHAT Pouv Seang as a standby counsel for NUON Chea,[30] the Supreme Court Chamber ordered that the appeal hearing be resumed on 16 February 2016 and continued through 18 February 2016.[31]

14. On 16 February 2016, the Supreme Court Chamber resumed the appeal hearing,[32] which, having heard the oral submissions of KHIEU Samphân, the Co-

[21] *See* T. 2 July 2015, F1/1.1; T. 3 July 2015, F1/2.1; T. 6 July 2015, F1/3.1.
[22] Order Scheduling Evidentiary Hearing (F24); Decision on Conduct of Hearing (F26). *See also* Decision on Investigation into Witness Credibility (F28/4).
[23] *See* Decision on Call for Witnesses on Appeal (F2/5).
[24] Decision on Torture-tainted Evidence (F26/12).
[25] Order Scheduling Appeal Hearing (F30).
[26] Final Order Scheduling Appeal Hearing (F30/4).
[27] *See* T. 17 November 2015, F1/4.1.
[28] Decision on Conduct of Lawyers (F30/18).
[29] Memorandum on Appointment of Standby Counsel (F30/15). *See also* Memorandum Addressing Conflict of Interest (F30/15/1/1).
[30] DSS Appointment of Standby Counsel (F30/15/2). *See also* Decision Rejecting OCP Submission (F30/16/1).
[31] Order Resuming Appeal Hearing (F30/17).
[32] *See* T. 16 February 2016, F1/5.1.

Prosecutors and the Civil Party Lead Co-Lawyers, it declared concluded on 18 February 2016.[33]

15. On 12 September 2016, the Supreme Court Chamber scheduled the pronouncement of its appeal judgement for 23 November 2016.[34]

16. The Supreme Court Chamber denied on 8 April and 11 December 2015 requests from Case 003 and Case 004 defence teams to intervene in the appeal proceedings of Case 002/01 or submit *amici curiae* briefs.[35]

[33] T. 18 February 2016, F1/7.1, p. 102.
[34] Order Scheduling Pronouncement (F34).
[35] First Decision on Intervention (F20/1); Second Decision on Intervention (F31/1).

II. REQUESTS FOR ADDITIONAL EVIDENCE

A. PROCEDURAL BACKGROUND

17. In the course of the appeal proceedings, NUON Chea, through numerous written submissions, requested that the Supreme Court Chamber obtain, admit and consider additional evidence; his requests included seeking to obtain audio-visual material, summoning sixteen individuals as witnesses; and admitting into evidence other documentary or audio-visual material.[36]

18. On 1 April 2015, the Supreme Court Chamber granted, in part, NUON Chea's requests, initiating an additional investigation pursuant to Internal Rule 93, which was to be conducted by two Delegate Judges.[37] In the framework of the investigation, Robert LEMKIN provided his unpublished notes, stating that they summarised the content of interviews he and THET Sambath had conducted with the four individuals Robert LEMKIN mentioned during his interview with the Delegate Judges [38] ("LEMKIN Notes"). [39] Pursuant to the Third Interim Decision on Additional Investigation (F2/4/3/3/5), Robert LEMKIN subsequently provided also what he said were the transcripts of the interviews with these four individuals ("LEMKIN Transcripts").[40]

19. On 29 May 2015, the Supreme Court Chamber granted, in part, additional aspects of NUON Chea's requests, admitting the interview record of TOAT Thoeun[41] (SCW-5) into evidence and summoning SÂM Sithy (SCW-3), SAO Van (SCW-4) and TOAT Thoeun to testify,[42] which they did on 2, 3 and 6 July 2015.[43]

20. On 21 October 2015, the Supreme Court Chamber issued a decision, with reasons to follow, disposing of the remainder of NUON Chea's requests for additional

[36] *See*, for a detailed recapitulation of the procedural history, Disposition on Pending Requests for Additional Evidence (F2/9).
[37] First Interim Decision on Additional Investigation (F2/4/3), paras 24-26.
[38] Robert LEMKIN Interview Record, 18 May 2015, F2/4/3/1 ("LEMKIN Interview Record (F2/4/3/1)").
[39] Annex - Robert LEMKIN's Notes on RUOS Nhim's Political Agenda, 15 June 2015, F2/4/3/3.1.
[40] Transcripts of Interviews Provided by Robert LEMKIN, 2 October 2015, F2/4/3/3/6.2.
[41] Note that his name is also transliterated into Latin characters as "TOIT Thoeurn". In all its decisions in Case 002/01, including the present judgement, the Supreme Court Chamber uses the variant "TOAT Thoeun".
[42] Decision on Call for Witnesses on Appeal (F2/5), para. 26.
[43] Order Scheduling Evidentiary Hearing (F24).

evidence.[44] Pursuant to Internal Rule 104(1), it admitted into evidence: (i) the video record of an interview given at the Aspen Institute in November 2013 by Judge Silvia CARTWRIGHT, then a judge of the Trial Chamber ("CARTWRIGHT Interview");[45] (ii) excerpts from the book entitled *Un juge face aux Khmers Rouges*, written by former Co-Investigating Judge Marcel Lemonde ("LEMONDE Book Excerpts");[46] (iii) the two transcripts of PECH Chim's 23 and 24 April 2015 testimony before the Trial Chamber in Case 002/02 ("PECH Chim Transcripts");[47] (iv) the transcripts of TOAT Thoeun's interviews with THET Sambath and Robert LEMKIN;[48] and, on its own motion, (v) the written record of a conversation between SAO Van and individuals affiliated with DC-Cam ("SAO Van DC-Cam Interview");[49] whereas it rejected the remainder of NUON Chea's requests for additional evidence and closed the additional investigation it had launched.

21. On 11 February 2016, the Supreme Court Chamber denied NUON Chea's request that it reconsider its Disposition on Pending Requests for Additional Evidence (F2/9) or provide the related reasons prior to the scheduled resumption of the appeal hearing, stating that such reasons will be rendered in the judgement on the merits of the appeals.[50]

22. The Supreme Court Chamber hereby provides the reasons for the decisions issued within its Disposition on Pending Requests for Additional Evidence (F2/9).

B. LEGAL FRAMEWORK

23. In the Decision on Call for Witnesses on Appeal (F2/5),[51] the Supreme Court Chamber summarised the applicable law for additional evidence on appeal as follows:

[44] Disposition on Pending Requests for Additional Evidence (F2/9), pp. 6-7.
[45] Annex 3: Conversation of Judge Silvia CARTWRIGHT at the Aspen Institute (7 November 2013), 21 October 2015, F2/9.3R.
[46] Annex 4: Excerpts from Book by Marcel LEMONDE: Un juge face aux Khmers Rouges, 21 October 2015, F2/9.4 (merging the various excerpts from the book that had been filed into the record: E189/3/1/7.1.1, E189/3/1/7.1.2, E189/3/1/7.1.3 and E189/3/1/7.1.4).
[47] T. 23 April 2015 (PECH Chim) (Case 002/02), F2/6.1.1; T. 24 April 2015 (PECH Chim) (Case 002/02), F2/6.1.2.
[48] Interviews of TOAT Thoeun with THĒT Sambăth and Robert LEMKIN, 21 October 2015, F2/9.2 (excerpts from the LEMKIN Transcripts).
[49] Statement of SAO Van (DC-Cam), 21 October 2015, F2/9.1.
[50] Decision on NUON Chea's Request for Reconsideration (F2/10/3), pp. 3-4.
[51] Decision on Call for Witnesses on Appeal (F2/5), paras 15-17.

> The Supreme Court Chamber recalls that there are two avenues available to the Chamber to admit new evidence on appeal. First, Internal Rule 108(7) sets out the criteria that are to be followed in deciding upon the parties' requests for additional evidence. This is the ordinary avenue for the introduction of evidence on appeal. Internal Rule 108(7) reads in relevant part:
>
> > Subject to Rule 87(3), the parties may submit a request to the Chamber for additional evidence provided it was unavailable at trial and could have been a decisive factor in reaching the decision at trial. The request shall clearly identify the specific findings of fact made by the Trial Chamber to which the additional evidence is directed.
>
> The Supreme Court Chamber recalls that this rule applies to both newly discovered facts and new means of evidence (*facta noviter producta* and *facta noviter reperta*).[52]
>
> Thus, in addition to the general admissibility test under Internal Rule 87(3), a three-prong test governs decisions on requests for additional evidence on appeal. The Supreme Court Chamber must satisfy itself that the proffered evidence: (i) was unavailable at trial; (ii) could have been a decisive factor in reaching the trial decision under appeal; and (iii) pertains to specific findings of fact by the Trial Chamber. In relation to the first of these steps, jurisprudence at the international level requires the applicant to show that "the [proposed] evidence was not available at trial despite the exercise of due diligence".[53] This requirement is vital to avoid disruptive and inefficient litigation strategies.[54]
>
> Secondly, Internal Rule 104(1) confirms that the Supreme Court Chamber may "call new evidence" to decide the appeal of which it is seized. This is a discretionary power that the Chamber may exercise *proprio motu* where the interests of justice so require, taking into account the specific circumstances of the case.[55] In making this determination, the Chamber will consider whether the evidence is "conducive to ascertaining the truth".[56] The eventual use of this power is without prejudice to the Supreme Court Chamber's determination of NUON Chea's argument that the Chamber should exercise *de novo* appellate jurisdiction over factual findings of the Trial Chamber.[57]

24. In the section that follows, the Supreme Court Chamber further elaborates on the applicable law regarding additional evidence on appeal.

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[52] [Fn. 48 in Decision on Call for Witnesses on Appeal (F2/5)][First Interim Decision on Additional Investigation (F2/4/3)], para. 15.
[53] [Fn. 49 in Decision on Call for Witnesses on Appeal (F2/5)] *See* *Lubanga* Appeal Judgement (ICC), para. 50 (summarising the case law of the ICTY and ICTR on the point).
[54] [Fn. 50 in Decision on Call for Witnesses on Appeal (F2/5)] *See* [*Nahimana* Decision on Motion for Leave (ICTR)], paras 4-5; [*Kupreškić* Decision on Motion to Admit Additional Evidence (ICTY)], para. 3.
[55] [Fn. 51 in Decision on Call for Witnesses on Appeal (F2/5)] *See* [*Lubanga* Appeal Judgement (ICC)], para. 62 (in which the Appeals Chamber of the ICC found that it enjoyed discretion to admit evidence on appeal despite a negative finding on one or more of the criteria governing the admissibility of evidence on appeal).
[56] [Fn. 52 in Decision on Call for Witnesses on Appeal (F2/5)] *See* Internal Rule 87(4) read in conjunction with Internal Rule 104 *bis*.
[57] Decision on Call for Witnesses on Appeal (F2/5), paras 15-17.

1. "Decisiveness" under Internal Rule 108(7)

25. The Supreme Court Chamber notes at the outset that the Code of Criminal Procedure of Cambodia contains no normative directions on the criteria governing the introduction of new evidence on appeal.[58] Furthermore, the Supreme Court Chamber, as demonstrated below, considers that "the ECCC Law has mandated a distinct review procedure",[59] which is necessarily complemented by rules on additional evidence that – distinct from domestic ones – are in harmony with it. Therefore, in interpreting Internal Rule 108(7), the Supreme Court Chamber seeks guidance in the procedural rules at the international level.[60]

26. Rule 115(B) of the Rules of Procedure and Evidence of the ICTY and Rule 115(B) of the Rules of Procedure and Evidence of the ICTR provide, in relevant part, as follows:

> If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial.[61]

27. On the basis of this provision, the Appeals Chamber of the ICTY found that additional evidence on appeal, *inter alia*, must be relevant "to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence",[62] and that the proffered evidence "*could* have had an impact on the verdict, in other words, the evidence must be such that, if considered in the context of the evidence presented at trial, it could show that the verdict was unsafe".[63] This requires a showing of "a realistic possibility that the Trial Chamber's verdict might have been different if the new evidence had been admitted".[64] The

[58] *See* Code of Criminal Procedure of Cambodia, Art. 394 (providing that "[a]fter having questioned the accused person, the president shall interview the civil parties and the civil responsible person in the sequent order if he/she finds it useful. Witnesses and experts shall be interviewed only if the court orders to do so").
[59] *See below*, para. 93 *et seq*.
[60] ECCC Law, Art. 33 new, read in conjunction with Art. 37 new.
[61] Rule 115 (b) of the ICTY Rules of Procedure and Evidence; Rule 115 (b) of the ICTR Rules of Procedure and Evidence.
[62] *Popović* Decision on Additional Evidence (ICTY), para. 8.
[63] *Popović* Decision on Additional Evidence (ICTY), para. 9. *See also Nahimana* Decision on Motion for Leave (ICTR), para. 6 ("the evidence must be such that it *could* have had an impact on the verdict, *i.e.* it *could* have shown that a conviction was unsafe").
[64] *Popović* Decision on Additional Evidence (ICTY), para. 9.

ICTY Appeals Chamber also held that it is for the party proposing the additional evidence on appeal to demonstrate this impact.[65]

28. Similarly, the Appeals Chamber of the ICC held that, although not specifically required by Regulation 62 of the ICC Regulations of the Court:

> [I]t is necessary to introduce the criterion that it must be demonstrated that the additional evidence could have led the Trial Chamber to enter a different verdict, in whole or in part. This criterion derives from the principle that evidence should, as far as possible, be presented before the Trial Chamber and not on appeal. Accordingly, if the additional evidence is not shown to be of sufficient importance and could not have changed the verdict, there is no reason to allow its admission on appeal.[66]

29. The Supreme Court Chamber concurs with the principle recalled above that evidence should, in the ordinary course of events, be presented before the Trial Chamber. This is in keeping with the corrective character of the appeal process at the ECCC, a system in which the Trial Chamber is "the central body tasked with making factual findings" and the Supreme Court Chamber's role is to verify that the burden of establishing the elements of charges beyond reasonable doubt is fulfilled, without engaging in a *de novo* evaluation of the evidence.[67]

30. Therefore, the Supreme Court Chamber finds that, in order to show that a proposed piece of additional evidence could have been a decisive factor, the party proposing the evidence must demonstrate a realistic possibility that the evidence, had it been put before the Trial Chamber, could have led the Trial Chamber to enter a different verdict, in whole or in part. In making this assessment, the proposed additional evidence must be assessed in the context of the evidence that was put before the Trial Chamber in relation to a factual finding that was crucial or instrumental to the conviction or sentence. It is for the party proposing the additional evidence to demonstrate this impact of the proposed additional evidence.

[65] *Krajišnik* Decision on Additional Evidence (ICTY), para. 7.
[66] *Lubanga* Appeal Judgement (ICC), para. 59 (footnote(s) omitted).
[67] *See below*, para. 94.

2. "Interests of justice" in respect of Internal Rule 104(1)

31. As regards the calling of "new" evidence under Internal Rule 104(1),[68] the criterion of "decisiveness" does not expressly apply. In fact, Internal Rule 104(1) does not specify criteria on the basis of which the Supreme Court Chamber should decide to call new evidence on appeal. In the Decision on Call for Witnesses on Appeal (F2/5), the Supreme Court Chamber clarified that in exercising its discretion under Internal Rule 104(1) to call new evidence, it will consider whether the calling of new evidence is "in the interests of justice" in the sense of being "conducive to ascertaining the truth".[69] This included instances in which the Chamber was confronted with potentially exculpatory evidence, the admission of which was necessary in order to avoid a miscarriage of justice, or where the defence raised serious doubts as to the propriety of the recording of a key piece of evidence.[70] Internal Rule 104(1) also permits the introduction of evidence that is closely related to other evidence that is already before the Chamber or that could significantly affect its reliability or credibility.

32. Ultimately, the decision to call additional evidence under Internal Rule 104(1) lies entirely within the discretion of the Supreme Court Chamber. Nevertheless, when exercising its discretion, the Supreme Court Chamber bears in mind its role, which is primarily to ascertain whether the Trial Chamber's judgement is tainted by errors that invalidate it or lead to a miscarriage of justice, not to conduct a second trial.[71] This also informs the determination of whether additional evidence is "conducive to the ascertainment of the truth": without more, the Supreme Court Chamber will not admit additional evidence that relates to facts that have no potential to impact on the conviction or sentence, because by doing so it would venture into areas that are not actually relevant for the fulfilment of its role as an appellate court. As such, unless there are specific circumstances justifying otherwise, the Supreme Court Chamber will call evidence on appeal under Internal Rule 104(1) primarily in circumstances where there is a realistic possibility that the evidence, had it been put before the Trial Chamber, could have led the Trial Chamber to enter a different verdict, in whole or in

[68] Internal Rule 104(1).
[69] Decision on Call for Witnesses on Appeal (F2/5), para. 17.
[70] Decision on Call for Witnesses on Appeal (F2/5), paras 23, 25.
[71] *See below*, para. 94.

part. In making this assessment, the proposed evidence must be assessed in the context of the evidence that was put before the Trial Chamber in relation to a factual finding that was crucial or instrumental to the conviction.

33. The Supreme Court Chamber notes that interpreting Internal Rule 104(1) in the manner outlined above could lead to some overlap between this provision and Internal Rule 108(7). Nevertheless, Internal Rule 104(1) is not rendered redundant. Notably, it could be relied upon to admit evidence on appeal that was available at trial, but that was, for some reason or another, not called. Similarly, Internal Rule 104(1) would be the basis for decisions of the Supreme Court Chamber to call evidence on its own motion, in the absence of a request by a party.

34. The Supreme Court Chamber analysed the evidence requests before it in light of the legal framework set out above. Its conclusions regarding the individual requests for additional evidence are summarised in the sections that follow.

C. REQUEST TO SUMMON GAUTAM KUL CHANDRA (SCW-1) AND PAUL IGNATIEFF (SCW-2)

35. In the appeal brief's prayer, NUON Chea requested that the Supreme Court Chamber summon Gautam Kul CHANDRA (SCW-1) and Paul IGNATIEFF (SCW-2) "acting pursuant to its *de novo* appellate jurisdiction",[72] seemingly suggesting that the Supreme Court Chamber should call the two individuals under its *proprio motu* powers recognised by Internal Rule 104(1). However, he did not explain why those witnesses should be called and how the request complies with Internal Rule 104(1).[73] The two individuals were not even mentioned in the appeal brief except in its prayer.

[72] NUON Chea's Appeal Brief, para. 730(c).
[73] It appears that Gautam Kul CHANDRA served as program officer for UNICEF in Phnom Penh from 1973 to 1975; NUON Chea proposed him as a witness at trial, arguing that he could give evidence on the general conditions of the population prior to Democratic Kampuchea (*see* Annex 3: Witness Summaries (E93/4.3), pp. 35-36). The Trial Chamber rejected this request, considering that his testimony would be irrelevant or repetitious (*see* Final Decision on Witnesses (E312), Annex II: Individuals Requested but not Heard before the Trial Chamber (E312.2), p. 4). As to Paul IGNATIEFF, it appears that the he served as head of UNICEF in Phnom Penh from 1973 to 1975 and that NUON Chea requested the Trial Chamber to call him as a witness for the same reasons as Gautam Kul CHANDRA (*see* Annex 3: Witness Summaries (E93/4.3), pp. 51-52). The Trial Chamber considered that it was unnecessary to call him in light of the totality of the evidence before the Chamber (*see* Final Decision on Witnesses (E312), Annex II: Individuals Requested but not Heard before the Trial Chamber (E312.2), p. 5).

In the absence of any substantiation as to why these two witnesses ought to be called, the Supreme Court Chamber rejected NUON Chea's request.

D. REQUEST TO SUMMON HENG SAMRIN AND OUK BUNCHHOEN

36. NUON Chea requested the Supreme Court Chamber to summon HENG Samrin and OUK Bunchhoen pursuant to Internal Rule 108(7).[74] As set out above, this provision only allows for the introduction of evidence on appeal that was "unavailable at trial". The two proposed witnesses, however, were known to NUON Chea at trial and he repeatedly requested that they appear before the Trial Chamber;[75] the Trial Chamber ultimately did not grant this request.[76] Accordingly, even though the fact that they were not called to testify was the result of the Trial Chamber's decision (the correctness of which is challenged on appeal)[77] and not related to any lack of diligence on the part of the Defence, it could not be said that the two witnesses were "unavailable at trial" in terms of Internal Rule 108(7), which, in keeping with the role of the Supreme Court Chamber, only permits that "newly discovered facts" or "new means of evidence" enter the proceedings at this stage. Therefore, Internal Rule 108(7) was deemed inapplicable to the request to call HENG Samrin and OUK Bunchhoen.

37. Turning to the question of whether the Supreme Court Chamber should have exercised its discretion and called HENG Samrin and OUK Bunchhoen under Internal Rule 104(1), the Supreme Court Chamber noted that, in his appeal brief, NUON Chea had raised several grounds based on the, in his submission, erroneous decision of the Trial Chamber not to call those two individuals. He argued in particular that the failure to call HENG Samrin was evidence of the lack of independence of the national judges of the Trial Chamber;[78] that the international judges of the Trial Chamber erred by not issuing a ruling on NUON Chea's fair trial claim in relation to the failure to

[74] NUON Chea's Appeal Brief, para. 730(a).
[75] NUON Chea's Sixth Request to Summon HENG Samrin (E236/5/1/1), paras 3-8 (summarising the procedural history of his requests before the Trial Chamber).
[76] Final Decision on Witnesses (E312), paras 86-111 (in which the Trial Chamber declared that it was unable to reach an affirmative vote of four judges as to whether HENG Samrin should be summoned to testify, and provided two separate opinions on the issue).
[77] *See below*, para. 133.
[78] NUON Chea's Appeal Brief, paras 58-69.

summon HENG Samrin;[79] that his right to present a defence was violated by the failure to call HENG Samrin;[80] that the Trial Chamber erred in law by not calling OUK Bunchhoen as a witness;[81] that the Trial Chamber failed to provide a reasoned decision because it did not discuss Defence submissions regarding the two individuals' out-of-court statements regarding the policy vis-à-vis Khmer Republic soldiers;[82] that the Trial Chamber refused to hear the most important witnesses regarding the interaction between the leadership of the CPK with powerful officials;[83] and that in light of the failure to call HENG Samrin, the section of the Trial Judgement dealing with the orders given during the evacuation of cities was based on the testimony of a single witness.[84]

38. In these circumstances, the Supreme Court Chamber considered whether the interests of justice would best be served by seeking to rectify the alleged error by calling the proposed witnesses in exercise of its discretionary powers under Internal Rule 104(1). This would have been contrary to the principle that evidence should be heard by the Trial Chamber rather than the Supreme Court Chamber and would have likely prolonged the appeals proceedings.[85] Alternatively, the Supreme Court Chamber considered addressing NUON Chea's related grounds of appeal, drawing whatever inferences in favour of the Defence as may be considered necessary and appropriate.[86] The Supreme Court Chamber concluded that the latter approach was most appropriate in the circumstances and that proceeding in this way would not prejudice NUON Chea in any way, while contributing to the efficiency of the proceedings.

[79] NUON Chea's Appeal Brief, paras 70-73.
[80] NUON Chea's Appeal Brief, para. 75; *see also* paras 299, 569-570, 610.
[81] NUON Chea's Appeal Brief, para. 82; *see also* para. 571.
[82] NUON Chea's Appeal Brief, para. 111.
[83] NUON Chea's Appeal Brief, para. 242; *see also* para. 621.
[84] NUON Chea's Appeal Brief, para. 510.
[85] *See above*, para. 29; *see below*, para. 94.
[86] *Limaj* Appeal Judgement (ICTY), para. 21; *Naletilić* Appeal Judgement (ICTY), para. 120; *Čelebići* Trial Judgement (ICTY), para. 601;Akayesu Trial Judgement (ICTR) para. 319.

E. REQUESTS RELATING TO THET SAMBATH AND ROBERT LEMKIN

39. NUON Chea, supported by KHIEU Samphân,[87] requested that the Supreme Court Chamber, acting pursuant to Internal Rule 108(7), summon THET Sambath and Robert LEMKIN to testify.[88] NUON Chea recalled that the two proposed witnesses had co-produced the documentaries *Enemies of the People* and *One Day at Po Chrey*, which have been relied upon in the Trial Judgement.[89] According to NUON Chea, unpublished footage allegedly in the possession of the two co-producers – consisting of "interviews with witnesses reluctant to speak with the [Co-Investigating Judges]" – would cast doubt on the Trial Chamber's conclusion that the CPK had been a strictly hierarchical and unified party and on NUON Chea's criminal liability (especially for the killings at Tuol Po Chrey), showing that crimes charged in Case 002/01 had been orchestrated by Khmer Rouge cadres "acting contrary to Party policy from the very beginning of Democratic Kampuchea".[90]

40. The Co-Prosecutors contended that the source material allegedly in the possession of THET Sambath and Robert LEMKIN would be more helpful than their testimonies, and disputed their reliability, knowledge and expertise, their willingness to cooperate with the ECCC and the decisive character of their anticipated testimonies.[91] In reply, NUON Chea contested the Co-Prosecutors' assertions, but agreed that the ideal course of action would be to procure and admit the footage.[92]

1. Relevance of alleged rift within the CPK on NUON Chea's individual criminal responsibility

41. The Supreme Court Chamber considered that the primary purpose behind NUON Chea's request was to obtain the unpublished footage believed to be in the co-

[87] Soutien de KHIEU Samphân aux requêtes de NUON Chea sur l'admission de preuves supplémentaires (F2/1/1) (not available in English).
[88] NUON Chea's Appeal Brief, paras 83, 242, 730(a); NUON Chea's First Request for Additional Evidence (F2), para. 18(b). *See also* NUON Chea's Response on LEMKIN Notes and THĒT Sambăth (F2/4/3/3/1), para. 9; KHIEU Samphân's Submission on Additional Investigation (F2/4/3/3/2), paras 7, 13.
[89] NUON Chea's First Request for Additional Evidence (F2), paras 1, 14-15.
[90] NUON Chea's First Request for Additional Evidence (F2), para. 14; NUON Chea's Appeal Brief, paras 57, 83, 242.
[91] Co-Prosecutors' Response to First and Second Requests for Additional Evidence (F2/2), paras 9, 10-16.
[92] Reply to Co-Prosecutors' Response to First and Second Requests (F2/3), paras 3, 5.

producers' possession.[93] It accordingly took a series of actions to assess whether the footage was promptly available and *prima facie* relevant and, having confirmed that it was, procure it.[94] As a result, the Supreme Court Chamber obtained the LEMKIN Notes and the LEMKIN Transcripts. Upon review of the material, the Chamber noted that it related in considerable part to a purported rift within the CPK and activities to overthrow Pol Pot and NUON Chea's leadership thereof.[95] Considering that NUON Chea had not specified the exact import of those circumstances on his individual criminal responsibility for the crimes of which he was convicted, it afforded him another opportunity to make submissions on the point.[96]

42. In respect of liability based on the notion of joint criminal enterprise ("JCE"), NUON Chea maintained, first, that, while he had contributed to the design of the CPK policies, they had not contemplated the commission of crimes, which had been carried out by "bad cadres" who, under the influence of foreign powers, had deviated from the Party line.[97] Therefore, the ability and willingness of those cadres to act independently from the Party Centre's directions was relevant, all the more so given that the Trial Chamber largely deduced the CPK policies from an "alleged pattern of conduct among lower-level officials".[98] Secondly, NUON Chea argued that the hierarchical structure of the CPK was widely understood as a pivotal issue at trial and a "foundation" for future trials.[99] He averred in this regard that the effective control wielded by the Party Centre over all other lower tiers is called into question by the additional evidence he proffered, which would establish that factions conspiring against the Party leadership had existed as early as May 1975.[100] In respect of other modes of liability, NUON Chea recalled that, since the attendant findings of the Trial Chamber are based on his alleged *de facto* authority or effective control over Khmer

[93] *See* NUON Chea's Appeal Brief, para. 57 ("The Defence has already requested that this Chamber summons THĒT Sambăth and […] Rob LEMKIN in order to ascertain the nature of the evidence in their possession"); Reply to Co-Prosecutors' Response to First and Second Requests (F2/3), para. 3 ("The Defence agrees strongly with the Co-Prosecutors that admission of the footage itself is ideal"); *see also* NUON Chea's Response on LEMKIN Notes and THĒT Sambăth (F2/4/3/3/1), para. 9.
[94] First Interim Decision on Additional Investigation (F2/4/3), paras 24-26; LEMKIN Interview Record (F2/4/3/1); Second Interim Decision on Additional Investigation (F2/4/3/3); Third Interim Decision on Additional Investigation (F2/4/3/3/5).
[95] Fourth Interim Decision on Additional Investigation (F2/4/3/3/6), p. 3.
[96] Fourth Interim Decision on Additional Investigation (F2/4/3/3/6), pp. 3-4.
[97] NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), paras 19-20.
[98] NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), para. 22; *see also* paras 21, 24, 61.
[99] NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), paras 27-29, 47-49.
[100] NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), paras 31-44.

Rouge cadres, the relevance of internal divisions within the CPK is "straightforward".[101]

43. The Co-Prosecutors submitted that NUON Chea's factual propositions are often not supported by the evidence he cited, which they regarded as being largely unreliable, implausible or contradicted by other evidence on record, and on the whole unable to undermine the Trial Chamber's findings on the CPK structure and hierarchy.[102] Most importantly, the Co-Prosecutors argued that the existence of factions or discontent within the CPK would "not mean that the organizational hierarchy has ceased to function" or that Party members would not be "working together toward a common criminal plan".[103] The Co-Prosecutors considered that the Trial Chamber's findings on the CPK structure were important to prove that the Party policies had been binding on Party members and had actually been implemented, but maintained that NUON Chea's allegations on the rift, even if entirely correct, would have no impact on the respective findings of the Trial Chamber.[104]

44. The Civil Party Lead Co-Lawyers argued that NUON Chea had failed to address the Supreme Court Chamber's question, since he did not show how the alleged rift within the CPK could have had an impact on findings of the Trial Chamber that were instrumental to the conviction against him.[105]

45. The Supreme Court Chamber noted that, in several of his requests for additional evidence, NUON Chea had focused on the Trial Chamber's findings concerning the hierarchical structure of the CPK, his effective control over lower-ranking cadres and those cadres' capacity to act independently from the policies that had been adopted by the Party leadership.[106] Effective control, however, is not a requirement for a conviction based on JCE. Nor, as noted by the Co-Prosecutors,[107] do secret plots of rebellion or even actual preparatory activities to overthrow the

[101] NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), para. 66.
[102] Co-Prosecutors' Response on CPK Rift (F2/4/3/3/6/1/1), paras 7-18.
[103] Co-Prosecutors' Response on CPK Rift (F2/4/3/3/6/1/1), paras 21-22.
[104] Co-Prosecutors' Response on CPK Rift (F2/4/3/3/6/1/1), para. 23.
[105] Civil Parties' Response on CPK Rift (F2/4/3/3/6/1/2), paras 3, 7-20.
[106] *See*, *e.g.*, NUON Chea's First Request for Additional Evidence (F2), para. 14; NUON Chea's Third Request for Additional Evidence (F2/4), paras 18-20; NUON Chea's Sixth Request for Additional Evidence (F2/8), paras 10-13; NUON Chea's Response on LEMKIN Notes and THĒT Sambăth (F2/4/3/3/1), para. 3; NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), paras 31-36.
[107] Co-Prosecutors' Response on CPK Rift (F2/4/3/3/6/1/1), paras 21-22.

leadership of the Party necessarily mean that CPK officials would not have implemented the instructions of their superiors. Whereas NUON Chea contested the Trial Chamber's finding that Zone leaders had not acted independently,[108] he failed to explain how this conclusion would have had any impact on specific findings that were the basis for his conviction for specific crimes and modes of liability.

46. NUON Chea argued further that deducing the CPK policy from a pattern of conduct amounted to erroneous, circular argumentation, since the purported pattern encompassed actions of lower-level officials against the Party line.[109] However, there was no indication that the proposed evidence would have been capable of rendering the Trial Chamber's findings based on a pattern of events, which had occurred over a long time-span and in various parts of the country, unreasonable. Indeed, in support of his request, NUON Chea referred to other submissions that challenged the Trial Chamber's findings as to the existence of a pattern (which, it was alleged, were based on insufficient evidence),[110] but not to any proposed evidence that would have rendered the Trial Chamber's reliance on the pattern "circular".

47. The Supreme Court Chamber found that it was irrelevant whether the hierarchical structure of the CPK had been considered to be a key issue at trial, unless the relevant factual conclusions of the Trial Chamber actually underpinned an element of a crime or mode of liability. The Supreme Court Chamber saw some merit in NUON Chea's contention that crimes could not be attributed to JCE members where they were committed *against* the common plan, that is, where they did not form part or were not carried out in furtherance thereof. Nevertheless, the existence of conflicting factions within the CPK and activities to overthrow its leadership was not regarded *per se* as sufficient proof that a crime was not encompassed by the common criminal purpose or executed in furtherance thereof.

48. In sum, contrary to NUON Chea's submission, the Supreme Court Chamber did not consider the hierarchical structure of the CPK to be an "essential component" of his criminal liability for any of the crimes he was convicted of based on JCE

[108] NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), para. 33.
[109] NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), para. 22.
[110] *See* NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), fn. 66, referring to paras 53-60.

liability.[111] The primary basis for holding NUON Chea responsible was that the crimes in question could be imputed on at least one member of the JCE, which in turn resulted in liability being attributable to all members of the JCE, including NUON Chea.[112] While the Trial Chamber also found that his position of authority meant that there had been a "sufficient link" between the crimes' direct perpetrators and NUON Chea,[113] this was only an additional, non-essential element to impute the crimes on NUON Chea under the notion of JCE.

49. Turning to liability for ordering and instigating, the Supreme Court Chamber observed that NUON Chea's submissions as to the impact of the alleged rift were brief and partly overlapping with those relating to JCE.[114] For the reasons explained above, and contrary to his contention, "the existence of factional conflict within the CPK"[115] would not necessarily contradict his position of authority over lower-level Party officials, nor would it *per se* call into question those officials' acceptance of his instructions or CPK policies. As for NUON Chea's liability as a superior, the Supreme Court Chamber noted that, as no conviction under this mode of liability had been entered, challenges to it could not invalidate the Trial Judgement and the respective arguments were accordingly dismissed.

2. Admissibility of the proffered evidence

50. The present section sets out how the Supreme Court Chamber applied the principles set out above to the concrete requests for additional evidence at hand. Given that the summoning of THET Sambath and Robert LEMKIN was primarily requested to shed light on the interviews they had conducted, and considering that the Supreme Court Chamber had obtained primary and secondary material – namely, the LEMKIN Transcripts and the LEMKIN Notes – relating to the interviews that, according to Robert LEMKIN, were proof of RUOS Nhim's political views and attempts to overthrow Pol Pot and NUON Chea's leadership of the CPK,[116] the

[111] NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), para. 48.
[112] Trial Judgement, para. 862.
[113] Trial Judgement, para. 862.
[114] NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), para. 66.
[115] NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), para. 66.
[116] LEMKIN Interview Record (F2/4/3/1), para. A34.

admissibility analysis relating to those two proposed witnesses was conducted jointly with that relating to the source material.

51. NUON Chea submitted that the LEMKIN Notes and the LEMKIN Transcripts should be admitted into evidence, since they contain relevant, reliable and "key exculpatory" evidence, namely, they would establish that the CPK had been a fragmented party and that RUOS Nhim was acting independently of the Party Centre since the beginning of the jurisdictional period.[117] The Co-Prosecutors opposed the admission of the proffered evidence, challenging their reliability, probative value and decisiveness.[118] They submitted, *inter alia*, that Robert LEMKIN's expertise was incomparable to that of other individuals the Trial Chamber had heard (Philip SHORT, François PONCHAUD and Stephen HEDER), that THET Sambath had a personal relationship with NUON Chea, and that THET Sambath and Robert LEMKIN's methodology in conducting the interviews was questionable.[119] In reply, NUON Chea contended that the Co-Prosecutors' response abounded with "distortions, evasions and misrepresentations".[120]

52. The Supreme Court Chamber observed that several of the Co-Prosecutors' arguments discrediting the probative value of the proffered evidence were inaccurate, contradictory or inapposite. For example, since NUON Chea had requested that Robert LEMKIN be called not as an expert, but to testify as to the content of the interviews he had conducted together with THET Sambath, what mattered was not so much his knowledge of the Khmer Rouge history, but his qualifications in investigative journalism. Furthermore, some of the arguments that the Co-Prosecutors relied upon to downplay the extent of Robert LEMKIN's involvement in the field work with THET Sambath – and thus the probative value of the LEMKIN Notes – proved to have been little more than speculation.[121] It was also wholly unconvincing

[117] NUON Chea's Response on LEMKIN Notes and THĒT Sambăth (F2/4/3/3/1), paras 3-7; NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), paras 5-9.
[118] Co-Prosecutors' Response on LEMKIN Notes (F2/4/3/3/3), paras 9-29, 41; Co-Prosecutors' Submission on LEMKIN Transcripts (F2/4/3/3/6/3), paras 13-40.
[119] Co-Prosecutors' Response on LEMKIN Notes (F2/4/3/3/3), paras 9-18.
[120] NUON Chea's Reply to Co-Prosecutors' Response to Submission on LEMKIN Notes (F2/4/3/3/4), para. 32.
[121] *Compare* Co-Prosecutors' Response to First and Second Requests for Additional Evidence (F2/2), para. 16 *with* LEMKIN Interview Record (F2/4/3/1), paras A14, A16-A18, A21-A23. *See also* Fourth Interim Decision on Additional Investigation (F2/4/3/3/6), p. 2, third recital; First Interim Decision on Additional Investigation (F2/4/3), para. 25.

that the Co-Prosecutors should challenge the reliability of the material provided by Robert LEMKIN on account of his lack of mastery of the Khmer language and the lack of information on the interviewees' identity, biographical background and potential motives to mislead,[122] given that the Co-Prosecutors had repeatedly argued that the Supreme Court Chamber should accept the Trial Chamber's reliance on anonymous refugees accounts, an expert witness with no Khmer language skills and anonymous hearsay evidence.[123]

53. Nevertheless, the Supreme Court Chamber rejected NUON Chea's requests to admit the LEMKIN Transcripts and the LEMKIN Notes into evidence, given that it had not been established that they were decisive or even relevant to the verdict. First of all, most of the concrete subversive activities referred to therein postdate Population Movement Phase One and the killings at Tuol Po Chrey.[124] Importantly, despite several filings on the point, NUON Chea failed to show that activities such as the diversion of food, fuel and weapons, internal sabotage and preparation of a military rebellion could have rendered unsafe any of the Trial Chamber's findings instrumental to his conviction.[125] Notably, he did not demonstrate that these activities could lead to the conclusion that the crimes for which he was convicted had not been within the scope of the common plan or had not been executed in furtherance thereof.

54. As for the "secret meeting" that SAO Phim and RUOS Nhim allegedly had held in Phnom Penh in May 1975,[126] the Supreme Court Chamber noted that NUON Chea sought to establish its occurrence based on the LEMKIN Notes – that is, a secondary source – but did not refer to any part of the underlying interviews. Thus, NUON Chea had provided an insufficient basis for his claim. Moreover, even though TOAT Thoeun testified that RUOS Nhim and other senior CPK officials had attended a meeting, possibly held in 1975, he stated that no plans to rebel against Pol Pot had

[122] Co-Prosecutors' Response to First and Second Requests for Additional Evidence (F2/2), para. 16; Co-Prosecutors' Response on CPK Rift (F2/4/3/3/6/1/1), para. 11; Co-Prosecutors' Response on LEMKIN Notes (F2/4/3/3/3), para. 15.
[123] *See*, *e.g.*, Co-Prosecutors' Response, para. 162, fn. 602 (anonymous refugee account); para. 174, fn. 672 (anonymous refugee account); para. 274, fn. 1121 (Philip SHORT); para. 344, fn. 1417 (Philip SHORT); para. 361, fn. 1493 (Philip SHORT and anonymous refugee account).
[124] *See*, *e.g.*, LEMKIN Transcripts (F2/4/3/3/6.2), pp. 13, 33, 110, 112.
[125] NUON Chea's Response on LEMKIN Notes and THĒT Sambăth (F2/4/3/3/1), para. 6; NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), para. 6(b), (c), (e).
[126] NUON Chea's Response on LEMKIN Notes and THĒT Sambăth (F2/4/3/3/1), para. 6; NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), para. 6(a).

been discussed at that meeting, but proposals to reform some of the CPK policies.[127] Ultimately, even if the occurrence of the "secret meeting" were to be established, there was no indication, based on its supposed agenda, that this would have had any impact on NUON Chea's criminal liability for any of the crimes of which he was convicted.

55. According to NUON Chea, another key indication that insurrectional activities, including the "planning [of an] *armed* confrontation with Pol Pot", dated back to the beginning of the jurisdictional period was TOAT Thoeun's statement that in 1975 he had erected a concealed warehouse for the storage of weapons.[128] However, when tested in court on those circumstances, TOAT Thoeun consistently denied knowledge that the stockpiling of weapons had been connected to any subversive design.[129]

56. Therefore, the Supreme Court Chamber did not consider that the LEMKIN Notes and the LEMKIN Transcripts fulfilled the requirements for admission of additional evidence on appeal. Therefore, pursuant to Internal Rule 104(1), the Supreme Court Chamber decided to admit only the portion of the LEMKIN Transcripts relating to interviews with TOAT Thoeun, because he had appeared before it as a witness and his prior statements were relevant to assessing the reliability and credibility of his testimony. However, it saw no need to summon him once again, as requested by NUON Chea.[130]

57. Considering that NUON Chea sought to summon THET Sambath and Robert LEMKIN primarily because of the interviews they had conducted, and having found that NUON Chea had failed to argue compellingly that the material resulting from these interviews could have been a relevant and decisive factor to the verdict, the Supreme Court Chamber dismissed also the request to summon these two individuals.

[127] T. 6 July 2015 (TOAT Thoeun), F1/3.1, pp. 36-38.
[128] NUON Chea's Appeal Brief, paras 242, 462; *see also* NUON Chea's Third Request for Additional Evidence (F2/4), paras 19, 24.
[129] T. 6 July 2015 (TOAT Thoeun), F1/3.1, pp. 25-26, 34, 51.
[130] NUON Chea's Submission on CPK Rift (F2/4/3/3/6/1), paras 10-15, 67(b).

F. REQUEST TO ADMIT INTO EVIDENCE THET SAMBATH'S INTERVIEW WITH VOICE OF AMERICA KHMER

58. NUON Chea requested that the Supreme Court Chamber admit into evidence the audio recording of an interview given by THET Sambath to Voice of America Khmer on 12 and 13 August 2014 ("THET Sambath Interview"). The Supreme Court Chamber has already summarised the Parties' arguments concerning the admission of the THET Sambath Interview and addressed some of them in the First Interim Decision on Additional Investigation (F2/4/3).[131] In its subsequent Disposition on Pending Requests for Additional Evidence (F2/9), the Supreme Court Chamber denied the request by NUON Chea.

59. NUON Chea argued that the THET Sambath Interview could call into question the Trial Chamber's findings concerning the hierarchical structure of the CPK and, therefore, his responsibility for the killings at Tuol Po Chrey.[132] However, the Supreme Court Chamber found that THET Sambath's statements were inapt to cast doubts on the Trial Chamber's findings, as they amounted to an assessment of the Trial Chamber's findings, as opposed to providing new, relevant information. Additionally, this Chamber had obtained the source material on which THET Sambath presumably formed the opinions he expressed in the interview, and found that it was unsuitable to exculpate NUON Chea.[133] As for NUON Chea's contention that the THET Sambath Interview is proof that, because of governmental interference, key exculpatory evidence was not included in the record,[134] the Supreme Court Chamber considered THET Sambath's statements on the point to be unspecific and unsubstantiated, and thus of too low probative value to be admitted into evidence.

G. REQUESTS TO ADMIT INTO EVIDENCE THE CARTWRIGHT INTERVIEW AND THE LEMONDE BOOK EXCERPTS

60. NUON Chea submitted that the CARTWRIGHT Interview should be admitted into evidence because it contains several statements that "bear on the public's reasonable apprehension of [Judge CARTWRIGHT's] bias against both the CPK and

[131] First Interim Decision on Additional Investigation (F2/4/3), paras 5-13, 20.
[132] NUON Chea's First Request for Additional Evidence (F2), para. 14.
[133] *See above*, para. 53 *et seq*.
[134] NUON Chea's First Request for Additional Evidence (F2), para. 16; NUON Chea's Appeal Brief, paras 57, 74.

NUON Chea" and on the impartiality of the Cambodian judges sitting in the Trial Chamber.[135] Turning to the LEMONDE Book Excerpts, NUON Chea argued that the experience of irregularities recounted by former Co-Investigating Judge LEMONDE resonates with that highlighted by one of his successors as Co-Investigating Judge, Judge Laurent KASPER-ANSERMET, and would therefore establish that irregularities and political interference in Cases 003 and 004 were not distinct from those alleged to affect Case 002, but a continuation thereof.[136]

61. The Co-Prosecutors opposed both requests. They maintained that no statement in the CARTWRIGHT Interview showed that a Trial Chamber's decision was "affected by personal experiences, bias or political influence".[137] They went on to argue that Judge CARTWRIGHT was merely discussing "the pros and cons of a hybrid court" and speculating on the "emotional impact" that the evidence could have on judges who had lived through the Democratic Kampuchea era.[138] As for the LEMONDE Book Excerpts, the Co-Prosecutors contended that KHIEU Samphân's request to admit them into evidence had already been dismissed at trial, hence Internal Rule 108(7) is not the proper avenue to seek its admission on appeal.[139] Further, they recalled that defects in the judicial investigation are cured by the closing order and cannot be raised again before the Trial and Supreme Court Chambers.[140]

62. The Supreme Court Chamber decided to admit the CARTWRIGHT Interview into evidence pursuant to Internal Rule 104(1), given that, since the comments she made during the panel discussion at the Aspen Institute were the basis for a ground of appeal alleging that there was an apprehension of bias, it was in the interests of justice to place them on the record, so as to allow unrestricted litigation by the Parties and consequent examination of the merits of NUON Chea's submissions regarding the fundamental issue of fairness of proceedings.[141]

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[135] NUON Chea's Second Request for Additional Evidence (F2/1), para. 14. *See also* NUON Chea's Appeal Brief, paras 49-53.
[136] NUON Chea's Second Request for Additional Evidence (F2/1), paras 16-17; NUON Chea's Appeal Brief, para. 56.
[137] Co-Prosecutors' Response to First and Second Requests for Additional Evidence (F2/2), para. 21.
[138] Co-Prosecutors' Response to First and Second Requests for Additional Evidence (F2/2), paras 18-19. *See also* Co-Prosecutors' Response, paras 32-36.
[139] Co-Prosecutors' Response to First and Second Requests for Additional Evidence (F2/2), para. 23.
[140] Co-Prosecutors' Response to First and Second Requests for Additional Evidence (F2/2), para. 24.
[141] *See below*, para. 114.

63. The Supreme Court Chamber also determined that it was in the interests of justice, pursuant to Internal Rule 104(1), to grant NUON Chea's request to admit the LEMONDE Book Excerpts into evidence. The Supreme Court Chamber was aware that the evidence had been available at trial, but recalled that the material had previously been tendered in connection with an interlocutory appeal before it, and that, at the time, it was rejected for procedural reasons, on the understanding that NUON Chea remained at liberty to submit "a future application on the basis of the evidence and arguments contained" in his request.[142] As to the Co-Prosecutors' contention that potential irregularities of the judicial investigation were cured by the closing order, the Supreme Court Chamber observed that NUON Chea was not seeking to invalidate, in whole or in part, the judicial investigation, but rather to demonstrate that the entire proceedings, including the trial phase, were tarnished by pervasive political interference that had rendered them fundamentally unfair.

64. Whether and to what extent the CARTWRIGHT Interview and LEMONDE Book Excerpts support NUON Chea's arguments regarding the fairness of the proceedings is a question that the Supreme Court Chamber addresses elsewhere in this judgement.[143]

H. REQUEST TO ADMIT INTO EVIDENCE THE PECH CHIM TRANSCRIPTS, AND *PROPRIO MOTU* ADMISSION OF SAO VAN DC-CAM INTERVIEW

65. NUON Chea requested, pursuant to Internal Rules 104(1) and 108(7), the introduction of the PECH Chim Transcripts in relation to two circumstances narrated therein. He submitted that the evidence resonated with SAO Van's (also spelled SAO Vorn; *alias* SAO Pok, also spelled SAO Port) account that, at a meeting held in Takeo provincial town after liberation, Ta Mok had announced that soldiers with the rank from second lieutenant to colonel were not to be harmed.[144] Secondly, NUON Chea noted that the evidence contained PECH Chim's explanation as to the meaning of the Khmer word "*komchat*", which referred to the treatment by the Khmer Rouge of individuals associated with the Khmer Republic.[145] In NUON Chea's view, PECH

[142] Appeal Decision on Application for Immediate Action (E189/3/1/8), paras 10-11.
[143] *See below*, paras 114, 119.
[144] NUON Chea's Fourth Request for Additional Evidence (F2/6), para. 7.
[145] NUON Chea's Fourth Request for Additional Evidence (F2/6), para. 8.

Chim corroborated SAO Van's and HENG Samrin's statements, confirming that no policy to execute former Khmer Republic soldiers and officials existed at the time of the events at Tuol Po Chrey.[146]

66. The Co-Prosecutors opposed the request, averring that the proffered evidence, considered in its context and not in isolation, could not be a decisive factor pursuant to Internal Rule 108(7).[147] They argued that the meeting to which PECH Chim referred had taken place a few months after the events at Tuol Po Chrey, that his testimony must be evaluated against other incriminating evidence, and that his interpretation of the word "*komchat*" is not decisive.[148] The international Co-Prosecutor further stated that, should the Chamber admit evidence proposed by NUON Chea concerning the targeting policy, he would seek admission of rebuttal evidence.[149]

67. The Civil Party Lead Co-Lawyers argued that NUON Chea's request should be dismissed. In their opinion, NUON Chea had had the opportunity to examine PECH Chim when the witness appeared in Case 002/01, but negligently did not do so; in addition, the proffered evidence failed to refute any of the evidence relied upon by the Trial Chamber and would not be conducive to the ascertainment of the truth on appeal; finally, admitting the evidence would run counter to the need to ensure expeditious appeal proceedings.[150]

68. The Supreme Court Chamber agreed with the Co-Prosecutors and Civil Party Lead Co-Lawyers that NUON Chea's request to admit into evidence the PECH Chim Transcripts did not fulfil the requirements of Internal Rule 108(7). Even though NUON Chea claimed that the request to seek the admission of the portions of PECH Chim's testimony was "directly inspired" by an interview record that had been disclosed after the close of the Case 002/01 trial, the Supreme Court Chamber considered that NUON Chea should have questioned PECH Chim comprehensively in respect of the issues relevant to Case 002/01, which included the topics of enemies, smashing and, most significantly, instructions relayed at a meeting when Ta Mok

[146] NUON Chea's Fourth Request for Additional Evidence (F2/6), paras 14-16.
[147] Co-Prosecutors' Response to Fourth Request for Additional Evidence (F2/6/2), paras 1, 3, 14-16.
[148] Co-Prosecutors' Response to Fourth Request for Additional Evidence (F2/6/2), paras 6-11.
[149] Co-Prosecutors' Response to Fourth Request for Additional Evidence (F2/6/2), para. 16.
[150] Civil Parties' Response to Fourth Request for Additional Evidence (F2/6/1), paras 14-31.

talked about enemies, instructions concerning the "purging of enemy officers" and the treatment of former Khmer Republic soldiers.[151] Therefore, the evidence could not be considered unavailable at trial.

69. The Supreme Court Chamber determined that it was nonetheless in the interests of justice to admit the PECH Chim Transcripts into evidence pursuant to Internal Rule 104(1). This was because their content concerning the meeting held in Takeo provincial town is closely related to the main factual circumstance on which this Chamber summoned SAO Van to testify on appeal, and as such is important for the assessment of SAO Van's reliability and credibility.

70. The Supreme Court Chamber admitted *proprio motu* the SAO Van DC-Cam Interview, which, as a previous statement of a witness who appeared before it, is important to the assessment of his reliability.

I. REQUESTS INCLUDED IN NUON CHEA'S FIFTH REQUEST FOR ADDITIONAL EVIDENCE (F2/7)

71. In his fifth request for additional evidence, NUON Chea, pursuant to Internal Rules 104(1) and 108(7), requested: (i) the admission into evidence of four interview records disclosed from Case 004; (ii) the admission into evidence of an interview record of TOAT Thoeun and the attendant annex; and (iii) the summoning of five witnesses.[152] NUON Chea requested the admission of these additional pieces of evidence to show that the Party Centre exercised only limited control, was deeply fragmented, and that the Zone leaders, in particular RUOS Nhim and SAO Phim, wielded substantial independent authority, which they used to foment rebellion against the CPK.[153] He also proposed this evidence "to corroborate and verify" the testimony of TOAT Thoeun, who was to appear before the Supreme Court Chamber.[154] The admission of the interview record of TOAT Thoeun and its annex was sought to "assist the Chamber in having a full understanding of the information on the case file with respect" to this witness.[155]

[151] T. 1 July 2013 (PECH Chim), E1/215.1, pp. 19-20, 31-33, 37-38, 65, 75-77.
[152] NUON Chea's Fifth Request for Additional Evidence (F2/7), paras 13, 61, 67.
[153] NUON Chea's Fifth Request for Additional Evidence (F2/7), paras 53-57, 59-65.
[154] NUON Chea's Fifth Request for Additional Evidence (F2/7), paras 4, 62.
[155] NUON Chea's Fifth Request for Additional Evidence (F2/7), paras 58, 66.

72. The Co-Prosecutors opposed all requests, except for the interview record of TOAT Thoeun and the annex thereto.[156] As to the regulations governing admission of additional evidence on appeal, they submitted that the Chamber's discretionary power under Internal Rule 104(1) should not be broadly used, lest the "gatekeeping" function of Internal Rule 108(7) be compromised.[157] Turning to the merits, the Co-Prosecutors posited that none of the proposed pieces of evidence could have been a decisive factor at trial, given that they are irrelevant as none of them disproved the hierarchical structure existing at the time of the events at Tuol Po Chrey.[158]

73. The Supreme Court Chamber recalled that "the ordinary avenue for the introduction of evidence on appeal" is Internal Rule 108(7).[159] Accordingly, it reasoned that a party could not invoke Internal Rule 104(1) to elude the strict requirements under Internal Rule 108(7), which are "vital to avoid disruptive and inefficient litigation strategies".[160] In the present case, NUON Chea requested to call three individuals (2-TCW-959, 2-TCW-960 and 2-TCW-961) whose identities and role during the DK era had been in the public domain since the publication of a book in 2010; a book which, in addition, had been placed in the case file.[161] In requesting their testimony, NUON Chea did not rely on any information that had not already been known to him in 2010 and therefore could have been presented to the Trial Chamber. His contention that he was waiting to see if Robert LEMKIN and THET Sambath would provide the footage in their possession, which was likely to feature interviews with those three proffered witnesses,[162] is irrelevant. Therefore, the Supreme Court Chamber found that this portion of NUON Chea's Fifth Request for Additional Evidence (F2/7) merited rejection as the proffered evidence had not been unavailable at trial, and there was no valid reason to exercise its discretionary power under Internal Rule 104(1).

74. The Supreme Court Chamber rejected NUON Chea's requests relating to Witnesses 1, 2, 3 and 4 on account of their manifest irrelevance to any of the Trial

[156] Co-Prosecutors' Response to Fifth Request for Additional Evidence (F2/7/1), para. 53.
[157] Co-Prosecutors' Response to Fifth Request for Additional Evidence (F2/7/1), paras 4-5.
[158] Co-Prosecutors' Response to Fifth Request for Additional Evidence (F2/7/1), paras 7-10.
[159] Decision on Call for Witnesses on Appeal (F2/5), para. 15.
[160] Decision on Call for Witnesses on Appeal (F2/5), para. 16.
[161] NUON Chea's Fifth Request for Additional Evidence (F2/7), para. 42.
[162] NUON Chea's Fifth Request for Additional Evidence (F2/7), para. 63.

Chamber's findings that were instrumental to his conviction. According to their interview records, the witnesses had referred primarily to circumstances relating to the arrest and killing of Northwest Zone cadres, including RUOS Nhim, by Southwest Zone cadres occurring, at the earliest, from mid/late 1976,[163] that is, more than a year after the events at Tuol Po Chrey. Aside from their clear temporal irrelevance, the Supreme Court Chamber did not consider that circumstances such as those described above could have had a bearing on NUON Chea's conviction. As for what NUON Chea described as "concrete examples of active steps taken towards rebellion",[164] the Supreme Court Chamber noted that they referred, as far as relevant, to RUOS Nhim collecting military uniforms from the Vietnamese in 1977 and to a plan to "fight back against Pol Pot", which had led to arrests in mid-1977.[165] Not only are such alleged activities temporally irrelevant, but also patently incapable of controverting any of the Trial Chamber's findings instrumental to NUON Chea's conviction, as generally set out above.[166] Therefore, the proffered evidence was deemed to be neither a decisive factor nor conducive to the ascertainment of the truth.

75. As to TOAT Thoeun's interview record and its annex, the Supreme Court Chamber was of the view that the interview record of a witness who had testified before the Court should normally be placed into the case file pursuant to Internal Rule 104(1). However, in the case at hand, none of the information contained in the interview record had any connection to the issues to which his testimony before the Supreme Court Chamber related and could therefore serve to test his reliability. This part of NUON Chea's request was accordingly dismissed.

J. REQUESTS INCLUDED IN NUON CHEA'S SIXTH REQUEST FOR ADDITIONAL EVIDENCE (F2/8)

76. In his sixth request for additional evidence, NUON Chea, pursuant to Internal Rules 104(1) and 108(7), requested: (i) the admission into evidence of ten pieces of witness testimony (interview records, trial transcripts and statements from DC-Cam); (ii) the admission into evidence of twelve documents originating from foreign governments, that is, intelligence reports and diplomatic cables; and (iii) the

[163] NUON Chea's Fifth Request for Additional Evidence (F2/7), paras 20, 24-25, 27, 32, 39, 41.
[164] NUON Chea's Fifth Request for Additional Evidence (F2/7), para. 56.
[165] NUON Chea's Fifth Request for Additional Evidence (F2/7), paras 16, 27-28.
[166] *See above*, paras45-49.

summoning of two witnesses.[167] NUON Chea argued that the additional evidence would refute the Trial Chamber's findings that the CPK had been a strictly hierarchical party, with cadres faithfully implementing instructions from the leadership, and that NUON Chea had exercised ultimate decision-making power within the CPK and effective control over lower-level cadres; the proffered evidence would also respond to the Trial Chamber's scepticism that those identified as "enemies" by the CPK posed a real threat, taking into account Vietnam's plans to extend its control over Cambodia.[168] NUON Chea submitted that the additional evidence established the "substantial independent authority" of some Zone leaders, who, with the support of Vietnam, had fomented rebellion against the CPK.[169]

77. NUON Chea argued on this basis that no reasonable trier of fact could have found that NUON Chea shared a common purpose "with the very leaders who sought to foment rebellion" against him.[170] In this regard, he averred that it was crucial to shed light on the root causes and consequences of the events that had occurred in the DK period, notably Vietnam's efforts to destabilise and ultimately overthrow the country's "legitimate and widely-recognised" government, relying on rebels within the CPK.[171] The proffered evidence, in NUON Chea's submission, was proof to Vietnam's "Plan A" – namely, to seize control of Cambodia through internal rebellion – and "Plan B" – namely, to seize control through direct military invasion.[172]

78. The Civil Party Lead Co-Lawyers argued that, while NUON Chea's request sought to refute the Trial Chamber's findings as to who had been part of the joint criminal enterprise, NUON Chea had not challenged these findings in his appeal brief.[173] They noted that the relevant findings were not premised upon the individuals' respective positions within the CPK, but on other factors, to which the hierarchical structure of the CPK was unrelated.[174] They submitted that, while the organisational structure could be relevant to superior responsibility, NUON Chea had not been

[167] NUON Chea's Sixth Request for Additional Evidence (F2/8), paras 70, 156-160.
[168] NUON Chea's Sixth Request for Additional Evidence (F2/8), paras 2-8, 151-152.
[169] NUON Chea's Sixth Request for Additional Evidence (F2/8), paras 9-12.
[170] NUON Chea's Sixth Request for Additional Evidence (F2/8), para. 13 (emphasis omitted).
[171] NUON Chea's Sixth Request for Additional Evidence (F2/8), paras 17-69.
[172] NUON Chea's Sixth Request for Additional Evidence (F2/8), paras 153-155; *see also* paras 29-53 ("Plan A"); 54-69 ("Plan B").
[173] Civil Parties' Response to the Sixth Request for Additional Evidence (F2/8/1), paras 13-16.
[174] Civil Parties' Response to the Sixth Request for Additional Evidence (F2/8/1), paras 17-20.

convicted on that basis.[175] Furthermore, they argued that some pieces of evidence sought to be admitted fell outside the temporal scope of Case 002/01.[176]

79. The Co-Prosecutors regarded the Sixth Request for Additional Evidence (F2/8) as frivolous, dilatory and unnecessarily time- and attention-consuming, thereby meriting summary dismissal.[177] In particular, they contended that the proffered evidence did not meet the requirements of either Internal Rule 108(7) or 104(1), given that, whereas part of the evidence was available at trial, its totality has "no plausible connection" to the crimes of which NUON Chea was convicted.[178] Notably, apart from having misleadingly and selectively presented the evidence, NUON Chea failed to demonstrate that internal conflict within the CPK, including the role allegedly played by Vietnam in supporting insurrectional activities, could have an impact on his criminal liability in Case 002/01.[179]

80. NUON Chea replied that the Civil Party Lead Co-Lawyers had failed to demonstrate their standing and that, in any event, their arguments were without merit.[180] He argued further the Co-Prosecutors had failed to refer to the correct standard for the admission of new evidence on appeal and had not addressed his arguments taken in their entirety.[181]

81. As a preliminary matter, the Supreme Court Chamber had to address NUON Chea's argument that the Civil Party Lead Co-Lawyers had no standing to respond to his sixth request for additional evidence. In this respect, it agreed with NUON Chea in that the Civil Party Lead Co-Lawyers had failed to substantiate how their submission complied with the principles set out in its previous jurisprudence,[182] namely, how

[175] Civil Parties' Response to the Sixth Request for Additional Evidence (F2/8/1), paras 23-28.
[176] Civil Parties' Response to the Sixth Request for Additional Evidence (F2/8/1), paras 29-30.
[177] Co-Prosecutors' Response to Sixth Request for Additional Evidence (F2/8/5), paras 4, 7, 41-42.
[178] Co-Prosecutors' Response to Sixth Request for Additional Evidence (F2/8/5), paras 2, 45.
[179] Co-Prosecutors' Response to Sixth Request for Additional Evidence (F2/8/5), paras 5, 19, 26-27, 39, 44.
[180] NUON Chea's Reply to Civil Parties' Response to the Sixth Request for Additional Evidence (F2/8/4), para. 4; *see also* paras 5-17.
[181] NUON Chea's Reply to Co-Prosecutors' Response to Sixth Request for Additional Evidence (F2/8/6), paras 8, 10, 14. *See also* NUON Chea's Reply to Co-Prosecutors' Response to Sixth Request for Additional Evidence (F2/8/6), paras 6-7, 11 (in which NUON Chea moved the Supreme Court Chamber to censure the Co-Prosecutors' for their use of "insulting" and "indignant language"); Decision on Investigation into Witness Credibility (F28/4), p. 4 (in which the Supreme Court Chamber addressed this complaint).
[182] Decision on Civil Party Standing (F10/2), paras 14, 17.

NUON Chea's requests affected the Civil Parties' rights and interests. Mere reference to the need to guarantee the "balance of parties" is too generic to meet that requirement, even if understood as a Civil Parties' right to obtain a timely verdict.[183] Therefore, the Supreme Court Chamber did not take the Civil Parties' Response to the Sixth Request for Additional Evidence (F2/8/1) into consideration.

82. Turning to the merits, the Supreme Court Chamber found that NUON Chea had not established that the evidence sought to be admitted was relevant to his criminal liability. The root causes and the consequences of certain actions may be suitable subjects of historical analysis, but have no bearing on an individual's *criminal*, as opposed to moral, responsibility. Even assuming that the proffered evidence established Vietnam's plans to overthrow Pol Pot and NUON Chea's leadership of the CPK – either through aiding an internal rebellion or directly invading the country – NUON Chea did not establish how this would impact on any findings that were instrumental to the conviction for specific crimes and modes of liability in Case 002/01. As stated above, a potential rift in the CPK, even if accompanied by widespread and on-going preparatory subversive activities, was considered to be immaterial, unless capable of refuting a constituent element of the crime or its mode of liability.[184] In addition, Witness 5, KEO Loeur, Witness 6, Witness 7, LAT Suoy and 2-TCW-918 had referred to activities that had allegedly occurred in late 1976, 1977 or 1978, with no clear link to any earlier period or to the scope of the charges.[185] Further, while SÈM Hoeun did testify about clandestine rebellious activities as of 1975,[186] there was no indication that the furtive stockpiling of weapons he had mentioned would demonstrate that the potential insurgents had no longer adhered to the CPK policies. As for the documents originating from foreign governments, apart from their probable availability at trial, correctly highlighted by

[183] Civil Parties' Response to Sixth Request for Additional Evidence (F2/8/1), para. 32.
[184] *See above*, paras 45-49.
[185] NUON Chea's Sixth Request for Additional Evidence (F2/8), paras 72, 79, 82 (KEO Loeur recounted having seen a truck loaded with weapons in connection with a meeting held by Oeun and that, the night after the meeting, Oeun had been arrested; relying on the date of Oeun's arrest, KEO Loeur's sighting could be dated to early 1977); *see also* paras 100, 104, 108-109, 111.
[186] Attachment 5: E1/320.1, 'Transcript of SÈM Hoeun - 23 June 2015', 11 September 2015 (F2/8.1.5), pp. 16-17.

the Co-Prosecutors,[187] they were manifestly unrelated to any of the Trial Chamber's findings instrumental to NUON Chea's conviction.

83. In conclusion, the Supreme Court Chamber found that the evidence mentioned in NUON Chea's Sixth Request for Additional Evidence (F2/8) could not have been a decisive factor at trial, nor conducive to the ascertainment of the truth. Hence, the request was denied in full.

[187] Co-Prosecutors' Response to Sixth Request for Additional Evidence (F2/8/5), paras 95-97, 105.

III. STANDARD OF APPELLATE REVIEW

84. Internal Rule 104(1) provides that the grounds of appeal to the Supreme Court Chamber against a judgement of the Trial Chamber are "an error on a question of law invalidating the judgment […] or an error of fact which has occasioned a miscarriage of justice".[188] The Appellants in the present case raise both errors of law and errors of fact; in addition, they challenge certain decisions of the Trial Chamber of a procedural nature taken in the course of the trial. The Supreme Court Chamber shall address its standard of review for these types of errors.

A. ALLEGED ERRORS OF LAW

85. With regard to alleged errors of law, in the *Duch* Appeal Judgement (001-F28), the Supreme Court Chamber found with reference to the jurisprudence of the ICTY that:

> When a party raises such an allegation, the Supreme Court Chamber, as the final arbiter of the law applicable before the ECCC, is bound in principle to determine whether an error of law was in fact committed on a substantive or procedural issue. The Supreme Court Chamber reviews the Trial Chamber's findings on questions of law to determine whether they are correct, not merely whether they are reasonable.[189]

86. The Supreme Court Chamber also stated that:

> Where the Supreme Court Chamber finds an error of law in a trial judgement arising from the application of the wrong legal standard by the Trial Chamber, the Supreme Court Chamber will determine the correct legal standard and review the relevant factual findings of the Trial Chamber. In so doing, the Supreme Court Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced on the relevant standard of proof as to the factual finding challenged by a party before that finding is confirmed on appeal. The Supreme Court Chamber may amend a decision of the Trial Chamber only if it identifies an error of law "invalidating the judgment or decision". Consequently, not every error of law justifies a reversal or revision of a decision of the Trial Chamber.[190]

[188] Internal Rule 104(1).
[189] *Duch* Appeal Judgement (001-F28), para. 14.
[190] *Duch* Appeal Judgement (001-F28), para. 16.

87. None of the Parties to the present appeals challenges the Supreme Court Chamber's standard of review regarding alleged legal errors. The Chamber sees no reason to depart from this standard when addressing such allegations in the present appeal.

B. ALLEGED ERRORS OF FACT

88. With regard to alleged errors of fact, in the *Duch* Appeal Judgement (001-F28), the Supreme Court Chamber held with reference to the jurisprudence of the ICTY that it would:

> [A]ppl[y] the standard of reasonableness in reviewing an impugned finding of fact, not whether the finding is correct. In determining whether or not a Trial Chamber's finding of fact was one that no reasonable trier of fact could have reached, the Supreme Court Chamber "will not lightly disturb findings of fact by a Trial Chamber."[191]

89. The Supreme Court Chamber stated that it agreed with the ICTY Appeals Chamber's general approach to factual findings of a Trial Chamber[192] which that Chamber had articulated as follows:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.
>
> […]
>
> The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in

[191] *Duch* Appeal Judgement (001-F28), para. 17.
[192] *Duch* Appeal Judgement (001-F28), para. 17.

> reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion.[193]

90. Accordingly, the starting point for the Supreme Court Chamber's assessment of the reasonableness of the Trial Chamber's factual findings is the reasoning provided for the factual analysis, as related to the items of evidence in question. In particular when faced with conflicting evidence or evidence of inherently low probative value (such as out-of-court statements or hearsay evidence), it is likely that the Trial Chamber's explanation as to how it reached a given factual conclusion based on the evidence in question will be of great significance for the determination of whether that conclusion was reasonable. As a general rule, where the underlying evidence for a factual conclusion appears on its face weak, more reasoning is required than when there is a sound evidentiary basis. At the same time, arguments limited to disagreeing with the conclusions of the Trial Chamber and submissions based on unsubstantiated alternative interpretations of the same evidence are not sufficient to overturn factual findings of the trier of fact.[194]

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[193] *Duch* Appeal Judgement (001-F28), para. 17, quoting *Kupreškić* Appeal Judgement (ICTY), paras 30, 32. *See also* *Ntagerura* Appeal Judgement (ICTR), paras 12, 213; *Kajelijeli* Appeal Judgement (ICTR), para. 50; *Rutaganda* Appeal Judgement (ICTR), para. 21 ("[D]eference is based essentially on the fact that the Trial Chamber has the advantage of observing witnesses in person and hearing them when they are testifying, and so are better placed to choose between divergent accounts of one and the same event") (footnote(s) omitted); *Simba* Appeal Judgement (ICTR), para. 9; *Munyakazi* Appeal Judgement (ICTR), para. 8; *Mrkšić and Šljivančanin* Appeal Judgement (ICTY), para. 14 ("[T]he task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber") (quoting *Kupreškić* Appeal Judgement (ICTY), para. 30) and para. 306 ("[G]iven that the Trial Chamber is in a unique position to evaluate the demeanour of the testifying witness, where the factual challenges concern the issues of witness credibility, deference to the finder of fact is particularly appropriate"); *Kordić and Čerkez* Appeal Judgement (ICTY), para. 293; *Krstić* Appeal Judgement (ICTY), para. 40; *Blaškić* Appeal Judgement (ICTY), para. 17.

[194] *Kalimanzira* Appeal Judgement (ICTR), para. 50; *Kamuhanda* Appeal Judgement (ICTR), paras 252 and 337 ("The Appellant merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber, without showing that the Trial Chamber's findings were unreasonable or wholly erroneous. This cannot form the basis of an appeal"); *Niyitegeka* Appeal Judgement (ICTR), para. 256 (dismissing argument that merely sought an "alternative interpretation of the evidence"); *Ntabakuze* Appeal Judgement (ICTR), para. 254 (dismissing argument because appellant "merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber without attempting to demonstrate any specific error"); *D. Milošević* Appeal Judgement (ICTY), para. 101 ("[W]here an appellant merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber without attempting to demonstrate any specific error, his submission is to be summarily dismissed"); *Orić* Appeal Judgement (ICTY), para. 13; *Hadžihasanović and Kubura* Appeal Judgement (ICTY), para. 169 ("The Appeals Chamber notes that it is within the discretion of the Trial Chamber to weigh different witnesses' evidence at trial and recalls that a party's assertion that the Trial Chamber should have preferred the testimony of certain witnesses over others is, without more, 'no argument at all'" [sic]) (quoting *Galić* Appeal Judgement (ICTY), para. 300); *Strugar* Appeal Judgement (ICTY), para. 21 (holding summary dismissal appropriate "where an appellant merely seeks to substitute its own evaluation of the evidence for that of the Trial Chamber or claims that the Trial Chamber could not

91. As to when a factual error occasions a miscarriage of justice, the Supreme Court Chamber stated that it must be shown "that the Trial Chamber's factual errors create a reasonable doubt as to an accused's guilt".[195]

92. NUON Chea challenges the Supreme Court Chamber's standard of review regarding alleged factual errors,[196] as set out in the *Duch* Appeal Judgement (001-F28). In his submission, under Article 9 new of the ECCC Law, which provides that the Supreme Court Chamber "shall serve as both appellate chamber and final instance", the Chamber's role is to carry out an appellate review pursuant to Cambodian criminal procedure, which includes a *de novo* review of facts, after which its findings are final.[197] He argues that, unlike at the ICTY and in common law jurisdictions, there is no reason for the Supreme Court Chamber to defer to the Trial Chamber's factual findings.[198]

93. The Supreme Court Chamber rejects NUON Chea's averments as argumentative. The Chamber recalls that, in the *Duch* Appeal Judgement (001-F28), it noted that the "remedies available under Cambodian criminal procedure were conflated into one *sui generis* appellate system".[199] Article 9 new of the ECCC Law does not mean that the Supreme Court Chamber has to conduct a hearing *de novo* pursuant to Article 373 *et seq*. of the Code of Criminal Procedure of Cambodia as opposed to cassation pursuant to Article 417 *et seq*. of the Code of Criminal Procedure of Cambodia. To the contrary, the legislative history of Article 9 demonstrates that the original concept of the review system foresaw a three-tier process, with the Appellate Court to hear appeals and the Supreme Court to hear cassation, and it was the Appellate Court that eventually has been eliminated in Article 9 new.[200] Therefore, a more appropriate conclusion is that the ECCC Law has

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have inferred a certain conclusion from circumstantial evidence without offering an alternative inference or explaining why no reasonable Trial Chamber could have excluded such an alternative inference" (footnote(s) omitted)); *Galić* Appeal Judgement (ICTY), para. 290; *Vasiljević* Appeal Judgement (ICTY), para. 16 ("The Appeals Chamber will not consider those arguments where the Appellant has failed to argue an alleged error and instead merely offers an alternative reading of the evidence"); *Gatete* Appeal Judgement (ICTR), para. 156.

[195] *Duch* Appeal Judgement (001-F28), para. 18.

[196] NUON Chea's Appeal Brief, paras 3-11.

[197] NUON Chea's Appeal Brief, para. 6.

[198] NUON Chea's Appeal Brief, para. 10; *see also* paras 8-9.

[199] *Duch* Appeal Judgement (001-F28), para. 13.

[200] ECCC Law, Art. 9 new; David Scheffer, "The Extraordinary Chambers in the Courts of Cambodia" in M. Cherif BASSIOUNI (ed.), *International Criminal Law*, 3rd ed., Koninklijke Brill NV, 2008, p.

mandated a distinct review procedure, not covered by the Code of Criminal Procedure of Cambodia.

94. Accordingly, as set out in the *Duch* Appeal Judgement (001-F28), the Supreme Court Chamber was authorised under Article 12 of the ECCC Agreement to seek guidance in the rules applicable at the international level as to the scope of appellate review, as expressed within the Internal Rules[201] and to derive its standard for the review of factual findings of the Trial Chamber from the approaches of the ICTY and the ICTR.[202] This interpretation of the two-tier process foreseen in the ECCC founding documents finds support in consideration given to the particular breadth and complexity of trials in relation to alleged international crimes, which makes it both impracticable and undesirable to enter *de novo* factual findings at the appellate level. To do so would significantly extend the length of proceedings. Moreover, in procedural models employing *de novo* fact finding, the breadth of review is rationally complemented by the appellate court's authority to amend the judgement in accordance with facts so established, with a cassation complaint as a means to ultimately review it, and with an option of remanding the case for re-trial. This model presupposes that court proceedings do not cease until they determine the "objective truth" of the event in question. In the ECCC context, the unavailability of a further recourse precludes pronouncing a conviction and sentence on appeal,[203] which, in combination with the ban on remanding a case to the first instance chamber for re-trial,[204] signifies focus on expeditiousness of proceedings, where the corrective function of the appellate process is limited and disposed to protect the interest of the

247 ("The Supreme Court Chamber acts as the sole appeals court for the ECCC and its decisions are final on both issues of law and fact. The original ECCC Law negotiated through 2000 and adopted in 2001 provided for an intermediate Appeals Chamber between the Trial Chamber and the Supreme Court Chamber. However, […] an amendment to the ECCC Law, adopted in 2004 [...] removed the Appeals Chamber from the ECCC") (footnote(s) omitted), p. 251 ("The ECCC Law establishes the authority of the ECCC Supreme Court Chamber to 'decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court"); Report of the Secretary-General on Khmer Rouge trials, para. 26 (three-tier structure that had been envisaged for the Extraordinary Chambers during the earlier negotiations has been changed to a simpler, two-instance one).

[201] Internal Rules 104(1), 104 *bis.*

[202] *See* *Duch* Appeal Judgement (001-F28), para. 13.

[203] Internal Rules 110 and 111 in connection with ICCPR, Art. 14(5); *see*, *e.g.*, *Gomariz v. Spain* (Human Rights Committee Communication), p.139, ("Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a higher court, in the absence of a reservation by the State party").

[204] ECCC Law, Art. 36 new.

defence. Accordingly, it is more consistent with these features of the ECCC's appellate model to see the role of the Supreme Court Chamber, in addition to correcting legal errors, as mainly verifying whether the burden of proving the elements of the charges was met, rather than in repeating the hearing and substituting the trial findings with its own ones. A model which NUON Chea purports to interpret from Article 9 new would be still favourable to the defence, but on the whole inefficient and imbalanced, and the Supreme Court Chamber sees no basis for it either in the text of Article 9 new or in the purpose of the ECCC law. The Supreme Court Chamber further rejects NUON Chea's contention that, given that Cambodian criminal procedure follows the Romano-Germanic tradition, the Trial Chamber at the ECCC has a "diminished importance […] as a finder of fact".[205] Rather, the Chamber finds that, just as is the case in several other civil law systems that limit the appellate review of factual findings,[206] the ECCC Trial Chamber was designed as the central body tasked with making factual findings. Lastly, as NUON Chea suggests,[207] the Trial Chamber in the present case relied on a large amount of out-of-court evidence and many of NUON Chea's grounds of appeal relate to the purportedly erroneous evaluation of this evidence.[208] However, this does not impact the standard of review. If it were otherwise, the standard of review for factual errors would depend upon the specificities of each case and the arguments raised by the appellant – a result that is clearly untenable.

[205] NUON Chea's Appeal Brief, para. 10.
[206] *See*, *e.g.*, Code of Criminal Procedure of Poland, Art. 452(1) ("An appellate court shall not be allowed to conduct evidentiary proceedings pertaining to the intrinsic nature of the case"); Criminal Procedural Law of Latvia, Section 569(3) ("A court of cassation shall not evaluate evidence in a case *de novo*"); Code of Criminal Procedure of Azerbaijan, Art. 397.2. ("The facts established by the court of first instance shall be verified by the court of appeal only within the limits of the complaint or appeal"); Code of Criminal Procedure of Georgia, Art. 297(c) ("[D]uring the appeal hearing, only evidence newly submitted in the court of appeal may be examined, and all evidence examined by the court of first instance shall be considered examined, except when the evidence was examined in substantial violation of the law and a party files a motion for the reexamination of the evidence"); Code of Criminal Procedure Montenegro, Art. 398(2) ("[T]he second instance court shall limit its review to the violations stated in paragraph 1, Items 1 and 2 of this Article"); Criminal Procedural Law of Macedonia, Art. 427(1) ("The second instance court shall examine only the part of the judgment that is being disputed with the appeal"; Code of Criminal Procedure of Ukraine, Art. 362 ("Trial examination in court of appeals is conducted in accordance with Chapter 26 of the present Code only with regard to that part of judgment whose legality and validity are challenged in the appeal").
[207] NUON Chea's Appeal Brief, para. 8.
[208] NUON Chea's Appeal Brief, para. 9.

95. Accordingly, the Supreme Court Chamber will assess any alleged factual errors against the standard of review set out in the *Duch* Appeal Judgement (001-F28), as summarised above.

C. CHALLENGES TO DECISIONS OF A PROCEDURAL NATURE

96. The Supreme Court Chamber recalls that NUON Chea and KHIEU Samphân challenge, either directly or indirectly, several decisions of a procedural nature taken by the Trial Chamber in the course of the trial. In the view of the Supreme Court Chamber, such challenges may be classified as allegations of either errors of law, or errors of fact. These challenges may therefore be brought under Rule 104(1) of the Internal Rules.

97. The Supreme Court Chamber notes, however, that the Trial Chamber often enjoys discretion with respect to procedural matters.[209] In keeping with the principle set out in the last sentence of Rule 104(1) of the Internal Rules, the Supreme Court Chamber adopts a deferential approach to the review of discretionary decisions and will intervene in the Trial Chamber's exercise of discretion only if it is tainted by a "discernible error […] which resulted in prejudice to the appellant". In this regard, the Supreme Court Chamber notes that the Appeals Chambers of the ICTY, ICTR and the ICC, have each adopted a deferential standard of review as regards discretionary decisions.[210] For example, the Appeals Chamber of the ICC has held:

> 79. The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion […] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.
>
> 80. [T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion […], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error

[209] *See* Appeal Decision on Application for Immediate Action (E189/3/1/8), paras 21, 26; Decision on Appeal Against First Severance (E163/5/1/13), para. 30; Appeal Decision on Fairness of Investigation (E116/1/7), para. 33.
[210] *See*, *e.g.*, *Kony* Appeal Judgement (ICC), paras 79-80; *Krajišnik* Appeal Judgement (ICTY), para. 81; *Kupreškić* Appeal Judgement (ICTY), paras 30-32; *Setako* Appeal Judgement (ICTR), para. 19; *Nchamihigo* Appeal Judgement (ICTR). para. 18.

> materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[211]

98. The Appeals Chambers of the ICTY and ICTR have expressed their respective standards of review for discretionary decisions in similar terms.[212] The Supreme Court Chamber considers that the deferential standard of review adopted by these tribunals is equally appropriate in the context of the ECCC, and will assess alleged errors in discretionary decisions of the Trial Chamber against this standard.

D. IMPACT OF ANY IDENTIFIED ERROR ON THE JUDGEMENT

99. Under Internal Rule 104(1), it is not sufficient to identify an error in the Trial Chamber's judgement for it to be reversed on appeal. Rather, any legal error must have invalidated the judgement, while factual errors must have occasioned a miscarriage of justice. A judgement is invalidated by an error of law if in the absence of the error, a different verdict, in whole or in part, would have been entered.[213] A miscarriage of justice is defined as "a grossly unfair outcome in judicial proceedings".[214] For the error of fact to be one that occasioned a miscarriage of justice it must have been "critical to the verdict reached".[215] A party must demonstrate how the error of fact has actually occasioned a miscarriage of justice.

100. As regards errors of a procedural nature, and in particular those regarding the exercise of discretion, Internal Rule 104(1) states in respect of immediate appeals that

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[211] *Kony* Appeal Judgement (ICC), paras 79-80 (footnote(s) omitted).
[212] *See*, *e.g.*, *Šainović* Appeal Judgement (ICTY), para. 29; *Ndahimana* Appeal Judgement (ICTR), para. 14.
[213] *See*, *e.g.*, *Popović* Appeal Judgement (ICTY), para. 17 ("An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground"). *See also* *Lubanga* Appeal Judgement (ICC), para. 19 (an error of law will lead to a reversal of the judgement if it is "materially affected" by that error, which is said to be the case "if the Trial Chamber 'would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error'").
[214] *Furundžija* Appeal Judgement (ICTY), para. 37, citing *Black's Law Dictionary*, 7th ed., West Group, 1999.
[215] *Kupreškić* Appeal Judgement (ICTY), para. 29.

the error in the exercise of discretion must have "resulted in prejudice to the appellant". In the context of an appeal against a judgement under Internal Rule 102, which is issued at the end of the trial, the Supreme Court Chamber will consider whether such prejudice has arisen in view of the proceedings as a whole, occasioning a miscarriage of justice. In other words, not all procedural errors will lead to a reversal of the judgement, but only procedural errors that resulted in a "grossly unfair outcome in judicial proceedings". In determining whether this is the case, the Supreme Court Chamber will take into account all phases of the proceedings, including measures that were taken in the course of the appeals phase.

E. REQUIREMENT TO SUBSTANTIATE ARGUMENTS ON APPEAL

101. In the *Duch* Appeal Judgement (001-F28), the Supreme Court Chamber found that:

> On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Supreme Court Chamber. Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Supreme Court Chamber and need not be considered on the merits. In order for the Supreme Court Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the trial judgement to which the challenge(s) is being made. Further, the Supreme Court Chamber "cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies." The Supreme Court Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing. The Supreme Court Chamber may dismiss arguments that are evidently unfounded without providing detailed reasoning.[216]

102. The Supreme Court Chamber will apply the same approach to the appeals at hand. Notably, it will not consider arguments that merely claim that a given decision or finding of the Trial Chamber was erroneous, without actually substantiating why the decision or finding was in error.

[216] *Duch* Appeal Judgement (001-F28), para. 20 (footnote(s) omitted).

IV. THE APPEALS OF NUON CHEA AND KHIEU SAMPHÂN

A. CONSTITUTIONALITY OF THE INTERNAL RULES

103. In the proceedings before the Trial Chamber, NUON Chea challenged the constitutionality of the Internal Rules, asserting that their adoption had been an exercise of law-making powers inconsistent with Article 90 of the Cambodian Constitution, that the plenary of judges of the ECCC had no power to adopt the Internal Rules and that the Internal Rules were incompatible with Article 12(1) of the ECCC Agreement.[217] The Trial Chamber rejected this challenge in its Decision on the Constitutionality of the Internal Rules (E51/14), noting that the adoption of Internal Rules was not prohibited by the ECCC Agreement[218] and that the purpose of the Internal Rules was to "consolidate applicable Cambodian procedure, supplemented by international standards where necessary and appropriate".[219] The Trial Chamber explained that "trials at the ECCC differ substantially from cases before ordinary Cambodian courts"[220] and that "[o]ther international courts trying cases similar to those before the ECCC have also adopted Rules of Procedure and Evidence specifically adapted to the requirements of complex international criminal trials".[221] Moreover, the Trial Chamber noted that the Internal Rules were "consonant with the ECCC's obligation […] to conduct proceedings in accordance with international standards of justice, fairness and due process of law".[222] NUON Chea submits that the Trial Chamber's reasoning is tainted by several errors of law,[223] which the Supreme Court Chamber shall address in turn.

104. First, to the extent that NUON Chea argues that the Trial Chamber's reference to practices of other international courts and tribunals was incorrect because those courts and tribunals are not limited by domestic law and have specific provisions authorising the adoption of Rules of Procedure and Evidence,[224] the Supreme Court

[217] NUON Chea's Appeal Brief, para. 15, referring to NUON Chea's Preliminary Objections (E51/3), paras 66-71.
[218] Decision on the Constitutionality of the Internal Rules (E51/14), para. 6.
[219] Decision on the Constitutionality of the Internal Rules (E51/14), para. 7.
[220] Decision on the Constitutionality of the Internal Rules (E51/14), para. 7, referring to Decision on Refusal of Request for Annulment (D55/I/8), para. 14.
[221] Decision on the Constitutionality of the Internal Rules (E51/14), para. 7.
[222] Decision on the Constitutionality of the Internal Rules (E51/14), para. 7.
[223] NUON Chea's Appeal Brief, para. 16.
[224] NUON Chea's Appeal Brief, para. 16.

Chamber concedes that the Trial Chamber did not explain why it referred to the practices of other tribunals, but does not consider that this constitutes an error of law. The Trial Chamber did not find that *because* other international courts and tribunals have adopted specific rules, the ECCC was also authorised to do so. The Trial Chamber merely noted that such specific rules existed and that they had been referred to in the course of the drafting process of the Internal Rules. The relevance of this observation, in the Supreme Court's opinion, lies not in deriving competence for the adoption of Internal Rules from the statutes of international and hybrid criminal tribunals, but in demonstrating the inherent necessity for international or hybrid tribunals to have specific sets of rules in order for them to be operational.

105. Second, the Supreme Court Chamber notes that, indeed, neither the ECCC Law nor the ECCC Agreement expressly provide authorisation for the plenary of the ECCC to adopt Internal Rules. Nevertheless, while the first sentence of Article 12(1) of the ECCC Agreement provides that "[t]he procedure shall be in accordance with Cambodian law", it goes on to read as follows:

> Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.[225]

106. Thus, Article 12(1) of the ECCC Agreement explicitly anticipates that the procedure before the ECCC may deviate from general criminal procedure in Cambodia. In the ECCC Law, this authorisation is specifically expressed for each phase of the proceedings, empowering the relevant judicial organ to seek guidance from "procedural rules established at the international level".[226] This language does not lead to the conclusion, as NUON Chea suggests, that the judges of the ECCC may import norms only for *ad hoc* application in specific situations that arise in the course of proceedings and are therefore prohibited from adopting rules that would be formulated in abstract and general terms; Article 12(1) of the ECCC Agreement does not contain a limitation to specific judicial organs, but is formulated more generally.

[225] ECCC Agreement, Article 12(1).
[226] ECCC Law, Arts 20 new, 23 new, 33 new.

In the formal sense, Article 12(1) of the ECCC Agreement does not therefore collide with the adoption of the Internal Rules by the plenary. Disposing of NUON Chea's argument requires, however, consideration of two other questions: first, what is the content of the Internal Rules, and, second, whether Internal Rules adopted by the plenary are binding upon the organs of the ECCC. As to the first question, it must be noted that the Internal Rules are not homogenous and contain, in part, a re-statement of the Cambodian law, in part, a re-statement of, and elaboration, upon the international standards and, in part, additional rules. The latter were adopted, "where [the] existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards".[227] To the extent that the Internal Rules re-state the applicable law, the argument as to their unconstitutionality is moot as they do not contain any additional content than existing Cambodian law. As to the second question, the Supreme Court Chamber agrees with NUON Chea that there is no provision that would grant law-making competence to the plenary either in the ECCC founding documents or in the applicable Cambodian laws. For that reason, the Internal Rules do not have the binding force of general law and, as provided by Article 33 new of the ECCC Law and previously confirmed by this Chamber, the Offices and Chambers of the ECCC retain the power to apply the law as they deem fit in individual instances, including to "innovate" *ad hoc*, as necessary.[228] In this regard, the Internal Rules must be seen primarily as an agreed interpretation of the applicable law, including the necessity of "innovations"; however, their binding force stems from the fact that they offer a persuasive value and, having been adopted in a consultative process and endorsed by the majority of the ECCC Judges, contribute to legal predictability more efficiently than if the ECCC relied exclusively on the individual Chambers' power to close gaps and seek guidance from international rules in specific situations.[229] As such, the Internal Rules are an expression of a consolidation of the applicable legal framework rather than usurpation of legislative powers. The argument that the Internal Rules, as a whole, are unconstitutional must therefore be rejected.

[227] Internal Rules, Preamble, para. 5.
[228] *Duch* Appeal Judgement (001-F28), para. 423.
[229] *Duch* Appeal Judgement (001-F28), para. 423.

107. NUON Chea further argues that the Trial Chamber erred by finding that international rules could be resorted to "where necessary and appropriate" because Article 12(1) of the ECCC Agreement provides for a narrower standard.[230] The Supreme Court Chamber considers that the application of international rules must be consistent with Article 12 of the ECCC Agreement; however, this provision is to be read to encompass a broad array of issues arising at the interface of the ECCC's specific structure and mandate and Cambodian law. It is evident that the criminal procedure set out in the Code of Criminal Procedure of Cambodia was not tailored to the unique features of the ECCC: first, in relation to each office of the Court, the national component is complemented by an international counterpart, reflecting the international community's "vitally important concern" as to the "serious violations of Cambodian and international law during the period of Democratic Kampuchea from 1975 to 1979";[231] second, the structure of the ECCC differs from other parts of the Cambodian judiciary – for example, the appellate level is merged into a single instance;[232] and, third, the proceedings are multi-lingual. The overall aim of Article 12 of the ECCC Agreement is to allow the ECCC to overcome any potential difficulties that may arise from these facts, while ensuring the overall fairness of proceedings. In this context, the criterion that "Cambodian law does not deal with a particular matter" in Article 12 of the ECCC Agreement covers matters which are inevitably consequential to the unique features of the ECCC. Conversely, to interpret its terms in an overly narrow manner runs the risk that, by adhering literally to Cambodian procedure, the ECCC would render itself unable to operate and would clearly go against the spirit of the ECCC Agreement. In conclusion, the Supreme Court Chamber dismisses the contention that the standard "where necessary and appropriate" would be *contra legem* as such.

108. In sum, the Supreme Court Chamber rejects NUON Chea's arguments regarding the purported unconstitutionality of the Internal Rules.

[230] NUON Chea's Appeal Brief, para. 16.
[231] United Nations General Assembly, *Resolution 57/228A*, 27 February 2003, A/RES/57/228, Preamble.
[232] *See* *Duch* Appeal Judgement (001-F28), para. 11.

B. FAIRNESS OF THE PROCEEDINGS

109. NUON Chea and KHIEU Samphân submit that there were various violations of their right to a fair trial. The Supreme Court Chamber addresses these arguments below.

1. Right to an independent and impartial tribunal

110. NUON Chea argues that his right to be tried before an impartial and independent tribunal was violated. He makes numerous submissions relating to the judicial investigation that preceded the trial,[233] while acknowledging that the decisions of the Pre-Trial Chamber and of the Co-Investigating Judges, taken in the course of the judicial investigation of this case, are not before the Supreme Court Chamber for review.[234] Accordingly, the Supreme Court Chamber shall refer to those submissions only to the extent that they are relevant to the analysis of NUON Chea's other arguments, regarding the purported lack of independence and impartiality of the Trial Chamber.

111. NUON Chea submits that the Trial Chamber was deeply biased against him and that the "Judgement was a *post facto* rationalisation of a long-held belief that the Accused are morally repugnant and deserving of the harshest punishment".[235] In his submission, the bias is demonstrated by the Trial Chamber's misrepresentation of evidence,[236] inconsistent or illogical findings of fact[237] and inconsistent legal standards.[238] In support of each of these contentions, he refers, by way of example, to instances in the Trial Judgement where the Trial Chamber is alleged to have erred.[239]

112. The Supreme Court Chamber considers that judges are presumed impartial.[240] It has been held that "to demonstrate actual bias, a party must provide convincing

[233] NUON Chea's Appeal Brief, paras 18-39.
[234] NUON Chea's Appeal Brief, para. 18.
[235] NUON Chea's Appeal Brief, para. 41.
[236] NUON Chea's Appeal Brief, para. 43.
[237] NUON Chea's Appeal Brief, para. 44.
[238] NUON Chea's Appeal Brief, para. 45.
[239] NUON Chea's Appeal Brief, footnotes 105-109.
[240] *Kyprianou v. Cyprus* Judgement (ECtHR), para. 28; *Albert and Le Compte v. Belgium* Judgement (ECtHR), para. 32; *Hauschildt v. Denmark* Judgement (ECtHR), para. 47; *Akayesu* Appeal Judgement (ICTR), para. 91; *Blagojević and Jokić* Rule 15 (B) Decision (ICTY), para. 13; *S. Milošević* Se parate Opinion on Contempt (ICTY), para. 7. *See also Furundžija* Appeal Judgement (ICTY), para. 197 ("[t]ere is a high threshold to reach in order to rebut the presumption of impartiality […]

evidence that a Judge's mind is, or would be, tainted by a predisposition to resolve matters that come before him or her in a prejudiced manner".[241] Bias, or to the same effect, an appearance of bias, is established if the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[242] A showing of bias, or appearance of bias, can be made, *inter alia*, based on statements contained in the reasoning of a decision of the court in question.[243] As NUON Chea acknowledged in a filing made before the Trial Chamber, such enquiry is not directed, in the first place, at establishing whether the Trial Chamber erred, but whether its reasoning revealed lack of impartiality.[244] NUON Chea refers to certain findings by the Trial Chamber, which he alleges were erroneous, claiming that the purported errors were "so unreasonable that they could not have been the product of impartial fact-finding or analysis".[245] The Supreme Court Chamber is not persuaded that the examples NUON Chea cites were an indication of lack of impartiality, as opposed to (potentially) errors of fact or law, noting that a party seeking to displace a judge's presumption of impartiality has a high burden.[246] In these circumstances, the Supreme Court Chamber considers the arguments to be insufficiently substantiated and will not consider them any further in the context of the argument that the Trial Chamber was biased.

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disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be 'firmly established'").

[241] *El Sayed* Disqualification Motion (STL), para. 24.

[242] Decision on Disqualification of Judges (E55/4), para. 11; Decision on Disqualification of Judge SOM Sereyvuth (1/4), para. 10; *Furundžija* Appeal Judgement (ICTY), para. 189; *Karemera* Severance Decision (ICTR), para. 18; *Brđanin* Disqualification Decision (ICTY), para. 6; *Seromba* Disqualification Decision (ICTR), "Deliberations", para. 1.

[243] *Blagojević and Jokić* Rule 15(B) Decision (ICTY), para. 14 ("[w]hile the Bureau would not rule out entirely the possibility that decisions rendered by a Judge or Chamber by themselves could suffice to establish actual bias, it would be a truly extraordinary case in which they would"); *Seromba* Disqualification Decision (ICTR), para. 12; *Bagosora* Disqualification Decision (ICTR), para. 10; *El Sayed* Disqualification Motion (STL), para. 21.

[244] NUON Chea's Application for Disqualification of Judges (E314/6), para. 24. *See also* *Seromba* Disqualification Decision (ICTR), para. 12 ("[w]here such allegations [of bias] are made, the Bureau has a duty to examine the content of the judicial decisions cited as evidence of bias. The purpose of that review is not to detect error, but rather to determine whether such errors, if any, demonstrate that the judge or judges are actually biased, or that there is an appearance of bias"); *El Sayed* Disqualification Motion (STL), para. 21.

[245] NUON Chea's Appeal Brief, para. 46.

[246] *Furundžija* Appeal Judgement (ICTY), paras 196-197; Decision on Disqualification of Judge SOM Sereyvuth (1/4), para. 10.

113. Furthermore, NUON Chea refers to Judge CARTWRIGHT Interview that gave in the United States on 7 November 2013,[247] certain parts of which are said to reflect "deep bias".[248] He notes in particular that Judge CARTWRIGHT stated that the Cambodian Government had handed over potential accused to the ECCC "on a platter", that the Khmer Rouge had "wiped out the intelligentsia", that "anyone suspected of being a Khmer Republic soldier was killed", that "'thousands of people died' for the construction of a 'useless' dam", and that the "purpose of trials such as those at the ECCC is to ensure that 'tyrant[s] will be put on trial and humiliated'".[249] NUON Chea submits that "[t]hese issues were directly at issue in Case 002/01" and that "[n]o judge viewing the facts through the lens of Judge Cartwright's baseless, grossly exaggerated caricatures could possibly have assessed those allegations in a fair and impartial manner".[250] KHIEU Samphân agrees with NUON Chea's arguments in this regard.[251] In contrast, the Co-Prosecutors dispute NUON Chea's submissions and note, *inter alia*, that the timing of Judge CARTWRIGHT's statement is of relevance: at the time of her statement, the hearing of evidence had been closed and the Trial Chamber had received both written and oral closing submissions.[252]

114. The Supreme Court Chamber is not persuaded by NUON Chea's argument that Judge CARTWRIGHT's statements give rise to an appearance of bias. In the impugned statements, Judge CARTWRIGHT spoke only in a general manner and did not refer to NUON Chea. Notably, when referring to the purpose of putting on trial and humiliating tyrants, a reasonable person, properly informed of the context, would not have understood her as referring to NUON Chea, whose guilt or innocence, at that time, had not yet been determined by the Trial Chamber. Rather, a reasonable observer would have understood that she was referring more generally to the purpose of judicial reactions to mass atrocities.[253]

[247] Annex 3: Conversation of Judge Silvia Cartwright at the Aspen Institute (7 November 2013), 21 October 2015, F2/9.3R.
[248] NUON Chea's Appeal Brief, paras 49-50.
[249] NUON Chea's Appeal Brief, para. 49.
[250] NUON Chea's Appeal Brief, para. 50.
[251] KHIEU Samphân's Appeal Brief, para. 48.
[252] Co-Prosecutors' Response, para. 32.
[253] *See also* Co-Prosecutors' Response, para. 35.

115. With reference to submissions seeking the disqualification of Judges of the Trial Chamber in Case 002/02, [254] NUON Chea further submits that Judge CARTWRIGHT's statements also show that the Cambodian judges of the Trial Chamber were biased against him.[255] He recalls that Judge CARTWRIGHT stated that the Cambodian judges would often "'growl in antagonism' and make 'very rude comments' in response to exculpatory evidence".[256] She asserted that two of the judges had been directly affected by the actions of the Khmer Rouge.[257]

116. The Supreme Court Chamber is not persuaded that Judge CARTWRIGHT's statements establish bias on the part of the Cambodian judges. As regards the "rude comments" the Cambodian judges are said to have made, Judge CARTWRIGHT acknowledged that she did not understand Khmer and that she only "imagined" that comments that had been made were rude and it is even uncertain on what basis she made such an assumption. Similarly, the fact that, according to Judge CARTWRIGHT, some of the Cambodian judges had been directly affected by the actions of the Khmer Rouge does not *per se* give rise to an apprehension of bias. When mass atrocities are tried at the domestic level, it is likely that some or all of the judges hearing those cases have lived through the period at issue or had other personal experiences relevant to crimes charged. To find, without more, that this makes such judges biased would mean that events amounting to international crimes could rarely be tried domestically. More importantly, professional judges are expected to be able to put aside their personal experiences when trying cases and this also applies to post-conflict situations and in the face of mass atrocities. The events described by Judge CARTWRIGHT as personal experiences of her two bench colleagues, even if accurate, do not implicate either of the Accused or, for that matter, any particular person, and do not concern charges tried in the present case, but the general conditions of life in Democratic Kampuchea.[258] Accordingly, NUON Chea's arguments fall to be rejected.

[254] NUON Chea's Appeal Brief, para. 52, referring to NUON Chea's Application for Disqualification of Judges (E314/6), paras 53-60.
[255] NUON Chea's Appeal Brief, para. 52.
[256] NUON Chea's Appeal Brief, para. 52.
[257] NUON Chea's Appeal Brief, para. 52.
[258] *See* NUON Chea's Second Request for Additional Evidence (F2/1), pp. 2-3.

117. NUON Chea submits further that the Trial Chamber lacked independence.[259] He refers the Supreme Court Chamber to his submissions regarding the conduct of the investigations, as well as to submissions contained in an application to disqualify Judges of the Trial Chamber from sitting in Case 002/02, alleging that the Cambodian judiciary is not structurally independent.[260]

118. Regarding NUON Chea's arguments relating to the conduct of the investigations, the Supreme Court Chamber recalls that it has previously considered – and rejected – similar arguments by NUON Chea. In its decision on the fairness of the investigation,[261] it noted that the factual allegations directly concerning Case 002 had undergone extensive litigation and consideration before the Co-Investigating Judges and the Pre-Trial Chamber, and found no error in the Trial Chamber's refusal to adjudicate these allegations again.[262] Similarly, in its decision on the application for immediate action,[263] the Supreme Court Chamber agreed with the Trial Chamber's assessment that a note for the file made by former international Co-Investigating Judge KASPER-ANSERMET, which concerned Cases 003 and 004, did not amount to a *prima facie* showing of interference with Case 002.[264] The Supreme Court Chamber sees no reason to revisit those issues. It notes, however, that NUON Chea raises additional arguments in support of his contention that the Trial Chamber lacked independence. The Supreme Chamber will address these arguments below.

119. First, NUON Chea submits that the political influence on the investigation is evidenced by statements made by former Co-Investigating Judge Marcel LEMONDE in a book on his tenure at the ECCC. NUON Chea refers specifically to a statement contained therein that "*all* Cambodian judges are ultimately beholden to the government whether because of fear of or proximity to power, and that the [Royal Government of Cambodia] 'pulls strings' behind every Cambodian judge".[265] The

[259] NUON Chea's Appeal Brief, para. 40.
[260] NUON Chea's Appeal Brief, para. 54, referring to NUON Chea's Application for Disqualification of Judges (E314/6), paras 43-51. The Supreme Court Chamber notes that NUON Chea does not cite to specific paragraphs of the latter document; however, paragraphs 43-51 contain his submissions relating to the purported lack of structural independence of the Cambodian judiciary.
[261] Appeal Decision on Fairness of Investigation (E116/1/7).
[262] Appeal Decision on Fairness of Investigation (E116/1/7), para. 32.
[263] Appeal Decision on Application for Immediate Action (E189/3/1/8).
[264] Appeal Decision on Application for Immediate Action (E189/3/1/8), paras 19, 22.
[265] NUON Chea's Appeal Brief, para. 56. The Supreme Court Chamber notes that the said paragraph does not contain specific references to the book. Nevertheless, the Supreme Court Chamber

Supreme Court Chamber observes that the first statement relates to a comment that an unnamed Cambodian Judge made to Judge LEMONDE in the context of the appointment of the national Co-Investigating Judge as President of the Court of Appeal. Given its generality and lack of reference to Case 002, the statement is inapt to establish lack of independence of the Trial Chamber. As regards the second statement, as noted by the Trial Chamber,[266] the statement that the Royal Government of Cambodia "pulls strings" reflects a personal impression of Judge LEMONDE during the early phases of the ECCC and the drafting of the Internal Rules.[267] It is therefore insufficient to demonstrate lack of independence on the part of the Trial Chamber.

120. Second, NUON Chea argues that statements which THET Sambath made in the course of the THET Sambath Interview demonstrated the Trial Chamber's lack of independence.[268] Specifically, in response to the question whether potential witnesses were "concerned about their security", THET Sambath stated that:

> Yes. When they started talking, they asked me about their security. I asked them why? I actually knew why they were concerned, but I wanted to know their ideas. They asked me if I knew the ones who led this government and they said they would be killed if they spoke about it. They did say this. They will go and speak out if they are provided with a security assurance.[269]

121. THET Sambath's statements suggest that persons connected to the Cambodian Government might harm witnesses who decide to testify. While this is a very serious allegation (which, however, lacks substantiation), it cannot be assumed that threats to witnesses, if assumed to exist, would have an impact on the independence of the Trial Chamber or any of its members. In other words, the allegations of witness

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understands NUON Chea to refer to the statement at p. 51 of the book: "*Poursuivant sa description de la société locale, ce juge ajouta que je devais me méfier de* tous *les magistrats cambodgiens: ou bien ils vivaient dans la peur du pouvoir en place ou bien ils en étaient proches mais, dans tous les cas, aucun n'était fiable ni indépendant*" (LEMONDE Book Excerpts, p. 12, ERN (Fr) 00893650), as well as the statement at p. 32: "*Il est évident que, derrière les juges cambodgiens, il y a des gens qui tirent les ficelles au sein du gouvernement*" (LEMONDE Book Excerpts, p. 3, ERN (Fr) 00893641).
[266] Decision on LEMONDE Book Excerpts (E280/2/1).
[267] Decision on LEMONDE Book Excerpts (E280/2/1), para. 17.
[268] NUON Chea's Appeal Brief, para. 57.
[269] NUON Chea's First Request for Additional Evidence (F2), para. 6. The cited text is an unofficial transcription of the THĒT Sambăth Interview provided by NUON Chea's Defence.

intimidation and the contention of lack of independence by the Trial Chamber are unrelated.

122. Third, NUON Chea submits that "the National Judges' reasoning in support of their decision not to summons Heng Samrin for testimony" demonstrates lack of independence on their part.[270] In this regard, the Supreme Court Chamber recalls that the question of whether HENG Samrin, along with other witnesses, should be called to testify was the subject of several decisions, both during the investigative and trial phases of the proceedings.[271] The national Judges of the respective Chambers involved in these decisions were all of the view that calling HENG Samrin as a witness was not necessary, while the international Judges were of the view that he should be called. In its Final Decision on Witnesses (E312), the Trial Chamber, *inter alia*, disposed of the requests to call HENG Samrin; as the Chamber was unable to reach the required supermajority, the proposed witness was not called.[272]

123. NUON Chea raises several arguments in support of his contention that the Trial Chamber should have called HENG Samrin to testify, challenging the national Judges' reasoning as to why they decided not to call him. The Supreme Court Chamber considers, however, that at issue here is not whether HENG Samrin should have been called. Rather, at issue is whether the reasoning of the national Judges "falls to be explained only by the absence of judicial independence and integrity".[273] In the Supreme Court Chamber's opinion, it is not obvious that the latter would be the only possible conclusion. The national Judges acknowledged the *prima facie* relevance of the testimony of HENG Samrin, but held that this relevance was limited – an issue argued on the merits, in relation to other evidence. They accept, *inter alia*, that HENG Samrin had made a statement on which NUON Chea heavily relied. Further, they weighed the potential value of HENG Samrin's testimony against the "practical reality that he has already refused to comply with a summons issued by the international Co-Investigating Judge such that the Trial Chamber has been invited to

[270] NUON Chea's Appeal Brief, para. 58.
[271] Final Decision on Witnesses (E312), paras 86-111; Preliminary Indication of Individuals to Be Heard (E236/1), paras 1-3, 6; Decision on Objections to Admissibility (E299), paras 37-39; Order on Request to Summon Witnesses (D314), paras 7, 16-17; Decision on Appeal Against Order on Requests to Summons Witnesses (D314/1/7, D314/1/8), para. 13; Second Decision on Appeal Against Order to Summons Witnesses (D314/1/12), paras 40-41.
[272] Final Decision on Witnesses (E312), para. 86.
[273] NUON Chea's Appeal Brief, para. 74.

compel witness testimony through the imposition of criminal sanctions",[274] on which occasion they question the Trial Chamber's ability to enforce the potential witness's appearance through coercive measures in light of his parliamentary immunity.[275] As such, the national Judges' decision might be taken, at face value, as an acknowledgment of the ECCC's weak enforcement powers vis-à-vis non-cooperative witnesses, a problem generally not uncommon to international(ised) criminal courts and tribunals, rather than as a corollary to the lack of independence. Whether the failure to call HENG Samrin prejudiced NUON Chea's right to an effective defence and whether it occasioned a contradictory approach to evidence and resulted in an insufficient basis for the conviction, as otherwise claimed by NUON Chea,[276] is a matter that is addressed below in this judgement.

124. Also, under the heading "Independence and Impartiality of the Trial Chamber", NUON Chea submits that the Trial Chamber erred in law by excluding testimony concerning events after 1979.[277] He complains that the Trial Chamber erred by excluding certain questions or evidence that, although concerning events after the period of the charges, were capable of showing Vietnam's role in justifying its unlawful aggression against, and occupation of, Cambodia by grossly overstating the CPK's supposed atrocities and responsibility of its leaders.[278] However, neither the submissions on appeal nor the submissions on point made before the Trial Chamber to which NOUN Chea refers[279] demonstrate why the refusal to admit evidence or allow questions on these subjects would have been rooted in the lack of independence, rather than genuinely motivated by an apprehension of the irrelevance of events lying outside temporal jurisdiction of the ECCC and without any demonstrated link to any particular piece of evidence. In the absence of further substantiation, the argument is dismissed.

125. As to the structure of the Cambodian judiciary, NUON Chea recalls that judges in Cambodia, including the national Judges of the Trial Chamber, are

[274] Final Decision on Witnesses (E312), para. 96.
[275] Final Decision on Witnesses (E312), para. 97.
[276] NUON Chea's Appeal Brief, paras 58-75.
[277] NUON Chea's Appeal Brief, paras 76-79.
[278] NUON Chea's Appeal Brief, para. 77.
[279] NUON Chea's Appeal Brief, para. 79, referring to NUON Chea's Closing Submissions (E295/6/3), paras 57-59.

appointed, promoted, dismissed and disciplined by the Supreme Council of the Magistracy, which includes among its members four individuals appointed by the executive branch, as well as the ECCC's national Co-Prosecutor and national Co-Investigating Judge.[280] He notes that the national Judges in the Trial Chamber retain their full time positions in the national judiciary.[281] He also points out that judges in Cambodia are poorly paid, do not have security of tenure and that there are widespread allegations of corruption.[282]

126. The Supreme Court Chamber notes that the relation between the judiciary and the other branches of government remain marked by conflict and tension, including in modern democracies aspiring to the highest Rule of Law standards.[283] Structural challenges, including the manner of selection and appointment of judges so as to prevent imbalance among the branches of government and balancing security of judges' tenure *vis-à-vis* enforcement of efficiency and discipline, are not exclusive to Cambodia and it would be legitimate to say that a perfect system has not yet been implemented anywhere. Without diminishing the importance of judicial reform in the direction of strengthening autonomy and independence,[284] it would, nevertheless, be inappropriate to refuse, as NUON Chea proposes, legitimacy to a trial before the ECCC based on abstract discord between the institutional design of the Cambodian judiciary and international standards. Advancing this proposition further would effectively question the *raison d'être* of hybrid criminal tribunals – a conclusion unacceptable for institutions operating under the auspices of the United Nations. Rather, structural issues that may affect fairness must be related to concrete proceedings in order to assess whether they are likely to bring about a real and reasonable apprehension of bias. In this regard, notwithstanding that the composition of the Cambodian Supreme Council of Magistracy would arguably not meet the standards of the Council of Europe,[285] this, in the opinion of the Supreme Court

[280] NUON Chea's Application for Disqualification of Judges (E314/6), para. 43.
[281] NUON Chea's Application for Disqualification of Judges (E314/6), para. 43.
[282] NUON Chea's Application for Disqualification of Judges (E314/6), para. 44.
[283] Opinion No. 18 (2015) on the Position of the Judiciary (CCEJ), para. 2; *See* Opinion No.10 (2007) on the Council for the Judiciary at the Service of Society (CCEJ).
[284] Cambodian League for the Promotion and Defence of Human Rights, "Legal and Judicial Reform in Cambodia", February 2006, p. 2, https://www.licadho-cambodia.org/reports/files/79LICADHOLegalJudicialReformPaper06.pdf
[285] *See* Recommendation CM/Rec (2010) On Judges: Independence, Efficiency and Responsibilities; Opinion No.1 on Standards Concerning the Independence of the Judiciary (CCJE).

Chamber, does not raise a real apprehension of bias on the part of the Trial Chamber. First, the Supreme Court Chamber notes that, unlike in the ECtHR's judgement in *Volkov v. Ukraine*,[286] on which NUON Chea relies, neither do members of the executive participate in the present case nor is it alleged that any of the national Judges of the Trial Chamber are subject to proceedings before the Supreme Council of Magistracy; as such, the possibility that the judicial functions of the ECCC would be performed under the influence of the executive through this Council is hypothetical and weak. Moreover, regarding the argument that the impartiality of the Trial Chamber is compromised due to the membership of the national Co-Prosecutor in the Council, the Supreme Court Chamber observes that the records of both Case 001 and Case 002 show that the Trial Chamber did not hesitate to rule against the position of the Co-Prosecutors on numerous material issues, apparently not intimidated by the national Co-Prosecutor's position outside the ECCC. As concerns averments of insufficient pay and corruption, without entertaining their veracity, the Supreme Court Chamber points out that in the context of the ECCC, certain guarantees have been provided, which are capable of insulating ECCC Judges from these problems, including in respect of adequate remuneration and prevention of corruption. Other challenges persist and apply to both international and national judges, including limited tenure, funding dependent heavily on interested States and pressure on mandate completion; these have been amply discussed in international jurisprudence[287] and scholarly writings, and the Supreme Court Chamber understands that the appeal does not allege that the ECCC is fundamentally flawed in this respect.

127. KHIEU Samphân also alleges that the Trial Chamber was biased against him. In support of this contention, he raises several arguments, which the Supreme Court Chamber shall address in turn.

128. KHIEU Samphân submits that the Trial Chamber applied a procedural "double standard" that favoured the Co-Prosecutors to the disadvantage of the Defence.[288] In support of this contention he appears to argue that the Trial Chamber intimidated Defence witnesses, while it protected witnesses who testified against the Accused.[289]

[286] *Volkov v. Ukraine* Judgement (ECtHR).
[287] Decision on Preliminary Motion (Judicial Independence) (SCSL), paras 37-38.
[288] KHIEU Samphân's Appeal Brief, para. 41.
[289] KHIEU Samphân's Appeal Brief, para. 41.

Specifically, he refers to statements made by Judge LAVERGNE in the course of the questioning of witnesses and questioning by the Co-Prosecutors, and contrasts those statements and questioning with the Trial Chamber's treatment of witness PHY Phuon.[290] The Supreme Court Chamber has reviewed each of the pages of the transcripts cited by KHIEU Samphân and in the absence of any concrete substantiation, the Supreme Court Chamber cannot identify undue behaviour by the Trial Chamber or any of its members in the treatment of these witnesses. To the extent that KHIEU Samphân appears to argue that the Trial Chamber erred by reducing the time allotted to his examination of witness PHY Phuon,[291] the Supreme Court Chamber notes that counsel for KHIEU Samphân was able to conclude the examination within the time allocated to him.[292] In any event, it is unclear how any error by the Trial Chamber in that regard could demonstrate that the Chamber was biased against him.

129. KHIEU Samphân further submits that the unequal treatment by the Trial Chamber is evidenced by its treatment of requests to admit documentary evidence into the case record.[293] He notes, first, that the Trial Chamber did not rule on a request to admit a newspaper article into evidence, according to which a witness who had testified before the Trial Chamber subsequently recanted his testimony.[294] While it appears that the Trial Chamber indeed did not rule on this request, despite a reminder by counsel for KHIEU Samphân,[295] which would constitute an error, the Supreme Court Chamber does not consider that it may be presumed that this was, as KHIEU Samphân submits, because the Trial Chamber was unable to justify the rejection of the request and therefore chose to ignore it. Considering the large quantity of documents that the Parties requested to be admitted into evidence and the fact that the Trial Chamber often had to defer deciding upon such requests until it had an

[290] KHIEU Samphân's Appeal Brief, para. 41. The Supreme Court Chamber notes that the witness identifies by the names PHY Phuon and ROCHOEM Ton, and carries the *alias* "Vycheam". *See* T. 25 July 2012 (PHY Phuon), E1/96.1, p. 66.
[291] KHIEU Samphân's Appeal Brief, fn. 105.
[292] T. 2 August 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/101.1, p. 56 (counsel for KHIEU Samphân stated that he had no further questions to ask of witness ROCHOEM Ton).
[293] KHIEU Samphân's Appeal Brief, para. 42.
[294] KHIEU Samphân's Appeal Brief, para. 42, referring to Demande de KHIEU Samphân de verser un nouveau document (E220) (not available in English).
[295] T. 13 June 2013, E1/207.1, p. 94 (counsel for KHIEU Samphân stated that the Chamber has not yet ruled on KHIEU Samphân's motion to admit a newspaper article into evidence).

opportunity to deliberate, the assumption that the lack of a ruling was caused by a mere oversight is not an unreasonable conjecture.

130. KHIEU Samphân also argues that the Trial Chamber's bias is evidenced by the fact that it granted a request by the Co-Prosecutors to admit into the record a transcript of a lecture by expert witness Philip SHORT, while it rejected a request by NUON Chea to admit a newspaper article concerning the methodology used by Philip SHORT for his book.[296] He submits that the Trial Chamber's reason for rejecting this request, namely that the expert witness could be examined in court regarding those questions, applied equally to the Co-Prosecutors' request.[297] Upon review of the documents concerned and of the Trial Chamber's decision,[298] the Supreme Court Chamber finds that the rejection of NUON Chea's request was not unreasonable. The document which he sought to be admitted was a relatively short excerpt from a newspaper article discussing Philip SHORT's book on Pol Pot.[299] It constituted a second-hand account regarding the methodology, an issue which indeed was better to be explored during examination of the witness. In contrast, the document sought to be admitted by the Co-Prosecutors was a relatively lengthy audio-recording of a lecture by Philip SHORT himself.[300] Furthermore, the Trial Chamber took issue with the reliability of some of the documents sought to be admitted as they had apparently been prepared by NUON Chea's Defence team.[301] Upon review of the document proposed by NUON Chea, the Supreme Court Chamber considers that it appears that it fell into this category, which provided further justification for rejecting it – as opposed to the document submitted by the Co-Prosecutors.

131. KHIEU Samphân submits, furthermore, that the Trial Chamber's lack of impartiality is evidenced by its systematic disregard for exonerating evidence,[302] its distortion of evidence, including KHIEU Samphân's own testimony, in order to draw conclusions against him[303] and its misapplication of the principle *in dubio pro reo*.[304]

[296] KHIEU Samphân's Appeal Brief, para. 42.
[297] KHIEU Samphân's Appeal Brief, para. 42.
[298] Response to Internal Rule 87(4) Request (E260).
[299] Philip SHORT, Asian Wall Street Journal (E226.1).
[300] Response to Internal Rule 87(4) Request (E260), para. 4; Co-Prosecutors' Rule 87(4) Request (E230), paras 2-3.
[301] Response to Internal Rule 87(4) Request (E260), para. 8.
[302] KHIEU Samphân's Appeal Brief, para. 43.
[303] KHIEU Samphân's Appeal Brief, paras 44-45.

He also submits that the Trial Chamber made findings that went beyond the scope of Case 002/01.[305] The Supreme Court Chamber notes that his arguments are cursory and do not substantiate how the purported errors, if established, would give rise to a finding of bias,[306] as opposed to errors of law or fact. Accordingly, the Supreme Court Chamber will not consider his arguments any further.

2. Right to an effective defence

132. NUON Chea and KHIEU Samphân raise several arguments in support of their contention that their right to an effective defence was violated. The Supreme Court Chamber shall address these arguments in turn.

a) Failure to summon witnesses

133. NUON Chea submits that his right to an effective defence was violated because the Trial Chamber failed to summons certain witnesses.[307] The witnesses in question are HENG Samrin,[308] OUK Bunchhoen,[309] and Robert LEMKIN,[310] as well as witnesses who would have testified to the conditions in Phnom Penh prior to the city's evacuation in April 1975[311] and witnesses whose testimony could have been relevant to the issue of whether there was a policy against Khmer Republic soldiers and officials.[312] Before assessing each of these arguments, the Supreme Court Chamber wishes to underline that, undoubtedly, the right to request that witnesses be called in one's defence is an essential component of the right to a fair trial. At the same time, this right is not an absolute one. Under the procedural regime of the ECCC, it is the Trial Chamber that decides on requests to hear evidence. This decision is governed primarily by the last sentence of Internal Rule 87(3), which sets out the grounds on which a request to hear evidence may be rejected. It involves an element of discretion to which the Supreme Court Chamber, in keeping with the standard of

[304] KHIEU Samphân's Appeal Brief, para. 46.
[305] KHIEU Samphân's Appeal Brief, para. 47.
[306] Co-Prosecutors' Response, para. 31.
[307] NUON Chea's Appeal Brief, paras 80-81.
[308] NUON Chea's Appeal Brief, para. 81.
[309] NUON Chea's Appeal Brief, para. 82.
[310] NUON Chea's Appeal Brief, para. 83.
[311] NUON Chea's Appeal Brief, para. 84.
[312] NUON Chea's Appeal Brief, para. 85.

review set out above,[313] affords deference, given the Trial Chamber's intimate knowledge of the case based on its direct administration of evidence.

(1) HENG Samrin

134. As to the argument that the Trial Chamber violated NUON Chea's right to an effective defence because it failed to call HENG Samrin, the Supreme Court Chamber recalls that the issue of whether this witness should be called to testify arose several times in the course of the proceedings.

135. On 24 February 2009, in the course of the judicial investigation of Case 002, counsel for NUON Chea filed before the Co-Investigating Judges a request for investigative action, requesting, *inter alia*, that the Co-Investigating Judges interview HENG Samrin in relation to a number of subjects.[314] On 25 September 2009, the international Co-Investigating Judge, Judge Marcel LEMONDE, issued a witness summons in respect of HENG Samrin.[315] HENG Samrin, however, did not comply with the summons. Then, in a note of 11 January 2010, the international Co-Investigating Judge indicated that "[i]t is therefore clearly established that the persons concerned [which include HENG Samrin] have refused to attend for testimony".[316] As to whether the law enforcement authorities should be called upon to compel the persons, including HENG Samrin, to appear, the international Co-Investigating Judge noted the complex issue of a potential parliamentary immunity that the witnesses may invoke, as well as the "practical difficulties", which, "in the best-case scenario, would unduly delay the conclusion of the judicial investigation, contrary to the need for expeditiousness".[317] The international Co-Investigating Judge concluded that "it is preferable to defer to the Trial Chamber […] for it to decide whether employing such coercive measures is warranted".[318]

136. In the Order on Request to Summon Witnesses (D314), the Co-Investigating Judges, *inter alia*, informed the Parties of their disagreement "on how to deal with the requests to summon and question […] Heng Samrin, [and] Ouk Bunchhoen" and

[313] *See above*, para. 97.
[314] NUON Chea's Tenth Request for Investigative Action (D136).
[315] Witness HENG Samrin Summons (D136/3/1).
[316] Note by the Co-Investigating Judge on Summons (D301), p. 3.
[317] Note by the Co-Investigating Judge on Summons (D301), p. 3.
[318] Note by the Co-Investigating Judge on Summons (D301), p. 4.

declared that "for the Cambodian Judge, these requests must be dismissed" and "for the international Co-Investigating Judge, while they are accepted in principle, [they] have not been granted for the reasons explained in the separate note which is on the case file [(E301)]".[319] Upon appeal by NUON Chea and IENG Sary, the Pre-Trial Chamber found in respect of the international Co-Investigating Judge's decision to defer the question of whether coercive measures should be employed in respect of, *inter alia*, HENG Samrin that the conclusion reached was correct, though it replaced its own reasons with those of the international Co-Investigating Judge.[320] Notably, the Pre-Trial Chamber found "unacceptable" the international Co-Investigating Judge's position that "the individuals summoned [including HENG Samrin] have 'refused to attend for testimony'".[321]

137. In the subsequent proceedings before the Trial Chamber, NUON Chea repeatedly reiterated his request that, *inter alia*, HENG Samrin be called to testify before the Trial Chamber.[322] NUON Chea submitted that HENG Samrin should testify not only to the events that were the subject of the charges against the Accused, but also as to NUON Chea's character, an issue that could be relevant to sentencing, should a conviction be entered.[323]

138. The Trial Chamber addressed the requests to summon HENG Samrin to testify in the Final Decision on Witnesses (E312). Judges NIL Nonn, YA Sokhan and YOU Ottara ("Majority") were of the view that HENG Samrin should not be called to testify before the Trial Chamber.[324] The Majority noted that a "summons is a binding order to appear before the ECCC [which] entails the use of coercive powers that may lead to the imposition of criminal sanctions in the event of non-compliance".[325] Recalling the procedural history regarding the requests for HENG Samrin to testify in the course of the judicial investigation, they noted that HENG Samrin has "declined to

[319] Order on Request to Summon Witnesses (D314), paras 3-18.
[320] Decision on Appeal Against Order on Requests to Summons Witnesses (D314/2/7, D314/1/8).
[321] Decision on Appeal Against Order on Requests to Summons Witnesses (D314/2/7, D314/1/8), para. 68.
[322] *See* NUON Chea Sixth Request to Summon HENG Samrin (E236/5/1/1), paras 3-7 (listing the various requests to summon HENG Samrin that NUON Chea had made before the Trial Chamber).
[323] NUON Chea's Fifth Request to Summon HENG Samrin (E236/5/1).
[324] Final Decision on Witnesses (E312), paras 87-103.
[325] Final Decision on Witnesses (E312), para. 89.

testify before the ECCC"[326] and that the "issue for the Trial Chamber is not merely whether to issue a summons, but whether to employ coercive measures".[327] They recalled the Pre-Trial Chamber's finding that the "likely invocation of a parliamentary immunity would in any event significantly delay the prospect of [HENG Samrin] testifying in the investigation stage".[328]

139. As to the relevance of HENG Samrin's expected testimony, the Majority recalled the topics in relation to which it was sought[329] and explained that, in their assessment, the topics had already been addressed in procedural decisions or were irrelevant to the trial (political interference and the role of Vietnam, respectively), and that his testimony on other topics would be "largely repetitious" or not unique (military structures and evacuation of Phnom Penh, respectively).[330] As to his possible testimony regarding the meeting in Phnom Penh on 20 May 1975, the Majority recalled that the Trial Chamber had received evidence in this regard, which means that "any additional evidence would be largely repetitious", and that NUON Chea apparently sought to persuade the Trial Chamber otherwise by emphasising the issue of whether NUON Chea used the word "*komchat*" as opposed to "*komtec*" when describing the CPK policy towards Khmer Republic soldiers and officials.[331] The Majority expressed doubts as to the relevance of this issue, noting the testimony of witness Stephen HEDER as to the meaning of the word "*komchat*", with which they agreed.[332] In their view, in light of the, limited aspects of the case to which HENG Samrin's evidence could be relevant, they concluded that they were unprepared to issue a summons.[333] As to NUON Chea's right to call witnesses in his defence, they considered that NUON Chea was not prejudiced by the decision not to summon HENG Samrin, as it was not "plausible" that his testimony would advance NUON Chea's defence.[334] They observed that the notes of Ben KIERNAN's interview with HENG Samrin, which were put before the Trial Chamber as evidence, "reliably

[326] Final Decision on Witnesses (E312), para. 90.
[327] Final Decision on Witnesses (E312), para. 97.
[328] Final Decision on Witnesses (E312), para. 91, citing Decision on Appeal Against Order on Requests to Summons Witnesses, (D314/2/7, D314/1/8), para. 69.
[329] Final Decision on Witnesses (E312), para. 92.
[330] Final Decision on Witnesses (E312), para. 93.
[331] Final Decision on Witnesses (E312), para. 94.
[332] Final Decision on Witnesses (E312), para. 95.
[333] Final Decision on Witnesses (E312), para. 96.
[334] Final Decision on Witnesses (E312), para. 98.

demonstrate" that HENG Samrin had made the statements upon which NUON Chea wished to rely, and that "calling the witness to confirm the contents of the interview notes does not demonstrate that a policy to eliminate LON Nol officials did not exist. That question should be assessed in light of the totality of the evidence".[335]

140. As to the request to call HENG Samrin as a "character witness", the Majority noted that evidence of an accused person's good character prior to the events for which he or she is standing trial is largely irrelevant,[336] and they disagreed with NUON Chea's submission that his working relationship with HENG Samrin continued in the period relevant to the charges.[337] They voiced their concern that NUON Chea had made the request to call HENG Samrin "in an attempt to generate controversy" and that it was "suggestive of trial tactics".[338] They noted that it would have been possible to solve "any questions of relevance […] by according little weight to such testimony", but concluded that the request to call HENG Samrin should be rejected, given that, in their view, it was likely that granting it would prolong the proceedings and that the request had been made for tactical reasons.[339]

141. Judges Silvia CARTWRIGHT and Jean-Marc LAVERGNE ("Minority") differed from the Majority's conclusion as to whether HENG Samrin should be summoned.[340] They recalled that, as any citizen, HENG Samrin has a duty to assist the Court in ascertaining the truth, noting the importance of the case to the Cambodian people.[341] They underlined that the issue of parliamentary immunity would only arise should the witness refuse to testify, and that the possibility that the witness might rely on it "does not remove the obligation of a Chamber to seek to hear their evidence".[342] The Minority recalled that immunity must be invoked by the individual concerned, "rather than anticipated by the Chamber" and that there was "no information to suggest that any of these potential witnesses have personally expressed an unwillingness to be heard in court".[343] Accordingly, in their view, whether

[335] Final Decision on Witnesses (E312), para. 98.
[336] Final Decision on Witnesses (E312), para. 116.
[337] Final Decision on Witnesses (E312), para. 117.
[338] Final Decision on Witnesses (E312), para. 117.
[339] Final Decision on Witnesses (E312), para. 118.
[340] Final Decision on Witnesses (E312), paras 104-111.
[341] Final Decision on Witnesses (E312), para. 106.
[342] Final Decision on Witnesses (E312), para. 107.
[343] Final Decision on Witnesses (E312), para. 107.

parliamentary immunity may be invoked and would prevent HENG Samrin from testifying was "speculative and irrelevant".[344] The Minority recalled that the Trial Chamber must be perceived as treating all witnesses equally and that "[t]he ECCC trials are intended to promote national reconciliation, heightening the duty to serve justice to which Cambodian officials are presumably not indifferent".[345] The Minority reasoned further that HENG Samrin appeared to be privy to information that no other witness proposed in the case held,[346] and that he should therefore be summoned as a witness.[347] As to the issue of the possible delay that summoning HENG Samrin may cause, the Minority expressed the view that the expeditiousness of the proceedings was no justification for not calling witnesses who may be important and that the Trial Chamber could have called the witnesses at the early stages of the trial proceedings, had there been the requisite majority for doing so.[348] The Minority decided not to express a view on whether the failure to summon HENG Samrin led to a violation of NUON Chea's right to a fair trial.[349]

142. NUON Chea raises the Trial Chamber's failure to summon HENG Samrin primarily in the context of the claim that the Trial Chamber lacked independence, a claim which the Supreme Court Chamber has already addressed.[350] Nevertheless, he also submits that the failure to summon HENG Samrin violated his right to an effective defence, which had a direct impact on the Trial Chamber's findings in relation to a CPK policy in respect of Khmer Republic soldiers and officials.[351] The Co-Prosecutors respond that the Trial Chamber's decision not to call HENG Samrin amounted to a proper exercise of discretion[352] and that, in any event, NUON Chea has failed to establish any prejudice from HENG Samrin's not testifying at trial.[353]

143. Given that the question whether HENG Samrin should be summoned to testify involved the exercise of discretion, the Supreme Court Chamber will assess the correctness of the failure to summon HENG Samrin against the deferential standard of

[344] Final Decision on Witnesses (E312), para. 107.
[345] Final Decision on Witnesses (E312), para. 109.
[346] Final Decision on Witnesses (E312), para. 108.
[347] Final Decision on Witnesses (E312), para. 108.
[348] Final Decision on Witnesses (E312), para. 110.
[349] Final Decision on Witnesses (E312), para. 111.
[350] *See above*, para. 122 *et seq*.
[351] NUON Chea's Appeal Brief, para. 75; *see also* paras 569-570.
[352] Co-Prosecutors' Response, paras 39-47.
[353] Co-Prosecutors' Response, paras 48-54.

review for discretionary decisions.[354] In this regard, the Supreme Court Chamber also recalls that even if an error were to be identified, it has to be established whether it "resulted in prejudice to the appellant", in the sense that it led to a "grossly unfair outcome in judicial proceedings".[355]

144. The most important criterion for the decision as to whether or not to summon a witness to testify before the Court is the relevance of the anticipated testimony to the events that are the subject of the charges. At the same time, and in particular when several possible witnesses or other means of evidence are available in respect of the events in question, the Chamber will have to select which witnesses should be called, also with a view to ensuring the expeditiousness of the proceedings. This is reflected in, *inter alia*, Internal Rule 87(3), which lists the grounds for rejecting requests for evidence, including evidence that is "irrelevant or repetitious". Generally, the Trial Chamber should strive to obtain the witness or other means of evidence that can best shed light on the events in question.

145. The Supreme Court Chamber recalls that NUON Chea proposed HENG Samrin as a witness in light of his former position as Deputy Division Commander of the Eastern Zone and as one of highest-ranking individuals still alive who were involved in the evacuation of Phnom Penh, one of the central aspects of Case 002/01. Based on the notes of an interview that HENG Samrin had with Ben KIERNAN, NUON Chea also suggested that HENG Samrin could testify in relation to a meeting in Phnom Penh that took place on 20 May 1975, at which the CPK's policies were disseminated. The Supreme Court Chamber is of the view that, as such, HENG Samrin's testimony could have been relevant to Case 002/01, a fact recognised not only by the minority, but also, with some limitations, by the majority of the Trial Chamber.[356]

146. Nevertheless, despite recognising that the testimony of HENG Samrin might be relevant, the Majority did not consider that he should be summonsed, based on the purported delay that was likely to result from a decision to summons him, which

[354] *See above*, para. 97 *et seq*.
[355] *See above*, para. 100.
[356] Final Decision on Witnesses (E312), para. 96 (recognising that "although [it] accept[s] that testimony from [HENG Samrin] could conceivably be relevant to limited aspects of Case 002/01").

would "lead the Trial Chamber into a situation full of difficulties".[357] The reason for the anticipated delay and difficulties was the assumption that HENG Samrin would be unwilling to respond to a summons to appear, that the Trial Chamber would therefore have to rely on coercive measures to execute the summons, that HENG Samrin would invoke his parliamentary immunity in respect of any such coercive measures, and that this situation could not be resolved quickly.

147. In the view of the Supreme Court Chamber, this assumption was based largely on speculation and therefore could not form an appropriate basis for the exercise of discretion. As set out above, the only attempt to obtain HENG Samrin's testimony was made by the international Co-Investigating Judge in the course of the judicial investigation, nearly five years before the Trial Chamber's decision. While the international Co-Investigating Judge concluded, *for the purposes of the judicial investigation*, that HENG Samrin had refused to give testimony and that the issue of his potential parliamentary immunity could create delay,[358] no further effort was made to summon him. Moreover, there is no statement by HENG Samrin on file that would indicate his actual unwillingness to testify before the Trial Chamber and invoke his parliamentary immunity should he be summonsed to do so. Indeed, the Pre-Trial Chamber specifically criticised as unacceptable the international Co-Investigating Judge's finding that, *inter alia*, HENG Samrin "refused to attend for testimony".[359] Even if one assumed that HENG Samrin had been unwilling to testify for the purposes of the judicial investigation, there was no indication that HENG Samrin would have maintained this position now that the case had actually moved to trial – to the contrary, it would have had to be assumed that a leading Cambodian politician would not hesitate to contribute to the fulfilment of the mandate of the ECCC, an institution created by a law passed by the very same Cambodian National Assembly over which he presides.

148. Accordingly, the Trial Chamber should have explored HENG Samrin's availability to testify before it. Only in the event of his refusal to respond to a summons would the Trial Chamber have had to face the question of coercive

[357] Final Decision on Witnesses (E312), para. 97.
[358] Note by the Co-Investigating Judge (D301), p. 3.
[359] Decision on Appeal Against Order on Requests to Summons Witnesses (D314/2/7, D314/1/8), para. 68.

measures and, should the witness invoke his parliamentary immunity, decide on the impact, if any, of that immunity on their execution. Only once it had been established that it was not possible to obtain HENG Samrin's testimony at all or within a reasonable time, could the request have been legitimately rejected, in accordance with Internal Rule 87(3)(b).

149. As to the possible delay that this might have caused, the Supreme Court Chamber notes that the question whether HENG Samrin should appear before the Trial Chamber was known by the time the case reached that Chamber; NUON Chea requested that he be called as a witness before the Trial Chamber for the first time in February 2011[360] and subsequently repeated the request several times. The Trial Chamber issued a decision on the request only in August 2014 – three and a half years after the initial request. There is no information on the record as to why the decision could not be issued earlier. There is also no indication that the issue of HENG Samrin's appearance as a witness could not have been resolved within that time. Accordingly, any reference by the Majority to potential delay was irrelevant and unjustified. The Supreme Court Chamber therefore concludes that the Trial Chamber's exercise of discretion in relation to the request to call HENG Samrin was unreasonable and amounted to an error.

150. Nevertheless, the Supreme Court Chamber recalls that, as stated above, in particular if there are several witnesses or pieces of evidence relating to the same subject-matter, the Trial Chamber may decide not to call all of them, but only those that are most relevant to the case at hand.[361]

151. NUON Chea submits that HENG Samrin was "the most important witness" in connection to both the evacuation of Phnom Penh and the events at Tuol Po Chrey.[362] Since HENG Samrin had been in charge of the 126th Regiment within the East Zone 1st Division and deputy commander of the 1st Division, NUON Chea argued that he would certainly have provided "first-hand knowledge" of the orders given by top ranking officials in respect of the evacuation and of the "inter-zonal conflict among

[360] Annex to NUON Chea's Summaries of Proposed Witnesses (E9/10.1), p. 18.
[361] *See*, in this regard, Final Decision on Witnesses (E312), para. 96.
[362] NUON Chea's Appeal Brief, para. 59.

the forces which liberated Phnom Penh".[363] Moreover, based on the notes of HENG Samrin's interview with Ben KIERNAN, NUON Chea claims that HENG Samrin's testimony would have been exonerating. In particular, he submits that, according to the record of the interview, HENG Samrin stated that, at a meeting in Phnom Penh in May 1975, NUON Chea had used a term in respect of the policy towards Khmer Republic soldiers and officials that indicated that they should be "removed from the framework", as opposed to killed. In response, the Co-Prosecutors contend that HENG Samrin's testimony would have been neither unique nor exculpatory.[364]

152. The Supreme Court Chamber notes, first, that there is no indication that HENG Samrin was privy to information in relation to the evacuation of Phnom Penh that other witnesses did not have. While he was commander of the 126th Regiment and deputy commander of the 1st Division at the relevant time, he received orders from CHAN Chakrey, the Division commander, who, in turn, reported to the Zone Secretary, as acknowledged by NUON Chea.[365] Nothing in the record indicates that HENG Samrin had direct access to directives or orders originating from the Party Centre – rather, it appears that it was the commander of his division who relayed such information to him,[366] which corresponds to the testimony regarding the line of communication given by MEAS Voeun, another former regimental commander, who testified before the Trial Chamber.[367] The Supreme Court Chamber also notes that

[363] NUON Chea's Appeal Brief, paras 59, 64, fns 151.
[364] Co-Prosecutors' Response, para. 38.
[365] NUON Chea's Appeal Brief, para. 63.
[366] KIERNAN Retyped Interview Notes, E3/1568, dated 30 December 1991, ERN (En) 00651879 (HENG Samrin declared that he had not attended the meeting during which the Party Centre gave instructions concerning the attack on and evacuation of Phnom Penh personally, but was briefed in this regard by his division commander, CHAN Chakrey). *See also* KIERNAN Retyped Interview Notes, E3/1568, dated 30 December 1991, ERN (En) 00651885-00651886 (stating that, aside from the meeting on or about 20 May 1975, he met Pol Pot only one more time, during a "big meeting" in 1977). In the Chamber's view, this element militates against the hypothesis that HENG Samrin had direct contact with the Party Centre at the time of the evacuation.
[367] MEAS Voeun was, similar to HENG Samrin, a regimental commander in charge of 600 soldiers during the attack on Phnom Penh. *See* T. 3 October 2012 (MEAS Voeun), E1/129.1, pp. 89, 96, 110. He testified that he had received orders from the Commander of Division I, who in turn reported to the Zone Secretary, and that what he knew was up to the Zone level. *See* T. 3 October 2012 (MEAS Voeun), E1/129.1, pp. 90-96, 101; T. 4 October 2012 (MEAS Voeun), E1/130.1, p. 23; T. 9 October 2012 (MEAS Voeun), E1/132.1, p. 12. He stated that he had received plans for the attack on Phnom Penh from the division commander, who had received them during a meeting chaired by NUON Chea. *See* T. 3 October 2012 (MEAS Voeun), E1/129.1, p. 94; T. 4 October 2012 (MEAS Voeun), E1/130.1, pp. 93. UNG Reng, who had also been regimental commander, stated that he did not know about the relationship between the division commander and the upper echelon. *See* T. 9 January 2013 (UNG Ren), E1/157.1, p. 60. *See also* T. 20 May 2013 (IENG Phan), E1/193.1, pp. 7, 11, 12 (IENG Phan, who had been commander of a battalion, stated that commanders of brigades and divisions had been

MEAS Voeun as well as other military officers who appeared as witnesses before the Trial Chamber were questioned at length as to the orders that were given in relation to the attack on, and evacuation of, Phnom Penh.[368] HENG Samrin's testimony was thus not unique. Secondly, according to NUON Chea, the purportedly pivotal value of HENG Samrin's testimony is that he was "actively involved" in a conflict between the Zones and the Party Centre and among the Zones themselves, "starting as early as 1973 and continuing in Phnom Penh".[369] However, the Supreme Court Chamber observes that, although HENG Samrin's account shows that a degree of enmity among different Zones appears to have existed since 1973,[370] he unequivocally stated that no substantial act of rebellion against the Party Centre – let alone defiance of its

entitled to participate in the meetings only at the Zone level).

[368] *See*, *e.g.*, T. 4 October 2012 (MEAS Voeun), E1/130.1, p. 11 (MEAS Voeun was asked what orders had been given in the meetings he had attended); T. 8 October 2012 (MEAS Voeun), E1/131.1, p. 91 (he was questioned about any other order he had received in relation to the attack on Phnom Penh); T. 9 January 2013 (UNG Ren), E1/157.1, pp. 34, 40-41 and T. 10 January 2013 (UNG Ren) E1/158.1, pp. 50-52 (UNG Ren was questioned about the evacuation and the orders which, to his knowledge, had been issued in that regard); T. 20 May 2013 (IENG Phan), E1/193.1, pp. 11-13, 16 (IENG Phan was questioned about the orders to evacuate the civilian population from the city and the underlying rationale); T. 11 January 2013 (CHHAOM Se), E1/159.1, pp. 42, 44, 58-59, 63-65; T. 8 April 2013 (CHHAOM Se), E1/177.1, pp. 66, 76, 81-84 (CHHAOM Se, who had been deputy commander of a company composed of about 100 soldiers, which had been involved in the evacuation of Phnom Penh, was questioned extensively on the nature and actual implementation of the orders he had received on this matter). *See also* T. 24 October 2012 (KUNG Kim), E1/138.1, pp. 85, 101 and T. 25 October 2012 (KUNG Kim), E1/139.1, p. 5, (KUNG Kim stated that he had been an ordinary soldier during the attack on Phnom Penh and had been promoted to unit chief when the city was conquered); T. 24 October 2012 (KUNG Kim), E1/138.1, pp. 85-91, 100-103 and T. 25 October 2012 (KUNG Kim), E1/139.1, pp. 5-7, 8, 52-56 (KUNG Kim was questioned about the nature and provenance of orders he had received, including chain of command and reporting officers); T. 5 November 2011 (SUM Chea), E1/140.1, pp. 10, 11-13, 15-16, 23-27, 48-49, 49-50, 56, 70, 76 (SUM Chea, who had been an ordinary soldier during the evacuation of Phnom Penh, was questioned on the content and source of the orders concerning the evacuation).

[369] NUON Chea's Appeal Brief, paras 59, 64. The Supreme Court Chamber notes that NUON Chea errs when he states that Stephen HEDER "confirmed" that HENG Samrin was "already opposed to forces aligned with the Party center" in April 1975 (*compare* NUON Chea's Sixth Request to Summon HENG Samrin (E236/5/1/1), para. 14, *with* T. 16 July 2013 (Stephen HEDER), E1/224.1, pp. 97-101). *See also* NUON Chea's Appeal Brief, para. 242 and fn. 674, arguing that it was likely that a faction led by Northwest Zone Secretary RUOS Nhim was planning an armed confrontation with Pol Pot as early as 1975; this claim is based on information that TOAT Thoeun constructed in 1975 a concealed warehouse to store weapons seized from Lon Nol soldiers. The Supreme Court Chamber observes in this regard that TOAT Thoeun, when testifying before the Chamber, denied that the weapons had been amassed with a view to utilising them in an insurrection against the Party Centre. *See* T. 6 July 2015 (TOAT Thoeun), F1/3.1, pp. 25-26, 31.

[370] KIERNAN Retyped Interview Notes, E3/1568, dated 30 December 1991, ERN (En) 00651882-00651883 (describing skirmishes between the East and Southwest Zones troops occurring in 1973), 00651881-00651882 (recounting, in ambiguous terms, a 1974 "struggle to resist Pol Pot" in Koh Kong), 00651879 (recalling that, since control of Phnom Penh was divided among different units, soldiers were prevented from accessing areas under other units' responsibility and that, when he attempted to do so, he was threatened with arrest).

orders – occurred before August 1978.[371] According to HENG Samrin's interview notes, at least until September 1977, "no one" – including HENG Samrin and SAO Phim – "dared" contest the instructions issued from the Centre, lest "[t]hey would certainly kill you".[372] Thus, even though the Supreme Court Chamber does not dismiss the *prima facie* relevance of the testimony that HENG Samrin might have given with respect to this factual area, it does not appear *prima facie* that his testimony in this regard would have been exonerating.

153. Finally, NUON Chea contends that HENG Samrin's interview notes are "the only direct evidence of NUON Chea's intent" regarding the treatment of Khmer Republic soldiers and officials.[373] NUON Chea points to HENG Samrin's recollection that, during a meeting held on or about 20 May 1975 in Phnom Penh to disseminate the CPK's main political standpoints, NUON Chea used the word "*komchat*" to describe the policy concerning Khmer Republic officials.[374] HENG Samrin understood that term to mean "[d]on't allow them to remain in the framework" and specified that the speakers at the gathering had not used the word "*komtec*", which means to smash, to kill.[375] NUON Chea further submits that the policy set out at the

[371] KIERNAN Retyped Interview Notes, E3/1568, dated 30 December 1991, ERN (En) 00651886-87, 00651896 (declaring that the rebellion against Pol Pot's forces started on 25 August 1978), 00651888, 00651889, 00651891, 00651896 (clarifying that, even if he and others had had reservations regarding the Party's policy since 1975, it was only in September-October 1976, when the leadership had amended the CPK's statute, that they had considered Pol Pot's actions to be treacherous; in any event, in 1976-77, they had not dared say anything, they had engaged in a secret struggle but "at the time it was very tight and cramped, there was no opportunity to rise up", so they had just waited for a chance to revolt), 00651905 (regretting that until Pol Pot's perceived treason in 1976, HENG Samrin had not resisted because, in spite of earlier suspicions, he had still "believed the Party"), 00651896 (asserting that, starting from the moment he had realised that "Pol Pot was a traitor" in 1976, he had tried to resist the "measures" coming from the leadership, but had not yet had the capacity to do so), 00651896-00651897, 00651899, 00651907 (stating that East Zone Secretary SAO Phim, whom the Party Centre had suspected to engage in rebellious activities, had said in 1977 that the resistance movement should not "attack friends" and should rather "follow orders" of the Party, at least for a period and that, in 1978, SAO Phim had been "still ambivalent" and "still believed Pol Pot", thus refraining from furthering the insurgence outright). CHEA Sim's 1991 account, as reported by Ben KIERNAN, confirms many aspects of HENG Samrin's statements, *see* KIERNAN Retyped Interview Notes, E3/1568, dated 30 December 1991, ERN (En) 00651879.
[372] KIERNAN Handwritten Interview Notes, E3/5593, dated 30 December 1991, ERN (En) 00419414.
[373] NUON Chea's Appeal Brief, para. 59.
[374] NUON Chea's Appeal Brief, para. 59, referring to KIERNAN Retyped Interview Notes, E3/1568, dated 30 December 1991, ERN (En) 00651884.
[375] KIERNAN Retyped Interview Notes, E3/1568, dated 30 December 1991, ERN (En) 00651884.

May 1975 meeting "only concerned the 'leaders' of the Khmer Republic government", as HENG Samrin and CHEA Sim were reported to have affirmed.[376]

154. The Supreme Court Chamber notes that the interview notes raise a number of issues relevant to the charges in Case 002/01,[377] some of which could have been clarified through the live testimony of HENG Samrin. The Supreme Court Chamber also notes that a possible interpretation of the words that, according to HENG Samrin, were used at the meeting, could be exonerating. It must be underlined, however, that the interview notes were actually before the Trial Chamber; the Majority specifically stated that they "sufficiently and reliably demonstrate that [HENG Samrin] uttered the words and opinions upon which the NUON Chea Defence seeks to rely".[378] Accordingly, it is unlikely that HENG Samrin's testimony would have produced significant additional exonerating information in relation to the meeting on 20 May 1975.

155. In sum, the Supreme Court Chamber considers that it has not been established that the Trial Chamber's failure to call HENG Samrin resulted in a "grossly unfair outcome in the judicial proceedings". To the extent that information contained in the

[376] NUON Chea's Appeal Brief, para. 67, referring to KIERNAN Retyped Interview Notes, E3/1568, dated 30 December 1991, ERN (En) 00651884 (HENG Samrin) and ERN (En) 00651867 (CHEA Sim).

[377] First of all, it is unclear whether HENG Samrin and CHEA Sim specifically referred to Lon Nol "leaders", as opposed to ordinary soldiers or officials of the Khmer Republic, or whether it was Ben KIERNNAN who concluded that the interviewees had talked about leaders only, given that in the records of the interviews such references appear in brackets, which are otherwise used to signal Ben KIERNAN's interjections (*see* KIERNAN Retyped Interview Notes, E3/1568, dated 30 December 1991, ERN (En) ERN 00651884 (HENG Samrin), ERN 00651867 (CHEA Sim)). Casting further doubt that HENG Samrin actually referred to *leaders* is the translation of the full phrase reported by Ben KIERNAN, namely "*komchat puok rattakar chinh*" (កម្ចាត់ពួករដ្ឋការចេញ) (KIERNAN Handwritten Interview Notes, E3/5593, dated 30 December 1991, ERN (En) 00419408). The term "*rattakar*" translates as "[Lon Nol] officials", without any further qualification. Secondly, HENG Samrin recalled the words that NUON Chea had uttered and their literal meaning, but did not explain what he had understood them to mean in the context. There is a fair possibility that NUON Chea used the word "*komchat*" as a euphemism to convey an implicit but clearly intelligible message to the audience; in this regard, the Supreme Court Chamber notes that both HENG Samrin and CHEA Sim talked about the use of similar euphemisms (*see* KIERNAN Retyped Interview Notes, E3/1568, dated 30 December 1991, ERN (En) 00651885 ("look after" for "kill"), 00651869 ("careful screening" for "kill")). Thirdly, there appears to be disagreement among scholars as to the correct translation of the word "*komchat*" into English. While Ben KIERNAN translates it as "scatter" or "don't allow them to remain in the framework" (Book by B. KIERNAN: *The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975-79*, E3/1593, p. 57, ERN (En) 01150025), Stephen HEDER testified that "*komchat*" is stronger than "scatter" and means "get rid of, eliminate", thus coming "closer to the notion of komtech (*sic*)"; *see* T. 16 July 2013 (Stephen HEDER), E1/224.1, p. 105.

[378] Final Decision on Witnesses (E312), para. 98.

interview notes could be considered to be exonerating, the information was before the Trial Chamber. Whether the Trial Chamber sufficiently took this information into account is a separate issue, which the Supreme Court Chamber shall address below in the context of the relevant grounds of appeal;[379] the Supreme Court Chamber shall also, where appropriate, draw inferences in favour of the Accused based on the interview notes of HENG Samrin.

(2) OUK Bunchhoen

156. The procedural history as to whether OUK Bunchhoen should be summoned is largely the same as for HENG Samrin: the international Co-Investigating Judge issued a summons in 2009, though OUK Bunchhoen did not appear before the Judge.[380] NUON Chea requested in early 2011 that the Trial Chamber summon OUK Bunchhoen to testify before it and subsequently repeated this request.[381] In the Final Decision on Witnesses (E312), the Majority concluded that OUK Bunchhoen should not be called.[382] Noting that NUON Chea had sought the witness's testimony about the role of Vietnam, the Majority considered this issue not to be relevant to the charges.[383] With regard to the issue of political interference as a potential topic of testimony, the Majority recalled a finding of the Supreme Court Chamber that there was "no basis upon which to call witnesses to testify on such allegations".[384] As to the issue of alternative command structures within the CPK, the Majority noted that other witnesses testified on this issue, and OUK Bunchhoen's testimony would have therefore been largely repetitive. As to the statement, made in the course of OUK Bunchhoen's interview with Stephen HEDER, that in February 1975 plans had been made to build accommodation for those people who were to be expelled from Phnom Penh upon its fall, the Majority noted that the record of the interview was part of the evidence put before the Trial Chamber and could be relied upon; the written record was also sufficient to the extent that NUON Chea argued that this statement was

[379] *See below*, para. 846 *et seq*.
[380] Summons of Witness OUK Bunchhoen (A298/1).
[381] Annex to NUON Chea's Summaries of Proposed Witnesses (E9/10.1), p. 39.
[382] Final Decision on Witnesses (E312), paras 99-103.
[383] Final Decision on Witnesses (E312), para. 100.
[384] Final Decision on Witnesses (E312), para. 100, referring to *Duch* Appeal Judgement (001-F28), paras 79-80 (where the Supreme Court Chamber found that the question of whether a person is a "senior leader" or "most responsible" for the crimes of the Khmer Rouge era is not a justiciable issue before the Trial Chamber, but is subject to the broad discretion of the Co-Investigating Judges and the Co-Prosecutors).

exculpatory and it was therefore unnecessary to call OUK Bunchhoen to confirm the statement.[385] The Majority concluded that "difficult and probably protracted questions would arise in relation to their [OUK Bunchhoen's] immunity from prosecution" and that it was unnecessary to venture "into an area of such legal and practical difficulty".[386]

157. The Minority disagreed with the Majority's conclusion and expressed the view that OUK Bunchhoen should be called, essentially for the same reasons that HENG Samrin should be called.[387] They noted that OUK Bunchhoen's "proposed testimony – as a zonal leader who fought against Central troops in the late 1970s as put forward by NUON Chea's Defence – might provide directly relevant and probative evidence concerning that period, as might his ability to provide evidence on the directive of February 1975 which concerned plans to accommodate those evacuated from Phnom Penh".[388]

158. As with HENG Samrin, the Supreme Court Chamber considers that the Majority's decision not to call OUK Bunchhoen amounted to an erroneous exercise of discretion because, based on the information available to the Trial Chamber, it was not clear that the witness would actually refuse to testify and that this would cause undue delay.[389] However, just as with HENG Samrin, it has not been established that this procedural error actually prejudiced NUON Chea and resulted in a "grossly unfair outcome in the judicial proceedings". In particular, the Supreme Court Chamber recalls that, in the interview with Stephen HEDER, OUK Bunchhoen reportedly affirmed that in April 1975 Pol Pot had issued a secret policy calling for the "wiping out [of] all elements in the Lon Nol regime", specifying the precise targets that had to be "purged" or "swept clean".[390] As to the May 1975 meeting, OUK Bunchhoen reportedly declared that the CPK leadership had issued instructions to "firmly oppose

[385] Final Decision on Witnesses (E312), paras 101- 102.
[386] Final Decision on Witnesses (E312), para. 103.
[387] Final Decision on Witnesses (E312), paras 104-111.
[388] Final Decision on Witnesses (E312), para. 108.
[389] *See above*, paras 147-149.
[390] UK Bunchhoeun DC-Cam Interview, E3/387, dated 4 August 1990, p. 6. The Supreme Court Chamber has noted NUON Chea observation as to whether "wipe out" is the correct translation of the corresponding Khmer term (*see* NUON Chea's Closing Submissions (E295/6/3), para. 386 fn. 837), and, taking into account Stephen HEDER's testimony on this point (*see* T. 11 July 2013 (Stephen HEDER), E1/222.1, p. 12), finds that the terms "wipe out" and "sweep clean away" are interchangeable in the context of the passage of OUK Bunchhoen's interview in question.

and root out" the previous regime in all fields, "based on political, consciousness, and organizational works".[391] As regards his alleged participation in acts of internal rebellion within the CPK, the Chamber notes that, according to the interview, they occurred starting in 1978.[392] To the extent this information might be considered exculpatory, as noted by the Majority, it was put before the Trial Chamber in the form of the interview notes and could therefore be taken into account. Accordingly, this ground of appeal is dismissed.

(3) Robert LEMKIN

159. NUON Chea argues that the Trial Chamber erred by rejecting his request not to call Robert LEMKIN or to take investigative action to obtain video footage from him, which, it is claimed, could have resulted in evidence demonstrating that NUON Chea was not responsible for the events at Tuol Po Chrey.[393]

160. In rejecting NUON Chea's request to hear Robert LEMKIN as a witness or take additional investigative measures, the Trial Chamber reasoned as follows: (i) Robert LEMKIN had proved to be uncooperative with the Court in the past and the email that he sent to the Defence of NUON Chea on 9 July 2013, which gave rise to NUON Chea's request, did not indicate whether he would be prepared to waive journalistic privilege; (ii) the video footage in question was not actually new, but was filmed prior to May 2009; (iii) NUON Chea unduly delayed waiving the confidentiality of his interviews with THET Sambath; (iv) absent any further detail, the quest for the evidence sought would risk turning into a protracted and improper "fishing expedition"; (v) notwithstanding the potential probative value of the material, fairness of proceedings must be weighed against demands of trial expeditiousness; and (vi) even if Robert LEMKIN were to cooperate with the ECCC, placing the material in the case file and making it available to the court and the Parties would require an unreasonably long period of time.[394]

[391] UK Bunchhoeun DC-Cam Interview, E3/387, dated 4 August 1990, p. 8.
[392] UK Bunchhoeun DC-Cam Interview, E3/387, dated 4 August 1990, p. 19 *et seq*.
[393] NUON Chea's Appeal Brief, para. 83.
[394] Decision on New Evidence, Investigations and Summons (E294/1), paras 16, 19-24.

161. The Supreme Court Chamber observes that, despite referring to Internal Rule 87 when rejecting NUON Chea's request,[395] the Trial Chamber did not make determinations consistent with the criteria of Internal Rule 87(3), that is, in particular, that the evidence would be "impossible to obtain within a reasonable time", "irrelevant", or "intended to prolong proceedings". The Supreme Court Chamber also notes that the Trial Chamber merely posed "a question" as to whether the footage would be admissible pursuant to Internal Rule 87(4), *i.e.* whether NUON Chea would be able to demonstrate that it had not been available before the opening of the trial,[396] without actually making any determination in this regard.

162. The Trial Chamber refused to investigate its specific content and availability because it was concerned about the timely delivery of the judgement and the risk that the investigation would not be completed within a reasonable time.[397] In this regard, the Supreme Court Chamber, first, disagrees with the Trial Chamber's statement that the fairness of proceedings must be balanced with the requirement of an expeditious trial.[398] The Chambers of this Court are under an obligation to ensure that proceedings are both fair and expeditious.[399] Two aspects of the fair trial are relevant here: the right of the accused to be tried without undue delay[400] and the right to "obtain the attendance and examination of witnesses on his behalf".[401] The expected value of evidence *in support of* the charges may be balanced against the time required to obtain evidence, in light of the accused's right to be tried without undue delay.[402] Nevertheless, the right to be tried without undue delay does not limit the right of the accused to obtain evidence *in his or her defence*. However, general concerns of expeditiousness circumscribe the right of the accused to obtain such evidence where the motion for evidence would, in fact, not serve the defence, such as, *per* Internal

[395] Decision on New Evidence, Investigations and Summons (E294/1), para. 10.
[396] Decision on New Evidence, Investigations and Summons (E294/1), para. 20.
[397] Decision on New Evidence, Investigations and Summons (E294/1), para. 24
[398] Decision on New Evidence, Investigations and Summons (E294/1), para. 19.
[399] ECCC Law, Art. 33 new. *See also* *Aleksovski* Decision on Evidence (ICTY), para. 19.
[400] ICCPR, Art. 14(3)(c).
[401] ICCPR, Art. 14(3)(e), guarantees that a party's fair trial rights include the right to present evidence. The term "witness" has an autonomous meaning that is applied to other types of evidence, including expert witnesses, co-accused, victims, or documentary evidence. *See*, *e.g.*, *S.N. v. Sweden* Judgement (ECtHR), para. 45; *Trofimov v. Russia* Judgement (ECtHR), paras 34-37; *Romanov v. Russia* Judgement (ECtHR), para. 97; *Mirilashvili v. Russia* Judgement (ECtHR), paras 158-159.
[402] *See*, *e.g.*, *Gotovina* Decision on Appeal to Reopen the Case (ICTY), para. 23; *Čelebići* Appeal Judgement (ICTY), paras 290-293.

Rule 87(3), where evidence sought is irrelevant, repetitious or the motion is meant to prolong the proceedings.[403]

163. Based on the aforesaid, the Supreme Court concludes that in the Decision on New Evidence, Investigations and Summons (E294/1), the Trial Chamber incorrectly interpreted the governing law in placing expeditiousness above considerations of fair trial and its component right to obtain evidence. Moreover, the Trial Chamber failed to apply the criteria of Internal Rule 87(3). As such, the Supreme Court Chamber considers that the Trial Chamber's decision not to summon Robert LEMKIN or to take investigative steps to seek the video footage amounted to a procedural error.

164. As noted above, however, not every procedural error will lead to a finding that NUON Chea's right to an effective defence was violated. Rather, it is necessary to assess whether the Defence was actually prejudiced by the error, taking into account the proceedings as a whole, including steps taken during the appeals phase of the proceedings. In this regard, the Supreme Court Chamber recalls that it ordered an additional investigation to explore whether the footage allegedly in possession of THET Sambath and Robert LEMKIN could be obtained within a reasonable time and what specific information could be derived from it.[404] The additional investigation resulted in the Supreme Court Chamber obtaining primary and secondary material – namely, the LEMKIN Transcripts and the LEMKIN Notes – relating to the interviews that were considered by Robert LEMKIN to show RUOS Nhim's role at Tuol Po Chrey and his attempts to overthrow Pol Pot and NUON Chea's leadership of the CPK.[405] The Supreme Court Chamber afforded the Parties ample opportunity to make submissions on the relevance of the material provided by LEMKIN as well as on the import of the alleged rift within the CPK on NUON Chea's individual criminal responsibility.[406] However, the Supreme Court Chamber has concluded that the material should not be admitted into evidence because it had not been established that

[403] *See also* *Galić* Decision on New Evidence (ICTY) cited in Decision on New Evidence, Investigations and Summons (E294/1), fn. 36. *See also* *Kanyabashi* Decision on Re-Opening the Case (ICTR), paras 23-25 (holding that the probative value of the new evidence needs to outweigh the prejudice caused by delaying the proceedings and that relevant factors to be considered include the advanced stage of the trial and the potential for delay).
[404] First Interim Decision on Additional Investigation (F2/4/3), paras 24-26.
[405] LEMKIN Interview Record (F2/4/3/1), para. A34.
[406] Second Interim Decision on Additional Investigation (F2/4/3/3); Fourth Interim Decision on Additional Investigation (F2/4/3/3/6).

it was decisive or even relevant to the verdict.[407] Therefore, the Supreme Court Chamber considers that, in light of the proceedings as a whole, NUON Chea has not been prejudiced by the Trial Chamber's decision.

(4) Witnesses in relation to pre-evacuation conditions

165. NUON Chea submits that the Trial Chamber erred because it failed to call proposed witnesses in relation to the conditions in Phnom Penh prior to the city's evacuation in April 1975.[408] The Supreme Court Chamber agrees with the Co-Prosecutors' submission[409] that not calling additional witnesses in that regard did not cause NUON Chea any prejudice because the Trial Chamber acknowledged in the Trial Judgement that the pre-evacuation conditions in Phnom Penh had been difficult conditions and that there had been food shortages.[410] The Trial Chamber, however, found that this did not justify the evacuation of the city. Whether the Trial Chamber erred in evaluating the relevance of this factual circumstance is addressed elsewhere in this judgement, namely in the discussion of the purported justifications of Population Movement Phase One.[411]

(5) Witnesses in relation to policy to target Khmer Republic officials and soldiers

166. With regard to NUON Chea's argument that the Trial Chamber erred when it rejected the request to call witnesses to testify about the existence of a policy to target Khmer Republic officials and soldiers,[412] the Supreme Court Chamber notes that NUON Chea made the request to call these individuals in reaction to the Trial Chamber's indication that it would admit their prior statements into evidence. Thus, the essence of the issue is the extent to which the Trial Chamber could rely on prior witness statements without them appearing in court. This issue is addressed elsewhere in this judgement.[413]

[407] *See above*, paras 53, 56.
[408] NUON Chea's Appeal Brief, para. 84.
[409] Co-Prosecutors' Response, para. 61.
[410] Trial Judgement, para. 537.
[411] *See below*, para. 604 *et seq*.
[412] NUON Chea's Appeal Brief, para. 85.
[413] *See below*, para. 279 *et seq*.

b) Admission and use of documents

167. Several of NUON Chea's and KHIEU Samphân's arguments relate to the admission into evidence and use of documents at trial, which will be addressed in turn.

(1) Requiring Defence to file document lists

168. On 17 January 2011, the Trial Chamber ordered the Parties, *inter alia*, to file, by 13 April 2011 (the time limit was subsequently extended to 19 April 2011), a list of documents already on the case file that the Parties intend to put before the Chamber.[414] NUON Chea did not file such a list, stating that he "is not required nor able, at this time, to identify specific documents from [a list of all documents on the case file] that it intends to rely upon at trial".[415] In response to a request by the Co-Prosecutors that the Trial Chamber "preclude the NUON Chea defence from introducing at trial documents that were not identified pursuant to the Trial Preparation Orders" or alternatively direct NUON Chea to file a proper list within two weeks,[416] the Trial Chamber found that:

> [D]ocuments not filed in accordance with previous deadlines must satisfy, in accordance with Internal Rule 87(3) [*sic*], the extremely high threshold of showing that they could not have been disclosed within the applicable deadlines with the exercise of due diligence, and that their late admission is vital in the interests of justice.[417]

169. Opening statements before the Trial Chamber commenced on 21 November 2011.[418] On at least one occasion in the course of the trial, the Trial Chamber authorised NUON Chea in the interests of justice to put before the Chamber a document that had been on the case file since the end of 2007, despite NUON Chea's failure to file a document list.[419]

170. On appeal, NUON Chea raises two sets of arguments: first, he submits that the Trial Chamber was overly restrictive by requiring him to identify documents on the case file for admission into evidence long in advance of the commencement of the

[414] Order to File Material in Preparation for Trial (E9), para. 12 i).
[415] NUON Chea's Submissions Regarding New Documents (E9/26), para. 2.
[416] Co-Prosecutors' Request Regarding NUON Chea's Lists of Documents (E109/5), para. 2.
[417] Memorandum on Witness Lists (E131/1), p. 4.
[418] Trial Judgement, para. 7.
[419] Memorandum on Request under Internal Rule 87(4) (E276/2), para. 5.

trial.[420] Second, NUON Chea argues that the Trial Chamber's restrictions on the use of documents for the purpose of the 'impeachment' of witnesses amounted to an error.[421]

171. In relation to the first set of arguments, and for the reasons that follow, the Supreme Court Chamber rejects NUON Chea's arguments that the Trial Chamber's approach was erroneous. According to Internal Rule 87(3), first sentence, the Trial Chamber may rely, for the purposes of the verdict, only on those documents in the case file that the Parties have specifically put before the Trial Chamber, or that the Trial Chamber has put before the Parties. This is an exception to the rule contained in Article 321(1) of the Code of Criminal Procedure of Cambodia, which states that "[t]he judgement of the court may be based only on the evidence *included in the case file* or which has been presented at the hearing" (emphasis added). At the ECCC, it is not sufficient that evidence be included in the case file; rather, it must also be specifically identified as a piece of evidence for use. The rationale for this rule is to ensure that it is at all times clear which pieces of evidence may be the basis for the Trial Chamber's verdict, despite the potentially large number of documents accumulated in the case file during the investigation, not all of which may be relevant to the charges ultimately proffered in the closing order. In addition, this procedure strengthens the adversarial character of the proceedings, as well as the principle of orality of the proceedings.

172. Pursuant to Internal Rule 80(3)(d), the Trial Chamber may order the parties to submit a "list of new documents which they intend to put before the Trial Chamber […] and a list of documents already on the case file, appropriately identified" within a time limit set by the Chamber. This is a corollary to Internal Rule 87(3), in order to allow for the proper preparation of the proceedings. Thus, requiring the parties to file document lists in advance of the trial is primarily a tool for the Trial Chamber to manage the proceedings.

173. Internal Rule 80(3) is silent as to whether and under what circumstances parties may, in the course of the trial, put before the Trial Chamber documents on the case

[420] NUON Chea's Appeal Brief, paras 89-100.
[421] NUON Chea's Appeal Brief, paras 101-104.

file that were not referred to in their document lists. As noted above, the Trial Chamber indicated that it would apply Internal Rule 87 and enquire, in particular, whether the moving party had exercised due diligence. Nevertheless, as set out above, it allowed the presentation of documents in the interests of justice, even if the conditions of Internal Rule 87(4) were not fulfilled.

174. In the view of the Supreme Court Chamber, this approach was, at least in its result, not erroneous. As NUON Chea submits,[422] it is arguable whether Internal Rule 87(4) was meant to apply to documents placed on file or only to truly "new" evidence. Nevertheless, the approach of the Trial Chamber was consistent with Internal Rule 39, which grants the Chambers wide discretion in determining the consequences of deadlines are set by the Chambers. Notably, a party who deemed the allotted time too short could have petitioned for an extension of the deadline. Where a party breached the deadline to put documents before the Chamber, the Trial Chamber considered whether the moving party exercised due diligence in preparing its list under Internal Rule 80(3) and, even if the party did not prepare a list, the Trial Chamber still considered that it might accept the presentation of the document in the interests of justice.[423] This approach adequately balanced the needs of proper trial management with flexibility when required to ensure fair proceedings.

175. The Supreme Court Chamber is not convinced by the argument that the Trial Chamber failed to defer to the Code of Criminal Procedure of Cambodia, according to which "all evidence is admissible" and may be submitted until the last day of the trial.[424] As set out above, Internal Rule 80(3), which must be seen in the context of Internal Rule 87, is a managerial tool that does not seek to exclude any piece or category of evidence. Rather it seeks to impose on the Parties a degree of discipline, which is necessary in view of the potentially massive size of the case file in the proceedings before the ECCC and the fact that proceedings are conducted in three languages. Accordingly, the ECCC was entitled to adopt these Internal Rules to attain

[422] NUON Chea's Appeal Brief, paras 95-99.
[423] Decision on New Documents (E190), para. 21; Memorandum on Request under Internal Rule 87(4) (E276/2), para. 2.
[424] NUON Chea's Appeal Brief, para. 90, referring to Code of Criminal Procedure of Cambodia Arts 321 and 334.

the objective of fair proceedings and to ensure expeditious trial proceedings.[425] The deviation, if any, from ordinary Cambodian criminal procedure was therefore justified. The Internal Rules were framed to regulate the procedure for the production of evidence that may be relied on by the Trial Chamber; these rules promote an open and orderly process.

176. In reference to NUON Chea's argument that the approach adopted by the Trial Chamber actually diverged from the practices of the ICC, ICTY and ICTR,[426] the Supreme Court Chamber recalls that the ECCC was not required to copy international practice, but merely authorised to seek guidance from it.[427] It is noteworthy in this regard that the legal instruments under which the ICC, ICTY and ICTR operate do not provide for a judicial investigation and for the transmission of the whole investigative *dossier* to the trial court. Moreover, other international and internationalised courts and tribunals do provide for an obligation upon parties to submit document lists in advance of the trial,[428] even though there may be differences in the practice. Most importantly, however, NUON Chea has not referred the Supreme Court Chamber to any instance where the Trial Chamber actually disallowed him to use a specific document that was part of the case file because of his failure to file a document list and that he was therefore unable to test the evidence against him or mount a defence. Thus, as the Co-Prosecutors note, in any event, no prejudice is apparent.[429]

177. For the same reason, the Supreme Court Chamber sees no need to address in any detail NUON Chea's second set of arguments, namely, that the Trial Chamber's approach regarding the use of "impeachment documents" was erroneous.[430] NUON Chea has not substantiated how the Trial Chamber's purported error actually inhibited him from challenging the reliability or credibility of any witness.

178. KHIEU Samphân argues that the Trial Chamber did not adhere to the same rules regarding tendering documents into evidence when the Trial Chamber itself examined

[425] *See above*, para. 103 *et seq*.
[426] NUON Chea's Appeal Brief, paras 92-94.
[427] ECCC Agreement, Art. 12(1).
[428] *See* ICTY Rules of Procedure and Evidence, Rule 65 *ter* (g) (ii); ICTR Rules of Procedure and Evidence, Rule 73 *ter* (b).
[429] Co-Prosecutors' Response, para. 65.
[430] NUON Chea's Appeal Brief, paras 101-104.

witnesses.[431] Formally speaking, the Supreme Court Chamber agrees with the Co-Prosecutors[432] that this argument disregards the fact that the deadlines for presentation of evidence are indeed rules that are only applied to the Parties and not to the Trial Chamber. To the extent, however, that these deadlines have the function of ensuring procedural clarity, the Parties should also benefit from appropriate notice regarding the use of documents. This said, the Supreme Court Chamber notes that, apart from complaining, in general, about the uncertainty of rules applicable to him, KHIEU Samphân has failed to demonstrate that he was actually prejudiced by the Trial Chamber's practice.

(2) Procedures relating to the admission of documents into evidence

179. KHIEU Samphân raises several arguments relating to the admission of documents by the Trial Chamber.

180. As noted above, early in the proceedings, the Trial Chamber required the Parties to file lists of those documents that the Parties intended to put before the Chamber.[433] The Trial Chamber also informed the Parties that it intended to put before the Parties all documents referred to in the Closing Order (D427), to the extent that they related to Case 002/01.[434]

181. Subsequently, the Trial Chamber gave the Parties opportunities to make written objections to the documents proposed by the other Parties.[435] The Chamber also scheduled hearings to hear the Parties' submissions on the admission of documents ("admissibility hearings").[436] In addition, the Trial Chamber scheduled hearings to identify among the admitted documents those that were, in the view of the Parties,

[431] KHIEU Samphân's Appeal Brief, para. 38.
[432] Co-Prosecutors' Response, para. 74.
[433] *See above*, para. 168.
[434] Order to File Material in Preparation for Trial (E9), para. 12 iii); T. 27 June 2011, E1/4.1, p. 25; Scheduling of Oral Hearing on Documents Jan 2012 (E159), para. 1. *See also* Severance Order (E124), para. 2.
[435] Memorandum on Witness Lists (E131/1), pp. 1-2; KHIEU Samphân's Admissibility Objection (E131/1/11), para. 2 *et seq*.; NUON Chea Admissibility Objection (E131/1/12).
[436] Scheduling of Oral Hearing on Documents Jan 2012 (E159), paras 8-9; Scheduling of Oral Hearing on Documents Feb 2012 (E170), paras 6-7; Memorandum on Further Oral Hearing on Documents (E172/1); Updated Memorandum for Next Document Hearing (E172/5); Revised Schedule for Forthcoming Document Hearing (E223/3); Third Decision on Objections to Documents for Admission before the Trial Chamber (E185/2), paras 4-12 (setting out the procedural history of admissibility hearings before the Chamber).

most relevant to the case ("documents hearings").[437] At the first of those hearings, only NUON Chea and KHIEU Samphân were given an opportunity to make submissions on those documents, while subsequently, the Parties' counsel were also invited to make submissions on the probative value of the documents.[438] Generally, any document that was put before the Trial Chamber received a number in the case file commencing with the code 'E3' ("E3 number").[439]

182. KHIEU Samphân raises several arguments regarding the procedure for the admission of evidence. As to his argument that the Trial Chamber failed to clarify the status of documents that were assigned an E3 number in the case file and did not provide a list of documents to the Parties,[440] the Supreme Court Chamber notes that in support of this argument, he only refers, in a footnote, to four memoranda that the Trial Chamber issued in the course of the proceedings in response to various requests by the Parties.[441] In the absence of any explanation as to why these memoranda were tainted by an error, the Supreme Court Chamber dismisses KHIEU Samphân's argument for lack of substantiation.[442]

183. Regarding the argument that the procedure for admission of evidence adopted by the Trial Chamber did not comply with the requirement of an adversarial debate,[443] the Supreme Court Chamber understands KHIEU Samphân to be raising two issues: first, the Trial Chamber's general approach to the admission of documentary evidence, including its decision to assign an E3 number to all documents cited in the Closing Order (D427) related to Case 002/01 (therefore indicating that those documents could be relied upon when reaching a verdict); and second, the reliance by the Trial Chamber on a specific document that had not been assigned an E3 number, and to the admission of which KHIEU Samphân had objected.

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[437] Scheduling of Oral Hearing on Documents Feb 2012 (E170); Direction to Parties following Hearing of 21 September 2012 (E233); Revised Schedule for Forthcoming Document Hearing (E223/3); Announcement of Remaining Hearings (E288); Memorandum on the Schedule for Final Document Hearing and Other Hearings (E288/1/1).
[438] Scheduling of Oral Hearing on Documents Feb 2012 (E170); Direction to Parties following Hearing of 21 September 2012 (E233), paras 3-4; Trial Judgement, para. 68.
[439] *See* Scheduling of Oral Hearing on Documents Jan 2012 (E159), para. 5.
[440] KHIEU Samphân's Appeal Brief, para. 21.
[441] KHIEU Samphân's Appeal Brief, para. 21, fn. 45.
[442] *See above*, para. 101 *et seq*.
[443] KHIEU Samphân's Appeal Brief, paras 23, 36.

184. Regarding the first issue, the Supreme Court Chamber recalls that the Trial Chamber decided to assign E3 numbers to all documents cited in the Closing Order (D427) because it considered that, in the course of the judicial investigation, the "Co-Investigating Judges assessed all documents placed on the case file for relevance, and accorded some probative value to the evidence cited in the Closing Order".[444] The Trial Chamber also noted that the Closing Order (D427) "was subject to appeal to the Pre-Trial Chamber. For these reasons, the Trial Chamber has accorded the documents cited in the Closing Order (D427) a presumption of relevance and reliability (including authenticity) and has given them an E3 number".[445] The Supreme Court Chamber also recalls that the Trial Chamber subsequently gave the Parties an opportunity to address those documents, both at the document hearings[446] and in the course of their written and oral closing submissions. Similarly, regarding the admission of documentary evidence more generally, the Parties could raise objections, in writing, against the admission of documents and could make submissions on their content at document hearings and in their written and oral closing submissions.

185. In the view of the Supreme Court Chamber, the Trial Chamber's approach did not amount to a violation of the principle of adversarial proceedings. The principle of adversarial proceedings requires foremost that all Parties are given an opportunity to comment on the evidence adduced at trial and on the opposing party's submissions, with a view to influencing the court's decision.[447] This principle does not require that such an opportunity be given at a particular time during the proceedings, for instance, before evidence is admitted. Nor does the principle require that a party actually make submissions in relation to a given piece of evidence, as long as each party had an opportunity to do so.[448] In the case at hand, the Trial Chamber clearly set out which documents in the case file could potentially be relied upon for the verdict, including all documents referred to in the Closing Order (D427). It also provided the Parties

[444] Memorandum of 31 January 2012 (E162), para. 3.
[445] Memorandum of 31 January 2012 (E162), para. 3.
[446] Memorandum on Scheduling Informal Meeting (E141), p. 2; T. 16 January 2012, E1/27.1, p. 1; T. 17 January 2012, E1/28.1, p. 1; T.18 January 2012, E1/29.1, p. 1; T. 19 January 2012, E1/30.1, p. 4.
[447] *Laukkanen v. Finland* Judgement (ECtHR), *para.* 34. *See also* *Kamasinski v. Austria* Judgement (ECtHR), para. 102; *Brandstetter v. Austria* Judgement (ECtHR), para. 67; *Rowe v. United Kingdom* Judgement (ECtHR), para. 60; *Fitt v. United Kingdom* Judgement (ECtHR), para. 44; *Göç v. Turkey* Judgement (ECtHR), para. 34.
[448] *Nideröst-Huber v. Switzerland* Judgement (ECtHR), paras 20-24.

with opportunities to comment on those documents, including their probative value and reliability. Accordingly, KHIEU Samphân's submission in this regard is rejected.

186. As to the second issue raised by KHIEU Samphân, namely the Trial Chamber's reliance on a document that did not have an E3 number,[449] the Supreme Court Chamber notes the Co-Prosecutors' argument that the lack of an E3 number appears to be the result of an administrative oversight.[450] Be this as it may, as acknowledged by KHIEU Samphân,[451] the document was, in fact, presented during a hearing and he objected to its use.[452] Contrary to KHIEU Samphân's submission,[453] the Trial Chamber did rule on this objection, addressing a whole category of objections at the same time.[454] Accordingly, the requirements of an adversarial debate have been observed and KHIEU Samphân's argument in this regard is dismissed.

c) Inadequate time and page limits

187. With regard to the examination of witnesses, experts and Civil Parties by the Parties, the Trial Chamber usually divided the time for questions equally between, on the one hand, the Co-Prosecutors and Civil Parties, and, on the other hand, the three and subsequently two Defence teams.[455] NUON Chea argues that these time limits were rigid and inadequate and that he was generally provided only a third of the time afforded to the Co-Prosecutors.[456] NUON Chea and KHIEU Samphân also submit that the Trial Chamber imposed unduly restrictive page limits for their closing briefs. Further, KHIEU Samphân argues that the Trial Chamber's time limit for the filing of the written closing submission, set to 26 September 2013, was too short in light of the Decision on Objections to Admissibility (E299), which admitted several hundred written statements into evidence, and which was issued on 15 August 2013, that is, merely six weeks before the closing submissions were due.[457]

[449] KHIEU Samphân's Appeal Brief, para. 36, fn. 87.
[450] Co-Prosecutors' Response, para. 76.
[451] KHIEU Samphân's Appeal Brief, para. 36.
[452] T. 30 January 2013, E1/167.1, p. 89 *et seq*.
[453] KHIEU Samphân's Appeal Brief, para. 36.
[454] T. 31 January 2013, E1/168.1, p. 2.
[455] NUON Chea's Appeal Brief, para. 105; Co-Prosecutors' Response, para. 67; Co-Prosecutors' Request for Time Extension (E236/5/4/1), para. 3.
[456] NUON Chea's Appeal Brief, paras 105-106.
[457] KHIEU Samphân's Appeal Brief, para. 20.

188. As previously noted by the Supreme Court Chamber, the principle of equality of arms does not require that time to examine witnesses be allotted to the Parties mechanically.[458] Although the principle of equality of arms ensures that neither party is put at a disadvantage in terms of procedural equity, this does not mean that the accused "is entitled to precisely the same amount of time or the same number of witnesses as the Prosecution, since the latter bears the burden of proving every element of the crimes charged beyond reasonable doubt".[459] Rather, a principle of basic proportionality, and not a strict principle of "numerical equality", governs the relationship between the time and witnesses allocated between the prosecution and the accused.[460] Furthermore, in a case with multiple accused, the issue of proportionality is affected by the fact that the prosecution must present evidence to prove the responsibility or more than one individual accused.[461] Therefore, in explaining whether the disproportionality between the prosecution and the accused interfered with a party's right to present its case, a party's argument should focus on "specific allegations of prejudice".[462]

189. The Supreme Court Chamber considers that, apart from the numerical comparison, NUON Chea has not provided any substantiation as to why the allotted time for the questioning witnesses was prejudicial to his case. The approach adopted by the Trial Chamber – namely to afford equal time to, on the one hand, the Co-Prosecutors and the Civil Parties, and, on the other hand, the Defence teams – does not appear to be unreasonable. In this regard the Supreme Court Chamber also notes the submissions of the Co-Prosecutors, who highlight that the Trial Chamber showed flexibility in respect of the allotment of time.[463] Thus, NUON Chea has failed to show a discernible error in the Trial Chamber's exercise of discretion in assessing the proportion of the time allocated to the questioning of witnesses by the Co-Prosecutors and by the Accused.

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[458] Decision on Request for Additional Time (F26/2/2), para. 6; *Orić* Interlocutory Appeal Decision (ICTY), para. 7.
[459] *Prlić* Decision on Appeal of Refusal to Decide Upon Evidence (ICTY), para. 15; *Orić* Interlocutory Appeal Decision (ICTY), para. 7.
[460] *Prlić* Decision on Appeal of Refusal to Decide Upon Evidence (ICTY), paras 14, 15. *See also* *Orić* Interlocutory Appeal Decision (ICTY), para. 7.
[461] *Prlić* Decision on Defendants Appeal Against Decision to Allocate Time (ICTY), paras 35, 39; *Prlić* Decision on Appeal of Refusal to Decide Upon Evidence (ICTY), para. 15.
[462] *See* *Orić* Interlocutory Appeal Decision (ICTY), fn. 25.
[463] Co-Prosecutors' Response, para. 67.

190. Regarding the written closing submissions, the Supreme Court Chamber considers that the Trial Chamber enjoys discretion to set page limits at trial and that such decisions are afforded a degree of deference on appeal. The Trial Chamber initially set a page limit of 100 pages for each Defence team, in addition to 20 pages each for submissions on the applicable law. The page limit for the Co-Prosecutors' submissions was set to 200 pages (and 20 pages on the applicable law), and for the Civil Parties' submissions (excluding reparations) to 80 pages (and 20 pages on the applicable law).[464] The Trial Chamber subsequently extended each of these page limits by 25 pages.[465] These page limits did not include endnotes.[466] It has to be stressed that, in addition to inviting the Parties' written closing submissions, the Parties argued their case orally during a hearing, where the Trial Chamber assigned the Co-Prosecutors three days, the Civil Parties one day, and each of the Defence teams two days, followed by short rebuttal statements and, eventually, the Defence teams and/or NUON Chea and KHIEU Samphân personally had an opportunity to make a final statement.[467]

191. In light of this procedural history, the Supreme Court Chamber is not persuaded by NUON Chea's[468] and KHIEU Samphân's[469] arguments that the Trial Chamber imposed inadequate page limits for the Parties' closing submissions.

192. As to the time limit for the filing of written closing submissions,[470] the Supreme Court Chamber is not persuaded that the Trial Chamber acted unreasonably: as set out in the Trial Judgement,[471] the issue of the admission of documentary evidence was the subject of a series of submissions, hearings and decisions since the opening of the trial. KHIEU Samphân was expected to prepare his defence, including his closing submissions, on the basis of the documentary evidence that was put before the Trial Chamber, irrespective of when the ruling on the admissibility of the evidence was issued. In this regard, the Supreme Court Chamber notes with approval the judgement

[464] Memorandum Notifying Modalities for Closing Submissions (E163/5/4), p. 1.
[465] T. 23 July 2013, E1/227.1, p. 71.
[466] Memorandum on the Schedule for Final Document Hearing and Other Hearings (E288/1/1), para. 10.
[467] Memorandum on the Schedule for Final Document Hearing and Other Hearings (E288/1/1), para. 12.
[468] NUON Chea's Appeal Brief, paras 107-109.
[469] KHIEU Samphân's Appeal Brief, para. 23.
[470] KHIEU Samphân's Appeal Brief, para. 20.
[471] Trial Judgement, para. 63 *et seq*.

of the ICTR Appeals Chamber in *Kanyarukiga*[472] and the judgement of the ICC Appeals Chamber in *Bemba*,[473] which indicate that reserving the ruling on the admissibility of evidence until the end of the trial is not necessarily incompatible with the requirements of a fair trial. KHIEU Samphân has not established that the Trial Chamber's approach in that regard was unreasonable.

d) Procedural orders of the Trial Chamber

193. KHIEU Samphân submits that several procedural orders that the Trial Chamber made in the course of the trial violated his right to an effective defence. First, he complains that the President of the Chamber intervened too frequently and unjustifiably in the examination of witnesses and that the Trial Chamber often prevented the Defence from making submissions.[474] However, apart from referring to numerous transcripts of the trial by way of example, KHIEU Samphân does not substantiate this complaint by explaining how the interventions of the Trial Chamber President prejudiced the defence. In the absence of such substantiation, the Supreme Court Chamber fails to see such prejudice; it shall therefore not address this complaint any further.

194. For the same reason, the Supreme Court Chamber dismisses KHIEU Samphân's general argument[475] that the Trial Chamber erred by adopting what are said to have been arbitrary and variable procedural rules. In the absence of substantiation, apart from the question of the use of documents during the examination of witnesses, which was discussed above in this judgement, the Supreme Court Chamber is unable to address this argument.

195. As to the argument that the Trial Chamber erred by finding that it was within its discretion to authorise the filing of a reply to a response, because this was in breach of Article 8.4 of the Practice Direction for the filing of documents before the ECCC, which provided for the filing of replies in certain circumstances,[476] the Supreme Court Chamber notes that the purpose of the Practice Direction is to facilitate the proper

[472] *Kanyarukiga* Appeal Judgement (ICTR), paras 52-53; the Trial Chamber referred to this judgement at Trial Judgement, para. 65, fn. 161.
[473] *Bemba* Appeal Judgement Against Decision of Trial Chamber III (ICC), paras 36-37.
[474] KHIEU Samphân's Appeal Brief, paras 31-32.
[475] KHIEU Samphân's Appeal Brief, para. 35.
[476] KHIEU Samphân's Appeal Brief, para. 35, fn. 84.

conduct of the proceedings. Article 8.4, however, must be read in light of Article 8.1 of the Practice Direction, which recognises the right of the Chambers to make orders diverging from the rules stipulated in the Practice Direction. KHIEU Samphân has not substantiated why the approach adopted by the Trial Chamber early in the proceedings, which appears to have responded to the exigencies of the case,[477] was unreasonable.

196. Regarding the argument that the Trial Chamber erred when finding that requests seeking the reconsideration of previous decisions were inadmissible before the ECCC,[478] KHIEU Samphân fails to substantiate his submission and merely refers to a decision of the Pre-Trial Chamber on reconsideration, which, on its face, does not even appear to be in conflict with the Trial Chamber's approach, according to which it would reconsider its prior decisions only when there has been a change in circumstances.[479] Regarding KHIEU Samphân's argument that the Trial Chamber erred when relying on a document – a telegram of the Australian Embassy regarding KHIEU Samphân's visit to Laos – which it had previously decided not to admit into evidence,[480] the Supreme Court Chamber notes that the Trial Chamber explained that it had decided to admit the document into evidence because it contained, in part, exculpatory information.[481] While KHIEU Samphân submits that the Trial Chamber nevertheless used this document against him,[482] he only refers to paragraphs 138 and 142 of the Trial Judgement, which, however, do not refer to that document. Thus, he has failed to substantiate any prejudice.

197. Furthermore, KHIEU Samphân submits that the Trial Chamber violated his right to remain silent. He complains, first, that the Trial Chamber misstated in the Trial Judgement the procedural history as to his exercise of his right to remain silent.[483] Specifically, he complains that the Trial Chamber frequently asked him to comment on matters, despite his clear indication that he wished to exercise his right to

[477] *See* Directive on Single-Language Filings (E64); Memorandum on Replies (E126).
[478] KHIEU Samphân's Appeal Brief, para. 37.
[479] KHIEU Samphân's Appeal Brief, para. 37, referring to Decision on Reconsideration (C22/I/8) and Trial Judgement, paras 42-44 and 136, fn. 391. It appears from these paragraphs that the Trial Chamber's approach was generally to contemplate reconsideration only if there had been a change in circumstances, but that it had discretion to do so without a change as well.
[480] KHIEU Samphân's Appeal Brief, para. 37.
[481] Trial Judgement, para. 136, fn. 391.
[482] KHIEU Samphân's Appeal Brief, para. 37, fn. 92.
[483] KHIEU Samphân's Appeal Brief, para. 39.

remain silent.[484] KHIEU Samphân refers, by way of example, to transcripts of hearings in the course of which the Trial Chamber invited him to comment on documents or respond to questions posed by the Civil Parties.[485] He fails, however, to explain why this amounted to an error and how was prejudiced. The Supreme Court Chamber notes that there is no indication that the Trial Chamber exercised pressure on KHIEU Samphân, who was legally represented throughout the proceedings, to renounce his right to silence; it merely invited him to comment on certain issues in the course of a lengthy trial. Accordingly, KHIEU Samphân's arguments are dismissed.

198. KHIEU Samphân also argues that the Trial Chamber abused its power by forcing him to attend the proceedings in circumstances where he had waived his right to be present.[486] In support of this argument, KHIEU Samphân lists decisions of the Trial Chamber and refers to two decisions of the ICTY. The Supreme Court understands that KHIEU Samphân interprets the right to be present at trial to mean that an accused may choose whether to attend the trial or not. This is erroneous. The right to be present at trial in the sense of Article 14(3)(d) of the ICCPR, which is mirrored in 35 new (2)(d) of the ECCC Law, means, generally speaking, that the court will not proceed in the absence of the accused;[487] it does not, however, entail, as a corollary, a right of an accused to freely absent himself from the proceedings. The Code of Criminal Procedure of Cambodia specifically provides that the accused person is obliged to be present at the trial; in addition, it provides powers for the court to compel the presence of the accused as it deems fit.[488] Accordingly, the Supreme Court Chamber dismisses KHIEU Samphân's argument.

3. Right to a reasoned decision

199. NUON Chea[489] and KHIEU Samphân[490] argue that the Trial Chamber violated their right to a reasoned decision because it provided insufficient or no reasons for important decisions taken in the course of the trial. KHIEU Samphân refers to a list of

[484] KHIEU Samphân's Appeal Brief, para. 39.
[485] KHIEU Samphân's Appeal Brief, para. 39, fn. 98.
[486] KHIEU Samphân's Appeal Brief, para. 40.
[487] Note, however, that according to Articles 361 and 362 of the Code of Criminal Procedure of Cambodia, the trial court may enter a judgement even if the accused person did not appear for the trial.
[488] *See* Code of Criminal Procedure of Cambodia, Arts 300(1), 303 *et seq*.
[489] NUON Chea's Appeal Brief, paras 110-111.
[490] KHIEU Samphân's Appeal Brief, para. 34.

60 decisions, orders and memoranda issued by the Trial Chamber and one report by the Witnesses and Experts Support Unit contained in the table of authorities to his appeal brief.[491] In the appeal brief, he states in a footnote that he is appealing all of the prejudicial decisions in the table of authorities.[492] The Supreme Court Chamber considers that this does not fulfil the requirement of substantiation[493] and will not assess his arguments any further.

200. NUON Chea argued before the Trial Chamber that it had failed to sufficiently reason decisions taken in the course of the proceedings.[494] On appeal, NUON Chea rearticulates the claim that the Trial Chamber systematically failed to reason its decisions and submits that the Trial Chamber overlooked "detailed arguments" in NUON Chea's Closing Submissions (E295/6/3) outlining the Trial Chamber's purported errors.[495] NUON Chea specifically argues that the Trial Chamber erred when it stated, in two footnotes in the Trial Judgement, that his claims were too general and insufficiently substantiated.[496] He points out that the relevant paragraphs of NUON Chea's Closing Submissions (E295/6/3) contained footnotes with references to other parts of the document where those arguments were further developed.[497] The Supreme Court Chamber is not persuaded by this argument. While it is true that said footnotes referred to other parts of NUON Chea's Closing Submissions (E295/6/3), the referenced paragraphs did not address lack of reasoning, but whether the substance of the Trial Chamber's decisions was correct. As a result, apart from very general submissions claiming a lack of reasoning, there were no arguments before the Trial Chamber substantiating this claim. Accordingly, the Chamber's dismissal of the allegation of lack of reasoning cannot be faulted; the Trial Chamber could not be expected to analyse the purported lack of reasoning of decisions taken in the course of the trial without specific indication by NUON Chea as to in what respect those decisions' reasoning was insufficient.

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[491] Table des Sources d'appel de la Défense KHIEU Samphân (F17.1) , pp. 7-11 (not available in English).
[492] KHIEU Samphân's Appeal Brief, para. 34, fn. 82.
[493] *See above*, para. 101.
[494] NUON Chea's Closing Submissions (E295/6/3), paras 89-90.
[495] NUON Chea's Appeal Brief, para. 110, fn. 257, referring to NUON Chea's Closing Submissions (E295/6/3), paras 89-90.
[496] NUON Chea's Appeal Brief, para. 110 fn. 258, referring to Trial Judgement, fns 111, 147.
NUON Chea's Appeal Brief, para. 110, referring to NUON Chea's Closing Submissions (E295/6/3), fns 208-211.

201. NUON Chea also submits that the Trial Judgement itself was insufficiently reasoned. In his appeal brief, he refers the Supreme Court Chamber to several "detailed Defence submissions on questions key to criminal liability", which he asserts the Trial Chamber failed to address.[498]

202. The Supreme Court Chamber considers that it is an important element of a fair trial that the Trial Chamber's decisions, including its judgement pursuant to Internal Rule 98, are sufficiently reasoned. This is reflected in the Court's legal texts: Internal Rule 101(1) specifically provides that the judgement must set out, *inter alia*, "the factual and legal reasons supporting the Chamber's decision". Internal Rule 101(4) provides that "[t]he findings in the judgment shall respond to the written submissions filed by all of the parties".

203. The requirement that decisions must be sufficiently reasoned decisions is supported by international jurisprudence. The ECtHR, in *Hadjianastassiou v. Greece*, held that courts must "indicate with sufficient clarity the grounds on which they based their decision" to uphold the right to a fair trial guaranteed under Article 6 of the ECHR, "which makes it possible for the accused to exercise usefully the rights of appeal available to him".[499] In a subsequent decision, the Grand Chamber of the ECtHR explained that, while "courts are not obliged to give a detailed answer to every argument raised […] it must be clear from the decision that the essential issues of the case have been addressed".[500]

204. The Appeals Chamber of the ICC has held, in the context of decisions authorising the non-disclosure of information to the defence and with reference to the above-cited ECtHR cases, that:

> Decisions of a Pre-Trial Chamber authorising the non-disclosure to the defence of the identity of a witness of the Prosecutor must be supported by sufficient reasoning. The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the

[498] NUON Chea's Appeal Brief, para. 111.
[499] *Hadjianastassiou v. Greece* Judgement (ECtHR), para. 33.
[500] *Taxquet v. Belgium* Grand Chamber Judgement (ECtHR), para. 91. *See also* *Affaire Boldea c. Roumanie* Jugement (ECtHR) (Fr), para. 30 (not available in English).

> Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.[501]

205. Similarly, the Appeals Chamber of the ICTY has held that the right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision is proper appellate review possible.[502] The ICTY Appeals Chamber has also held that, "at a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision".[503]

206. More specifically, regarding the need to provide reasons in respect of the evaluation of evidence, the ICTY Appeals Chamber explained that:

> [I]t is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion.[504]

207. It follows from the above that the reasoning required to ensure fairness of the proceedings will always depend on the specific circumstances of the case. This does not mean that a chamber has to mechanically work through each and every argument that a party has raised in the course of the trial, or that failure to do so automatically leads to a finding that the right to a reasoned decision has been violated.[505] Of most importance is that it is comprehensible how the chamber evaluated the evidence and reached its factual and legal conclusions.

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[501] *Lubanga* Judgement on Appeal Against Decision of Pre-Trial Chamber I (ICC), para. 20.
[502] *Nikolić* Appeal Judgement (ICTY), para. 96 ("[o]nly a reasoned opinion, one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute, allows the Appeals Chamber to carry out its function pursuant to Article 25 of the Statute by understanding and reviewing findings of a Trial Chamber"). *See also* *Furundžija* Appeal Judgement (ICTY), paras 68-69 (where the ICTY Appeals Chamber held that Article 23 of the Statute gives the right of an accused to a reasoned opinion as one of the elements of the fair trial requirement "embodied in Articles 20 and 21 of the Statute"); *Kunarac* Appeal Judgement (ICTY), para. 41 ("[p]ursuant to Article 23(2) of the Statute, the Trial Chamber has an obligation to set out a reasoned opinion […]. This element, *inter alia*, enables a useful exercise of the right of appeal available to the person convicted. Additionally, only a reasoned opinion allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of evidence") (footnotes omitted).
[503] *Milutinović* Decision on Interlocutory Appeal (ICTY), para. 11.
[504] *Kupreškić* Appeal Judgement (ICTY), para. 32. The Supreme Court Chamber cited this passage of the judgement with approval in the *Duch* Appeal Judgement (001-F28), para. 17.
[505] *See* *Van de Hurk v. The Netherlands* Judgement (ECtHR), para. 61 ("Article 6 para. 1 [of the European Convention on Human Rights] obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument"). *See also* *García Ruiz v. Spain* Grand Chamber Judgement (ECtHR), para. 26; *Helle v. Finland* Judgement (ECtHR), para. 55.

208. It must also be noted that the jurisprudence of the ECtHR cited above assessed the sufficiency of the judicial reasoning at a point in time when the criminal proceedings in question had already been concluded. The ECtHR generally makes findings as to the fairness of a trial based on the totality of the proceedings. In contrast, the present proceedings are still ongoing and it may therefore be possible to remedy any shortcomings in the Trial Chamber's reasoning, thereby avoiding any violations of the right to a fair trial. In this regard, the Supreme Court Chamber recalls, in particular, that the reasoning provided by the Trial Chamber is the starting point for the analysis as to whether a factual finding of the Trial Chamber was reasonable.[506] Thus, rather than leading to the conclusion that the whole trial was unfair, insufficient reasoning in relation to factual findings could lead the Supreme Court Chamber to conclude that the factual finding concerned was not reasonably reached and was therefore erroneous.

209. As a specific complaint, NUON Chea submits that the Trial Chamber failed to address his arguments regarding: Stephen HEDER's testimony as to the targeting of Khmer Republic Soldiers in Kampong Cham in 1973, Philip SHORT's testimony as to the killing of Khmer Republic soldiers in Oudong in 1974, the statements of PHY Phuon, HENG Samrin and OUK Bunchhoen as to the existence of a policy to execute Khmer Republic soldiers, the testimony of CHHOUK Rin regarding hatred of "civilian city dwellers", the power of zone leaders within the CPK; the command structure within Phnom Penh after its fall; and the "distinction between class theory outlined in CPK publications and the intent to commit criminal acts".[507] The Supreme Court Chamber notes that, while it is true that the Trial Judgement did not specifically address these arguments, the Trial Chamber explained its approach in relation to each of its respective findings, indicating the evidence on which they were based.[508]

[506] *See above*, para. 90.
[507] NUON Chea's Appeal Brief, para. 111.
[508] Regarding the targeting of Khmer Republic soldiers in Kampong Cham in 1974, *see* Trial Judgement, para. 830, fn. 2620. Regarding the killing of Khmer Republic soldiers in Oudong, *see* Trial Judgement, paras 124-127, 830. Regarding the existence of a policy to execute Khmer Republic soldiers, *see* Trial Judgement, paras 120-127, 830-834. Regarding CHHOUK Rin's testimony on "New People", *see* Trial Judgement, para. 787. Regarding the structure of the CPK and the power of zone leaders, *see* Trial Judgement, paras 199-228. Regarding the command structure in Phnom Penh after its fall, *see* Trial Judgement, para. 240. The "distinction between class theory outlined in CPK publications and the intent to commit criminal acts", *see* NUON Chea's Appeal Brief, para. 111, is not as such discussed in the Trial Judgement, nevertheless the Trial Chamber considered and evaluated the CPK publications and set out its findings thereon frequently in the judgement.

Whether any of these findings were erroneous, as NUON Chea claims elsewhere in his appeal brief,[509] will be addressed below.

4. Right to be informed of the charges/scope of the trial

210. NUON Chea and KHIEU Samphân raise several arguments relating to the right to be informed of the charges against them, the ECCC's temporal jurisdiction; and the scope of the trial in Case 002/01. The Supreme Court Chamber shall address the arguments which are of a more general nature in the present section, while it will address arguments relating to specific crimes or modes of liability in the respective sections elsewhere in this Judgement.[510]

a) Temporal jurisdiction

211. With reference in particular to the *Nahimana* Appeal Judgement (ICTR),[511] NUON Chea and KHIEU Samphân submit that the Trial Chamber overstepped its temporal jurisdiction because it relied, particularly in respect of the Accused's individual criminal responsibility, on facts and conduct that had occurred before 17 April 1975.[512]

212. The Co-Prosecutors respond that the provisions regarding the ECCC's temporal jurisdiction limit the ECCC precisely to the period during which the Khmer Rouge ruled. For this reason, these provisions cannot be interpreted in the same way as the ICTR's provisions on temporal jurisdiction, which included a period before the commencement of the actual genocide, so as to cover the planning and preparation of the crimes.[513]

213. The Supreme Court Chamber notes that the ECCC Law gives the ECCC jurisdiction to try crimes "that were committed during the period from 17 April 1975 to 6 January 1979".[514] It is clear from this provision that, where the *actus reus* of a

[509] *See* NUON Chea's Appeal Brief, paras 548 (regarding Stephen Heder's testimony in relation to events in Kampong Cham), 530-533 (regarding Philip SHORT's testimony in relation to events in Oudong), 376 (regarding CHHOUK Rin's testimony on city dwellers), 569-571 (regarding HENG Samrin's and OUK Bunchhoen's evidence).
[510] *See below*, paras 636, 741, 828, 999, 1028.
[511] *Nahimana* Appeal Judgement (ICTR).
[512] NUON Chea's Appeal Brief, paras 627-635, 663; KHIEU Samphân's Appeal Brief, para. 9, *see also* para. 231.
[513] Co-Prosecutors' Response, paras 111-115.
[514] ECCC Law, Art. 2 new.

given crime (*e.g.* an act of killing) was committed outside this period, the ECCC lacks temporal jurisdiction. What stands to be determined, however, is whether, in situations where the accused did not carry out the *actus reus* personally, the conduct giving rise to their individual criminal liability must also have occurred during that period.

214. This is a question that needs to be considered, first, on the ground of the substantive law. In this regard, the Supreme Court Chamber recalls that the criminal responsibility of the Accused was established primarily based on their contribution to the implementation of a common criminal purpose, which spanned over a long period of time, the contributions of the Accused having occurred both prior to and following 17 April 1975.[515] The Trial Chamber, when imputing crimes on the Accused that they did not personally commit, relied *inter alia* on their activity in meetings and training sessions, speeches that they had delivered and statements that they had made before 17 April 1975.[516]

215. In the view of the Supreme Court Chamber, where crimes are committed by persons acting jointly with a common criminal purpose, the acts of those who devise the common criminal purpose and who contribute in a relevant manner to its implementation form a cluster of interrelated transactions with the acts of those who personally carry out the *actus rei*, so that they all are to be considered co-perpetrators, the central element being the agreement to further the common purpose. The temporal extent of this cluster of transactions starts with the initial contribution to the common purpose as an expression of the shared criminal intent and ends with either the cessation of any further criminal activity by the enterprise or, as far as individuals contributing to the implementation are concerned, withdrawal from the enterprise, the

[515] *See below*, para. 988 *et seq*.
[516] *See*, *e.g.*, Trial Judgement, paras 865, 870, 875: (in determining that NUON Chea contributed to the implementation of a common criminal purpose, the Trial Chamber relied *inter alia* on his participation in the decision to evacuate Phnom Penh at meetings that took place in June 1974 and early April 1975, "focussed actively on propaganda and training Khmer Rouge cadres", including "in the years preceding the evacuation of Phnom Penh"); *see also* paras 966, 973 (referring to para. 367), 981, 982, 989: (in respect of KHIEU Samphân's contribution to the implementation of a common criminal purpose, the Trial Chamber relied *inter alia* on his participation in meetings in June 1974 and early April 1975 at which the evacuation of Phnom Penh had been discussed and decided, his participation in instructional and indoctrination meetings and broadcasts before 1975, his participation in instructional and propaganda meetings in the early 1970s, public statements in June 1973, December 1974, and March and early April 1975, and his participation in diplomatic missions and in receiving foreign dignitaries in 1973 and 1974).

latter requiring cessation of any further contribution as well as abandonment of the shared criminal intent. From the perspective of the substantive law, therefore, it would be unnatural to break up such a protracted and complex transaction as it is only intelligible if all of its components are considered together. This approach remains valid notwithstanding any truncation in pronouncing on the responsibility for the crime as may be necessitated by limits on exercising jurisdiction, such as statute of limitation, age of the perpetrator, temporal limitations etc.

216. This understanding, while not borne out by jurisprudence on international level, where the question apparently has never arisen, finds support in domestic jurisdictions that employ modes of responsibility for participation in multi-actor criminal activity similar to joint criminal enterprise. Most directly on point, according to the jurisprudence of England and Wales, a member of a joint enterprise will be held responsible for all acts of the other members unless he or she communicates the intention to withdraw to those other parties to the joint enterprise who intend to carry on, and this in a timely and unequivocal manner.[517] This jurisprudence focuses on continuing participation in the joint enterprise at the time of the commission of the *actus rei* rather than on the individual contribution to it. The centrality of the element of continuing agreement on the joint criminal enterprise bears similarity to the crime of conspiracy; therefore jurisprudence on the temporal extent of conspiracy is also instructive. Although in England and Wales the crime of conspiracy is considered to be completed as soon as the agreement between the conspirators has been made, it continues as long as its design is being carried out.[518] In American criminal law, in respect of conspiracy, which is considered to be a continuing crime, statutes of limitation will start tolling only once the criminal agreement has been completed, abandoned or after the last overt act in furtherance of the agreement has been carried

[517] *R. v. Becerra* (Court of Appeals, United Kingdom). *See also R. v. O'Flaherty* (Court of Appeals, United Kingdom) at para. 64, citing *R. v. Mitchell and King* (Court of Appeal Criminal Division, Scotland) ("the jury […] must be satisfied (a) that the fatal injuries were sustained when the joint enterprise was continuing and that the defendant was still acting within that joint enterprise, and (b) that the acts which caused the death were within the scope of the joint enterprise").

[518] *DPP v. Doot* (House of Lords, United Kingdom) ("although a conspiracy was complete as a crime when the agreement was made it continued in existence so long as there were two or more parties to it intending to carry out its design"). *See also R. v. Governor of Brixton Prison* (House of Lords, United Kingdom); *R. v. Anderson (William Ronald)* ("[t]he Act [Criminal Law Act of 1977, as amended] does not provide that the course of conduct intended should be pursued by all parties as far as the commission of the offence, but only to the extent that the offence should be committed by at least one of the persons with whom the offender agrees").

out, irrespective of when the participant invoking the statute of limitations last contributed to it.[519]

217. With this understanding of the substantive law in mind, given that the contributions of the Accused occurred before 17 April 1975 were part of a cluster of transactions of a joint criminal enterprise that continued over a period of time and brought to fruition the relevant *actus rei* committed within the jurisdictional period of the ECCC, the crime in question "was committed" within the temporal jurisdiction of the ECCC, as required by Article 2 new of the ECCC Law[520] and the Accused remains responsible for them unless by 17 April 1975 he would have quit the joint criminal enterprise.

218. The holding of the ICTR Appeals Chamber in the *Nahimana* Case, to which the Accused refer, is of limited relevance to the interpretation of Article 2 new of the ECCC Law. In Nahimana, the ICTR Appeals Chamber found that Article 1 of the ICTR Statute, which gave it jurisdiction over crimes committed "between 1 January 1994 and 31 December 1994", must be interpreted such that:

> 1 - The crime with which the accused is charged was committed in 1994;
>
> 2 - The acts or omissions of the accused establishing his responsibility under any of the modes of responsibility referred to in Article 6(1) and (3) of the Statute occurred in 1994, and at the time of such acts or omissions the accused had the requisite intent (*mens rea*) in order to be convicted pursuant to the mode of responsibility in question.[521]

219. The ICTR Appeals Chamber reached this conclusion primarily based on the presumed intent of the U.N. Security Council, which, in the course of the drafting process of the ICTR Statute, had reformulated the provision regarding the ICTR's

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[519] *See* *U.S. v. Kissel* (Supreme Court, United States); *Fiswick v. U.S.* (Supreme Court, United States); *U.S. v. Scarpa* (Court of Appeals, United States); *U.S. v. Maloney* (Court of Appeals, United States) citing *U.S. v. Elwell* (Court of Appeals, United States). *See also* *U.S. v. Seher* (Court of Appeals, United States) ("The government satisfies the requirements of the statute of limitations for a non-overt act conspiracy if it alleges and proves that the conspiracy continued into the limitations period"); *U.S. v. Rouphael* (District Court, United States) ("If the conspiracy was on-going, the 'presumption of continuity' makes Rouphael criminally responsible for the acts of his co-conspirators, even if he did not personally act on behalf of the conspiracy during the relevant statute of limitations period"); *Smith v. U.S.* (Supreme Court, United States).

[520] The Supreme Court Chamber notes that the formulation of ECCC Law, Art. 2 new, contrasts with the formulation of ICC Statute, Art. 24(1), which provides that "No person shall be criminally responsible under this Statute for *conduct* prior to the entry into force of the Statute" (emphasis added).

[521] *See* *Nahimana* Appeal Judgement (ICTR), para. 313.

temporal jurisdiction to cover the period from the beginning of April 1994 (when the actual crimes of genocide began) to 1 January 1994. According to the representatives of France and New Zealand, this had been done so as to cover acts of planning and preparation of the crimes.[522] The ICTR Appeals Chamber also noted the statement of the Rwandan representative at the Security Council, who had criticised that, with the formulation of the temporal scope that was eventually adopted, the ICTR would be unable to prosecute "those individuals who were responsible for the acts of planning committed prior to 1 January 1994".[523] Thus, the ICTR's interpretation of Article 1 of the ICTR Statute is the result of its consideration of the particular drafting history of that provision and the ICTR Appeals Chamber's resulting assumption of the Statute's drafters' intention. None of this can be transposed to the interpretation of Article 2 new of the ECCC Law.

220. The Supreme Court Chamber notes that the ICTR Appeals Chamber found that the "existence of continuing conduct is no exception" to the rule that the ICTR could only take into account conduct that occurred within its temporal jurisdiction and that "even where such conduct commenced before 1994 and continued during that year, a conviction may be based only on that part of such conduct having occurred in 1994".[524] This finding, from which Judge Fausto Pocar dissented,[525] was cursory[526] and had, in fact, no relevance to the disposition of the case before the ICTR: as far as incitement to genocide was concerned – a crime irrelevant to the charges in Case 002/01 – the ICTR Appeals Chamber considered that the crime was completed as soon as the inciting language has been uttered, suggesting that it did not continue beyond that point, and that the ICTR therefore lacked jurisdiction over acts of incitement that had occurred before 1 January 1994.[527] As to the charge of conspiracy to commit genocide, the ICTR Appeals Chamber declined to discuss whether this was a continuing crime, given that it found that, in any event, the charge had not been

[522] *See* *Nahimana* Appeal Judgement (ICTR), para. 311.
[523] *See* *Nahimana* Appeal Judgement (ICTR), para. 311.
[524] *Nahimana* Appeal Judgement (ICTR), para. 317.
[525] *Nahimana* Appeal Judgement (ICTR), p. 349, para. 2.
[526] In support of this conclusion, the ICTR Appeals Chamber referred to the separate opinion of Judges Lal Chand Vohrah and Rafael Nieto-Navia in an earlier interlocutory appeal (*see* *Nahimana* Appeal Judgement (ICTR), para. 317, fn. 760, referring to *Nahimana* Decision on Interlocutary Appeal (ICTR)). It must be noted, however, that the separate opinion's finding regarding continuing crimes was based exclusively on the drafting history of the ICTR Statute and the presumed intent of the Security Council (*see* paras 11-18).
[527] *Nahimana* Appeal Judgement (ICTR), para. 723.

established beyond reasonable doubt.[528] The ICTR Appeals Chamber did not discuss a constellation comparable to the one in the present case, namely where accused are held responsible based on their contributions – stretching over a long period of time – to the implementation of a common purpose, without, however, themselves fulfilling the *actus rei* of the crimes charged.

221. In sum, the Supreme Court Chamber considers that in accordance with Article 2 new of the ECCC Law the *actus rei* of the crimes that form the subject of the charges must fall within the period from 17 April 1975 to 6 January 1977, while the conduct giving rise to individual criminal liability based on participation in a joint criminal enterprise may have occurred before, provided it formed part of extended contributions to the implementation of a common purpose which continued after 16 April 1975. Turning to the case at hand, it must be noted that this is not a case where there was a single act (such as planning or incitement), completed outside the temporal scope of the ECCC's jurisdiction, which eventually led to a criminal result within the temporal jurisdiction. Rather, the conduct in question was part of extended contributions to the implementation of a common purpose, which continued in the period after 16 April 1975. Specifically, the Accused took part in inspection of Phnom Penh after the expulsion of the inhabitants and continued to contribute to the implementation of the common purpose. As such, there is no indication that the Accused had distanced themselves from the common purpose prior to 17 April 1975, or, for that matter, any later time. Accordingly, the Supreme Court Chamber rejects KHIEU Samphân's arguments as regards the ECCC's temporal jurisdiction.

b) Findings on facts not covered by charges in Case 002/01

222. NUON Chea submits that the Trial Chamber "made numerous findings concerning facts and policies outside the scope of Case 002/01",[529] which, while not invalidating the Trial Judgement or causing a miscarriage of justice, "are subject to appellate review on the basis of [the Supreme Court Chamber's] *de novo* appellate jurisdiction".[530] His arguments concern (i) the Trial Chamber's finding regarding the

[528] *Nahimana* Appeal Judgement (ICTR), paras 318, 912.
[529] NUON Chea's Appeal Brief, para. 212; *see also* paras 627-638.
[530] NUON Chea's Appeal Brief, para. 212.

"regulation of marriage" as a CPK policy;[531] (ii) its summary of the evidence and of the Co-Prosecutors' arguments in relation to NUON Chea's role at the S-21 Security Office;[532] and (iii) its statements regarding the total death toll during the Democratic Kampuchea period.[533] NUON Chea submits that, in making these statements and findings in the Trial Judgement, the Trial Chamber erred in law because they were based on evidence on the implementation of alleged CPK policies that were outside the scope of Case 002/01.[534] NUON Chea also challenges the Trial Chamber's findings as to the existence of a policy of smashing enemies, submitting that the Trial Chamber's findings in this regard were outside the scope of Case 002/01 and, in any event, wrong in fact.[535]

223. KHIEU Samphân argues that the Trial Chamber made several findings on matters that were not part of Case 002/01, as severed, referring in particular to the issues of collectivisation, cooperatives, forced labour etc.[536] KHIEU Samphân argues further that the "uncertainty created with regard to the charges excluded from Case 002/01" and the ambiguity of the meaning of Case 002/01 as a "general foundation" for Case 002/02 has caused him prejudice.[537] KHIEU Samphân also challenges the Trial Chamber's "incorporation" of the targeting policy into the policy to "smash enemies", though he states that he was not prejudiced by this.[538]

224. The Co-Prosecutors submit that NUON Chea's arguments should be summarily dismissed as he acknowledges that the alleged errors, even if they were to be established, would not invalidate the Trial Judgement or cause a miscarriage of justice. Moreover, the Co-Prosecutors contend that the Trial Chamber correctly assessed NUON Chea's role at the S-21 Security Office, not by determining his responsibility for crimes that had occurred there, but as part of considering his role in the DK regime and participation in a JCE.[539] They also argue that the Trial Chamber did not establish the existence of a forced marriage policy but one of a regulation of

[531] NUON Chea's Appeal Brief, paras 216-219 referring to Trial Judgement, paras 128-130.
[532] NUON Chea's Appeal Brief, paras 220-221 referring to Trial Judgement, paras 342-346.
[533] NUON Chea's Appeal Brief, paras 222-224 referring to Trial Judgement, para. 174.
[534] NUON Chea's Appeal Brief, paras 213-215; *see also* para. 249.
[535] NUON Chea's Appeal Brief, paras 268-280.
[536] KHIEU Samphân's Appeal Brief, para. 12, *see also* paras 47, 197, 581, 582.
[537] KHIEU Samphân's Appeal Brief, paras 13-15.
[538] KHIEU Samphân's Appeal Brief, para. 643.
[539] Co-Prosecutors' Response, para. 117.

marriage, which it examined for background purposes only.[540] Further, they submit that the Trial Chamber did not make a finding about the amount of deaths during the DK era.[541] Turning to KHIEU Samphân's arguments relating to the severance of the case, the Co-Prosecutors respond that they fail to satisfy the applicable standard of review.[542] The Co-Prosecutors submit that KHIEU Samphân erroneously assumes that the Trial Chamber lacked the competency "to examine policy evidence apart from material concerned with the forced movement charges at issue in Case 002/01".[543] To the contrary, the Co-Prosecutors maintain that the Trial Chamber always made clear that all five policies were at issue in Case 002/01, even though only two of them served as the bases for the charges in Case 002/01.[544]

225. The Supreme Court Chamber recalls that the scope of the trial against NUON Chea and KHIEU Samphân had initially been much broader. It was only in the course of the trial proceedings that the Trial Chamber severed the case and eventually limited the charges in Case 002/01 to "the portions of the Closing Order [(D427)] pertaining to forced movement phases one and two, executions committed at Tuol Po Chrey in the aftermath of the evacuation of Phnom Penh and associated crimes against humanity".[545] The Trial Chamber noted that "proceedings in Case 002/02 are a continuation of those in Case 002/01. […] the evidence already put before the Chamber in Case 002/01 shall serve as a foundation for Case 002/02".[546] In relation to the alleged policies of the CPK, the Trial Chamber explained early in the proceedings that:

> What is therefore envisaged is presentation in general terms of the five policies, although the material issue for examination in the first trial is limited to the forced movement of the population (phases one and two). It follows that there will be no examination of the implementation of policies other than those pertaining to the forced movement of the population (phases one and two).[547]

[540] Co-Prosecutors' Response, para. 119.
[541] Co-Prosecutors' Response, para. 120.
[542] Co-Prosecutors' Response, para. 121.
[543] Co-Prosecutors' Response, para. 124.
[544] Co-Prosecutors' Response, para. 124.
[545] Second Severance Decision (E284), p. 70.
[546] Clarification Memorandum (E302/5), para. 7.
[547] Memorandum on Scheduling Informal Meeting (E141), p. 2. Note that at the time of that memorandum, the events at Tuol Po Chrey had not yet been included in the scope of Case 002/01.

226. The Trial Chamber recalled that it had informed the Parties from the outset "that they could lead evidence in relation to all five policies as background, but that the Chamber would examine the implementation of only those policies relevant to Case 002/01 (*i.e.* forced movement and execution of purported enemies of the regime)"; it also stated that "[t]he existence of other policies is examined for background purposes only".[548]

227. Noting the ambiguity arising from distinguishing "background" from "implementation" and its possible consequences for determining the object of proof, the Supreme Court Chamber considers that the Trial Chamber was, in any event, prohibited from attributing criminal responsibility for crimes that fell outside the scope of the charges in Case 002/01. It lay, nevertheless, within the Trial Chamber's discretion to determine which facts were relevant for determining the charges at hand, even if they pertained to the factual foundation of other charges.[549] In this regard, the Supreme Court Chamber notes that the five CPK policies that were identified in the Closing Order (D427)[550] are not clearly distinguishable and mutually exclusive; rather, they are means to structure the analysis of the implementation of the socialist revolution in Cambodia. Among other, there appears to be a significant interconnection between the so-called population movement policy and the policy to establish worksites, in that, according to the Closing Order (D427), one of the objectives of moving the population was "to fulfil the labour requirements of the cooperatives and worksites".[551] Similarly, there appears to be an overlap between the so-called policy of re-educating and killing enemies and the policy of targeting Khmer Republic soldiers and officials. For instance, while the Closing Order (D427) included charges relating to crimes at security centres under the head of the policy of killing enemies,[552] while the killing of Khmer Republic soldiers and officials is linked to the

[548] Trial Judgement, para. 103, fn. 287.
[549] The Supreme Court Chamber notes that some of the purported 'findings' of the Trial Chamber referred to by NUON Chea actually do not amount to findings in any event. It is evident that the Trial Chamber did not actually make any conclusions as to the total death toll in the period of Democratic Kampuchea but merely summarised, in a section entitled "General Overview: 17 April 1975 – 6 January 1979", the views of various experts in relation to the total death toll (Trial Judgement, para. 174). Similarly, the Trial Chamber summarised the evidence that was given in respect of NUON Chea's alleged role in the S-21 Security Office (Trial Judgement, paras 342-345), and expressly stated that it would "make no finding in this regard in this Judgement" (Trial Judgement, para. 346).
[550] *See* Closing Order (D427), para. 157.
[551] Closing Order (D427), para. 161.
[552] Closing Order (D427), para. 178.

targeting policy,[553] it also alleges that former Khmer Republic soldiers and cadres were victims of crimes at the S-21 Security Office, the Sang Security Centre, the Kraing Ta Chan Security Centre, Koh Kyang Security Centre, etc.[554] While the overlap of policies may have posed a challenge in identifying *a priori* the evidence relevant to the charges, the question material for the appellate review is about the sufficiency of notice related to the charges of "forced movement phases one and two, executions committed at Tuol Po Chrey in the aftermath of the evacuation of Phnom Penh and associated crimes against humanity"[555] and, eventually, the sufficiency of factual findings underpinning the conviction, and not about subordinating the evidentiary basis of the case to certain policies. With regard to NUON Chea's argument that the Trial Chamber erred in making a finding as to the existence of a CPK policy of "smashing enemies" and its implementation, which had impact on its conclusions regarding the crimes at Tuol Po Chrey and on the policy of targeting Khmer Republic soldiers and officials,[556] the Supreme Court Chamber recalls that the Trial Chamber noted that, although the Closing Order (D427) had linked the facts at Tuol Po Chrey to the policy to kill enemies, it was not bound by this and would consider the events at Tuol Po Chrey as being based on the targeting policy instead.[557] The Supreme Court Chamber notes that in the part of the Closing Order (D427) discussing the policy of targeting Khmer Republic soldiers and officials (as well as of other targeted groups, namely the Cham, the Vietnamese, and Buddhist groups), the Co-Investigating Judges referred to the interview records of three witnesses who had testified in respect of the events at Tuol Po Chrey, even though elsewhere in the Closing Order (D427) the events at Tuol Po Chrey are listed under the heading "Security Centres and Execution Sites", while the section containing factual findings regarding the "Treatment of Specific Groups" does not refer to Khmer Republic soldiers and officials, but only to the treatment of the Buddhists, the Cham, the Vietnamese as well as to the regulation of marriage.[558] This demonstrates once again

[553] Closing Order (D427), para. 209.
[554] Closing Order (D427), paras 432, 479, 498, 524.
[555] Second Severance Decision (E284), p. 70.
[556] NUON Chea's Appeal Brief, paras 268-269, 278.
[557] Trial Judgement, para. 813.
[558] Closing Order (D427), para. 209, fn. 713 (referring to the interview records of SUM Alat, CHHONG Lat and LIM Sat); para. 698 *et seq*. (on Tuol Po Chrey), which is found in section VIII.C. The treatment of specific groups is discussed in a different section, at para. 740 *et seq*. *See also* Trial Judgement, para. 813, where the Trial Chamber explains why it considered the events at Tuol Po Chrey

the overlap between, *inter alia*, the policy of killing enemies and the targeting policy. For the same reason, the Supreme Court Chamber is not persuaded by KHIEU Samphân's argument that the Trial Chamber created impermissible procedural uncertainty when it stated, shortly before the Parties' closing briefs were to be filed, that the scope of the trial included as one of the policies the "execution of purported enemies of the regime".[559]

228. As to the potential complications caused by an overlap of factual findings in the situation where the same Accused are being tried once again by the same trial panel for crimes stemming from a common factual background, and as to the inappropriateness of treating findings from one case as the "foundation" for another, the Supreme Court Chamber has repeatedly flagged the issue and recalls its findings in the appeal decisions concerning the severance.[560] This issue, however, has no impact on the present case. Therefore, the Supreme Court Chamber sees no need to assess the matter any further.

229. Turning to NUON Chea's claim that the Supreme Court Chamber ought to review findings related to "policies" and events outside the charges in Case 002/01, the Supreme Court Chamber will do so insofar as they were relevant for their convictions for crimes committed during Population Movement Phases One and Two and at Tuol Po Chrey.[561] Beyond this, any findings by the Trial Chamber would only have the value of *dicta*, which, as such, are not subject to appellate review.

c) Scope of Population Movement Phase Two

230. NUON Chea and KHIEU Samphân raise several arguments regarding the scope of the charges in relation to Population Movement Phase Two.

231. NUON Chea submits that, in relation to the crimes against humanity of persecution and other inhumane acts through enforced disappearances committed in the course of Population Movement Phase Two, the Trial Chamber relied mostly on

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under the targeting policy.
[559] KHIEU Samphân's Appeal Brief, para. 14, referring to Memorandum on Clarifications on JCE (E284/6), which refers to Second Severance Decision (E284), para. 118.
[560] Decision on Appeal Against First Severance (E163/5/1/13), para. 47; Decision on Appeal Against Second Severance (E284/4/8), para. 28 *et seq*.; Appeal Decision on Severance Decision in Case 002/02 (E301/9/1/1/3), paras 45, 71 *et seq*.
[561] Second Severance Decision (E284), p. 70.

incidents that were, in fact, not part of that population movement and therefore outside the scope of Case 002/01.[562] In support of this contention, he argues that Population Movement Phase Two encompassed only population transfers for the purpose of "redistribution of labour" and the implementation of the "CPK's agricultural plans".[563] NUON Chea submits that "the mere fact that a person was transferred from one location to another location sometime between late 1975 and the end of 1977 is insufficient to bring that event within the scope of the Phase II movement".[564] He argues that findings as to arrests and executions of "New People" and Khmer Republic soldiers were likewise outside the scope of Case 002/01.[565] NUON Chea submits further that, to the extent that the Trial Chamber made findings regarding events at Ta Ney, Sgnok Mountain and Thkaol Security Centre, these events had not been mentioned in the Closing Order (D427) and he therefore had not been sufficiently put on notice of these allegations.[566]

232. KHIEU Samphân argues that the Trial Chamber erred when it considered that Population Movement Phase Two extended to December 1977, relying on facts not even mentioned in the Closing Order (D427), even though during the course of the proceedings before the Trial Chamber, it had been made clear that Population Movement Phase Two had ended in late 1976.[567] KHIEU Samphân notes that the Trial Chamber found that, upon arrival in cooperatives, those deemed less reliable had been assigned other tasks than other transferees, and also referred to the division of people at cooperatives.[568] He argues that, in relying on these findings for the crime of persecution, the Trial Chamber went beyond the scope of Case 002/01, as the treatment of people at cooperatives was not part of it.[569] Similarly, he argues that the Trial Chamber went beyond the scope of Case 002/01 when it found that people were shot "both during the movement or on arrival at their destination".[570] KHIEU Samphân argues further that, in relation to removal of people from the Vietnamese border for the purpose of their re-education, the Trial Chamber relied solely on

[562] NUON Chea's Appeal Brief, paras 395-398, 442-443.
[563] NUON Chea's Appeal Brief, para. 395.
[564] NUON Chea's Appeal Brief, para. 395; *see also* para. 397.
[565] NUON Chea's Appeal Brief, para. 395.
[566] NUON Chea's Appeal Brief, para. 395.
[567] KHIEU Samphân's Appeal Brief, paras 11, 637; *see also* para. 503.
[568] KHIEU Samphân's Appeal Brief, paras 484, 485, referring to Trial Judgement, paras 621, 622.
[569] KHIEU Samphân's Appeal Brief, paras 484, 485.
[570] KHIEU Samphân's Appeal Brief, para. 457, referring to Trial Judgement, para. 803.

evidence relating to events in 1978, which was outside the temporal scope of Case 002/01.[571]

233. The Co-Prosecutors dispute the Accused's arguments and submit that the Trial Chamber correctly defined the scope of Population Movement Phase Two.[572]

234. The Supreme Court Chamber notes that the Accused's arguments raise three broad issues: (1) whether Population Movement Phase Two, as alleged in the Closing Order (D427), was limited to transfers for economic reasons; (2) whether the Trial Chamber erred by taking into account facts that occurred not during the Population Movement Phase Two, but upon the transferees' arrival at their destinations; and (3) whether the temporal scope of Population Movement Phase Two was limited to transfers occurring up to the end of 1976.

235. In relation to the first issue, the Trial Chamber, based on a "complete reading of the Closing Order", found that, according to the charges against the Accused, the "alleged harsher treatment of "New People", characterised as re-education, was effected in particular through acts of forced transfer, enforced disappearances".[573] Thus, in the Trial Chamber's understanding, the charges alleged that the transfer itself amounted to an act of persecution on political grounds. The Supreme Court Chamber notes that, indeed, the closing order did not limit Population Movement Phase Two to transfers that took place to re-distribute the workforce and reach the goals set in CPK's agricultural plans. It stated that, while "[o]ne of the objectives of the population movements was to fulfil the labour requirements of the cooperatives and worksites", a "CPK Party document dated September 1975 reflects another major objective: to deprive city dwellers and former civil servants of their economic and political status and transform them into peasants".[574] While it is true that the evidence cited in support of this allegation refers to the evacuation of Phnom Penh, the Closing Order (D427) specifically alleged that, in the course of Population Movement Phase Two, "[s]ome people disappeared".[575] It also mentioned evidence that "New People" were moved from the East when fighting with Vietnam broke out (which suggests

[571] KHIEU Samphân's Appeal Brief, para. 472.
[572] Co-Prosecutors' Response, paras 123, 221, 227.
[573] Trial Judgement, para. 652 (footnote(s) omitted).
[574] Closing Order (D427), para. 161.
[575] Closing Order (D427), para. 270.

"Old People" were allowed to stay).[576] Importantly, in the section containing the legal findings regarding Population Movement Phase Two, the Closing Order (D427) specifically alleged that "New People" were targeted for forced transfer during Population Movement Phase Two.[577] Accordingly, the Supreme Court Chamber rejects the arguments that the Trial Chamber went beyond the scope of Case 002/01 when relying on transfers that had occurred for other than economic reasons, notably for the purpose of "re-education". Whether such conduct indeed was established in the case at hand and whether it amounts to the crime against humanity of persecution on political grounds is discussed elsewhere in this judgement.[578]

236. Turning to the issue of whether acts occurring upon the transferees' arrival at their destination were part of Population Movement Phase Two, the Supreme Court Chamber considers that the actual transfer of people accords with the ordinary meaning of the population movement, as defined by the Closing Order (D427), but their treatment upon and following their arrival does not. Moreover, the pronouncements of the Trial Chamber in respect of the severance of the case indicated that acts committed at cooperatives and worksites did not form part of the charges adjudicated in Case 002/01,[579] nor did the Trial Chamber impute on the Accused any criminal *actus rei* with respect to these acts.[580] Nevertheless the severance of the case did not curtail the Trial Chamber's competence to consider events predating or postdating the charges that may be relevant to establish the facts underlying the charges; for example, evidence of the behaviour that took place immediately before or after the transfers may be taken into account to establish a pattern of conduct or a perpetrator's mental state at the time of the facts. Specifically, the findings in the Trial Judgement concerning the treatment of "New People" at their destinations provide factual context of the aftermath of the transfer, which may be relevant to, for instance, identifying their purpose. Therefore, it is irrelevant whether the Closing Order (D427) expressly referred to events at Ta Ney, Sgnok Mountain and Thkaol Security

[576] Closing Order (D427), para. 278.
[577] Closing Order (D427), para. 1468.
[578] *See below*, paras 698 *et seq*.
[579] *See* Severance Order (E124), para. 7 ("[n]o co-operatives, worksites, security centres, execution sites or facts relevant to the third phase of population movements will be examined during the first trial").
[580] *See* Trial Judgement, para. 654 (which describes the discriminatory conduct, all of which occurred during the actual movement of the population); *see also* para. 656, which emphasises the forcible transfer as being the discriminatory act.

Centre[581] – these events could not, in any event, form the basis for a conviction in Case 002/01. On the other hand, the Supreme Court Chamber does not consider that instances where people were taken to locations other than those about which they had been told and separation of families necessarily occurred after the transfer had been completed and therefore are outside the scope of Case 002/01; indeed, these allegations were specifically mentioned in the Closing Order (D427) in the context of Population Movement Phase Two.[582] Finally, as to the argument that the Trial Chamber went beyond the scope of Case 002/01 when it found that Khmer Rouge shot people upon their arrival at their destination,[583] the Supreme Court Chamber notes that KHIEU Samphân misquotes the Trial Judgement: the Trial Chamber did not find that people had been shot upon their arrival.[584] His argument is therefore dismissed.

237. As to the temporal scope of Population Movement Phase Two, as defined in the Closing Order (D427), KHIEU Samphân argues[585] that the Trial Chamber confirmed twice in the course of the proceedings that it was limited to the period until late 1976, referring to two statements by Judge CARTWRIGHT on 18 July 2012, where she indicated that the relevant period extended from 1975 to the end of 1976.[586] The Supreme Court Chamber notes that, as explained by the Trial Chamber, the Closing Order (D427) made clear that Population Movement Phase Two extended into 1977[587] and the severance decisions refer to that part of the population movement without establishing any temporal limits. Had Judge CARTWRIGHT's remarks in the course of the trial occasioned confusion on the part of KHIEU Samphân, he could have asked for clarification. KHIEU Samphân, however, did not raise the issue until his closing submissions.[588] As such, the Supreme Court Chamber does not consider that the Trial Chamber exceeded the temporal scope of the charges in respect of Population Movement Phase Two, nor is it persuaded that KHIEU Samphân was not adequately put on notice as to their scope.

[581] *See* NUON Chea's Appeal Brief, para. 395.
[582] Closing Order (D427), para. 270.
[583] KHIEU Samphân's Appeal Brief, para. 457.
[584] *See* Trial Judgement, para. 803. While the paragraph contains the phrase "during the movement or on arrival", it relates to the lack of provision of food, water and shelter.
[585] KHIEU Samphân's Appeal Brief, para. 11.
[586] *See* T. 18 July 2012, E1/91.1, pp. 20-21.
[587] Trial Judgement, para. 629.
[588] *See* KHIEU Samphân Closing Submissions (E295/6/4), para. 61 (not available in English).

238. As to the argument that, in respect of transfers away from the Vietnamese border for the purpose of re-education, the Trial Chamber relied entirely on evidence outside the temporal scope of Case 002/01,[589] the Supreme Court Chamber notes that, indeed, the evidence upon which the Trial Chamber relied to establish that "'[b]ad elements' were evacuated [instead] to the rear for re-education, grouping and screening"[590] all related to events occurring in 1978, *i.e.*, after Population Movement Phase Two, as defined in the Closing Order (D427), had ended. The Supreme Court Chamber notes that the distinction between phases in the movement of the population that had been adopted in the charges may have been helpful to structure the analysis of the period of Democratic Kampuchea; nevertheless, the severance of the case pursuant to this distinction lead to an artificial compartmentalisation of the alleged historical events. Given the resulting scope of Case 002/01, the Trial Chamber could not attribute criminal responsibility based on acts committed during population movements that had occurred after 1977. The Supreme Court Chamber notes in this regard that the Trial Chamber in fact did not do so: in the section of the Trial Judgement containing its legal conclusions regarding the crime of persecution on political grounds, there is no reference to the earlier finding that was based on facts occurring in 1978.[591]

239. In sum, the Supreme Court Chamber rejects the Accused's arguments relating to the scope of Population Movement Phase Two.

C. THE TRIAL CHAMBER'S APPROACH TO EVIDENCE

240. NUON Chea and KHIEU Samphân allege that the Trial Chamber committed several errors in its approach to the evidence, notably by: (i) limiting opportunities for investigations at trial;[592] (ii) permitting witnesses to review prior statements before testifying and to answer leading questions based on those statements;[593] (iii) unduly

[589] KHIEU Samphân's Appeal Brief, para. 472.
[590] Trial Judgement, para. 625.
[591] While the relevant para. 625 of the Trial Judgement is referenced in para. 655, fn. 2056, this is not in the context of findings relating to the re-education of "bad elements" who had been transferred away from the Vietnamese border.
[592] NUON Chea's Appeal Brief, paras 30-39, 130-131, 133-134; KHIEU Samphân's Appeal Brief, para. 25.
[593] NUON Chea's Appeal Brief, paras 135-147; KHIEU Samphân's Appeal Brief, para. 26.

restricting the scope of cross-examination;[594] (iv) admitting and relying on written statements in lieu of oral testimony;[595] (v) relying on hearsay evidence;[596] (vi) relying on civil party testimony as material evidence;[597] (vii) relying on expert testimony and secondary sources as direct evidence; [598] and (viii) incorrectly assessing fact witnesses.[599]

241. NUON Chea also alleges that the Trial Chamber erred in holding that evidence produced by torture was inadmissible under all circumstances.[600]

242. In addition, KHIEU Samphân alleges that the Trial Chamber erred in: (i) presenting witnesses with documents which were unknown to them;[601] (ii) rejecting the Defence's demands regarding the production of the original versions of documents and their chain of custody; [602] (iii) admitting documents without an adversarial debate;[603] and (iv) relying on the wrong standard of the burden of proof.[604]

243. The Co-Prosecutors respond that the Trial Chamber was reasonable in the way it approached the evidence at trial, and that NUON Chea and KHIEU Samphân fail to demonstrate any error in the exercise of its discretion.[605]

1. Limiting opportunities for investigations at trial

244. In response to NUON Chea's and KHIEU Samphân's closing submissions that the Trial Chamber could not rely on evidence resulting from a judicial investigation so impaired by procedural defects and political interference without infringing their right to a fair trial, the Trial Chamber recalled its previous ruling that "during the pre-trial stage, the Accused had made extensive use of the procedural safeguards existing in the ECCC legal framework to address alleged defects in the investigation either

[594] NUON Chea's Appeal Brief, paras 148-153; KHIEU Samphân's Appeal Brief, para. 31.
[595] NUON Chea's Appeal Brief, paras 154-165; KHIEU Samphân's Appeal Brief, paras 29, 117.
[596] NUON Chea's Appeal Brief, paras 166-171; KHIEU Samphân's Appeal Brief, para. 116.
[597] NUON Chea's Appeal Brief, paras 185-206; KHIEU Samphân's Appeal Brief, para. 30.
[598] NUON Chea's Appeal Brief, paras 207-211; KHIEU Samphân's Appeal Brief, paras 24, 118.
[599] NUON Chea's Appeal Brief, paras 172-184; KHIEU Samphân's Appeal Brief, paras 43, 114-115.
[600] NUON Chea's Appeal Brief, paras 706-722.
[601] KHIEU Samphân's Appeal Brief, para. 27.
[602] KHIEU Samphân's Appeal Brief, para. 28.
[603] KHIEU Samphân's Appeal Brief, para. 36.
[604] KHIEU Samphân's Appeal Brief, paras 108-113, 119.
[605] Co-Prosecutors' Response, paras 78-110.

before the Co-Investigating Judges or on appeal to the Pre-Trial Chamber".[606] The Trial Chamber added that, "[n]evertheless, where defects in the investigation were alleged with sufficient particularity and have clear relevance to Case 002/01, the Chamber will consider them in its final assessment of evidence".[607]

245. On appeal, NUON Chea and KHIEU Samphân reiterate their submission that the investigation in relation to Case 002 was deeply flawed and tainted with numerous irregularities, rendering it unfair and prejudicial.[608] They contend that the Defence persistently tried to highlight their concerns to the Trial Chamber with a view to remedying at the trial stage some of the prejudice caused at the investigative stage, for instance by requesting that the Trial Chamber order additional investigations, and argue that the Trial Chamber erred in refusing these requests.[609] In particular, NUON Chea recalls that the Trial Chamber confirmed that he was not entitled to conduct his own investigations,[610] while it rejected his request that the Trial Chamber undertake the investigative actions that the Co-Investigating Judges had failed to carry out on his behalf.[611] KHIEU Samphân's allegation of error is limited to arguing that additional investigations should have been ordered so as to expose the procedural defects in the judicial investigation.[612]

246. The Co-Prosecutors respond that it was within the Trial Chamber's discretion to deny the requests for further investigations, and that NUON Chea's and KHIEU Samphân's arguments fail to demonstrate any error or prejudice.[613]

247. The Supreme Court Chamber understands NUON Chea to allege two errors by the Trial Chamber: first, that the Trial Chamber erroneously confirmed that the Defence was not entitled to investigate; and, second, that the Trial Chamber erred in its disposal of his requests for further investigative action. They will be addressed in turn.

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[606] Trial Judgement, para. 42.
[607] Trial Judgement, para. 42.
[608] NUON Chea's Appeal Brief, paras 30-38, 130-131; KHIEU Samphân's Appeal Brief, para. 25.
[609] NUON Chea's Appeal Brief, paras 39, 133-134; KHIEU Samphân's Appeal Brief, para. 25.
[610] NUON Chea's Appeal Brief, para. 133, fn. 331, referring to Memorandum on Research at DC-CAM (E211/2), para. 4.
[611] NUON Chea's Appeal Brief, para. 134, referring to Decision on Fairness of Investigation (E116), paras 19-20 and NUON Chea's Request for R93 Investigations (E88).
[612] KHIEU Samphân's Appeal Brief, para. 25.
[613] Co-Prosecutors' Response, paras 78-79, 108-109.

248. The ECCC's procedural framework does not envisage full-fledged party-driven investigations such as those common to adversarial systems. Rather, in line with the procedural tradition prevalent in Cambodia, investigations at the ECCC are conducted by the Co-Investigating Judges, who have a wide array of investigative powers affirmed under Internal Rule 55, such as issuing orders necessary for the conduct of the investigation, conducting on-site visits, interviewing witnesses, conducting searches, seizing evidence and ordering expert opinions.[614] At the trial stage, additional investigations may be ordered by the Trial Chamber, which has a similarly wide array of investigative powers under Internal Rule 93.[615] These powers may also be exercised during appellate proceedings.[616]

249. The Supreme Court Chamber notes that the rules applicable to the ECCC do not envisage the delegation of these powers to any of the Parties.[617] Accordingly, to the extent that NUON Chea sought to assume the investigative powers afforded to the Trial Chamber under Internal Rule 93, the Trial Chamber did not err in dismissing his request. On the other hand, the Supreme Court Chamber sees no statutory basis or compelling practical reasons for prohibiting the Defence from undertaking actions aimed at discovering relevant evidence, as long as such conduct does not lead to witness tampering or any other distortion of evidence. In particular, the Defence should be allowed to carry out the limited actions required to satisfy the first prong of the admissibility standard for requests for investigative actions before the Co-Investigating Judges – namely, that the action requested be "identif[ied] with sufficient precision"[618] – such as identifying potential witnesses. At a minimum, flexibility should be allowed in individual instances, in consideration of the interests involved.

250. Regarding the alleged error concerning the Trial Chamber's disposal of NUON Chea's requests for investigative action, the Supreme Court Chamber recalls that between 11 March 2008 and 12 February 2010 NUON Chea had submitted 26

[614] *See also* Code of Criminal Procedure of Cambodia, Book Four: Judicial Investigations.
[615] *See also* Code of Criminal Procedure of Cambodia, Art. 339.
[616] First Interim Decision on Additional Investigation (F2/4/3), para. 19.
[617] For example, the Trial Chamber's investigative powers may only be delegated to the judicial police upon the issuance of a rogatory letter. *See* Internal Rule 93(3).
[618] Decision on Investigative Action on the Crime of Forced Pregnancy and Forced Impregnation (004-D301/5), para. 33.

requests for investigative action to the Co-Investigating Judges.[619] He contended that, "[i]n almost every case, the [Co-Investigating Judges] either rejected the particular [Request for Investigative Action] (partially or in its entirety) or failed to adequately execute the requested action", and that "[o]n appeal, the [Co-Investigating Judges'] approach was largely endorsed by the Pre-Trial Chamber".[620] In rejecting NUON Chea's request, the Trial Chamber reasoned, *inter alia*, as follows:

> The Accused has had ample opportunity, during a judicial investigation spanning almost two and one half years, to request of the [Co-Investigating Judges] all investigative actions considered by the Accused to be relevant, and to challenge any refusals of such requests by the [Co-Investigating Judges] to the Pre-Trial Chamber where considered necessary. Where rejections of specified [Request for Investigative Actions] were considered to reflect an inculpatory bias on the part of the [Co-Investigating Judges] or to be otherwise unwarranted, these and other procedural safeguards exist to protect the rights of the Accused. The Accused has not demonstrated why the Trial Chamber must now accede to any of the specified [Request for Investigative Actions] in order to ensure the fairness of the trial.[621]

251. The Supreme Court Chamber notes that Internal Rule 93 provides the Trial Chamber with broad discretion to order additional investigations "at any time", as long as it considers them to be "necessary". Parties requesting additional investigations must therefore demonstrate their necessity. In his request to the Trial Chamber, NUON Chea relied on his previous submissions to the Co-Investigating Judges,[622] specifying that, "[r]egarding the necessity (in the [Internal] Rule 93 sense) of each of the particular requested actions, the Defence hereby adopts by reference the arguments advanced in the original [Request for Investigative Actions] and subsequent appellate submissions".[623] NUON Chea also submitted that such

[619] *See* NUON Chea's Request for R93 Investigations (E88), paras 3(a)-(t), and references cited therein.
[620] NUON Chea's Request for R93 Investigations (E88), para. 4.
[621] Decision on Fairness of Investigation (E116), para. 19 (footnote(s) omitted); *see also* para. 20 ("In relation to the Accused's request for investigations in relation to events outside the indictment period, the Chamber notes that it must weigh this request against its duty to safeguard the Accused's right to an expeditious trial. The Chamber has therefore already ruled that background contextual issues and events outside the temporal jurisdiction of the ECCC will be considered by the Chamber only when demonstrably relevant to matters within the ECCC's jurisdiction and the scope of the trial as determined by the Chamber").
[622] NUON Chea's Request for R93 Investigations (E88), paras 3-5, 13, 18.
[623] NUON Chea's Request for R93 Investigations (E88), para. 18 (footnote(s) omitted).

investigative action was "necessary in order to remedy the flaws of the judicial investigation and ultimately ensure the fairness of the trial proceedings".[624]

252. Two points fall to be considered in evaluating the Trial Chamber's decision. First, the Supreme Court Chamber recalls Internal Rule 76(7), which provides that "[s]ubject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation" and adds that "[n]o issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber". In consequence, the Trial Chamber may only consider the nullity of procedural acts made "after the indictment was filed".[625] Accordingly, merely exposing procedural defects in the investigation does not establish necessity in the sense of Internal Rule 93, and this provision cannot be invoked to circumvent the finality of the Co-Investigating Judges' or Pre-Trial Chamber's decisions. It was not for the Trial Chamber, therefore, to adjudicate the allegations of error over again by acting as a court of appeal vis-à-vis decisions of the Co-Investigating Judges and the Pre-Trial Chamber.[626] Rather, the Trial Chamber was seized of the case in the evidentiary condition put before it by these judicial offices.

253. This said, the Trial Chamber has a separate obligation, independent of that of the Co-Investigating Judges and the Pre-Trial Chamber, to determine all circumstances relevant for the adjudication of the case; to begin with, proceedings before the Trial Chamber involve a higher level of proof. It was open to the Defence to request the Trial Chamber to take further investigative action to undermine findings made at the pre-trial phase. In such a situation, the investigative action is undertaken not to challenge or review the Co-Investigating Judges' or Pre-Trial Chamber's decisions, but with a view to establishing facts that may differ from the factual findings made in the pre-trial phase. The question is, nevertheless, whether NUON Chea's specific concerns regarding the evidentiary basis of the case necessitated an additional investigation. In this respect, the Trial Chamber enjoys a broad margin of appreciation and the Accused, in order to succeed with his argument on appeal, would need to demonstrate that the Trial Chamber's approach was unreasonable and caused

[624] NUON Chea's Request for R93 Investigations (E88), para. 1.
[625] Internal Rule 89(1)(c).
[626] Appeal Decision on Fairness of Investigation (E116/1/7), para. 32.

prejudice. Relevant to this issue is that the Trial Chamber indicated that other remedies would be available to correct any alleged procedural flaws or defects in the judicial investigation:

> [T]he Accused has the opportunity, amongst other things, to request that exculpatory witnesses be called before the Chamber, to adduce documentary or other evidence considered necessary to ascertain the truth, and to cross-examine witnesses and otherwise rebut the evidence and allegations against him, which constitutes a further corrective to any alleged defects in the judicial investigation to date.[627]

254. In this respect, the Supreme Court Chamber recalls its previous decision in the same tenor:

> The question that remains relevant to the Accused's rights concerns the availability of certain Defence witnesses who were not heard in the investigative stage. This question is to be determined during the ongoing trial in Case 002, in which a broad range of options is still open to address the concerns that exculpatory evidence might be improperly prevented from entering the trial. This depends, for example, on whether the Defence persists in its requests for evidence, whether such requests are admissible under [Internal] Rule 87, whether the facts for which the testimonies are proposed are disputed, whether the called witnesses appear and, if they fail to do so, whether the facts upon which they had been called to testify may be established otherwise.[628]

255. As such, regarding the Trial Chamber's decision to limit opportunities for additional investigations at trial, the Supreme Court Chamber finds that NUON Chea and KHIEU Samphân have failed to demonstrate, first, that the Trial Chamber abused its discretion, and, second, that this decision *per se* caused them prejudice. As to NUON Chea's complaint relating to the Trial Chamber's refusal to initiate an investigation into material allegedly in possession of filmmakers THET Sambath and Robert LEMKIN,[629] the Supreme Court Chamber observes that, even assuming that the decision was invalidated, *inter alia*, by the defects already highlighted by this Chamber,[630] this did not cause prejudice to the Accused, given that the Supreme Court Chamber, having conducted the requested investigation itself, found that the material sought by NUON Chea was not relevant to any elements of the crimes of which he

[627] Decision on Fairness of Investigation (E116), para. 19 (footnote(s) omitted).
[628] Appeal Decision on Fairness of Investigation (E116/1/7), para. 32 (footnote(s) omitted).
[629] NUON Chea's Appeal Brief, paras 83, 572.
[630] First Interim Decision on Additional Investigation (F2/4/3), para. 22.

was convicted.[631] NUON Chea's remaining arguments concern the Trial Chamber's failure to give effect to the means that were *de jure* at the disposition of the Defence, for example, to request that exculpatory witnesses be summoned, to adduce documentary or other evidence to rebut the allegations against him and to cross-examine witnesses.[632] These arguments are developed elsewhere in his appeal and will be addressed in that context.

256. In sum, the present grounds of appeal are dismissed.

2. Permitting witnesses to review prior statements and asking them to confirm their content at the hearing

257. On 22 November 2011, the Trial Chamber announced that "the efficiency of proceedings may be enhanced if prior to testimony, witnesses are given the opportunity to refresh their memories by reviewing their prior statements".[633] In a subsequent instruction to the Witnesses and Experts Support Unit to assist the witnesses in reviewing their statements prior to testifying, the Trial Chamber reasoned:

> This initiative is intended to avoid a waste of valuable in-court time should witnesses, before answering questions in court, need to re-acquaint themselves with their prior statements or attest that they made these statements (for instance, by verifying their signatures or thumbprints). The Chamber considered that witnesses could be provided with an opportunity to read their prior statements as part of [the Witnesses and Experts Support Unit]'s usual efforts to familiarize and orient them within the courtroom environment in advance of their testimony.[634]

258. In the Trial Judgement, the Trial Chamber indicated that:

> Beginning in June 2012, in the interests of expeditiousness, the President began asking witnesses and Civil Parties appearing in court to affirm the accuracy of their prior statements made to the Office of the Co-Investigating Judges, as reflected in the written records of interview. […] Upon affirmation, while noting that the parties have the right to test a witness's credibility on areas within or beyond his prior statements, the Chamber invited the parties to ask further questions only where there

[631] *See above*, para. 39 *et seq*.
[632] NUON Chea's Appeal Brief, para. 134, citing Decision on Fairness of Investigation (E116), para. 19 (footnote(s) omitted).
[633] Memorandum on Scheduling Informal Meeting (E141), p. 4.
[634] Memorandum to Witnesses and Experts Support Unit on Witness Prior Statements (E141/1), p. 1.

> was a need for clarification relevant to matters that are insufficiently covered by these statements or not dealt with during questioning before the Co-Investigating Judges.[635]

259. On appeal, NUON Chea submits that, in permitting witnesses to review their prior statements, the Trial Chamber failed to consider Cambodian law as well as international practice, and relied on irrelevant considerations.[636] In particular, he contends that showing witnesses their past statements is prohibited in criminal prosecutions before Cambodian courts as well as in all civil law systems,[637] and that witness preparation practices that are common at the ICTR and ICTY are inapplicable in hybrid adversarial-inquisitorial criminal courts.[638] He adds that the Trial Chamber's primary justification for showing witnesses their prior statements – namely that they may have difficulty in recalling them otherwise – militates *against* adopting the practice.[639] As to the practice before the ICC, NUON Chea seeks to distinguish the *Lubanga* Case (where prior statements were made available to witnesses) from the case at hand, noting that the gap in time between the facts to which the witnesses testified and their first interview was much shorter than in the present case and that in the proceedings before the ICC, both parties were entitled to investigate the case.[640] NUON Chea similarly alleges that the Trial Chamber erred in allowing the Co-Prosecutors to ask witnesses leading questions by reading the content of their prior statements to them during their examination, a practice which he contends is prohibited by international criminal jurisprudence.[641]

260. KHIEU Samphân also submits that the Trial Chamber erred in providing the witnesses with their prior statements and other documents prior to their testimony, thereby placing too much importance on the expeditiousness of the proceedings to the detriment of the principle of equality of arms.[642] He and NUON Chea both argue that they suffered prejudice from the Trial Chamber's erroneous decisions in this regard, by eviscerating any meaningful debate or ability to test the credibility of witnesses or

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[635] Trial Judgement, para. 31.
[636] NUON Chea's Appeal Brief, paras 136-146.
[637] NUON Chea's Appeal Brief, paras 138-139, 146.
[638] NUON Chea's Appeal Brief, paras 140-144, referring to *Lubanga* Decision on Witness Proofing (ICC).
[639] NUON Chea's Appeal Brief, paras 145-146.
[640] NUON Chea's Appeal Brief, paras 141-144.
[641] NUON Chea's Appeal Brief, paras 135, 147.
[642] KHIEU Samphân's Appeal Brief, para. 26.

reliability of their recollections and of the flawed investigation by assessing whether in-court testimony was consistent with prior statements.[643]

261. The Co-Prosecutors respond that the Trial Chamber correctly permitted witnesses to review prior statements before testifying, and that "[j]urisprudence regarding the use of leading questions in 'direct examination' is inapposite, as a party suggesting an answer to its own witness is very different from a trial chamber asking witnesses to confirm a prior sworn statement".[644]

262. The Supreme Court Chamber notes that neither the Code of Criminal Procedure of Cambodia nor the Internal Rules specifically address the question of whether the Trial Chamber may allow witnesses to consult their prior statements or other documents before testifying or to confirm in court the content of a prior statement; in practice before Cambodian courts, however, this is not done. NUON Chea avers that such practices are "universally prohibited in civil law, inquisitorial systems" and refers to the practice in France before the *Cour d'assises*.[645] The Supreme Court Chamber notes that, indeed, also in several other jurisdictions following the Romano-Germanic tradition, the use of documents in connection with witness testimony in criminal proceedings is subject to authorisation by the presiding judge, which is granted not in the form of blanket permission but when the need arises during the testimony, to refresh the witness's memory or confront disparities.[646] As noted by some commentators in the broader context of witness proofing, which involves the preparation of witnesses before giving testimony, in systems following the Romano-Germanic tradition, witness proofing is generally inadmissible.[647] In these systems, the witness's spontaneous testimony is considered to be of particular importance, which would be diminished if witnesses were allowed to refresh their

[643] NUON Chea's Appeal Brief, paras 135, 143, 147; KHIEU Samphân's Appeal Brief, para. 26.
[644] Co-Prosecutors' Response, paras 83.
[645] *See* NUON Chea's Appeal Brief, para. 139 and fn. 345.
[646] *See* Code of Criminal Procedure of France, Art. 331(3) ("*Avant de commencer leur déposition, les témoins prêtent le serment 'de parler sans haine et sans crainte, de dire toute la vérité, rien que la vérité'. Cela fait les témoins déposent oralement. Le président peut autoriser les témoins à s'aider de documents au cours de leur audition*"). 1997 Code of Criminal Procedure of Poland, Arts 391, 392; Code of Criminal Procedure of Germany, Sections 250-253 (allowing the reading of prior statements when the witness refuses to testify, testifies different than before or does not remember or is not available or where it is accepted by the court and the parties that examination is not necessary).
[647] *See* Kai AMBOS, "'Witness proofing' before the ICC: Neither legally admissible nor necessary", in: Carsten STAHN, Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court*, Martinus Nijhof Publishers, 2008, p. 600 *et seq.*, at 605-606.

memories before testifying or simply asked to confirm the content of prior statements in court.[648]

263. In conclusion, notwithstanding the absence of a clear prohibition of allowing witnesses to read their statements prior to testifying and to confirm their content in court, it would be more consistent with the spirit of the Code of Criminal Procedure of Cambodia and with Cambodian judicial tradition not to resort to such practices. It was not erroneous, however, for the Trial Chamber to proceed on the assumption that the matter was not addressed by Cambodian law or that Cambodian law did give rise to "uncertainty" on the point, pursuant to Internal Rule 2 read with Article 33 new of the ECCC Law and Article 12(1) of the ECCC Agreement. The remaining question is whether the Trial Chamber properly sought guidance in "procedural rules established at the international level".[649]

264. In this regard, witness proofing is employed regularly at the ICTR and ICTY, whose proceedings follow an adversarial structure. The ICTY Trial Chamber in *Haradinaj* has affirmed this practice, which it defined as "a meeting held between a party to the proceedings and a witness, usually shortly before the witness is to testify in court, the purpose of which is to prepare and familiarize the witness with courtroom procedures and to review the witness's evidence".[650] The ICTR Trial Chamber in *Karemera* has also affirmed the practice of witness proofing, "provided that it does not amount to the manipulation of a witness' evidence",[651] a decision that was confirmed by the ICTR Appeals Chamber, which reiterated that discussing prior statements and forthcoming testimony with a witness is not *per se* inappropriate, unless it constitutes an attempt to influence content of testimony in ways that shade or distort the truth.[652]

265. At the ICC, the Trial Chamber in the *Lubanga* Case expressly authorised witnesses to consult their prior statements to refresh their memories before giving

[648] *See* Hannah GARRY, "Witness Proofing", in: Linda CARTER and Fausto POCAR, *International Criminal Procedure/The Interface of Civil Law and Common Law Legal Systems*, Edward Elgar Publishing, 2013, p. 66 *et seq*. at 72-73.
[649] ECCC Law, Art. 33 new; ECCC Agreement, Art. 12(1).
[650] *Haradinaj* Decision on Witness Proofing (ICTY), para. 8.
[651] *Karemera* Decision on Witness Proofing (ICTR), para. 15.
[652] *See* *Karemera* Appeal Decision on Witness Proofing (ICTR), para. 9, citing *Gacumbitsi* Appeal Judgement (ICTR).

evidence in court, but only through the ICC's Victims and Witnesses Unit, noting that this "will aid the efficient presentation of the evidence and help the Trial Chamber to establish the truth"; however, it prohibited Parties from meeting their witnesses to discuss their expected testimony by, for instance, examining their prior statements.[653] The ICC's procedural model is the one most similar to that adopted by the ECCC Trial Chamber, in that, at the ECCC, the Witnesses and Experts Support Unit, a neutral organ of the Court, makes the statements available to the witnesses.

266. Similarly, regarding the practice of inviting witnesses to confirm the content of their prior statements when appearing in court, the Supreme Court Chamber recalls that such practices are specifically provided for in the Rules of Procedure and Evidence of the ICTY and the ICC.[654]

267. The Supreme Court Chamber considers that the practice of exposing witnesses to what they previously said could interfere with or distort their memory, and thus the truth, by reducing the spontaneity with which their evidence is offered in court. The same applies to inviting witnesses, at the beginning of their testimony, to confirm the content of prior statements, as the Parties to the proceedings and the Trial Chamber will not be able to observe how a witness relates the events in question. As a consequence, it will be more difficult for the Parties or the Trial Chamber to detect inconsistencies between live testimony and prior statements as a basis for determining credibility. Accordingly, the value of such practices has to be evaluated by weighing the in-court time that would be saved against the risk that the spontaneity of the witness' testimony be jeopardised. Given the scale of proceedings before the ECCC in terms of the number of witnesses and the daily hearing time limited by the health conditions of the Accused, saving just ten minutes per witness would probably still militate against the practice; saving an hour per witness, however, would go into shortening the trial by weeks and result in a considerable gain. Another aspect worth weighing is the quality of the evidence concerned and its propensity for distorting the truth – for instance, if a witness's prior statement *prima facie* is replete with

[653] *Lubanga* Decision on Witness Proofing (ICC), paras 51-57.
[654] *See* Rule 92*ter* of the ICTY Rules of Procedure and Evidence and Rule 68(3) of the ICC Rules of Procedure and Evidence. The Supreme Court Chamber notes that NUON Chea does not even mention the relevant provisions of the ICTY and ICC Rules of Procedure and Evidence, instead referring to decisions on leading questions, which are not relevant to the question at hand. *See* NUON Chea's Appeal Brief, para. 147.

inconsistencies it is preferable not to make it available to the witness beforehand, so as to enable proper vetting of his or her credibility; on the other hand, it is hard to see the point in allowing a witness to review a statement that is entirely lacking in detail. These considerations are not expressed in the Trial Chamber's decision, which instead adopted a blanket approach.

268. The Supreme Court Chamber notes, nevertheless, that the actual risks resulting from the review or prior statements in this case were not great. First, at the time of the hearing, spontaneity of trial testimony may have been forgone in any event. After questioning by the ECCC investigators, witnesses received a copy of their written record of interview; they could therefore have consulted their own prior statements before testifying in court, should they have so wished. Moreover, the fact that the Witnesses and Experts Support Unit performed the task of assisting witnesses in this process rather than the Parties themselves, as would typically occur in the *ad hoc* tribunals, tempers any additional influence. All witnesses – including those proposed by the Defence – benefitted from the same treatment. Finally, a review of the trial record shows that in some cases, witnesses asserted in court that the contents of their prior statements were not accurate.[655] Overall, whereas comparing discrepancies between prior statements and live testimony is one measure by which to evaluate witness credibility and reliability, it is one of many. Others include identifying inconsistencies within the witness's live testimony or with the testimony of other witnesses, corroboration by independent evidence and assessing the quality of the testimony itself (*e.g.* hearsay, motive to lie, etc.), none of which would have been affected by the Trial Chamber's decision to allow the review of prior statements before testimony.

269. In conclusion, the Supreme Court Chamber considers that, clearly, the Trial Chamber could have adopted a procedure more consistent with Cambodian practice and the legal tradition followed by the Cambodian system. Nevertheless, NUON Chea has failed to establish that the Trial Chamber's resort to procedural rules established at the international level was unreasonable to a point that it amounted to an abuse of discretion.

[655] *See*, *e.g.*, T. 20 June 2012 (KHIEV Neou), E1/89.1, p. 98; T. 12 June 2012 (SAO Sarun), E1/85.1, pp. 106-107.

270. The Accused's grounds of appeal in this regard are accordingly dismissed.

3. Restrictions to the scope of questioning

271. In response to NUON Chea's and KHIEU Samphân's closing submissions that the Trial Chamber imposed arbitrary and unfair limitations on the scope of questioning and the material that could be used to challenge the credibility of the individuals heard in court, the Trial Chamber stated:

> Pursuant to Internal Rules 85 and 87, the President and Chamber excluded proceedings and lines of questioning that unnecessarily delayed the trial or were not conducive to ascertaining the truth. The Chamber encouraged all parties to limit their examination of persons called at trial to matters falling within the scope of Case 002/01. Further, taking into account the capacity in which individuals were called to give evidence, the Chamber limited the scope of questioning in order to ensure that examination did not stray into irrelevant topics. […]
>
> Insofar as the Accused allege unfair limitations on their ability to challenge evidence and examine witnesses, they fail either to demonstrate prejudice or that they exhausted other available means, for example by submission in rebuttal or the proposal of documentary evidence. The Chamber finds that the right of the Accused to challenge evidence and examine witnesses was not infringed.[656]

272. On appeal, NUON Chea and KHIEU Samphân reiterate their complaint, arguing that the Trial Chamber repeatedly violated their right to confront the evidence against them.[657] Recalling submissions in his closing brief, NUON Chea impugns the Trial Chamber's rulings on questions aimed at exposing the flaws in the collection of evidence during the judicial investigation.[658] He adds that the Trial Chamber also curtailed his ability to probe the reliability of the evidence where investigative methods were not at issue, pointing specifically to the testimonies of Philip SHORT, Stephen HEDER, and YOUK Chhang.[659] KHIEU Samphân points specifically to the Trial Chamber's interventions during the Defence questioning of PHY Phuon.[660]

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[656] Trial Judgement, paras 60, 62.
[657] NUON Chea's Appeal Brief, paras 148-153; KHIEU Samphân's Appeal Brief, para. 31.
[658] NUON Chea's Appeal Brief, para. 149, referring to NUON Chea's Closing Submissions (E295/6/3), para. 76.
[659] NUON Chea's Appeal Brief, paras 150-152. He also mentions the testimonies of KAING Guek Eav *alias* Duch and SUONG Sikoeun. *See* NUON Chea's Appeal Brief, fn. 378.
[660] KHIEU Samphân's Appeal Brief, para. 31, referring to T. 31 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/99.1, pp. 95-96; T. 1 August 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/100.1 (Fr), pp.

273. The Co-Prosecutors respond that the Trial Chamber reasonably exercised its discretion to manage the scope of questioning.[661]

274. The Supreme Court Chamber considers that the Trial Chamber enjoys broad discretion to manage the proceedings and take measures to streamline questioning it considers to be repetitious and/or irrelevant. A high level of deference is owed to such decisions; the Supreme Court Chamber will only intervene when an error in the exercise of discretion has been established, notably when the Trial Chamber's decision was unreasonable.[662] The Supreme Court Chamber will assess NUON Chea's and KHIEU Samphân's arguments in light of this standard.

275. As noted above, NUON Chea argues, first, that the Trial Chamber erred because it prevented him from exploring alleged irregularities in the course of the investigations, repeating submissions from his closing brief.[663] These submissions refer to several submissions, decisions of the Trial Chamber and transcripts of the proceedings, but fail to specify why the Trial Chamber's approach was unreasonable. Moreover, a *prima facie* review of the trial record and NUON Chea's submissions does not suggest that the Trial Chamber erred in curtailing questions it deemed repetitious or irrelevant about investigative modalities. NUON Chea also fails to engage with the Trial Chamber's response to his arguments in the Trial Judgement, which has been reproduced above. In sum, he fails to establish that the Trial Chamber acted unreasonably in that regard.

276. As to the specific instances to which NUON Chea points in support of his contention that the Trial Chamber curtailed his ability to probe the reliability of evidence where investigative methods were not an issue, the Supreme Court Chamber considers that he demonstrates no error or prejudice. From NUON Chea's own submissions regarding Philip SHORT's testimony, it arises that he was not denied the opportunity to question the expert on the reliability of his evidence, but merely discontent with the results thereof.[664] NUON Chea's submissions on YOUK Chhang's

33, 38-39, 57, and T. 2 August 2012 (ROCHOEM Ton alias PHY Phuon), E1/101.1 (Fr), pp. 35, 37-38.
[661] Co-Prosecutors' Response, paras 84-85.
[662] *See above*, paras 97-98.
[663] NUON Chea's Appeal Brief, para. 149.
[664] *See* NUON Chea's Appeal Brief, para. 150, where NUON Chea submits that the Trial Chamber "deemed counsel's questions repetitive and prohibited further cross-examination" after Philip SHORT

and Duch's testimonies demonstrate that he was not only afforded the opportunity to question these witnesses, but was also satisfied with the results thereof.[665] Furthermore, it is insufficient merely to point to instances of interruption of questioning, such as NUON Chea's reference to SUONG Sikeoun's testimony, without further substantiating the general allegation that an error lies therein,[666] or KHIEU Samphân's references to the testimony of PHY Phuon, without demonstrating relevance or prejudice to his particular case.[667]

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gave "a series of confused and contradictory responses concerning the source of his claim that […] executions [of Khmer Republic soldiers] occurred [following the CPK's capture of Oudong in 1974]", and then "ignored Defence counsel's cross-examination completely [in relying solely on Philip SHORT's testimony as the basis of its clearly erroneous finding that Khmer Republic soldiers were executed in Oudong]".

[665] *See* NUON Chea's Appeal Brief, para. 152, where NUON Chea submits, regarding YOUK Chhang's testimony, that despite the fact that "the Co-Prosecutors' objection that it was irrelevant was sustained by the President", "the next day, Defence counsel returned to the subject [concerning whether DC-Cam has been involved in some sort of project that would limit the prosecution of lower level DK officials] and this time was allowed to proceed", and was able to thus elicit "admissions, which severely undermine the reliability of the evidence produced by DC-Cam, [and which] would have been obscured had counsel not pressed his questions in spite of the original ruling". As to the testimony of Duch, NUON Chea submits that "Defence counsel was prevented from questioning *Duch* concerning whether he believed the content of the confessions obtained at S-21". *See* NUON Chea's Appeal Brief, fn. 37, referring to T. 3 April 2012 (KAING Guek Eav *alias* Duch), E1/58.1, pp. 82-84. A review of the portion of the transcript of KAING Guek Eav's testimony referred to by NUON Chea, however, reveals that, in response to the Co-Prosecutors' objection to his Defence counsel's line of questioning, *before* it was sustained by the Trial Chamber, his Defence counsel stated: "I believe that his answers so far show very little doubt about this witness' convictions [about whether the confessions contained the truth]. That was what I was trying to establish. I'm more than happy to continue to the next topic". *See* T. 3 April 2012 (KAING Guek Eav *alias* Duch), E1/58.1, p. 84.

[666] *See* NUON Chea's Appeal Brief, fn. 378, where NUON Chea submits merely that "Defence counsel was prevented from [determining whether] sources of knowledge were contaminated by recent public broadcasts about crime sites in the Closing Order to which he was connected". *See also* KHIEU Samphân's Appeal Brief, para. 31, and references cited in fn. 76.

[667] *See* KHIEU Samphân's Appeal Brief, para. 31, where KHIEU Samphân submits that the Trial Chamber repeatedly censured the Defence, suggested answers to PHY Phuon, and arbitrarily reduced without notice the Defence's questioning time. In support of these contentions, KHIEU Samphân refers to specific portions of PHY Phuon's testimony. *See* KHIEU Samphân's Appeal Brief, fn. 77. A review of these excerpts demonstrates that most of the references are to questions put to the witness by the Co-Lawyer for IENG Sary, in relation to IENG Sary only. *See* T. 31 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/99.1, p. 95 and T. 1 August 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/100.1, pp. 31, 36-37, 54. Only one reference is to an intervention by the President of the Trial Chamber, who indeed suggests a possible answer to a question; however, a review of the relevant portion of the transcript reveals that the President made the suggestion in the hypothetical and with the apparent aim of appeasing the witness, who seems to have been frustrated. *See* T. 2 August 2012, (ROCHOEM Ton alias PHY Phuon), E1/101.1, p. 31 ("Mr. Witness, could you please regain your composure? Don't be too emotional. This is the Court proceeding. And, indeed, you may be challenged emotionally in the cross-examination when some questions are posed to impeach you. And please be poised to respond to questions. For example, when it comes to the length -- of the height of termite mound, the response would be very simple. If you just said, look, you have never measured any termite mound -- you should not give statement or go further than that"). In any event, PHY Phuon had already answered the question posed by the Co-Lawyer for KHIEU Samphân prior to the President's suggested answer, thereby precluding any prejudice. *See* T. 2 August 2012 (ROCHOEM Ton alias PHY Phuon),

277. As to Stephen HEDER, NUON Chea develops his arguments regarding the Trial Chamber's treatment of his questioning elsewhere in his appeal brief, as part of a broader series of allegations that the Trial Chamber relied on his testimony for improper purposes.[668] The Supreme Court Chamber will address them together below.[669] However, regarding the allegation that the Trial Camber unduly restricted the scope of NUON Chea's questioning of witnesses, the Supreme Court Chamber finds that he fails to demonstrate that the Trial Chamber acted unreasonably.

278. The grounds of appeal in this regard are accordingly dismissed.

4. Admission and use of written evidence in lieu of oral testimony

279. On 20 June 2012, in the course of the trial, the Trial Chamber decided that, within the ECCC legal framework and in accordance with rules established at the international level, under certain conditions evidence from individuals in the form of written statements or transcripts that goes to proof of matters other than the acts or conduct of the Accused is admissible even if the Defence did not have an opportunity to examine their authors, and that the Trial Chamber may rely on such material under certain conditions.[670] The Trial Chamber enumerated factors in favour of admitting and affording probative value to such evidence, and specified that the absence of an opportunity for confrontation and, in the case of civil party statements, the fact that they were prepared by intermediary organisations without the civil parties having taken an oath, would be relevant considerations in diminishing the weight to be accorded thereto.[671] The Trial Chamber therefore admitted 1,124 written statements and transcripts of witnesses and Civil Parties who did not appear before it.[672]

E1/101.1, p. 30 ("Tell me, how high was that mound? Can you give me an idea of it? A. […]Maybe it's a little bit above 1 metre high"). KHIEU Samphân's remaining reference indeed points to a reduction in the time allocated to his Co-Lawyers to question PHY Phuon. *See* T. 2 August 2012, E1/101.1, pp. 32-34. The Co-Lawyers for KHIEU Samphân, however, appear to have been able to satisfactorily complete their questioning of the witness in the reduced amount of time. *See* T. 2 August 2012, E1/101.1, p. 56 ("Mr. President, I am sure you'll be pleased with me; I have no further questions for the witness").

[668] NUON Chea's Appeal Brief, para. 151, referring to NUON Chea's Appeal Brief, paras 180-182.

[669] *See below*, para. 340 *et seq*.

[670] Decision on Admission of Written Statements (E96/7), paras 22-23.

[671] Decision on Admission of Written Statements (E96/7), paras 24-25, 27, 29. *See also* Trial Judgement, para. 34 ("Absent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence") (footnote(s) omitted).

[672] *See* Decision on Objections to Admissibility (E299) and Confidential Annex A (E299.1). *See also* Trial Judgement, para. 32.

280. In laying out its approach to the final assessment of the evidence in the Trial Judgement, the Trial Chamber recalled that, absent the opportunity for examination, it excluded statements going to proof of the acts and conduct of the Accused, except where the witness was deceased, though, in such cases, "it would not base any conviction decisively thereupon".[673] The Trial Chamber also stated that "[a]bsent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence".[674] As to the selection of witnesses to testify, the Trial Chamber stated that it "weighed the rights of all parties to propose evidence, the need to hold a public hearing following the confidential investigation, the Accused's right to confront witnesses and the right of each Accused to a fair and expeditious trial".[675] It indicated that it had heard only 92 out of a total of 1,054 proposed witnesses,[676] but that "[o]ther mechanisms were nonetheless provided to enable the parties to introduce in written form relevant statements and other information concerning witnesses not called".[677]

281. NUON Chea and KHIEU Samphân allege that the Trial Chamber erred in its determination of the standard to admit written evidence in lieu of oral testimony and its subsequent reliance on a large amount thereof without appropriate efforts to assess its reliability or probative value.[678] In particular, they submit that the Trial Chamber broadened the international standards for the admission of such evidence by focusing solely on whether the evidence goes to the proof of acts and conduct of the Accused and discarding the consideration of numerous other factors, including whether the evidence concerned a live issue in dispute between the Parties.[679] They further contend that the Trial Chamber disregarded the applicable law, which mandates the appearance and cross-examination of any inculpatory witness at trial, and admitted

[673] Trial Judgement, para. 31, fn. 85, referring to Decision on Admission of Written Statements (E96/7), paras 21-22, 32-33, and Decision on Objections to Admissibility (E299), paras 29-30.
[674] Trial Judgement, para. 34.
[675] Trial Judgement, para. 51.
[676] Trial Judgement, paras 51-52.
[677] Trial Judgement, para. 52. *See also* Trial Judgement, para. 54.
[678] NUON Chea's Appeal Brief, paras 154-165; KHIEU Samphân's Appeal Brief, paras 29, 117. *See also* NUON Chea's Appeal Brief, para. 426; KHIEU Samphân's Appeal Brief, para. 468. KHIEU Samphân also submits that the Trial Chamber erred by belatedly issuing insufficiently reasoned decisions on the admission of documents, including written statements. His argument in this regard is limited to the timing of the decision, and not to its legal propriety. *See* KHIEU Samphân's Appeal Brief, para. 16. The Supreme Court Chamber dismisses this argument for lack of substantiation.
[679] NUON Chea's Appeal Brief, paras 154-155, 157, 160-162; KHIEU Samphân's Appeal Brief, para. 29.

into evidence an unprecedented number of unreliable documents.[680] They aver that the Trial Chamber repeatedly made key findings largely, if not exclusively, on the basis of such unreliable and/or unauthenticated statements, despite having stated that they should be given little, if any, weight.[681]

282. The Co-Prosecutors and the Civil Party Lead Co-Lawyers respond that the Trial Chamber correctly set forth the standard to admit and evaluate out-of-court written statements and transcripts and then correctly applied it to the facts.[682]

283. The Supreme Court Chamber notes that the Accused's arguments raise two related questions: first, whether the Trial Chamber applied the correct legal standard for the admission of written evidence in lieu of oral testimony; and, second, whether the Trial Chamber erred in its assessment of such written evidence as a basis for its factual findings in the Trial Judgement.

a) Legal standard for admission of written evidence in lieu of oral testimony

284. Internal Rule 87 provides that, in principle, all evidence is admissible in proceedings before the ECCC, unless it is irrelevant or repetitious, impossible to obtain within a reasonable time, unsuitable to prove the facts it purports to prove, not allowed under the law, or intended to prolong proceedings or frivolous.

285. NUON Chea and KHIEU Samphân's primary position is that Cambodian law requires the appearance of any inculpatory witnesses at trial. The Supreme Court Chamber notes that Article 297 of the Code of Criminal Procedure of Cambodia provides that "[i]nculpatory witnesses who have never been confronted by the accused shall be summoned to testify at the trial". Similarly, Internal Rule 84(1) indeed provides the accused person with the "absolute right to summon witnesses against him or her whom the accused had no opportunity to examine during the pre-trial stage".[683] The Trial Chamber was of the view that, despite these provisions, it was, under certain conditions, permissible to admit (and eventually rely upon) written

[680] NUON Chea's Appeal Brief, paras 155-159.
[681] NUON Chea's Appeal Brief, paras 163-165; KHIEU Samphân's Appeal Brief, paras 29, 117.
[682] Co-Prosecutors' Response, paras 86-90; Civil Parties' Response, paras 48-65.
[683] The Supreme Court Chamber notes that the Khmer version refers to the accused's "right to summon inculpatory witnesses" and in the French text, "*L'accusé a le droit d'exiger la comparution d'un témoin avec lequel il n'a pas eu l'occasion d'être confronté au stade de l'instruction*". *See* Internal Rule 84(1) (Fr).

evidence even though the individual from whom the evidence emanated had not appeared before it or had otherwise been examined by the Defence. The Trial Chamber grounded this finding, first, on the fact that only the English version of Internal Rule 84(1) speaks of an *absolute* right of the Defence to summon witnesses, and, second, on Article 318 of the Code of Criminal Procedure of Cambodia, which gives the presiding judge in a criminal trial the power to "exclude from the hearing everything he deems to unnecessarily delay the trial hearing without being conducive to ascertaining the truth".[684]

286. The Supreme Court Chamber recalls that the right to examine witnesses against the Accused, as stipulated in Internal Rule 84(1) and Article 297 of the Code of Criminal Procedure of Cambodia, is an expression of the right enshrined in Article 14(3)(e) of the ICCPR to "examine, or have examined, the witnesses against [the accused]". Similarly, Article 13(1) of the ECCC Agreement guarantees the right of the accused to "examine or have examined the witnesses against him or her", while Article 35 new (e) of the ECCC Law safeguards the accused's right to "examine evidence against them". This right, while of fundamental importance to the fairness of a trial, is, however, not absolute[685] and may be balanced with other important rights and interests in the context of a criminal trial. Indeed, an entirely unfettered right to examine witnesses against the accused would bear the risk of compromising a court's ability to render justice in cases of the size and complexity as the case at hand: the court would have to choose between calling a high number of witnesses to testify before it, which could make the trial unmanageable and overly lengthy, or refraining from relying on a substantive amount of evidence, which – though perhaps not central to the case – may be important to shed light on the context and breadth of the case.

287. Accordingly, the Supreme Court Chamber considers that Internal Rule 84(1) and Article 297 of the Code of Criminal Procedure of Cambodia are best interpreted

[684] Decision on Admission of Written Statements (E96/7), para. 18.
[685] *See* General Comment 32 (HRC), para. 39 ("[The right under Article 14(3)(e) of the ICCPR] does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings"). *See also* *S.N. v. Sweden* Judgement (ECtHR), para. 44 ("Article 6 [of the European Convention on Human Rights] does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness"). Similarly, *Trofimov v. Russia* Judgement (ECtHR), para. 33; *F and M v. Finland* Judgement (ECtHR), para. 56.

as not providing for a right without limitation; rather, they allow for restrictions in the interest, in particular, of the expeditiousness of the proceedings. As to the argument that the English version of Internal Rule 84(1) describes the right as being "absolute", it is to be noted that neither the Khmer nor the French versions of the provision contain that language. As the Khmer and French versions of Internal Rule 84(1) appear to be more appropriate for the context of a court like the ECCC, they must be given precedence over the English text. As a result, the Supreme Court Chamber considers that the Trial Chamber did not err when it found that the right to confront witnesses against the Accused was not unlimited.[686]

288. The next question is whether the Trial Chamber erred when identifying the criteria for the admission of written evidence in lieu of oral testimony, based on international practice. Article 33 new (1) of the ECCC Law and Article 12(1) of the ECCC Agreement require the procedure before the ECCC to be in accordance with Cambodian law, but in the case of *lacunae* in the law or uncertainty, "guidance may also be sought in procedural rules established at the international level". This is indeed what the Trial Chamber intended to do, as reflected in the Decision on Admission of Written Statements (E96/7)[687] and in the Decision on Objections to Admissibility (E299)[688] NUON Chea and KHIEU Samphân submit, however, that the Trial Chamber did so incorrectly.

289. Notably, KHIEU Samphân argues that the Trial Chamber erroneously admitted statements going to his acts and conduct, in breach of established rules at the international level.[689] The Supreme Court Chamber recalls that the Trial Chamber specifically found that written evidence going to the acts and conduct of the accused was inadmissible.[690] To the extent that KHIEU Samphân argues that the Trial Chamber made findings "connected to the acts and conduct of the Appellant" in relation to the policy of forced marriage, the Supreme Court Chamber notes that in the passage of the Trial Judgement to which he refers, the Trial Chamber did not address the acts or conduct of KHIEU Samphân, nor does the evidence cited by the Trial

[686] Decision on Admission of Written Statements (E96/7), paras 17-19.
[687] *See* para. 24 *et seq*. thereof.
[688] *See* Decision on Objections to Admissibility (E299), para. 17 *et seq*.
[689] KHIEU Samphân's Appeal Brief, para. 29.
[690] *See* Decision on Admission of Written Statements (E96/7), para. 22.

Chamber relate to it.[691] Contrary to KHIEU Samphân's submission, it is not sufficient that a finding is "directly linked to the relevant mode of liability and, hence, to the acts and conduct of the Appellant".[692] For the same reason, his argument that the Trial Chamber made the same mistake in its findings regarding Population Movement Phase Two must fail, since the impugned findings do not relate to KHIEU Samphân's "acts and conduct".[693]

290. NUON Chea argues that the Trial Chamber admitted into evidence an unprecedentedly large amount of written evidence, including civil party applications and victims complaints, which would not have "satisfied the bare minimum requirements for admission at the *ad hoc* tribunals", referring in a footnote to Rule 92 *bis* (B) of the ICTY Rules of Procedure and Evidence.[694] This provision requires that the author of a written statement admitted into evidence make a declaration as to the truthfulness of its content, which is to be witnessed by an authorised person. Rule 92 *bis* (B) of the ICTR Rules of Procedure and Evidence contains the same rule for proceedings before the ICTR, while Rule 68(2)(b)(ii) and (iii) of the ICC Rules and Procedure and Evidence contains a comparable provision. In contrast, the SCSL Rules of Procedure and Evidence, as well as those of the STL do not require that the author of a written statement make such a declaration.[695] Thus, international practice in this regard is not consistent and the Trial Chamber cannot be faulted for not having adopted the requirement stipulated by Rule 92 *bis* (B) of the ICTY Rules of Procedure and Evidence.

291. NUON Chea further submits that the Trial Chamber erred when it applied the criteria for the admission of out-of-court statements to items of written evidence that were not collected specifically for the purpose of litigation, referring, *inter alia*, to accounts of individuals collected by Henri LOCARD, François PONCHAUD and Stephen HEDER; NUON Chea avers that, according to the practice of the *ad hoc* tribunals, the standard for the admission of hearsay evidence ought to have been

[691] Trial Judgement, para. 128 and fn. 372.
[692] KHIEU Samphân's Appeal Brief, para. 29. *See* *Galić* Interlocutory Appeal Decision (ICTY), para. 9.
[693] *See* KHIEU Samphân's Appeal Brief, para. 29, referring to Trial Judgement, para. 588 and fns 1767, 1768 and 1769.
[694] NUON Chea's Appeal Brief, para. 158 and fn. 400.
[695] *See* SCSL Rules of Procedure and Evidence, Rule 92 *bis*, and STL Rules of Procedure and Evidence, Rule 155.

applied.[696] He does not, however, substantiate that the application of that standard would necessarily have led to a rejection of the evidence in question, and the argument is therefore rejected. In that regard, it is noted that the requirements for the admission of witness statements in lieu of testimony have been found to be "more stringent" than those for the admission of material that was not prepared for the purpose of the judicial proceedings.[697]

292. NUON Chea refers to several principles governing the admission of written statements at the *ad hoc* tribunals (for instance, that the written evidence must be cumulative), which the Trial Chamber, in his submission, ignored.[698] However, contrary to what he suggests, the Trial Chamber expressly noted these considerations in its decision on admission of written statements and indicated that it would apply them when deciding on the admission of written evidence.[699] NUON Chea makes broad claims that the Trial Chamber did not apply these considerations,[700] yet he fails to substantiate these claims.

293. Moreover, NUON Chea argues that any statement that "touches upon a critical element of the case, or goes to a live and important issue between the Parties, as opposed to a peripheral or marginally relevant issue" must be subject to cross-examination.[701] In support of this argument, he refers to decisions of the ICTY and ICTR, which have held that, in such scenarios, while the written evidence may be admitted, the witness may have to be called so that he or she may be cross-examined by the opposing party.[702] Thus, at issue is not whether the written evidence may be admitted, but whether additional measures should have been taken to safeguard the rights of the Defence. This is also borne out by the jurisprudence cited by the Trial Chamber in its Decision on Objections to Admissibility (E299), on the basis of which it rejected the Defence's argument that written statements relating to "pivotal issues"

[696] NUON Chea's Appeal Brief, para. 158 and fn. 402. *See* *Galić* Interlocutory Appeal Decision (ICTY), para. 28.
[697] *Galić* Interlocutory Appeal Decision (ICTY), para. 31.
[698] NUON Chea's Appeal Brief, paras 161-162.
[699] *See* Decision on Admission of Written Statements (E96/7), para. 24; Decision on Objections to Admissibility (E299), para. 18 *et seq*.
[700] NUON Chea's Appeal Brief, para. 163.
[701] NUON Chea's Appeal Brief, para. 162.
[702] *Nzabonimana* Decision on Admission of a Written Statement and Accompanying Documents (ICTR), para. 18. *See also* *Galić* Interlocutory Appeal Decision (ICTY), para. 13.

may not be admitted into evidence.[703] The Supreme Court Chamber will address the Trial Chamber's reliance on evidence that was not examined by the Defence in the subsequent section of this judgement; however, it notes that NUON Chea has failed to establish an error as regards the *admission* of written evidence.

294. In sum, in the Supreme Court Chamber's view, NUON Chea and KHIEU Samphân have failed to demonstrate that the Trial Chamber erred in law when determining that written statements in lieu of oral testimony are admissible, subject to certain limitations. Their submissions in this respect are accordingly dismissed.

b) Weight assigned to written evidence in lieu of oral testimony

295. The second issue to be addressed is whether the Trial Chamber afforded too much weight to written evidence. NUON Chea argues that the Trial Chamber "consistently failed" to correctly assess the reliability and probative value of written statements.[704] KHIEU Samphân makes similar but less detailed submissions.[705] Their central arguments are that: (i) the Trial Chamber should have provided written reasons for its determination of the probative value to assign to individual written statements;[706] (ii) the Trial Chamber relied on written statements to establish key facts in dispute; [707] and (iii) the Trial Chamber failed to consider the reliability of the source of the written statements.[708]

296. The Supreme Court Chamber notes that the written evidence of a witness who has not appeared before the Trial Chamber and who was not examined by the Chamber and the Parties must generally be afforded lower probative value than the evidence of a witness testifying before the Chamber. Even lower probative value must, in principle, be assigned to evidence that – unlike the interview records produced by the Office of the Co-Investigating Judges – was not collected specifically for the purpose of a criminal trial, such as in the case of the accounts collected by Henri LOCARD, François PONCHAUD and Stephen HEDER. This results, first, from the fact that the Trial Chamber would not have had an opportunity to assess the

[703] *See* Decision on Objections to Admissibility (E299), para. 19 and fn. 71.
[704] NUON Chea's Appeal Brief, para. 159.
[705] KHIEU Samphân's Appeal Brief, paras 29, 117, 468.
[706] NUON Chea's Appeal Brief, para. 163.
[707] NUON Chea's Appeal Brief, para. 163; KHIEU Samphân's Appeal Brief, paras 29, 117, 468.
[708] NUON Chea's Appeal Brief, paras 164-165.

demeanour of the individual while testifying and ask questions to clarify issues. Second, in accordance with persuasive jurisprudence of the European Court of Human Rights, a conviction may not be based solely or to a decisive degree on evidence by a witness whom the defence has not had an opportunity to examine, unless there are sufficient counterbalancing factors in place, so that an accused is given an effective opportunity to challenge the evidence against him.[709] Third, the trustworthiness, accuracy and authenticity of out-of-court statements collected outside the framework of a judicial process are affected by the lack of judicial formalities and guarantees. The Trial Judgement reflects the Trial Chamber's concern about the probative value of out-of-court evidence, where it stated: "[t]he Chamber also considers the identification, examination, bias, source and motive – or lack thereof – of the authors and sources of the evidence. Absent the opportunity to examine the source or author of the evidence, less weight may be assigned to that evidence".[710] The Trial Chamber was cognisant of "whether the parties had the opportunity to challenge the evidence"[711] and heard detailed submissions during the admissibility hearings on the probative weight and value to be assigned to the evidence.[712] The Trial Chamber was aware that the Defence had not had the opportunity to examine the authors of written statements and that this had to have an effect on the weight accorded to written statements.[713] It used its discretion to admit certain categories of statements, after hearing submissions from the Parties on individual documents,[714] and, in doing so, explained the unique nature of each category of document.[715] For example, it found that civil party applications, whilst admissible, enjoy no presumption of reliability

[709] *See*, *e.g.*, *Al-Khawaja v. United Kingdom* Grand Chamber Judgement (ECtHR), paras 127, 147; *Kazakov v. Russia* Judgement (ECtHR), para. 29. *See also Popović* Appeal Judgement (ICTY), para. 96 ("a conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial. This principle applies 'to any fact which is indispensable for a conviction'" (footnote(s) omitted)).
[710] Trial Judgement, para. 34.
[711] Trial Judgement, para. 34.
[712] Trial Judgement, para. 66.
[713] *See* Trial Judgement, para. 34; Decision on Objections to Admissibility (E299), para. 19; Decision on Admission of Written Statements (E96/7), para. 25.
[714] T. 12 March 2012, E1/46.1; T. 13 March 2012, E1/47.1; T.15 March 2012 E1/49.1. Decision on Objections to Documents Proposed to be Put Before the Chamber in the Co-Prosecutors' Annexes A1-A5 and to Documents Cited in Paragraphs of the Decision on Objections to Documents (E185), paras 21, 30; Decision on Objections Proposed to be Put before the Chamber in Co-Prosecutors' Annexes A6-A11 and by the Other Parties (E185/1, 3), paras 13, 19; Third Decision on Objections to Documents for Admission before the Trial Chamber (E185/2), paras 20, 24, 26; Decision on Objections to Admissibility (E299), paras 21, 23, 26, 30, 32.
[715] Decision on Objections to Admissibility (E299), paras 23-44; Decision on Admission of Written Statements (E96/7), paras 26-33.

and, where the circumstances in which they were recorded are unknown, may be "afforded little, if any, probative weight".[716]

297. In support of the argument that the Trial Chamber failed to apply those standards, NUON Chea posits that it failed to make "even once […] explicit reference to either the absence of cross-examination or the reliability of any single [interview record], statement, civil party application or complaint".[717] The Supreme Court Chamber does not consider that this establishes an overall error in the Trial Chamber's approach, as opposed to, potentially, errors in respect of specific factual findings. First, there is no requirement under the ECCC legal framework to provide written reasons for the assessment of each individual statement,[718] nor would it be in the interests of an expeditious trial to do so. In addition, there were instances where the Trial Chamber did make explicit reference to the reliability of individual written statements.[719]

298. The second, more complex issue is whether the Trial Chamber relied too heavily on out-of-court written statements. NUON Chea submits that a single out-of-court witness statement cannot be the basis to establish key facts in dispute between the Parties and refers to a number of instances in the Trial Judgement where the Trial Chamber allegedly nevertheless did just that.[720] The Supreme Court Chamber will consider under the appropriate sections of its judgement if out-of-court statements were afforded too much probative value and, in particular, whether the conviction depended solely or to a decisive degree on statements of individuals who the Defence was not afforded a chance to examine.

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[716] Decision on Admission of Written Statements (E96/7), para. 29.
[717] NUON Chea's Appeal Brief, para. 163.
[718] The ECCC has not adopted the standard for admission of out-of-court statements found in ICC Rule 68 of the Rules of Evidence and Procedure. Therefore, the holding in the *Bemba* Decision on the Admission of Evidence (ICC), para. 81, where the ICC Appeals Chamber found that a trial chamber of the ICC had erred because had decided "to admit all prior recorded statements without a cautious item-by-item analysis" is not applicable to the case at hand.
[719] *See* Trial Judgement, para. 80 (the Trial Chamber assessed the circumstances in which the record of KHEM Ngun's interview with NUON Chea had been taken and found the written transcript of the interview to be a reliable basis for a factual finding); Trial Judgement, para. 397 (the Chamber considered the notes of interview prepared by Stephen HEDER should not be afforded significant probative weight).
[720] NUON Chea's Appeal Brief, paras 163, 165.

299. Nevertheless, NUON Chea and KHIEU Samphân have failed to establish errors in the overall approach of the Trial Chamber to written evidence in lieu of in court testimony and their respective grounds of appeal are therefore dismissed.

5. Assessment of hearsay evidence

300. While not specifically referring to the term "hearsay evidence", the Trial Chamber stated that "[a]bsent the opportunity to examine the source or author of evidence, less weight may be assigned to that evidence".[721] NUON Chea and KHIEU Samphân do not contest the Trial Chamber's articulation of the standard applicable to the evaluation of hearsay evidence;[722] rather, they allege that the Trial Chamber failed to apply this standard in its assessment of the evidence.[723] In particular, NUON Chea avers that the Trial Chamber repeatedly relied on anonymous and/or uncorroborated hearsay evidence to make findings or establish critical facts in dispute.[724] He contends that the Trial Chamber also often mischaracterised or disregarded the hearsay nature of the evidence.[725] He submits that "[t]he worst abuse of the evidence was without question the Trial Chamber's finding that Khmer Republic soldiers were executed in Oudong in 1974, *solely* on the basis of Philip SHORT's supposed conversations with 'villagers'", a finding which "then became the cornerstone of the Chamber's conclusion that a CPK policy of targeting Khmer Republic soldiers existed prior to 1975 and thereafter".[726]

301. The Co-Prosecutors respond that the Trial Chamber correctly assessed hearsay evidence, and that NUON Chea's examples of alleged errors in the Trial Judgement are misleading and without merit.[727] Regarding KHIEU Samphân's submissions, they contend that he fails to support his argument with any precise references, thereby amounting to an unsubstantiated assertion, which should be summarily dismissed.[728]

302. The Supreme Court Chamber notes that the Trial Chamber's articulation of the standard applicable to the evaluation of hearsay evidence is not in dispute, and NUON

[721] Trial Judgement, para. 34.
[722] NUON Chea's Appeal Brief, paras 166-169; KHIEU Samphân's Appeal Brief, para. 116.
[723] NUON Chea's Appeal Brief, paras 170-171; KHIEU Samphân's Appeal Brief, para. 116.
[724] NUON Chea's Appeal Brief, para. 170.
[725] NUON Chea's Appeal Brief, para. 171.
[726] NUON Chea's Appeal Brief, para. 170.
[727] Co-Prosecutors' Response, paras 91-93.
[728] Co-Prosecutors' Response, para. 107.

Chea concedes that it is in line with international case law.[729] Indeed, the ICTR Appeals Chamber has established that the "weight and probative value to be afforded to [hearsay] evidence will usually be less than that accorded to the evidence of a witness who has given it under oath and who has been cross examined",[730] and it will depend on the "infinitely variable circumstances which surround hearsay evidence".[731] It is settled jurisprudence at the *ad hoc* international criminal tribunals that hearsay evidence is admissible as long as it is probative,[732] and that a trial chamber may rely on uncorroborated hearsay evidence to establish an element of a crime, although caution is required in such circumstances.[733] However, the application of this principle led the ICTR Appeals Chamber to find that no reasonable trier of fact could have reached a certain factual conclusion solely on the basis of vague and unverifiable hearsay, in a case where no particulars attesting to the reliability of the account referred to by the witness had been provided.[734] In sum, a trial chamber has broad discretion to consider and rely on hearsay evidence, though this must be done with caution;[735] it is for the appealing party to demonstrate that no reasonable trier of fact could have relied upon it in reaching a specific finding.[736]

303. Turning to the arguments of the Accused, although NUON Chea refers to several instances of reliance on hearsay evidence in the Trial Judgement,[737] he merely

[729] NUON Chea's Appeal Brief, paras 168-169.
[730] *Kalimanzira* Appeal Judgement (ICTR), para. 96, quoting *Karera* Appeal Judgement (ICTR), para. 39.
[731] *Karera* Appeal Judgement (ICTR), para. 39, referring to *Aleksovski* Decision on Evidence (ICTY), para. 15.
[732] *Semanza* Appeal Judgement (ICTR), para. 159; *Rutaganda* Appeal Judgement (ICTR), paras 34, 148, 207, 265, 311; *Karera* Appeal Judgement (ICTR), paras 178, 256; *Lukić and Lukić* Appeal Judgement (ICTY), para. 303.
[733] *Gacumbitsi* Appeal Judgement (ICTR), para. 133, fn. 320; *Hategekimana* Appeal Judgement (ICTR), para. 270.
[734] *Ndindabahizi* Appeal Judgement (ICTR), para. 115 and p. 49. *See also* *Kalimanzira* Appeal Judgement (ICTR), paras 77-80 (reversing a conviction based on witness testimony which was both undetailed as to the relevant factual circumstances and unclear as to whether the accounts were of hearsay nature); *Muvunyi* Appeal Judgement (ICTR), paras 68-70 (finding that the Trial Chamber did not act reasonably and with the requisite degree of caution in basing a conviction entirely on undetailed circumstantial and hearsay evidence).
[735] *Rukundo* Appeal Judgement (ICTR), para. 188; *Ndindabahizi* Appeal Judgement (ICTR), para. 115; *Gacumbitsi* Appeal Judgement (ICTR), para. 115; *Rutaganda* Appeal Judgement (ICTR), paras 34, 207, 311; *Muvunyi* Appeal Judgement (ICTR), paras 70, 81; *Karera* Appeal Judgement (ICTR), paras 39, 178; *Kordić and Čerkez* Appeal Judgement (ICTY), para. 281; *Gatete* Appeal Judgement (ICTR), para. 99; *Đorđević* Appeal Judgement (ICTY), para. 397.
[736] *Karera* Appeal Judgement (ICTR), paras 39, 196.
[737] *See* NUON Chea's Appeal Brief, fns 446-449, referring to Trial Judgement, fns 360, 1391, 1402, 1404, 1449, 1462, 1529, 1537, 2620, 2636, 2639 and paras 471, 474, 486, 490, 511, 832.

asserts that the Trial Chamber's failure to explicitly acknowledge the hearsay nature of the evidence or to expressly consider its reliability constitutes an error.[738] The only specific finding in relation to which NUON Chea develops his arguments in this regard concerns the CPK policy of targeting Khmer Republic soldiers and officials, a finding which he contends is based solely on Philip SHORT's hearsay testimony about killings at Oudong. The Supreme Court Chamber shall assess these arguments below in the context of its discussion of the other arguments raised against the Trial Chamber's findings that such a policy existed.

304. KHIEU Samphân also merely asserts that the Trial Chamber erred in relying on hearsay, but provides no specific references to support this assertion.[739] Mere assertions of error without further substantiation do not meet the standard of appellate review. Although the Trial Chamber has an obligation to provide a reasoned opinion, it is not required to articulate every step of its reasoning in detail, and it is presumed to have properly evaluated all the evidence before it, as long as there is no indication that it completely disregarded any particular piece of evidence.[740] The Supreme Court Chamber notes that, throughout his appeal brief, KHIEU Samphân points to Trial Chamber's factual findings improperly based, in his averment, on hearsay evidence.[741] As such, where the Accused has developed allegations of error more fully elsewhere in their respective appeal briefs, the Supreme Court Chamber will consider them accordingly. However, the argument that the Trial Chamber generally misapplied the standard for the treatment of hearsay evidence must be rejected.

6. Reliance on civil party evidence

305. In the course of the proceedings before the Trial Chamber, civil parties provided information relevant to the case in three ways: (i) by testifying before the Trial Chamber ("civil party testimony"); (ii) by making, at the end of their in-court testimony, a statement outlining their suffering ("statements of suffering"); and (iii) by giving victim impact testimony in the context of a four-day hearing specifically

[738] NUON Chea's Appeal Brief, paras 170-171.
[739] *See* KHIEU Samphân's Appeal Brief, para. 116 and fn. 241 ("[f]or concrete examples, see *infra*").
[740] *See*, *e.g.*, *Kalimanzira* Appeal Judgement (ICTR), para. 195; *Simba* Appeal Judgement (ICTR), para. 152; *Halilović* Appeal Judgement (ICTY), para. 121; *Kvočka* Appeal Judgement (ICTY), para. 23.
[741] *See*, *e.g.*, KHIEU Samphân's Appeal Brief, paras 182-183, 188, 203, 211, 217, 219-220, 355, 424, 430, 535, fn. 1165.

scheduled for that purpose toward the end of the trial ("victim impact testimony" and "victim impact hearing", respectively).

306. NUON Chea submits that the Trial Chamber erred in law by assessing civil party testimony on a case-by-case basis in light of the credibility of the testimony to make findings relating to the guilt of the Accused.[742] He seems to argue that the Trial Chamber should not have relied on civil party testimony at all when making findings on the guilt of the Accused, although his arguments could also be understood as suggesting that it was wrong to rely primarily or solely on civil party testimony or that it should have generally been given lower probative value compared to witness testimony.[743] NUON Chea recalls that the Co-Prosecutors sought a ruling on this matter in the course of the trial, which the Trial Chamber "effectively granted".[744] He submits that the Trial Chamber's approach was erroneous because the role of civil parties in the proceedings before the ECCC is limited; that, according to the Internal Rules and the Code of Criminal Procedure of Cambodia, civil parties may not be heard as witnesses; and that their role is to support the Co-Prosecutors.[745] He notes that civil party testimony lacks the safeguards that are in place for witness testimony, notably the requirement to take an oath and the prohibition of the Co-Prosecutors and Defence to be in contact with witnesses before their testimony, whereas civil parties are free to consult with their lawyers.[746]

307. As regards the Trial Chamber's reliance on statements of suffering and victim impact testimony, NUON Chea submits that they "should have been excluded entirely from the Chamber's consideration of the substance of the allegations",[747] and that "[e]ach and every reference to victim impact testimony in the [Trial] Judgement for any purpose other than reparations and sentencing constitutes an error of law".[748] He argues that reliance on victim impact testimony is contrary to the Trial Chamber's

[742] NUON Chea's Appeal Brief, para. 194.
[743] *See* NUON Chea's Appeal Brief, para. 206.
[744] NUON Chea's Appeal Brief, para. 194, referring to Co-Prosecutors' Submissions on Civil Party Testimony (E267) and Decision on Statement of Suffering (E267/3).
[745] NUON Chea's Appeal Brief, paras 197-199.
[746] NUON Chea's Appeal Brief, paras 201-206.
[747] NUON Chea's Appeal Brief, para. 187.
[748] NUON Chea's Appeal Brief, para. 193. *See also* NUON Chea's Appeal Brief, fn. 527 ("It follows that each and every finding of fact based only on victim impact testimony is furthermore an error of fact. Specific factual errors relevant to the charges are set out throughout these submissions").

repeated indication that they "would not constitute evidence of guilt".[749] He also refers to the practices of the ICTY and ICC as well as that of domestic jurisdictions in support of his contention that victim impact testimony should only have been used for sentencing purposes.[750]

308. KHIEU Samphân argues that the Trial Chamber erred in relying on victim impact testimony to make factual findings, submitting that "[i]n the overall view of the [Trial] Chamber's decisions, these statements were […] not to provide evidence prejudicial to the Accused".[751]

309. The Co-Prosecutors respond that NUON Chea's submissions distort the Trial Chamber's ruling and ignore relevant procedural history on this issue, establishing that there was mutual consent amongst the Parties to question civil parties on relevant factual issues.[752] They contend that NUON Chea is now taking a position contrary to his position at trial, barring him from complaining about it on appeal.[753] They submit that all Parties knew that elements of the victim impact testimony relevant to guilt could be considered by the Trial Chamber.[754] The Co-Prosecutors submit that KHIEU Samphân's arguments are equally without merit and, in any event, do not allege an error that would invalidate the verdict or occasion a miscarriage of justice.[755]

310. The Civil Party Lead Co-Lawyers respond that NUON Chea's argument is baseless because he knew that the civil parties would be permitted to provide evidence in the form of Civil party testimony, victim impact testimony and Statements of Suffering.[756] They submit that the Trial Chamber applied the correct standard when determining the procedure and modalities for examining civil parties and its subsequent reliance on their evidence to make findings.[757]

[749] NUON Chea's Appeal Brief, para. 190.
[750] NUON Chea's Appeal Brief, paras 188, 192.
[751] KHIEU Samphân's Appeal Brief, para. 30.
[752] Co-Prosecutors' Response, paras 99-101.
[753] Co-Prosecutors' Response, para. 102.
[754] Co-Prosecutors' Response, para. 103.
[755] Co-Prosecutors' Response, paras 108-109.
[756] Civil Parties' Response, paras 84-91.
[757] Civil Parties' Response, paras 70-168.

a) Reliance on civil party testimony

311. The Supreme Court Chamber recalls that, in the proceedings before the ECCC, civil parties are recognised as a "party", along with the Co-Prosecutors and the charged person/accused. As already observed by the Supreme Court Chamber,[758] this status affords civil parties a number of participatory rights, including the right to request to summon witnesses and question them; their role is to "support the prosecution" and seek reparations.

312. As noted by NUON Chea,[759] Internal Rule 23(4) provides that a "Civil Party cannot be questioned as a simple witness in the same case", reflecting Article 312 of the Code of Criminal Procedure of Cambodia, which stipulates that "[a] civil party may never be heard as a witness". This, however, does not mean that civil parties may not testify to issues relating to the guilt of an accused, or that the Trial Chamber may not take such testimony into account when making its factual findings. To the contrary, the civil party – the individual who claims to be the victim of an alleged crime – will often be particularly well-placed to report on the events that form the basis of the allegation. If civil parties' testimony were *per se* inadmissible, this would not be conducive to establishing the truth of the allegations against an accused person.

313. Indeed, the Internal Rules are based on the assumption that civil parties may provide information relating to the guilt of an accused. Internal Rule 59 stipulates the conditions under which the Co-Investigating Judges may interview civil parties in the course of a judicial investigation. There is no indication in the text of that provision that would suggest that the questioning must be limited to issues relevant to reparations and must not touch upon issues relevant to the guilt of the suspects. Similarly, Internal Rule 91(1) stipulates that "[t]he Chamber shall hear the Civil Parties, witnesses and experts in the order it considers useful". Thus, civil parties are mentioned, together with witnesses and experts, as means for establishing the truth in respect of the allegations against the accused. Accordingly, the Trial Chamber may rely on the testimony of civil parties to make determinations of guilt, just as it may rely on the testimony of the accused person, should he or she decide to testify.[760]

[758] Decision on Civil Party Standing (F10/2), paras 11-14.
[759] NUON Chea's Appeal Brief, para. 197.
[760] *See* Internal Rule 90.

While the status of a civil party may be of relevance to the probative value and/or credibility of the testimony, there is no reason to exclude it *per se.*

314. In light of the above, the Trial Chamber's approach to civil party testimony cannot be faulted. IENG Sary raised the issue of whether civil parties would be allowed to testify to their knowledge of the criminal case and argued that, at the least, they should be required to testify under oath.[761] The Trial Chamber decided to follow the same approach as in Case 001,[762] when it held that the weight given to civil party testimony will be assessed on a case-by-case basis in light of the credibility of the testimony and that civil parties were not required to testify under oath.[763] The Trial Chamber's approach allowed it to assess individually the probative value of the testimony based on a number of factors, including the demeanour of the person testifying, consistencies or inconsistencies in relation to material facts, ulterior motivations, corroboration and all the circumstances of the case.[764] The Trial Chamber specifically stated in the Trial Judgement (albeit in respect of documentary evidence) that, in assessing the evidence, it had considered the "identification, examination, bias, source and motive – or lack thereof – of the authors and sources the evidence".[765] The Supreme Court Chamber further notes that the Trial Chamber acknowledged the special status of the civil parties when testifying.[766]

315. To the extent that NUON Chea refers to factors that are unique to the role of civil parties (for example, that they take no oath, that their principal interest is seeking reparations, the lack of sanctions for false testimony, and their ability to consult with counsel during proceedings[767]), these are all factors that feed into the application of the approach the Trial Chamber adopted and are therefore to be considered when assessing the probative value and weight of individual civil party testimony. These factors *per se* do not demonstrate an error of law in the Trial Chamber's approach.

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[761] IENG Sary's Motion on Civil Party Testimony (E57).
[762] *See* *Duch* Trial Judgement (001-E188), paras 42, 53.
[763] *See* Trial Management Meeting, T. 5 April 2011, E1/2.1, p. 100; Decision on Oath Taking by Civil Parties (E74), p. 1; Decision on Statement of Suffering (E267/3), paras 21-22.
[764] *See mutatis mutandis* for witness evidence, *Kupreškić* Appeal Judgement (ICTY), para. 138; *Đorđević* Appeal Judgement (ICTY), para. 395; *Nahimana* Appeal Judgement (ICTR), para. 194; *Bikindi* Appeal Judgement (ICTR), para. 114; *Musema* Appeal Judgement (ICTR), para. 36.
[765] Trial Judgement, para. 34.
[766] Trial Judgement, para. 30.
[767] NUON Chea's Appeal Brief, paras 197-206.

316. NUON Chea's arguments are therefore dismissed. The Supreme Court Chamber will consider NUON Chea's more specific allegations regarding the Trial Chamber's reliance on civil party testimony in the relevant sections of this judgement.

b) Reliance on statements of suffering and victim impact testimony

317. The Trial Chamber heard thirteen civil parties make statements of suffering after their testimony in the substantive hearing,[768] and heard fifteen civil parties during the victim impact hearing.[769] During the substantive hearing, the Parties had the opportunity to question the civil parties, but were permitted to make comments on the statements of suffering only once the civil parties had left the courtroom.[770] The Parties were also able to examine the civil parties during the victim impact hearing, albeit only briefly.[771]

318. The issue that arises is whether the Trial Chamber erred when relying upon victim impact testimony or statements of suffering when making factual findings relevant to the guilt of the Accused. The Supreme Court Chamber notes that applicable legal texts do not provide any *prima facie* reason as to why the Trial Chamber could not rely upon victim impact testimony or statements of suffering for that purpose. Pursuant to Internal Rule 87, the Trial Chamber has judicial discretion to admit any evidence that is, *inter alia*, reliable and relevant.

319. Nor is the Supreme Court Chamber persuaded that the Trial Chamber's practice was contrary to prior practice or to assurances it had given in the course of the trial. NUON Chea's references to Case 001 are not pertinent. In the passage of the

[768] T. 29 August 2012 (EM Oeun), E1/117.1; T. 22 October 2012 (YIM Sovann; CHUM Sokha), E1/136.1; T. 24 October 2012 (LAY Bony), E1/138.1; T. 6 November 2012 (MOM Sam Oeum), E1/141.1; T. 22 November 2012 (MEAS Saran), E1/145.1; T. 23 November 2012 (OR Ry; CHAU Ny), E1/146.1; T. 4 December 2012 (TOENG Sokha), E1/147.1; T. 5 December 2012 (PECH Srey Phal), E1/148.1; T. 6 December 2012 (KIM Vanndy), E1/149.1; T. 13 January 2013 (Denise AFFONÇO), E1/153.1; T. 7 February 2013 (PIN Yathay), E1/170.1.
[769] T. 27 May 2013 (SOU Sotheavy), E1/197.1; T. 27 May 2013 (AUN Phally), E1/197.1; T. 27 May 2013 (SANG Rath), E1/197.1; T. 27 May 2013 (YOS Phal), E1/197.1; T. 29 May 2013 (THOUCH Phandarasar), E1/198.1; T. 29 May 2013 (CHAN Sopheap), E1/198.1; T. 29 May 2013 (HUO Chantha), E1/198.1; T. 29 May 2013 (CHHENG Eng Ly), E1/198.1; T. 30 May 2013 (NOU Hoan), E1/199.1; T. 30 May 2013 (SOPHAN Sovany), E1/199.1; T. 30 May 2013 (YIM Roumdoul), E1/199.1; T. 30 May 2013 (PO Dina), E1/199.1; T. 4 June 2013 (BAY Sophany), E1/200.1; T. 4 June 2013 (SOEUN Sovandy), E1/200.1; T. 4 June 2013 (SENG Sivutha), E1/200.1.
[770] Decision on Statement of Suffering (E267/3), para. 18.
[771] *See* T. 21 May 2013, E1/194.1, p. 119.

Duch Trial Judgement (001-E188) to which he refers,[772] the Trial Chamber merely found that the impact of the crime on the victim is a relevant consideration when evaluating the gravity of the crime. The Trial Chamber did not state that victim impact testimony could not be relied upon for findings of guilt. Similarly, the other Case 001 decision to which NUON Chea refers[773] concerned, *inter alia*, the question of whether civil parties were entitled to ask questions of the accused person, witnesses and experts who were to testify to the character of the accused, a matter relevant to sentencing. Nowhere in that decision did the Trial Chamber indicate that victim impact testimony could not be used to determine the guilt of the accused.

320. In Case 002/01, the Trial Chamber generally permitted civil parties "to express their suffering during the DK era in general" after their testimony, and stated that it had "distinguished at all time between testimony on the facts at issue, which is confined to the scope of Case 002/01 and subject to adversarial argument, and general statements of suffering, which the Civil Party can freely make at the conclusion of their testimony".[774] Nevertheless, the Trial Chamber clearly envisaged that statements of suffering could contain information relevant to the guilt of the Accused. Notably, it directed the Civil Party Lead Co-Lawyers to "discourage new allegations being made against the Accused at that stage", and noted that "[w]here the Accused's rights are alleged to be violated, the Defence has been granted ample opportunity to object".[775] Importantly, in a situation where a statement of suffering contained a new allegation against KHIEU Samphân, the Trial Chamber granted a request that the civil party who made the allegation be recalled for further questions on that allegation.[776] This demonstrates that, first, while statements of sufferings were not *intended* to contain new information relevant to the charges, both the Trial Chamber and the Parties were aware that this could occur; and, second, that the fact that the Trial Chamber granted the request that the civil party be recalled indicates that the Trial Chamber was of the view that the information contained in the statement of suffering could potentially be used for the determination of the guilt of the Accused; had it been otherwise, there

[772] NUON Chea's Appeal Brief, para. 189, fn. 512, referring to *Duch* Trial Judgement (001-E188), para. 596.
[773] NUON Chea's Appeal Brief, para. 189, fn. 513, referring to Decision on Civil Party Sentencing Standing (001-E72/3), para. 46.
[774] Decision on Statement of Suffering (E267/3), para. 14.
[775] Decision on Statement of Suffering (E267/3), para. 17.
[776] *See* Decision on Statement of Suffering (E267/3), para. 19.

would have been no need to give the Accused an opportunity to recall the civil party for further questioning. It was up to NUON Chea to make such requests in the course of the trial.

321. As regards the victim impact testimony, the Supreme Court Chamber notes that the modalities that the Parties proposed for questioning civil parties during the victim impact hearing, which were then adopted by the Trial Chamber,[777] indicate that they expected that civil parties would give evidence that could be relevant to the guilt of the Accused.[778] Importantly, it was discussed, *inter alia*, that civil parties could be questioned on all issues of relevance to the case,[779] could give evidence which goes to the heart of the forced movements,[780] and could be challenged by the Co-Prosecutors and the Defence, who were specifically allotted time for questioning.[781]

322. In sum, there is no indication that the Trial Chamber gave the impression that information contained in either statements of suffering or victim impact testimony could not be used to determine the question of guilt of the Accused and NUON Chea's arguments to that effect are rejected.

323. The Supreme Court Chamber also rejects his arguments that international and domestic practice indicates that testimony of suffering by victims may not be used to make determinations of guilt.[782] The jurisdictions to which he refers (Australia, Canada, Israel, New Zealand and the United States, as well as the ICC) have different procedural regimes in which civil parties do not participate. They are therefore of limited relevance to the issue at hand.

324. The Supreme Court Chamber accordingly finds that the Trial Chamber did not err in relying on statements of suffering of victim impact testimony as material evidence. Specific allegations concerning the probative value and weight assigned to

[777] T. 21 May 2013, E1/194.1, p. 119.
[778] T. 20 May 2013, E1/193.1, pp. 100-110.
[779] T. 20 May 2013, E1/193.1, p. 105
[780] T. 20 May 2013, E1/193.1, p. 106.
[781] T. 20 May 2013, E1/193.1, pp. 106-107; T. 21 May 2013, E1/194.1, p. 119.
[782] NUON Chea's Appeal Brief, para. 188.

individual statements of suffering and victim impact testimony are addressed in the relevant sections of this judgement.[783]

7. Reliance on expert testimony and secondary sources

325. In discussing the admissibility of evidence, the Trial Chamber stated that, over the course of Case 002/01, it had heard the opinions of experts on "specific technical issues, to assist it in understanding evidence presented during trial".[784] The Trial Chamber had heard three experts:[785] Philip SHORT, David CHANDLER and CHHIM Sotheara. The latter testified to the psychological impact of the Democratic Kampuchea period on the victims;[786] the Accused do not raise any arguments in that regard.

326. NUON Chea and KHIEU Samphân submit that, in principle, the Trial Chamber accurately recognised the limitations on expert opinions, but that, in practice, it routinely relied on expert testimony as direct evidence in support of factual findings in dispute between the Parties.[787] They contend that the Trial Chamber also erred by relying frequently on work from authors who did not testify in court as sources of considerable importance in support of findings of fact in dispute, and that it made no genuine effort to assess the expertise of any of these authors or experts or to explain why it considered their accounts of the facts reliable.[788]

327. The Co-Prosecutors respond that NUON Chea and KHIEU Samphân fail to demonstrate any error in the Trial Chamber's reliance on expert evidence and secondary sources.[789]

328. Internal Rule 31(1) provides that "[e]xpert opinion may be sought by the Co-Investigating Judges or the Chambers, on any subject deemed necessary to their investigations or proceedings before the ECCC". The remainder of the provision contains detailed rules as to how an expert is perform his or her task. The Code of Criminal Procedure of Cambodia contemplates the appointment of experts to assist

[783] *See* NUON Chea's Appeal Brief, fn. 503.
[784] Trial Judgement, para. 30.
[785] Trial Judgement, para. 32.
[786] *See* Trial Judgement, paras 1142, 1150.
[787] NUON Chea's Appeal Brief, paras 207-209; KHIEU Samphân's Appeal Brief, para. 118.
[788] NUON Chea's Appeal Brief, paras 210-211; KHIEU Samphân's Appeal Brief, paras 24, 118.
[789] Co-Prosecutors' Response, paras 104-107.

judges with technical aspects of the case, making provision for detailed rules regarding the use of experts during the investigative phase of proceedings.[790] Similarly, international jurisprudence and practice recognises that an expert witness is meant to provide specialised knowledge that may assist the fact finder to understand the evidence presented.[791] Jurisprudence from the *ad hoc* tribunals indicates that the role of an expert witness in proceedings before those tribunals is to testify to issues within his specific expertise, but not to testify on disputed facts or about the acts, conduct, or criminal responsibility of an accused as would a fact witness.[792] For that reason, a trial chamber's finding concerning an alleged murder attributed to the accused, which was based exclusively on the testimony of an expert witness amounting to double hearsay, was overturned on appeal.[793] The jurisprudence of the ICTY and ICTR further shows that, before these tribunals: (i) expert witnesses are afforded latitude as to what falls within their expertise;[794] (ii) when testifying to issues outside their expertise, their testimony "will be treated as personal opinions of the witness and will be weighed accordingly"[795] (suggesting that it may still be considered by the trier of fact); and (iii) that it is possible for an individual to assume both the role of an expert and that of a fact witness.[796]

329. NUON Chea refers to several instances in which he contends that the Trial Chamber erroneously relied on the testimony of expert witnesses Philip SHORT and David CHANDLER.[797] However, as noted above, the Trial Chamber's reliance on expert testimony to reach factual conclusions is not *per se* prohibited, as long as the role of experts remains limited to assisting the trier of fact in "understanding evidence

[790] *See* Code of Criminal Procedure of Cambodia, Arts 162-171.
[791] *Renzaho* Appeal Judgement (ICTR), para. 287; *Nahimana* Appeal Judgement (ICTR), para. 198; *Semanza* Appeal Judgement (ICTR), para. 303; *Simba* Appeal Judgement (ICTR), para. 174; *D. Milošević* Appeal Judgement (ICTY), para. 117.
[792] *Nahimana* Appeal Judgement (ICTR), paras 212, 509; *Renzaho* Appeal Judgement (ICTR), para. 288; *Bagosora* Appeal Judgement (ICTR), para. 226, fn. 503.
[793] *Nahimana* Appeal Judgement (ICTR), paras 508-509.
[794] *Nahimana* Appeal Judgement (ICTR), para. 198 (quoting *Semanza* Appeal Judgement (ICTR), para. 303); *Renzaho* Appeal Judgement (ICTR), para. 287; *Bagosora* Appeal Judgement (ICTR), para. 225.
[795] *D. Milošević* Decision on Admission of Expert Report of Robert Donia (ICTY), para. 11.
[796] *See* *Renzaho* Appeal Judgement (ICTR), para. 288 "Thus, while the report and testimony of an expert witness may be based on facts narrated by ordinary witnesses or facts from other evidence, an expert witness cannot, in principle, testify himself or herself on the acts and conduct of accused persons *without having also been called to testify as a factual witness and without his or her statement having been disclosed in accordance with the applicable rules concerning fact witnesses*" (footnote(s) omitted, emphasis added).
[797] NUON Chea's Appeal Brief, para. 209; in the relevant footnotes, NUON Chea only refers to instance of the Trial Chamber relying on these two experts.

presented during trial",[798] without becoming the vehicle for the introduction of otherwise unreliable evidence. Therefore, a key factor in the assessment of the reliability and probative value of expert evidence is the careful scrutiny of the sources from which experts infer their conclusions.[799] This is typically done in the course of cross-examination.[800] Where the sources are not fully accessible and verifiable, a diminished weight must be attributed to expert evidence derived from them, given the restricted possibility for the Parties and the court to test the experts' conclusions.[801]

330. More specifically, NUON Chea contends that there are numerous findings by the Trial Chamber that are erroneously based on expert opinion.[802] He raises the same argument in relation to findings supported by citations to academic works or other secondary sources.[803] The Supreme Court Chamber limits itself to observe, at this stage, that most of these references to which NUON Chea points were merely in relation to circumstantial findings (in that they were not pivotal or did not go to proof

[798] Trial Judgement, para. 30, fn. 82. *See also* *Nahimana* Appeal Judgement (ICTR), para. 198 (including references cited in fn. 473).
[799] *See*, *e.g.*, *Tolimir* Decision on Admission of Expert Report of Ratko (ICTY), para. 15 ("[i]n establishing reliability, there must be sufficient information as to the sources used in support of [the experts'] statements, which must be clearly indicated so as to allow the other party or the Chamber to test the basis on which the witness reached his or her conclusions. In the absence of clear references or accessible sources, the Chamber will treat such statements as the personal opinion of the witness and weigh the evidence accordingly" (footnote(s) omitted)); *D. Milošević* Decision on Admission of Expert Report of Robert Donia (ICTY), para. 8; *Popović* Decision on Defence Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler (ICTY), para. 30 (transparency in the methods and sources used by expert witnesses, including the established or assumed facts on which they relied, has been a factor used by trial chambers to assess the reliability and probative value of experts' conclusions). The Supreme Court Chamber considers that a careful assessment of the experts' sources is especially appropriate where, like in the present case, the fact finder is considering evidence provided by historical experts (Philip SHORT and David CHANDLER), since their specialist knowledge and analytical skills are indeed, as noted by NUON Chea (NUON Chea's Appeal Brief, para. 211), close to those expected of the judges involved in the present case.
[800] *Mladić* Decision on Defence Request to Disqualify Richard Butler as an Expert (ICTY), para. 15. *See also* *Galić* Decision on Expert Witness Statements (ICTY), pp. 6-7 (the sources used by expert witnesses to draw their conclusions must be clearly indicated and easily accessible to the parties upon request in order to allow proper preparation for cross-examination).
[801] *See* *Karadžić* Decision on Motion to Exclude Expert Report (ICTY), paras 22-23 (admitting an expert report into evidence despite limited indication of the sources for the opinions set out therein, but stating that this factor will be accounted for when evaluating the weight to be assigned to the report, once the expert witness has been cross-examined and in light of the totality of evidence). The Supreme Court Chamber clarifies that accessibility and verifiability of an expert's sources is a factor that is relevant, in the present discussion, to the evaluation of the probative value of the evidence. Therefore, the fact that international jurisprudence is unsettled as to the significance of such factor in the admissibility stage is immaterial. *See* A. SINGH, 'Expert Evidence', in K. KHAN, C. BUISMAN, C. GOSNEL (eds), *Principles of Evidence in International Criminal Justice*, Oxford University Press, 2010, p. 629.
[802] NUON Chea's Appeal Brief, para. 209.
[803] NUON Chea's Appeal Brief, para. 210.

of the acts or conduct of the accused) and/or were derived from other sources of evidence, including live testimony.[804] The few instances where the Trial Chamber relied solely on expert evidence or secondary sources to draw pivotal conclusions will be addressed in the relevant sections below.[805] As to NUON Chea's argument concerning the role of Philip SHORT, it is also of note that the Trial Chamber, in the Decision on Assignment of Experts (E215), found that he is "principally sought by the parties due to [his] personal knowledge of facts relevant to the Democratic Kampuchea period […]. [He is] therefore called as [an expert witness] although [he] may also be questioned on facts within [his] personal knowledge relevant to Case 002/01".[806] Thus, it was clear from the beginning that Philip SHORT might not only assume the role of an expert, but also that of a fact witness. With regard to the instance to which NUON Chea refers, in which Philip SHORT expressed an opinion apparently falling outside his field of expertise,[807] NUON Chea does not demonstrate how the related finding by the Trial Chamber[808] was instrumental to his conviction, nor does he argue that the Trial Chamber failed to treat SHORT's view as a personal opinion or to weigh it accordingly.

331. As to NUON Chea's argument that the Trial Chamber failed to assess the expertise of the experts, the Supreme Court Chamber recalls that the Trial Chamber qualified David CHANDLER and Philip SHORT as experts on the CPK and the state

[804] For instance, Trial Judgement, para. 114, fn. 318, cites expert evidence and academic works in support of the determination that, in the period leading up to April 1975, "[t]he CPK imposed increasingly difficult working conditions on members of cooperatives". Although this finding, as submitted by NUON Chea, is not supported by sources other than expert evidence and academic works (the cited fact witnesses do not refer to "increasingly difficult working conditions" in the cooperatives), NUON Chea does not demonstrate that this finding was instrumental to his conviction. The Trial Chamber found that there had been a nexus between the acts of the Accused and the attack against the civilian population and that the Accused knew of the attack and knew that their acts formed part of this attack, given that the attack was carried out in furtherance of, and pursuant to, Party policies and plans (Trial Judgement, para. 197. The Trial Chamber also found that the policy to evacuate cities forcibly "was taken pursuant to the Party's long-standing political line, focusing on agricultural production" (Trial Judgement, para. 790, referring, *inter alia*, to para. 116). However, none of those findings relied on the working conditions in the cooperatives, but on the existence of a Party policy to create cooperatives. Moreover, they were based on additional circumstances. Another example relates to the Trial Chamber's findings that NUON Chea had ultimate decision-making power within the Party and that his control extended to military matters (*see* Trial Judgement, para. 348). Even though the Trial Chamber, in making those findings, "agreed" with the views of two experts, its conclusion was based on a wealth of other evidence, including testimony of fact witnesses and contemporaneous DK documents (*see* Trial Judgement, paras 334-341).
[805] *See*, *e.g.*, paras 880-881, 888, 920.
[806] Decision on Assignment of Experts (E215), para. 18.
[807] NUON Chea's Appeal Brief, para. 209.
[808] Trial Judgement, paras 538-539.

of affairs in the DK period after having heard all the Parties on the subject,[809] including NUON Chea who, by including them in his list of proposed witnesses, acknowledged that they held the relevant expertise.[810] The Supreme Court Chamber is therefore unpersuaded by NUON Chea's challenge to their authority on appeal.[811]

332. NUON Chea also contests the Trial Chamber's resort to the writings of Ben KIERNAN and Elizabeth BECKER as "secondary sources" of evidence, albeit for different reasons, contending the former's lack of objectivity and the latter's lack of expertise.[812] KHIEU Samphân's general submissions that the Trial Chamber erred in adopting expert opinion as the basis for its findings and failed to ascertain whether the sources used by experts met the standards for admissibility of evidence are largely unsubstantiated.[813] The only specificity he provides in this respect relates to the work of Ben KIERNAN, which he alleges the Trial Chamber cited in support of certain factual findings despite its minimal probative value,[814] and the work of Elizabeth BECKER, which he contends the Trial Chamber relied upon as the sole source to substantiate certain other findings.[815]

333. NUON Chea's refutation of the writings and expertise of Elizabeth BECKER as evidence is unsubstantiated and contradicts his previous position that she should be called as a fact witness to testify about, *inter alia*, the command structure of the CPK, indicating that she could offer insight into pre-1975 conditions in the Khmer Republic and that, as only one of two American journalists briefly allowed into Democratic Kampuchea in 1978, she could offer insight into the state of affairs there at that time.[816] Moreover, Elizabeth BECKER's work was only used by the Trial Chamber in

[809] Decision on Assignment of Experts (E215), paras 17-18.
[810] *See* NUON Chea's Summaries of Proposed Witnesses (E9/10) and Annex to NUON Chea's Summaries of Proposed Witnesses (E9/10.1), pp. 8, 48; NUON Chea's Updated Summaries of Proposed Witnesses (E93/4) and Annex to NUON Chea's Updated Summaries of Proposed Witnesses (E93/4.3), pp. 22, 120.
[811] *See* NUON Chea's Appeal Brief, para. 211.
[812] NUON Chea's Appeal Brief, para. 211 ("Elizabeth Becker's brief sojourn as a reporter in Cambodia in 1973-1974 hardly endows her with the background, skills or knowledge to make broad assessments about the CPK or assertions about events she was nowhere near and did not observe. […] Ben KIERNAN may have nominal expertise but the objectivity of his analysis as a 'vile and odious hireling' of Vietnamese is doubtful").
[813] KHIEU Samphân's Appeal Brief, paras 24, 118.
[814] KHIEU Samphân's Appeal Brief, para. 24, and references cited at fn. 55.
[815] KHIEU Samphân's Appeal Brief, para. 24, and references cited at fn. 56.
[816] *See* NUON Chea's Summaries of Proposed Witnesses (E9/10) and Annex to NUON Chea's Summaries of Proposed Witnesses (E9/10.1), p. 4; NUON Chea's Updated Summaries of Proposed

relation to circumstantial findings[817] or findings that were derived from a variety of other sources of evidence.[818] KHIEU Samphân also contests the use of Elizabeth BECKER's work as evidence, but only where the Trial Chamber cites it exclusively.[819] A review of the findings to which those citations relate shows, once again, that they are of a background nature only, and do not have any bearing on NUON Chea's or KHIEU Samphân's convictions.[820] Their respective challenges to the Trial Chamber's reliance on her work are accordingly dismissed.

334. With respect to Ben KIERNAN, a review of the trial record shows that the Trial Chamber sought to obtain his live in-court testimony, as it "recognized […] that his expertise placed him among the foremost international authorities on the Democratic Kampuchea era and as it adjudged his expertise as likely to contribute to ascertaining the truth in Case 002".[821] Having been unsuccessful in its efforts to call Ben KIERNAN, the Trial Chamber determined that "his conclusions can have little if any probative value in Case 002 given that their author cannot be adversarially challenged".[822] Despite this, the Trial Chamber cited Ben KIERNAN's academic writings several times.[823] Nevertheless, as already found above,[824] most of these references were in relation to circumstantial findings and were based on a variety of other sources of evidence, including live testimony. NUON Chea's challenge to Ben KIERNAN's objectivity in these respects is therefore unpersuasive.

Witnesses (E93/4) and Annex to NUON Chea's Updated Summaries of Proposed Witnesses (E93/4.3), p. 10.
[817] *See*, *e.g.*, Trial Judgement, fns 200, 203, 205, 209, 214, 218, 222, 224, 234, 264, 906, 1057, 1079.
[818] *See*, *e.g.*, Trial Judgement, fns 672, 772, 1220, 1227, 1730, 1754, 1841, 2500.
[819] KHIEU Samphân's Appeal Brief, para. 24.
[820] *See* KHIEU Samphân's Appeal Brief, para. 24, fn. 56, referring to Trial Judgement, paras 81 ("The first developments of the history of communism in Cambodia are closely linked with the fight against French colonial authorities and especially the armed struggle after World War II, carried out by Khmer Issaraks and the Indochina Communist Party"), 82 ("In late 1953, after NOR[O]DOM Sihanouk had successfully launched his 'Royal Crusade for Independence,' Cambodia again became autonomous. Following the signing of the Geneva Accords in 1954 which nominally ended the first Indochina war"), 83 ("In 1955, NORODOM Sihanouk renounced the throne in order to become the Chief of the Cambodian state. He won an election and launched the Sangkum party which established a neutral foreign policy that included as a policy a refusal to join the Southeast Asia Treaty Organization"), 774 ("However, [in late 1975 and early 1967] Party control in Cambodia was not yet deemed firm enough to open the country") (footnote(s) omitted).
[821] Memo on Ben KIERNAN's Testimony (E166/1/4), p. 2.
[822] Memo on Ben KIERNAN's Testimony (E166/1/4), p. 2.
[823] *See* Trial Judgement, fns 318, 340, 352, 356, 672-673, 677, 683, 686, 694-697, 755, 813, 1057, 1062, 1081, 1142, 1562, 1944, 2385.
[824] *See above*, para. 334.

335. Three references to KIERNAN's work were made in support of findings pertaining to KHIEU Samphân's early life and career;[825] however, these findings are based primarily on KHIEU Samphân's own testimony and writings.[826] In respect of the remaining two instances in which the Trial Chamber refered to Ben KIERNAN's writings, the Supreme Court Chamber notes that they appear to support a finding going to KHIEU Samphân's conduct underpinning his criminal responsibility, namely his active participation in indoctrination sessions for Cambodians returning to the country from overseas.[827] The Supreme Court Chamber shall address the impact on the Trial Chamber's reliance on those writings for the reasonableness of the Trial Chamber's factual findings in the section of this judgement dealing with KHIEU Samphân's individual criminal responsibility.[828]

336. Furthermore, the Supreme Court Chamber rejects NUON Chea's general assertion that the Trial Chamber "made no genuine effort to assess the expertise of any of these authors or experts"[829] for lack of substantiation.

337. In sum, it finds that NUON Chea and KHIEU Samphân have failed to demonstrate any error warranting appellate intervention in the Trial Chamber's reliance on expert testimony or secondary sources. Their grounds of appeal in this regard are accordingly dismissed.

8. Assessment of probative value of fact witnesses

338. NUON Chea submits that, in contrast to the amount of attention it placed on civil party and expert testimony, the Trial Chamber relied on live fact witnesses the

[825] *See* Trial Judgement, paras 352 ("A few months after his arrival in Paris, KHIEU Samphan joined the 'Marxist Circle' founded and regularly attended by other Khmer students in France including IENG Sary, SALOTH Sar, IENG Thirith and SON Sen"), 353 ("Like other members of the Circle, KHIEU Samphan joined the French Communist Party"), 358 ("KHIEU Samphan nevertheless kept his cabinet post until he was forced to resign in mid-1963").
[826] *See* Trial Judgement, fns 1057, 1062, 1081, referring to T. 13 December 2011 (KHIEU Samphân), E1/21.1, pp. 71-73, 75, 86-87, 91; Book by KHIEU Samphân: *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, E3/18, dated 7 July 2004, pp. 13-14, 34.
[827] Trial Judgement, paras 379 ("As well as making speeches, KHIEU Samphan played a role in the re-education of those returning to Cambodia from overseas, conducting at least one policy study session with returnees in 1975"), 757 ("KHIEU Samphan conducted political indoctrination sessions of returned intellectuals and officials in late 1975 and 1976 at K-15. During these sessions, he justified urban evacuations which he claimed had destroyed private property and prevented starvations and lectured that knowledge originating from education by the colonialists and imperialists had to be destroyed").
[828] *See below*, para. 1015.
[829] NUON Chea's Appeal Brief, para. 211.

least in reaching its conclusions, whereas such witnesses "should have formed the foundation of the Judgement".[830] NUON Chea further contends that the relatively few fact witnesses on whose testimony the Trial Chamber did base its findings were either unreliable, or relied upon without explanation, referring in particular to the testimonies of François PONCHAUD, Stephen HEDER, Duch, PHY Phuon, and LIM Sat.[831] He adds that the Trial Chamber repeatedly relied on his own testimony for inculpatory purposes without ever giving credence to his exculpatory evidence.[832] KHIEU Samphân similarly submits that the Trial Chamber erred by consistently disregarding exculpatory evidence and evidence impeaching the credibility of witnesses, pointing in particular to EM Oeun, NOU Mao, PHY Phuon, and Duch.[833]

339. The Co-Prosecutors respond that the Trial Chamber correctly assessed the probative value of fact witnesses, and that NUON Chea and KHIEU Samphân fail to demonstrate any error in this regard.[834]

a) François PONCHAUD and Stephen HEDER

340. NUON Chea contends that the Trial Chamber relied extensively on the evidence of François PONCHAUD and Stephen HEDER "for improper purposes", that is, "far exceed[ing]" the purposes for which they were called as fact witnesses, namely to testify about the limited number of relevant events which they had personally witnessed.[835] In support of this contention, NUON Chea points to several footnotes in the Trial Judgement, submitting that "[e]ach such citation constitutes an error of law".[836]

341. The Supreme Court Chamber notes that François PONCHAUD and Stephen HEDER were called, along with David CHANDLER and Philip SHORT, to give

[830] NUON Chea's Appeal Brief, para. 173.
[831] NUON Chea's Appeal Brief, paras 174-182.
[832] NUON Chea's Appeal Brief, paras 183-184.
[833] KHIEU Samphân's Appeal Brief, para. 43. KHIEU Samphân adds that the Trial Chamber failed to explain why it accepted the evidence of accomplice witnesses, those with an interest to lie, and those whose testimonies present material contradictions upon considering the evidence as a whole. *See* KHIEU Samphân's Appeal Brief, paras 114-115. Unlike his allegations concerning the Trial Chamber's assessment of witnesses EM Oeun, NOU Maro, PHY Phuon, and Duch, his submissions in this respect are not supported with any reference to specifically identified witnesses, and are accordingly summarily dismissed.
[834] Co-Prosecutors' Response, paras 94-97, 107, and fns 86-87.
[835] NUON Chea's Appeal Brief, para. 180.
[836] NUON Chea's Appeal Brief, para. 180 and references cited at fn. 479.

evidence on events prior to 1975 in order to place the allegations in the Closing Order (D427) into context.[837] Stephen HEDER, among others, was also called in relation to features of the government of Democratic Kampuchea and the roles of the Accused.[838]François PONCHAUD was heard, among twenty-three other witnesses, in relation to Population Movement Phases One and Two.[839]

342. A review of the citations in the Trial Judgement to their testimonies shows that they relate to findings supported by other evidence, and stem not only from what they witnessed first-hand, but also from what they heard from other witnesses, or discovered through their own research or interviews. Contrary to NUON Chea's assertion that they "witnessed at most a few hours' worth of events during Democratic Kampuchea",[840] François PONCHAUD had been living in Cambodia since 1965,[841] speaks fluent Khmer,[842] was one of the last foreigners to leave the country weeks after the Khmer Rouge captured Phnom Penh,[843] and testified to having witnessed several relevant events in the years leading up to and including the period of Democratic Kampuchea.[844] After his departure on 7 May 1975, he kept abreast of developments by speaking with refugees in Thailand and France, listening to Khmer Rouge radio broadcasts and reading documents.[845] These sources formed part of the basis of his testimony.[846] The Supreme Court Chamber can see no irregularities in the Trial Chamber's reliance on François PONCHAUD's evidence.

343. As to Stephen HEDER, NUON Chea submits that "special considerations arise from the [Trial] Chamber's reliance on [his] opinions", recalling that HEDER had been employed by the ECCC's Office of the Co-Investigating Judges and Office of the Co-Prosecutors and that he drafted the "blueprint for the Introductory Submissions

[837] Final Decision on Witnesses (E312), para. 31.
[838] Final Decision on Witnesses (E312), para. 42.
[839] Final Decision on Witnesses (E312), paras 60-61.
[840] NUON Chea's Appeal Brief, para. 174. NUON Chea also mentions Sydney SCHANBERG and Al ROCKOFF, but only discusses the evidence of François PONCHAUD and Stephen HEDER. *See* NUON Chea's Appeal Brief, paras 174, 180-182, fn. 456.
[841] *See* T. 9 April 2013 (François PONCHAUD), E1/178.1, pp. 6-9.
[842] *See* T. 9 April 2013 (François PONCHAUD), E1/178.1, pp. 4-6, 10.
[843] *See* T. 9 April 2013 (François PONCHAUD), E1/178.1, pp. 6-9, 38. *See also* NUON Chea's Appeal Brief, fn. 478.
[844] *See* T. 9 April 2013 (François PONCHAUD), E1/178.1, pp. 10-55, 61-63, 69-70; T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 6-12, 21-22, 43-46, 51-52, 67, 93-94, 98-99, 110.
[845] *See* T. 9 April 2013 (François PONCHAUD), E1/178.1, pp. 67, 82-105; T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 14, 27-30, 33-35, 38-43, 56-65, 67-74, 94, 99-103, 108-109.
[846] *See* T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 58-71.

in March 2004 with the publication of *Seven Candidates for Prosecution*".[847] However, NUON Chea's argument that "[h]ad Heder been called as an expert, he would have been required to testify 'with the utmost neutrality and with scientific objectivity'"[848] is unconvincing. There is no indication that Stephen HEDER did not give neutral and objective testimony, or that his testimony would have been more neutral and objective had he testified as an expert and not as a fact witness. NUON Chea himself sought to call Stephen HEDER as a witness, referred to him as a "[l]eading expert on Cambodia",[849] and acknowledged that he had been present in Phnom Penh from 1973 through 1975 and had visited both Kampong Cham and Oudong following their capture by Khmer Rouge forces in 1973 and 1974, respectively.[850] Moreover, Stephen HEDER's numerous writings, which were subject of his testimony, pre-date his employment with the ECCC, and thus could not have been influenced by the latter.[851]

344. As noted above, NUON Chea also alleges that the Trial Chamber violated his right to confront the evidence against him and to equality of arms by permitting the Co-Prosecutors to seek Stephen HEDER's opinion by framing their questions as factual inquiries into his primary research, but disallowing the same during examination by the Defence.[852] He submits that, as a remedy for these alleged

[847] NUON Chea's Appeal Brief, para. 182.
[848] NUON Chea's Appeal Brief, para. 182.
[849] *See* NUON Chea Summaries of Proposed Witnesses (E9/10) and Annex to NUON Chea Summaries of Proposed Witnesses (E9/10.1), p. 17; NUON Chea Updated Summaries of Proposed Witnesses (E93/4) and Annex to NUON Chea Updated Summaries of Proposed Witnesses (E93/4.3), p. 40.
[850] NUON Chea's Appeal Brief, fn. 478.
[851] *See* Book by S. HEDER and B. TITTEMORE, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, E3/48, 2004; Book by S. HEDER, *Cambodia Communism and the Vietnamese Model*, E3/22, 2004; Report by Stephen HEDER and Masato MATSUSHITA: Interviews with Kampuchean Refugees at Thai-Cambodia Border, E3/1714, dated 25 March 1980; Interview Transcript Steve HEDER (SH) with IENG Sary (IS), E/89, 17 December 1996 (date of interview); IENG Sary Interview by Stephen HEDER, E3/543, dated 17 December 1996; IENG Sary Discussion with Stephen HEDER, E3/190, dated 1 April 1999; IENG Sary Discussion with Stephen HEDER Transcription of Notes, E3/573, dated 4 January 1999; Report by Stephen HEDER: *Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective*, E3/4527, dated 1 March 2003.
[852] NUON Chea's Appeal Brief, para. 182, fn. 490, referring to Withdrawal of Notice of Intent (E287/2), paras 6-12, 17, fn. 23. NUON Chea had also initially sought to call Stephen HEDER to testify about "the course and calibre of the […] Case 002 Investigation", in particular a meeting in August 2009 during which International Co-Investigating Judge Marcel LEMONDE allegedly expressed desired to collect more inculpatory evidence for Case 002. *See* NUON Chea Summaries of Proposed Witnesses (E9/10) and Annex to NUON Chea Summaries of Proposed Witnesses (E9/10.1), p. 17; NUON Chea Updated Summaries of Proposed Witnesses (E93/4) and Annex to NUON Chea Updated Summaries of Proposed Witnesses (E93/4.3), pp. 40-41. His prior complaint about having

violations, the Trial Chamber should have refrained from relying on his testimony.[853] The Supreme Court Chamber notes that a confused approach to the questioning of Stephen HEDER in court may have arisen from his designation as a fact witness rather than an expert.[854] Of note in this regard is that, since many of his statements are based on interviews with other individuals or documents he examined, it would be artificial to draw, as suggested by NUON Chea,[855] a distinction between, on the one hand, knowledge HEDER acquired through personal experience and, on the other hand, personal opinions based on his research.[856] NUON Chea points to several instances in which the Trial Chamber allegedly "far exceed[ed]" the limits deriving from HEDER's role as a fact witness,[857] but fails to elaborate how such confusion would have violated his fair trial rights.[858] Also, despite his apparent frustration, the Co-Lawyer for NUON Chea was able to question the witness, and does not demonstrate that he suffered prejudice from the Trial Chamber's strict approach to limiting the scope of Stephen HEDER's questioning.

b) Duch, PHY Phuon, LIM Sat, EM Oeun, and NOU Mao

345. KHIEU Samphân submits that the Trial Chamber ignored exculpatory testimony by Duch.[859] The portion of the transcript to which KHIEU Samphân points refers to his statement that a certain "Comrade Lin" and/or "Cheam" of the Ministry of Foreign Affairs had been generally in charge of bringing prisoners to the S-21

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been denied the opportunity to question Stephen HEDER on events during the judicial investigation (*see* Withdrawal of Notice of Intent (E287/2), para. 13) is not reiterated on appeal.

[853] NUON Chea's Appeal Brief, para. 182.

[854] *See*, *e.g.*, T. 16 July 2013 (Stephen HEDER), E1/224.1, pp. 24-28, 51, 67-69, 72, 75-77, 81, 87, 124-127.

[855] NUON Chea's Appeal Brief, para. 181.

[856] *See*, *e.g.*, Trial Judgement, fns 335, referring to T. 11 July 2013 (Stephen HEDER), E1/222.1, pp. 54-55 (HEDER relied on his interview with Ke Pauk), 340, referring to T. 10 July 2013 (Stephen HEDER), E1/221.1, pp. 102-105; (statement based on interviews with refugees); 344 (statement based on Tim Carney's timeline, which was based, in turn, on FBIS translations), 479 (based on his conversation with a Japanese military attaché), 665 (based on interview with an individual), 2654 (based on interviews with refugees).

[857] NUON Chea's Appeal Brief, para. 180 and fn. 479.

[858] The Supreme Court Chamber is cognisant that, in certain cases, Stephen HEDER's statements could more appropriately be qualified as personal opinion (*see*, *e.g.*, Trial Judgement, fns 629 (HEDER comments on the ambiguous use of the term "Party Centre"), 631, 637, 638, 644 and 646 (HEDER clarifies the meaning of the code "870" and explains that changing terminology was an intentional practice of the CPK to conceal the true nature of its leadership), 1717 (interpretation of the term "komchat"). Nevertheless, as stated, NUON Chea fails to show how the Trial Chamber's reliance on personal opinions of a fact witness either violated his fair trial rights or resulted in an error of law invalidating the Trial Judgement.

[859] KHIEU Samphân's Appeal Brief, para. 43, referring to T. 10 April 2012, (KAING Guek Eav *alias* Duch), E1/62.1, pp. 73 to 74.

Security Office.[860] KHIEU Samphân's cursory allegation that this constitutes exculpatory evidence that the Trial Chamber ignored without any clarification as to how such a statement could raise any doubt as to his guilt causes summary dismissal.

346. KHIEU Samphân also asserts that the Trial Chamber ignored his challenge to PHY Phuon's credibility;[861] in fact, the Trial Chamber specifically addressed KHIEU Samphân's challenge on this issue.[862] KHIEU Samphân submits further that the Trial Chamber ignored memory problems, important contradictions, and credibility issues regarding the testimonies of EM Oeun and NOU Mao.[863]

347. A review of the portion of Civil Party EM Oeun's transcript to which KHIEU Samphân refers reveals that some inconsistencies did arise in his testimony.[864] EM Oeun admitted to having trouble recalling the events in chronological order because of their traumatic nature and the 40-year passage of time, which he said affected and left gaps in his memory.[865] However, KHIEU Samphân fails to provide any reference to the Trial Judgement as to the impact that such alleged ignorance on the part of the Trial Chamber could have had on the verdict. As to NOU Mao, KHIEU Samphân fails to provide any reference to his evidence to demonstrate the alleged inconsistencies, or to link his supposedly flawed testimony to an allegedly erroneous finding. KHIEU Samphân's submissions in this respect are accordingly dismissed.

348. NUON Chea submits that the Trial Chamber, in the face of inconsistent and unreliable evidence, so persistently failed to comply with the duty to provide reasons for it decisions that it "amounts to a pervasive error of law".[866] He then refers to the Trial Chamber's treatment of Duch's testimony, in relation to whom NUON Chea contends that the Trial Chamber failed to refer to the issue of his credibility.[867] In particular, NUON Chea recalls the Supreme Court Chamber's statement in the *Duch*

[860] *See* T. 10 April 2012 (KAING GUEK Eav *alias* Duch), E1/62.1, pp. 76-77 (describing a "Comrade Lin", "Yem", and "Chean"/"Cheang").
[861] KHIEU Samphân's Appeal Brief, para. 43.
[862] Trial Judgement, fn. 425.
[863] KHIEU Samphân's Appeal Brief, para. 43.
[864] T. 29 August 2012 (EM Oeun) E1/117.1 (En), pp. 17-20 (exposing different dates given as to death of his father), 26-27 (exposing contradictions in account of the death of his mother and the existence of a pagoda).
[865] T. 29 August 2012 (EM Oeun) E1/117.1 (En), pp. 24-25.
[866] NUON Chea's Appeal Brief, para. 176.
[867] NUON Chea's Appeal Brief, paras 175-177.

Appeal Judgement (001-F28) that Duch sought to "minimise his role in the crimes" and "to attribute the responsibility for the crimes to others",[868] and avers that the Trial Chamber nevertheless "cited his testimony constantly, often as a source of considerable importance in support of highly disputed findings of fact",[869] without any effort to justify such reliance, and without considering his repeated admissions that he had no contemporaneous first-hand knowledge of the numerous facts to which he testified.[870] NUON Chea also contests the Trial Chamber's repeated reliance on the testimony of PHY Phuon for inculpatory purposes, with little or no corroboration in support of key findings disputed by the Defence,[871] while rejecting or ignoring exculpatory evidence such as Pol Pot's express instructions that Khmer Republic soldiers were not to be "touched".[872] He avers that the Trial Chamber's failure to acknowledge the existing exculpatory evidence constituted a "flagrant error of law".[873] Furthermore, NUON Chea submits that the Trial Chamber found that LIM Sat, one of the three witnesses who gave evidence about the executions at Tuol Po Chrey, lied before the Trial Chamber and that his memory was flawed in numerous respects, but that the Trial Chamber relied on his testimony anyway, without providing reasons for doing so.[874]

349. The Supreme Court Chamber notes that, with this line of argument, NUON Chea does not allege factual errors by the Trial Chamber, but legal errors in its failure to provide sufficient reasons. As noted above,[875] as an aspect of the right to a fair trial, the Trial Chamber was required to provide a reasoned decision. Nevertheless, not every instance in which there is a paucity of reasoning in a judgement will lead to the conclusion that the trial proceedings were unfair. The Supreme Court Chamber agrees that there is some paucity in the Trial Chamber's discussion of Duch's testimony, which should be approached with caution given the determination in Case 001 that he lacked credibility by motive of seeking to shift responsibility away from himself, even though his convictions have since been upheld on appeal and his case is

[868] NUON Chea's Appeal Brief, para. 176, citing *Duch* Appeal Judgement (001-F28), para. 368.
[869] NUON Chea's Appeal Brief, para. 176.
[870] NUON Chea's Appeal Brief, paras 176-177, and references cited at fn. 471.
[871] NUON Chea's Appeal Brief, para. 178, and references cited at fn. 472.
[872] NUON Chea's Appeal Brief, para. 178, referring to para. 566.
[873] NUON Chea's Appeal Brief, para. 178.
[874] NUON Chea's Appeal Brief, para. 179.
[875] *See above*, para. 199 *et seq*.

now closed, thereby arguably diminishing his motives to exonerate himself. Nevertheless, a review of the findings and references to Duch's testimony that NUON Chea contests shows that they are not tied to pivotal findings and/or are substantially supported by other evidence on the record; accordingly, reliance on Duch's testimony in these respects was not fundamental.[876] Moreover, a review of those findings or references by the Trial Chamber to Duch's testimony to which NUON Chea does not specifically refer reveals that, contrary to his assertion, the Trial Chamber did take into account Duch's admission that he did not have contemporaneous knowledge about certain facts he testified about, such as KHIEU Samphân's allegedly senior role within "Office 870", an allegation that the Trial Chamber considered Duch had inferred KHIEU Samphân's general seniority in the DK period, academic texts, and hearsay.[877]

350. Similarly, in relation to PHY Phuon's testimony, the Trial Chamber discussed the probative value of his testimony, finding him to be credible and reliable. For instance, when confronted with conflicting evidence as to KHIEU Samphân's presence at the June 1974 meeting in Meak village at which the evacuation of Phnom Penh was agreed,[878] the Trial Chamber considered PHY Phuon's "clear testimony", along with "equally clear information provided by SUONG Sikoeun", to be more reliable than that given by KHIEU Samphân's wife, whose testimony the Trial Chamber evaluated at length before rejecting as implausible and motivated by a desire

[876] Compare references cited in NUON Chea's Appeal Brief, fn. 471, with Trial Judgement, fns 326-340 (several sources of evidence on CPK policy to smash enemies), 615 (relying on, *inter alia*, KHIEU Samphân Interview Record, E3/27, dated 13 December 2007, pp. 10 ("the central committee did not have effective power as opposed to the standing committee")), 1004-1006 (relying on the testimonies of SALOTH Ban and NORNG Sophang in addition to Duch's to support the finding that, as part of his responsibility for "Party Affairs", NUON Chea's role included appointing and disciplining Party members), 1720 (relying on, *inter alia*, letters by KHIEU Samphân to support the finding that the Party Centre, zone, sector and district committees had to authorise transfers or movement in their respective areas), 1760 (relying on several pieces of documentary and live evidence, particularly on CPK Document: Governing and Carrying Out Policy and Restoring All Fields of the Country (Doc No. 3), E3/781, dated 19 September 1975, which indicates at p. 22 that "Preah Vihear has requested 50,000 [people] first. […] So send 20,000 first as we go along" to support the concomitant finding at Trial Judgement, para. 586), 1873 (relying on a U.S. State Department Telegram, E3/3559, as well as an article by François PONCHAUD, in addition to Duch's testimony, to discuss the role of mobile units in cooperatives), 1923 *et seq.* (several sources of evidence on the class struggle and Party policy against the "New People"), 2542 (several sources of evidence, mainly DK Telegrams, to support the concomitant finding at Trial Judgement, para. 798), 2643 (several sources of evidence to support finding that as of late 1975, Khmer Rouge continued targeting former Khmer Republic officials and their families).
[877] Trial Judgement, para. 396.
[878] *See* NUON Chea's Appeal Brief, fn. 472.

to assist her husband.[879] Similarly, in concluding that another meeting took place among senior CPK leaders in early April 1975 to discuss the evacuation of the inhabitants of Phnom Penh, the Trial Chamber explained that PHY Phuon "was present in the vicinity and provided a relatively detailed account", that it "accepts PHY Phuon's evidence in relation to the overall description of this meeting and its participants, who included both NUON Chea and KHIEU Samphan", and that "his evidence on this matter was corroborated [in important respects] by the Accused".[880]

351. As to the Trial Chamber's failure to refer to PHY Phuon's allegedly exonerating testimony "of unparalleled probative value that Pol Pot's express instructions were that Khmer Republic soldiers were not to be 'touched'",[881] the Supreme Court Chamber notes that the Trial Chamber relied on PHY Phuon's testimony to enter the finding that a final offensive to liberate the country was planned at a July 1974 meeting, during which "NUON Chea, Pol Pot, KHIEU Samphân, Zone, Sector and military leaders discussed the Party's experience at Oudong, where Khmer Republic officials were executed en masse", and that this plan was affirmed during meetings in early April 1975.[882] The Trial Chamber also relied in part on PHY Phuon's testimony to find that the Party's policy concerning "enemies", which, according to the Trial Chamber, included former Khmer Republic officials, was disseminated through indoctrination sessions conducted by Party leaders, including NUON Chea and KHIEU Samphân.[883] PHY Phuon also stated that, when he entered Phnom Penh on 20 April 1975, he was under strict instructions from Pol Pot not to harm LON Nol soldiers, because they had surrendered to the Khmer Rouge.[884] The

[879] Trial Judgement, para. 139. The Supreme Court Chamber addresses the question whether the Trial Chamber's finding was reasonable *below*, para. 1009.
[880] Trial Judgement, para. 144. The Supreme Court Chamber addresses the question of the Trial Chamber's findings were reasonable *below*, para. 1010 *et seq*.
[881] NUON Chea's Appeal Brief, para. 178. *See also* NUON Chea's Appeal Brief, para. 566.
[882] Trial Judgement, para. 816, referring to Trial Judgement, Section 3: Historical Background, para. 143-147 (which cites PHY Phuon frequently, particularly at paras 144-146 and fns 416-425).
[883] Trial Judgement, para. 818.
[884] ROCHOEM Ton *alias* PHY Phuon Interview Record, E3/24, dated 5 December 2007, p. 5 ("PP: I entered Phnom Penh on 20 April 1975 with Son Sen to look at the situation, as assigned by Pol Pot. I saw that the people were leaving in every direction and all the targets had not yet left. […] FL: Were there orders to seek out Lon Nol soldiers? PP: No, because they had raised white flags already. There were clear instructions not to touch […] them. During war, on the battlefield, that was different. Now they had surrendered to us, and we need not touch them, just welcome them and greet them, and respond to the questions which they asked us. He said that [they were] 'Cambodians, like us'; [d]on't touch them at all. Those were the words of Pol Pot"); T. 30 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/98.1, p. 88 ("Q. My next question is with respect to the treatment of Lon Nol soldiers. Were

Trial Chamber makes no reference to this latter portion of PHY Phuon's evidence in the Trial Judgement.

352. Merely that certain evidence has not been referred to in the Trial Judgement does not mean that it was not taken into account in the Trial Chamber's assessment, as a trial chamber is presumed to have evaluated all the evidence before it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[885] Notably, this presumption may be rebutted where the Trial Chamber did not address evidence which is clearly relevant to the challenged finding.[886] For example, the ICTR Appeals Chamber found it "unacceptable" that the Trial Chamber failed to address testimonial evidence it had not discounted, in a case where such evidence concerned an issue of "crucial importance".[887]

353. A review of the Trial Judgement shows that the record included evidence similar to that given by PHY Phuon, which the Trial Chamber explicitly accepted:

> [After the Khmer Rouge entered and conquered Phnom Penh,] many Khmer Republic soldiers waved white flags in surrender, laid down their arms, and shed their uniforms. *Khmer Rouge units were instructed not to shoot people waving white flags.*[888]
>
> Various Khmer Rouge units received orders that Khmer Republic soldiers who surrendered their arms could be either evacuated with the population or re-educated, while those who did not surrender could be shot.[889]

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there any special instructions with respect to how former soldiers under the Lon Nol regime were to be treated? A. Those soldiers were defeated, they surrendered. The white flag was hoisted -- or raised, so we did not do anything to harm them. People were advised strictly not to do any harm to those people who were defeated").

[885] *See*, *inter alia*, *Kalimanzira* Appeal Judgement (ICTR), para. 195; *Zigiranyirazo* Appeal Judgement (ICTR), para. 45; *Gacumbitsi* Appeal Judgement (ICTR), para. 74; *Brđanin* Appeal Judgement (ICTY), para. 11; *Ndindabahizi* Appeal Judgement (ICTR), para. 75; *Kvočka* Appeal Judgement (ICTY), para. 23; *D. Milošević* Appeal Judgement (ICTY), para. 123; *Krajišnik* Appeal Judgement (ICTY), para. 353; *Galić* Appeal Judgement (ICTY), para. 256; *Nchamihigo* Appeal Judgement (ICTR), para. 166; *Mrkšić and Šljivančanin* Appeal Judgement (ICTY), para. 224; *Strugar* Appeal Judgement (ICTY), para. 24; *Limaj* Appeal Judgement (ICTY), para. 86; *Perišić* Appeal Judgement (ICTY), para. 92.

[886] *Zigiranyirazo* Appeal Judgement (ICTR), para. 45; *Kalimanzira* Appeal Judgement (ICTR), para. 195; *Kvočka* Appeal Judgement (ICTY), para. 23. *See also Bagosora* Appeal Judgement (ICTR), para. 618.

[887] *Zigiranyirazo* Appeal Judgement (ICTR), paras 45-46. *See also Ntabakuze* Appeal Judgement (ICTR), para. 171.

[888] Trial Judgement, para. 502 (footnote(s) omitted, emphasis added).

[889] Trial Judgement, para. 505.

354. This evidence is consistent with the portion of PHY Phuon's testimony that NUON Chea alleges the Trial Chamber disregarded, namely that the orders regarding the treatment of Khmer Republic soldiers who surrendered were issued not long before the capture of Phnom Penh by the Party leadership.[890] However, even though the Trial Chamber mentioned this instruction when discussing the treatment of Khmer Republic soldiers and officials during Population Movement Phase One, it failed to do so in relation to its findings on the existence of a targeting policy. The Supreme Court Chamber considers that, in that context, evidence of any orders from the upper echelon concerning the treatment of Khmer Republic soldiers and officials was highly relevant to reaching a final determination of the issue. The Trial Chamber's failure to mention – let alone address – crucial evidence of exculpatory value is an error of law; the question of whether this error invalidates the relevant portion of the Trial Judgement is addressed in the appropriate section below.[891]

355. As to the argument that the Trial Chamber failed to provide sufficient reasons as to why it relied on the testimony of LIM Sat in relation to its findings on Tuol Po Chrey despite the inconsistencies in his testimony,[892] the Supreme Court Chamber notes that the Trial Chamber discussed the inconsistencies in the testimony on several occasions in its discussion of the events at Tuol Po Chrey.[893] Therefore, the argument that the Trial Chamber did not provide sufficient reasons and therefore erred in law cannot be sustained. NUON Chea develops his arguments more fully about the substance of the inconsistencies in the evidence of all three witnesses, as well as problems with relying on each of their testimonies, in the relevant section of his appeal brief alleging errors with regard to the events at Tuol Po Chrey.[894] The Supreme Court Chamber will therefore discuss the Trial Chamber's assessment of these witnesses' testimonies in the appropriate section below.[895]

[890] T. 8 October 2012 (MEAS Voeun), E1/131.1, pp. 90-91, citing MEAS Voeun Interview Record, E3/424, dated 16 December 2009, p. 3, ERN (En) 00421070.
[891] *See*, in particular, NUON Chea's Appeal Brief, paras 551-580. *See also below*, para. 948.
[892] NUON Chea's Appeal Brief, para. 179.
[893] *See* Trial Judgement, paras 664, 665, 669, 676, 677.
[894] NUON Chea's Appeal Brief, para. 449 *et seq*.
[895] *See below*, para. 487 *et seq*.

c) NUON Chea

356. NUON Chea submits that the Trial Chamber erred in relying on his testimony for inculpatory purposes without ever giving credence to his exculpatory evidence, rarely seeking to reason assessments of his credibility.[896]

357. The Supreme Court Chamber considers that, depending on the circumstances of the case, it is not generally unreasonable for a trial chamber to accept certain parts of a person's testimony while rejecting others, and it is within a trial chamber's discretion to evaluate the credibility of separate portions of a witness's testimony differently, without needing to set out in detail why it accepted some parts while rejecting others.[897] NUON Chea's blanket assertion that the Trial Chamber selectively relied on his evidence only for inculpatory purposes, merely providing references to the Trial Judgement without elaborating further as to where the error lies, is accordingly dismissed.

358. NUON Chea provides the requisite elaboration only in one respect, that is, regarding the Trial Chamber's treatment of his statements in the documentary film *Enemies of the People*[898] concerning the treatment of Khmer Republic officials, relying on the inculpatory segment wherein he admits to having agreed with the decision to execute the seven "super-traitors", but rejecting the exculpatory portion in which he denies having been aware of any executions of ordinary Khmer Republic soldiers or officials at Tuol Po Chrey.[899] In this respect, the Supreme Court Chamber notes that the Trial Chamber relied in part on NUON Chea's admission in the film, among several other sources of evidence, to find that high ranking Khmer Republic officials were executed in the immediate aftermath of the Khmer Rouge's capture of Phnom Penh.[900] Subsequently, in analysing whether NUON Chea failed to prevent or punish the killings at Tuol Po Chrey, the Trial Chamber acknowledged that, "[i]n an interview, NUON Chea claimed that had he known of the killings at Tuol Po Chrey he

[896] NUON Chea's Appeal Brief, para. 183, and references cited at fn. 492.
[897] *See*, *inter alia*, *Rukundo* Appeal Judgement (ICTR), para. 86; *Kamuhanda* Appeal Judgement (ICTR), para. 248; *Kajelijeli* Appeal Judgement (ICTR), para. 167; *Ntakirutimana* Appeal Judgement (ICTR), paras 184, 254; *Seromba* Appeal Judgement (ICTR), para. 110; *Karera* Appeal Judgement (ICTR), paras 88, 127; *Bagosora* Appeal Judgement (ICTR), paras 243, 253.
[898] Documentary by THĒT Sambath: Enemies of the People, Transcript, E3/4001, 2007.
[899] NUON Chea's Appeal Brief, para. 184.
[900] Trial Judgement, paras 501-503 and fn. 1510.

would have taken measures to stop them",[901] but disbelieved this claim, stating that "his role in developing the Targeting Policy establishes otherwise".[902]

359. Contrary to NUON Chea's assertion, the Supreme Court Chamber does not consider such analysis to be "circular" or "absurd",[903] as the development of the targeting policy preceded, in the Trial Chamber's assessment, the killings at Tuol Po Chrey. Moreover, it is clear that the Trial Chamber was aware of the exculpatory portion of NUON Chea's interview and took it into account, given that the Trial Chamber referred to that portion later in the Trial Judgement. Whether the Trial Chamber erred in concluding that a targeting policy existed forms the subject of a separate ground of appeal, which NUON Chea develops more fully elsewhere in his brief,[904] will be addressed in the appropriate section below.[905]

d) Conclusion

360. In sum, NUON Chea's and KHIEU Samphân's grounds of appeal alleging errors in the Trial Chamber's approach to the assessment of fact witnesses are dismissed.

9. Exclusion of evidence obtained through torture

361. The Trial Chamber held that "certain evidence admitted for a limited purpose, such as proof that a statement was obtained through torture, may be relied upon only for that limited purpose and not as to the truth of the statement".[906]

362. NUON Chea submits that the Trial Chamber erred in so holding, arguing that, while torture-tainted evidence may not be used *against* accused persons, the latter may use such evidence in their defence.[907] He specifies that "[w]hile this error does

[901] Trial Judgement, para. 938, fn. 2870, referring to NUON Chea's Closing Submissions (E295/6/3), para. 448, citing Enemies of the People (E3/4001R), Additional Footage: One Day at Po Chrey.
[902] Trial Judgement, para. 938.
[903] NUON Chea's Appeal Brief, para. 184.
[904] NUON Chea's Appeal Brief, paras 551-580.
[905] *See below*, para. 869 *et seq.*
[906] Trial Judgement, para. 35, and references cited at fn. 96.
[907] NUON Chea's Appeal Brief, paras 706-722.

not invalidate the [Trial Judgement], it is of general importance to the jurisprudence of the Tribunal".[908]

363. The Co-Prosecutors respond that adopting NUON Chea's argument would encourage torture, and is therefore "legally specious and morally bankrupt".[909]

364. The Supreme Court Chamber recalls that "[a] party wishing to appeal a judgment shall […] specify the alleged errors of law *invalidating the decision*".[910] As such, allegations of errors of law which have no demonstrable impact on the Trial Chamber's verdict are generally inadmissible for appellate review on the merits. In any event, the Supreme Court Chamber has already assessed and rejected, in a previous decision,[911] the substance of NUON Chea's arguments regarding torture-tainted evidence after having incorporated his appellate submissions by reference.

365. This ground of appeal is accordingly not considered any further.

10. Presenting witnesses with documents unknown to them

366. KHIEU Samphân submits that the Trial Chamber erred in allowing witnesses to be presented with documents unknown to them at the time of the facts in order to lead them to draw conclusions, thereby encouraging them to impermissibly speculate, and that the fact that a document was presented to a witness during the investigation does not justify its presentation at trial.[912]

367. The Co-Prosecutors respond that KHIEU Samphân does not substantiate his assertions in either law or fact, and demonstrates no prejudice from any allegedly speculative witness testimony.[913]

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[908] NUON Chea's Appeal Brief, para. 707.
[909] Co-Prosecutors' Response, para. 6.
[910] Internal Rule 105(3) (emphasis added). *See also* Internal Rule 104(1) ("The Supreme Court Chamber shall decide an appeal against a judgment or a decision of the Trial Chamber on […] an error on a question of law invalidating the judgment or decision") and 105(2) ("A party wishing to appeal a decision of the Trial Chamber where immediate appeal is available […] shall […] specify an alleged error on a question of law and demonstrate how it invalidates the decision").
[911] *See* Decision on Torture-tainted Evidence (F26/12), paras 26-28, 30-47, 60-65, 69.
[912] KHIEU Samphân's Appeal Brief, para. 27, referring to T. 28 March 2012, E1/55.1 (Fr), pp. 4-12, T. 24 April 2012 (CHHIN Navy), E1/67.1 (Fr), pp. 79-87, T. 25 April 2012 (CHHIM Sotheara), E1/68.1 (Fr), pp. 3-22, T. 31 May 2012 (SAR Kimlomouth), E1/79.1 (Fr), pp. 38-49.
[913] Co-Prosecutors' Response, para. 110.

368. A review of the of portions of the transcripts to which KHIEU Samphân refers in support of his contention reveals that, contrary to what he argues, the Trial Chamber generally disallowed the practice of confronting witnesses with documents of which they had no contemporaneous knowledge, sustained the Defence's objections in this regard, and instructed the Co-Prosecutor to avoid asking questions that would require the witness to speculate.[914] KHIEU Samphân's submissions are thus baseless, and his appeal in this respect is accordingly dismissed.

11. Rejection of requests to verify authenticity of documents

369. KHIEU Samphân submits that the Trial Chamber erred by denying requests seeking the production of the original versions of certain documents and information as to their provenance and chain of custody,[915] and cites, by way of example, the Decision on Objections to Documents (E185), by which the Trial Chamber allowed

[914] *See*, *e.g.*, T. 28 March 2012, E1/55.1, p. 11 ("MR. PRESIDENT: […] Prosecution is advised somehow to refrain from getting – or asking the witness to give his own view or express his personal opinion on the document"); T. 24 April 2012, E1/67.1, pp.72-73 ("MR. PRESIDENT: Thank you, Defence Counsel. The Prosecution, could you adhere to our practical guidelines and the practice we've been doing to the witnesses before the Chamber, in particular with those documents that are intended to be put before the Chamber? You need to question the witness whether the witness knows or ha[s] seen that document that you wish to rel[y] [upon] in your questioning. Otherwise, the Chamber will request you to remove or withdraw that document"); T. 25 April 2012 (SALOTH Ban), E1/68.1, pp. 19-21 ("MR. PRESIDENT: […] Witness, do you still remember whether you have seen the four documents that you have been provided just now – whether you were presented with these documents during the investigation phase, particularly, during your interview with the investigator? MR. SALOTH BAN: During my interview, I was given a few pages of documents, but as I have seen these documents, those pages were not the same as these documents. This is from my recollection that is why I said I do not know the writings of these documents. This is my answer. […] MR. PRESIDENT: […] Court officer is now instructed to take back the four documents from [the] witness"); T. 31 May 2012 (SAR Kimlomouth), E1/79.1, pp. 39-42 ("MR. PRESIDENT: Witness, please hold on. The International Defence Counsel for Nuon Chea, you may proceed. MR. PESTMAN: Thank you, Mr. President. I object to this question. The witness has indicated that he has never seen this document before, and the prosecutor is now simply trying to make the witness speculate as to whether one person that's mentioned in the document is another person that he has spoken about previously. If the witness does not know this document, he cannot in that way speculate. And further to your earlier rulings, I also think that there was a question that these documents had to be removed. […] MR. PRESIDENT: The National Defence Counsel for Khieu Samphan, you may proceed. MR. KONG SAM ONN: Thank you, Mr. President. I would like to add to my esteemed colleague. The witness did not say that Brother Hem was responsible for the Front and the Royal Government; he never stated so. So this was the question put by the Prosecution, and the Prosecution read it out. It was a leading question. […] MR. PRESIDENT: Witness, please look at the document again and see if you have seen this document before, particularly when you were interviewed by the Office of Co Investigating Judges. MR. SAR KIMLOMOUTH: Mr. President, when I was interviewed by the Office of Co-Investigating Judges, I was not presented with this document. In terms of the work – internal work arrangement of the Front, I did not know, and I only saw this document this morning. MR. PRESIDENT: The objections by the two defence teams is sustained. The court officer is now instructed to remove the document from the witness").

[915] KHIEU Samphân's Appeal Brief, para. 28.

several documents to be put before it.[916] He contends that the passage of significant time since the events and the chaos that reigned in Cambodia after 1979 require that a degree of caution be exercised when dealing with copies of documents in the absence of originals, and cites the testimony of YOUK Chhang, which KHIEU Samphân avers explains "the dubious methods used to identify originals whose location is in fact unknown" and which rebuts the presumption of relevance and reliability.[917] KHIEU Samphân further submits that the Trial Chamber erred when finding that NUON Chea was invoking his right to be silent when requesting to see an original document, which he submits was an invalid response to a legitimate request seeking to authenticate documents.[918]

370. The Co-Prosecutors respond that KHIEU Samphân's arguments lack specificity and fail to identify how the alleged error invalidates the verdict or occasions a miscarriage of justice.[919]

371. The Decision on Objections to Documents (E185) rejected objections by IENG Sary, NUON Chea and KHIEU Samphân to documents proposed by the Co-Prosecutors to be put before the Trial Chamber and to documents cited in the Closing Order (D427), which include documents emanating from the DC-Cam in relation to the first two trial segments of Case 002/01[920] on the basis of, *inter alia*, the authorship and provenance of some of these documents, and requested that they be excluded until clarification could be acquired as to their chain of custody and content, as well as their authenticity and reliability.[921]

372. With respect to documents cited in the Closing Order (D427), the Trial Chamber clarified that they are entitled to a presumption of relevance and reliability (including authenticity), because they had already been reviewed and evaluated by the Co-Investigating Judges as being of relevance and accorded some probative value,

[916] KHIEU Samphân's Appeal Brief, fn. 64.
[917] KHIEU Samphân's Appeal Brief, para. 28, and references cited at fn. 65.
[918] KHIEU Samphân's Appeal Brief, para. 28, referring to T. 11 January 2012 (NUON Chea), E1/25.1, pp. 39-41; T. 12 January 2012 (NUON Chea), E1/26.1, pp. 4-7, 37.
[919] Co-Prosecutors' Response, paras 108(v), 109.
[920] The two first trial segments of Case 002/01 concern: (i) historical background; and (ii) administrative and communications structures, and some elements of the roles of the Accused. *See* Decision on Objections to Documents (E185), para. 1.
[921] *See* Decision on Objections to Documents (E185), paras 11, 15(ii), 15(v), 15(ix), 17, 19.

and because the Closing Order (D427) was subject to appeal by the Pre-Trial Chamber.[922] The Trial Chamber also ruled, *inter alia*, that original documents would be preferred and accorded more weight than photocopies and that, while there was no procedural requirement at the ECCC to call witnesses to authenticate documents, testimony as to chain of custody and provenance would assist in assessing the weight to be attributed to certain documents.[923]

373. The Trial Chamber rejected all objections to the provenance of DC-Cam documents, finding the methodology used by DC-Cam in obtaining, archiving and preserving contemporaneous DK-era documents to have been reliable.[924] The Trial Chamber accordingly afforded DC-Cam documents a rebuttable presumption of *prima facie* relevance and reliability (including authenticity).[925] The Trial Chamber's decision to afford such a presumption was based in significant part on the testimony of YOUK Chhang, Director of DC-Cam,[926] who confirmed, *inter alia*, that copies and scans of documents sent to the ECCC emanate from originals, and that DC-Cam is prepared to assist Parties with the authentication of any copies with originals on request.[927] KHIEU Samphân has not substantiated how YOUK Chhang's testimony raised doubts as to the procedure or why it calls into question the Trial Chamber's presumption that DC-Cam documents were authentic.

374. Finally, a review of the portion of NUON Chea's testimony to which KHIEU Samphân refers shows that NUON Chea contested the authenticity of certain documents put to him for questioning, namely copies of the *Revolutionary Flag* publications.[928] These documents are among those that the Trial Chamber deemed to benefit from a *prima facie* rebuttable presumption of reliability and authenticity, given their provenance from DC-Cam.[929] NUON Chea's repeated insistence on seeing the originals of the documents before he would answer any questions on their basis was met with the Trial Chamber's reminder that, having already ruled on the issue, NUON

[922] Decision on Objections to Documents (E185), para. 20, and references cited at fn. 46.
[923] Decision on Objections to Documents (E185), para. 21, and references cited at fn. 47.
[924] Decision on Objections to Documents (E185), para. 28.
[925] Decision on Objections to Documents (E185), para. 28.
[926] Decision on Objections to Documents (E185), paras 26-28.
[927] *See*, *e.g.*, T. 2 February 2012 (YOUK Chhang), E1/38.1, pp. 12-19.
[928] T. 11 January 2012 (NUON Chea), E1/25.1, pp. 40-41.
[929] *See* List of DC-Cam Documents in OCP Case 002/01 Document List (E161.1), pp. 14-17 (listing all scans or copies of CPK publications, including issues of the *Revolutionary Flag*, received from DC-Cam).

Chea's continued refusal to answer the questions put to him would be interpreted as an exercise of his right to remain silent, which he then expressly exercised.[930]

375. The Supreme Court Chamber sees no error in this approach. It is for the party disputing the authenticity of a document which is judicially presumed to be *prima facie* authentic to rebut this presumption, and verification could have been sought by the disputing party, in this case NUON Chea, by sending a member of his Defence team to DC-Cam to review the originals of disputed documents on request, as confirmed by YOUK Chhang. There is no indication that NUON Chea did so, and with nothing to offer as a means of rebutting the presumption of authenticity of the documents in question except a blanket contestation thereof, the presumption remains intact. NUON Chea's refusal to answer questions on the basis of issues of the *Revolutionary Flag* provided by DC-Cam were, as a consequence, reasonably interpreted by the Trial Chamber as constituting NUON Chea's decision to remain silent on these matters. In any event, KHIEU Samphân does not demonstrate how he was affected or prejudiced in any way by the Trial Chamber's approach to NUON Chea's challenge to the authenticity of documents.

376. NUON Chea's and KHIEU Samphân's grounds of appeal in this respect are accordingly dismissed.

12. Reliance on wrong standard of proof

377. KHIEU Samphân submits that the Trial Chamber erred in reaching its findings by applying the civil law concept of "*intime conviction*" rather than the common law standard of proof of "beyond reasonable doubt", which he describes as being less subjective and more restrictive.[931] He further contends that the Trial Chamber erred making several inferences that were neither based on the evidence that had been debated nor the only reasonable conclusions available, and in failing to provide reasons to support these inferences.[932] In addition, he avers that the Trial Chamber

[930] *See*, *e.g.*, T. 11 January 2012 (NUON Chea), E1/25.1, pp. 39-42 and T. 12 January 2012 (NUON Chea), E1/26.1, pp. 4-7, 37.
[931] KHIEU Samphân's Appeal Brief, paras 109-110.
[932] KHIEU Samphân's Appeal Brief, paras 110-113.

committed an error of law by applying a double standard to defence evidence, treating it differently from prosecution evidence.[933]

378. The Co-Prosecutors respond that KHIEU Samphân fails to support any of his arguments, which amount to mere assertions without demonstrating any error.[934]

379. The Supreme Court Chamber notes that, in the English version of the Trial Judgement, the Trial Chamber stated that "[i]n order to convict, the Chamber must be convinced of an accused's guilt 'beyond reasonable doubt'", whereas, in the French version, it stated that "[*p*]*our condamner un accusé, la Chambre de première instance doit avoir 'l'intime conviction' de sa culpabilité*".[935] Both statements are verbatim quotes of the English and French versions of Internal Rule 87(1), respectively. The Trial Chamber then clarified that:

> In order to resolve any discrepancy between the different language versions of Internal Rule 87(1) that reflect the common law "beyond reasonable doubt" standard and the civil law concept of "*intime conviction*", the Chamber has adopted a common approach that evaluates the sufficiency of the evidence. Upon a reasoned assessment of the evidence, *the Chamber interprets any doubt as to guilt in the Accused's favour*.[936]

380. The Trial Chamber therefore clearly stated that it would adopt the standard of proof beyond reasonable doubt. Moreover, a review of the French version of the Trial Judgement reflects that the Trial Chamber never used the term "*intime conviction*", but rather such terms as "*il ne fait aucun doute*", when reaching its conclusions.[937] KHIEU Samphân's contention that the Trial Chamber failed to adopt the standard of proof beyond reasonable doubt is accordingly dismissed.

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[933] KHIEU Samphân's Appeal Brief, para. 119.
[934] Co-Prosecutors' Response, para. 107.
[935] Trial Judgement, para. 22, citing Internal Rule 87(1).
[936] Trial Judgement, para. 22 (emphasis added). The French version accurately reflects the same ("[*La Chambre*] *a interprété tout doute quant à la culpabilité des Accusés en faveur de ces derniers*").
[937] *See*, *e.g.*, Trial Judgement (Fr), paras 134, 142, 152, 347, 411, 415, 426. *See also* Trial Judgement (Fr), paras 140 ("*la déposition de l'intéressée n'est pas de nature à susciter un doute raisonnable quant à la présence de KHIEU Samphan*"), 333 ("*La Chambre de première instance n'est pas convaincue au-delà de tout doute raisonnable que l'intéressé ait été membre du Comité militaire du PCK durant la période du KD*"), 362 ("*la Chambre considère qu'elles ne sauraient constituer des motifs suffisants pouvant l'amener à douter de l'affirmation de KHIEU Samphan*"). It bears noting that the English, French, and Khmer versions of the Trial Judgement were issued at the same time, as original documents. *See* Trial Judgement (Fr), cover page. The French version is therefore not a translation, and accordingly carries equal authoritative value as the English and Khmer versions.

381. As to his remaining submissions, the Supreme Court Chamber notes that, in support thereof, KHIEU Samphân provides no references; rather, he merely refers to appeal judgements of the *ad hoc* international criminal tribunals, and indicates "[f]or concrete examples, see *infra*", with no indicated paragraphs of his appeal brief to follow.[938] Such general and unsubstantiated submissions fall to be summarily dismissed. To the extent that they may be sufficiently developed elsewhere in his appeal brief, the Supreme Court Chamber will address them accordingly.

D. CRIMES OF WHICH THE ACCUSED WERE CONVICTED

1. Murder

382. The Trial Chamber found NUON Chea and KHIEU Samphân guilty of the crime against humanity of murder in respect of Population Movement Phase One for the unlawful killings of civilians and soldiers as well as deaths due to the conditions and lack of assistance,[939] and in relation to the executions of former Khmer Republic soldiers and officials at Tuol Po Chrey in late April 1975.[940]

383. When evaluating the impact of multiple convictions, the Trial Chamber held that the findings for murder and extermination at Tuol Po Chrey and during Population Movement Phase One were based on the same killings.[941] Given that the crimes had been committed on a massive scale, the Trial Chamber found extermination to be the more specific offence, subsuming murder.[942] As a result, convictions for extermination (encompassing murder) were entered against NUON Chea and KHIEU Samphân for the events during Population Movement Phase One and at Tuol Po Chrey.[943]

384. On appeal, NUON Chea argues that the evidence of individual murders was inadequate and that no reasonable trier of fact could have been satisfied beyond a reasonable doubt that even a single murder had occurred.[944] In particular, he submits

[938] KHIEU Samphân's Appeal Brief, fns 231-233, 235-237, 247. Fn. 234 is equally unhelpful, as it merely refers to ECCC Law, Art. 33, which enshrines the right to a fair trial.
[939] Trial Judgement, paras 553-559, 940-941, 1053.
[940] Trial Judgement, paras 683, 940-941, 1053.
[941] Trial Judgement, paras 1055-1057.
[942] Trial Judgement, paras 1055-1057.
[943] Trial Judgement, para. 1057, Disposition.
[944] NUON Chea's Appeal Brief, paras 284-285, 287-293, 319-320, 451-458, 463-466.

that the Trial Chamber's findings were based on errors of law and fact because the Trial Chamber had (i) unduly relied on out-of-court evidence and the testimony of civil parties;[945] (ii) exaggerated the conditions of the evacuation and the use of violence employed;[946] (iii) failed to consider, in addition to whether each killing occurred, whether it was unlawful;[947] and (iv) erred by carelessly treating the testimony of witnesses to the events at Tuol Po Chrey without assessing inconsistencies affecting their reliability.[948]

385. Similarly, KHIEU Samphân alleges that the Trial Chamber (i) incorrectly relied on out-of-court evidence and the testimony of civil parties in its factual findings;[949] (ii) exaggerated the conditions of the evacuation of Phnom Penh causing deaths;[950] (iii) violated the principle of legality by applying the wrong standard to the *mens rea* of murder as it existed in 1975;[951] and (iv) erred in fact by distorting the testimony of witnesses at Tuol Po Chrey.[952]

386. The Co-Prosecutors respond that the Accused fail to show that the Trial Chamber committed any errors of fact or law in its assessment of the murders during Population Movement Phase One, and that their arguments are fragmented, fail to accord due weight to civil party evidence and mischaracterise the Trial Chamber's approach to the evidence.[953] Further, they submit that the Trial Chamber correctly defined the *mens rea* of murder as it stood in 1975.[954] In relation to Tuol Po Chrey, the Co-Prosecutors argue that the Trial Chamber properly assessed the evidence, including any inconsistencies, to reasonably conclude that at least 250 former Khmer Republic officials had been executed there.[955]

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[945] NUON Chea's Appeal Brief, paras 296-298, 300-301, 306-311, 313-318, 323-325, 426.
[946] NUON Chea's Appeal Brief, paras 322, 326, 422-429.
[947] NUON Chea's Appeal Brief, para. 294.
[948] NUON Chea's Appeal Brief, paras 449-458, 463-466.
[949] KHIEU Samphân makes more general allegations about the improper use of out-of-court statements throughout the Trial Judgement rather than in relation to specific crimes elsewhere: *see*, *e.g.*, KHIEU Samphân's Appeal Brief, paras 29, 117, 468.
[950] KHIEU Samphân's Appeal Brief, paras 351-352.
[951] KHIEU Samphân's Appeal Brief, paras 59- 62.
[952] KHIEU Samphân's Appeal Brief, paras 429-433.
[953] Co-Prosecutors' Response, paras 143-147, 176-187, 238-247, 252-263, 442-465.
[954] Co-Prosecutors' Response, paras 197-198.
[955] Co-Prosecutors' Response, paras 271-291.

a) Definition of the mens rea element of the crime against humanity of murder

387. As regards the mental element of the crime against humanity of murder, the Trial Chamber, after clarifying that murder as a crime against humanity does not require premeditation, relied on the standard it had applied in Case 001, which, in turn, was based on the *Kordić and Čerkez* Appeal Judgement (ICTY).[956] Accordingly, the Trial Chamber defined the *mens rea* of murder as:

> The intent of the accused or of the person or persons for whom he is criminally responsible to either to kill or to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death.[957]

388. KHIEU Samphân submits that this definition is not applicable because, at the time of the facts, direct intent to kill was required under customary international law in respect of the crime against humanity of murder.[958] He argues that the Trial Chamber erroneously relied on case law from the ICTY and ICTR, which, he submits, applied a lowered *mens rea* standard for the first time in the history of international criminal law.[959] He also notes that the jurisprudence of the ICTY and ICTR was not uniform, referring to an early judgement of an ICTR Trial Chamber in the *Kayishema and Ruzindana* Case.[960] He avers that, by relying on the lowered *mens rea* standard, the Trial Chamber violated the principle of legality and that the purported error invalidates all findings of the Trial Chamber concerning KHIEU Samphân's intent to commit murder.[961]

389. The Co-Prosecutors submit that the definition of murder relied upon by Trial Chamber, including the requisite *mens rea*, was "clearly established in customary international law and was a general principle of law in national systems in 1975".[962]

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[956] Trial Judgement, para. 412(ii), fn. 1257, referring *inter alia* to *Kordić and Čerkez* Appeal Judgement (ICTY), para. 37 (addressing the definition of murder as a violation of the laws and customs of war; the Supreme Court Chamber understands that the Trial Chamber intended to refer instead to *Kordić and Čerkez* Appeal Judgement (ICTY), para. 113, upholding *Kordić and Čerkez* Trial Judgement (ICTY), paras 235-236).
[957] Trial Judgement, para. 412(ii).
[958] KHIEU Samphân's Appeal Brief, paras 59-62.
[959] KHIEU Samphân's Appeal Brief, para. 60.
[960] KHIEU Samphân's Appeal Brief, para. 60, referring to *Kayishema and Ruzindana* Trial Judgement (ICTR), paras 137-140.
[961] KHIEU Samphân's Appeal Brief, paras 61-62.
[962] Co-Prosecutors' Response, para. 198.

390. As a preliminary matter, the Supreme Court Chamber notes that the definition of the mental element of the crime against humanity of murder on which the Trial Chamber relied would encompass the concept of reckless murder. It further notes that the ICTY also employed the notion of *dolus eventualis*, as found in jurisdictions following the Romano-Germanic tradition. In this regard, the *Stakić* Trial Chamber, elaborating on the definition of the requisite *mens rea* of murder as a war crime, found that:

> The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or "makes peace" with the likelihood of death. Thus, if the killing is committed with "manifest indifference to the value of human life", even conduct of minimal risk can qualify as intentional homicide. Large scale killings that would be classified as reckless murder in the United States would meet the continental criteria of *dolus eventualis*. The Trial Chamber emphasises that the concept of *dolus eventualis* does not include a standard of negligence or gross negligence.[963]

391. While recognising a difference between the notions of recklessness and *dolus eventualis* – roughly speaking, the first one being focused on the cognitive aspect and the second on the volitional aspect in the perpetrator's attitude toward the result,[964] the Supreme Court Chamber also notes that this demarcation is not sharp: within the doctrine of *dolus eventualis* there are concepts that emphasise the objective elements of probability and "manifestation of indifference" as sufficing for the attribution of criminal responsibility,[965] whereas jurisprudence based on the doctrine of recklessness also, at times, concerns itself with the inference of intent.[966] The Supreme Court Chamber shall use the term *dolus eventualis* as defined by the *Stakić* Trial Chamber; moreover, it concedes that, in practical terms, proving recklessness in murder will likely satisfy the criteria for proving *dolus eventualis* and *vice versa*.

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[963] *Stakić* Trial Judgement (ICTY), para. 587 (footnote(s) omitted).
[964] *See* Elies VAN SLIEDREGT, *Individual Criminal Responsibility in International Law*, Oxford University Press, 2012, p. 45.
[965] *See*, *e.g.*, Cassazione Penale (Sezioni Unite, Case No. 38343) (Court of Cassation, Italy); Bundesgerichtshof, 1 StR 262/88 (Federal Supreme Court, Germany) (HIV transmission through sexual intercourse); Bundesgerichtshof, 5 StR 35/55 (Federal Supreme Court, Germany), p. 363 *et seq*., at 369 (leather belt case).
[966] *See*, *e.g.*, *R v. Woollin* (House of Lords, United Kingdom); *R v. Nedrick* (Court of Appeal, United Kingdom). *See* Elies VAN SLIEDREGT, *Individual Criminal Responsibility in International Law*, Oxford University Press, 2012, p. 43.

392. The first question to be addressed is whether "murder" as a crime against humanity requires premeditation, in the sense that the perpetrator formulated the intent to kill after a cool moment of reflection, which would bar any recourse to the notion of *dolus eventualis*. This was the position of the ICTR Trial Chamber in *Kayishema and Ruzindana* to which KHIEU Samphân refers.[967] The ICTR Trial Chamber noted that the French version of the ICTR Statute used for "murder" the term "*assassinat*" and that "in most civil law systems, premeditation is always required for '*assassinat*'", referring in a footnote to the Criminal Code of France.[968] However, the ICTR Trial Chamber found that "[a]lthough it may be argued that, under customary international law, it is murder rather than *assassinat* that constitutes the crime against humanity […], this court is bound by the wording of the ICTR Statute in particular".[969] Thus, the ICTR Trial Chamber did not purport to make a finding as to premeditation as a requirement under customary law, but was concerned with its jurisdictional limitations. It is also of note that the subsequent case law of the ICTY, including that of its Appeals Chamber, has excluded premeditation as a requirement of murder as a crime against humanity,[970] notwithstanding the fact that some ICTR Trial Chambers have followed the approach from *Kayishema and Ruzindana*.[971]

393. Turning to the period prior to the facts relevant to the case at hand, the Supreme Court Chamber notes that the French version of the IMT Charter, in respect of crimes against humanity, used the term "*assassinat*", whereas the English version

[967] *Kayishema and Ruzindana* Trial Judgement (ICTR), para. 139.
[968] *Kayishema and Ruzindana* Trial Judgement (ICTR), para. 137, fn. 74.
[969] *Kayishema and Ruzindana* Trial Judgement (ICTR), para. 138.
[970] *Đorđević* Appeal Judgement (ICTY), para. 547; *Orić* Trial Judgement (ICTY), para. 348; *Kordić and Čerkez* Trial Judgement (ICTY), para. 235; *Brđanin* Trial Judgement (ICTY), para. 386; *Blaškić* Trial Judgement (ICTY), para. 216. *See also* *Sesay* Trial Judgement (SCSL), para. 140. *Cf.* *Kupreškić* Trial Judgement (ICTY), para. 561, which, while finding that either intent to kill or intent to inflict serious injury in reckless disregard of human life was sufficient, also referred to the *Kayishema and Ruzindana* Trial Judgement (ICTR), para. 139 which required premeditation. However, the *Kupreškić* Trial Chamber did not discuss this issue any further, in addition, when applying the law to the facts, it did not discuss the element of premeditation (*see* paras 818, 820, 831).
[971] *See*, *e.g.*, *Semanza* Trial Judgement (ICTR), para. 339; *Ntagerura* Trial Judgement (ICTR), para. 700; *Zigiranyirazo* Appeal Judgement (ICTR), para. 569, quoting *Semanza* Trial Judgement (ICTR), para. 339; *Rutaganda* Trial Judgement (ICTR), para. 79; *Musema* Trial Judgement (ICTR), para. 214. *But see* *Akayesu* Trial Judgement (ICTR), para. 588: "Customary International Law dictates that it is the act of 'Murder' that constitutes a crime against humanity and not 'Assassinat'. There are therefore sufficient reasons to assume that the French version of the Statute suffers from an error in translation". On this split in the jurisprudence of the ICTY and ICTR, *see* Gideon BOAS, James L. BISCHOFF and Natalie L. REID, *Elements of Crimes under International Law*, Cambridge University Press, Cambridge, 2008, pp. 58-59.

used the term "murder" and the Russian version used the term "*ubijstvo*" (убийство). All three versions being of equal authenticity,[972] with only the French one implying premeditation, the interpretation of the IMT Charter would require adopting a meaning which best reconciles the texts, having regard to the object and purpose of the treaty,[973] and thus the term murder or "*ubijstvo*" seems to be an agreed common ground.[974] Of note is that that during work of the ILC in 1950 of the formulation of the Nuremberg Principles, the divergence of terms in English and French was recognised but, despite the discrepancy and without much discussion, both were retained.[975] The French version of the 1954 Draft Code of Offences Against the Peace and Security of Mankind also used the term "*assassinat*" in its Article 2(10), codifying crimes against humanity. Interestingly, in Article 2(9), codifying the crime of genocide, the 1954 Draft Code of Offences Against the Peace and Security of Mankind used the term "*meurtre*". The change was made in respect of the crime of genocide on the basis that "[t]he offence in question would thus be declared punishable whether committed with premeditation or not".[976] No equivalent proposal in respect of murder/"*assassinat*" as a crime against humanity is reported.[977]As such, the ILC records are inconclusive on this point.

394. The Supreme Court Chamber is not aware of any jurisprudence from that period which stipulated premeditation as an element of the crime against humanity of murder. Importantly, the French version of the IMT Judgement uses the terms "*assassinat*" and "*meurtre*" interchangeably, including in passages where the English version of the judgement only uses the term "murder".[978]

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[972] *See* London Agreement of 8 August 1945, Operative part.
[973] *See now* Vienna Convention on the Law of the Treaties, Art. 33(4).
[974] *See similarly* for the war crime of murder *In Re Ahlbrecht* (No. 2) (Special Court of Cassation, The Netherlands).
[975] *Principes du Droit International Consacrés par le Statut du Tribunal de Nuremberg et dans le Jugement de ce Tribunal*, *Annuaire de la Commission du droit international* 1950, Vol. II. *See also* Summary Record of the 48th ILC Meeting, Vol. I, p. 57, paras 105-107.
[976] Summary Record of the 267th ILC Meeting, Vol. I, p. 132, para. 51.
[977] Summary Record of the 48th ILC Meeting, Vol. I, p. 56, paras 94, 95.
[978] *See, e.g.*, IMT Judgement (Fr), p. 153 (in the section on the law of war crimes and crimes against humanity, both terms are used interchangeably: "*En ce qui concerne les crimes contre l'Humanité, il est hors de doute que, dès avant la guerre, les adversaires politiques du nazisme furent l'objet d'internements ou d'assassinats […]. Une politique de vexations, de répression, de meurtres à l'égard des civils présumés hostiles au Gouvernement fut poursuivie sans scrupules*"); *see also* pp. 69 (discussing "*meurtres*" as part of the underlying acts of crime against humanity: "*ce plan comprenait*

395. The judgement in the *Medical* Case, issued by a U.S. Military Tribunal sitting in Nuremberg, provides insight into how the *mens rea* of murder was understood in the post-World War II proceedings. The U.S. Military Tribunal convicted several accused of the crime against humanity of murder for their involvement in medical experiments.[979] These medical experiments had inflicted serious bodily harm on the victims.[980] Whereas inflicting serious bodily harm was what the accused directly intended, they had at the same time the reasonable knowledge that their victims were likely to die as a result of the experiments. Thus, whilst an explicit definition of the *mens rea* of murder is lacking in the judgement in the *Medical* Case, it is safe to assume that the U.S. Military Tribunal did not require a showing of direct intent to kill in order to enter a conviction for murder in these circumstances. Rather, it was sufficient to establish that the accused knew that their acts and omissions would likely lead to their victims' death and accepted this result – which corresponds to the notions of *dolus eventualis* and recklessness. This provides a strong indication that in the post-World War II period, murder as a crime against humanity included the notion of *dolus eventualis.* This is further reinforced when domestic practices regarding the crime of murder are taken into consideration.

396. The Supreme Court Chamber notes in this respect that, although the precise definitions vary, murder is generally understood as the unlawful and intentional (as opposed to negligent[981]) killing of a human being. In a number of jurisdictions, there exist several crimes relating to intentional killing (for instance, "murder" and "voluntary homicide" in Cambodian Law;[982] "murder", "homicide" and "manslaughter" in the laws of England and Wales as well as Australia;[983] "*assassinat*", "*meurtre*" and "*homicide praeter intentionnel*" in French law;[984]

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entre autres le meurtre et la persécution de tous ceux qui étaient ou que l'on soupçonnait être opposés au plan concerté"), 195 ("*le meurtre d'au moins trois millions de juifs*").

[979] *Medical* Case, pp. 198, 207, 240-241, 248, 263, 271, 290.

[980] *Medical* Case, pp. 189-207, 235-241, 253-263.

[981] The Supreme Court Chamber notes that the meaning of the term "intentional" is not consistent across domestic jurisdictions and that in some jurisdictions, the term "culpable" is also used, although with variable meaning, including to denote unlawful killings. In the present judgement, the term "intentional" is used with the meaning set out below.

[982] 1956 Criminal Code of Cambodia, Arts 501 (distinction between voluntary and involuntary killing), 502 (homicide caused by being, *inter alia*, careless), 503 (homicide without intent to kill, encompassing voluntary acts to harm, without intent to kill, which cause death), 504 (murder).

[983] *See below*, para. 402 *et seq*.

[984] Criminal Code of France, Arts 221-1 (voluntary homicide), 221-3 ("*assassinat*"), 222-7 ("*coups et blessures ayant entrainé la mort*").

"*Mord*" and "*Totschlag*" in German law;[985] "*asesinato*" and "*homicide*" in Spanish law;[986] and "*Omicidio*", "*Omicidio preterintenzionale*" and "*Morte o lesione come conseguenza di altro delitto*" in Italian law[987]). However, there do not appear to be common criteria to distinguish between the various forms of intentional killings.[988] In the view of the Supreme Court Chamber, it would therefore be incorrect to attach undue weight to domestic practice in relation to the specific crime referred to as "murder" (or its equivalent in the language of the jurisdiction under consideration);[989] rather, all offences of intentional killing need to be scrutinised. Such analysis reveals that in all of the domestic jurisdictions reviewed by the Supreme Court Chamber, the requisite mental element of intentional killing is satisfied even if the perpetrator acted with less than direct intent to kill.

397. The 1956 Criminal Code of Cambodia included not only the crime of murder (no requirement of premeditation) and assassination (premeditated killing), but also the crime of killing with the intent to harm the victim, though in the absence of intent to kill.[990] In addition, the code provided that intent to kill was presumed to exist, *inter alia*, if a deadly weapon was used, if the attack was particularly violent, or if a particularly vulnerable part of the body of the victim was attacked.[991]

398. The French Criminal Code requires direct intent for the crime of "*meurtre*".[992] Nevertheless, it is not required that the perpetrator had a precise intent to kill; it is sufficient that the perpetrator wilfully committed acts in the knowledge that they *should normally* cause the death of the victim.[993] The Supreme Court Chamber notes

[985] Criminal Code of Germany, Sections 211, 212.
[986] Criminal Code of Spain, Arts 138.1, 139.1.
[987] Criminal Code of Italy, Arts 575, 584, 586.
[988] For instance, in French law, "*assassinat*" is distinguished from "*meurtre*" by the element of premeditation in the case of the former, while in German and Spanish law, "*Mord*"/"*asesinato*" differ from "*Totschlag*"/"*homicido*" on account of certain aggravating factors (such as the perpetrator acting deceitfully). In Poland and Russia the term "homicide" is employed to denote the whole type of crime, with sub-types qualified by additional elements.
[989] *See* *Čelebići* Trial Judgement (ICTY), para. 431: "[A] simple semantic approach, or one which confines itself to the specificities of particular national jurisdictions, can only lead to confusion or a fruitless search for an elusive commonality. In any national legal system, terms are utilised in a specific legal context and are attributed their own specific connotations by the jurisprudence of that system. Such connotations may not necessarily be relevant when these terms are applied in an international jurisdiction".
[990] *See* 1956 Criminal Code of Cambodia, Arts 503-505.
[991] *See* 1956 Criminal Code of Cambodia, Art. 505.
[992] Criminal Code of France, Art. 221-1. *See also* 1956 Criminal Code of Cambodia, Art. 502.
[993] Arrêt du 9 janvier 1990 (Court of Cassation, France). *See also* Jean-Yves MARECHAL, "*Elément*

that, depending on the circumstances, this comes close to the notion of *dolus eventualis*. In addition, in France, the crime of "*homicide praeter intentionnel*" covers situations in which the perpetrator intentionally commits acts of violence against the victim, which, in turn, lead, as an unintended result, to the victim's death.[994]

399. The same interpretation of the *mens rea* of murder is found in Belgian law, wherein the requisite mental element for "*meurtre*" may be satisfied by the perpetrator's knowledge that death will probably occur; in other words, to be convicted of murder, the offender must either have acted with intent to kill, or accepted "*la réalisation de la conséquence mortelle de son acte pour l'éventualité où elle se produirait*".[995]

400. In Germany, it is accepted in consistent jurisprudence that, for a conviction for wilful killing ("*Mord*"/"*Totschlag*"), *dolus eventualis* is sufficient.[996] The same is true in Italy[997] and Spain.[998]

401. In Poland, *dolus eventualis* is traditionally considered to be a form of intent, as reflected in a provision which defines a prohibited act as committed intentionally when the perpetrator "wants to commit it, or foreseeing the *possibility* of committing it, he accepts it".[999]

402. Jurisdictions following the Common Law tradition also accept a *mens rea* less than direct intent for crimes relating to intentional killing, as set out below.

403. As regards England and Wales, both murder and involuntary or constructive manslaughter may be classified as intentional killing. The former encompasses the

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moral de l'infraction", *LexisNexis*, Jurisclasseur Code, Fasc. 20, 6 November 2015, para. 30.
[994] *See* Criminal Code of France, Art. 222-7 ("Acts of violence causing an unintended death are punished by fifteen years' criminal imprisonment").
[995] Jacques VERHAEGEN, "Faute consciente ou intention coupable ? La ligne de partage", *Journal des Tribunaux*, 31 March 2001, No. 6006 . *See also* Jacques Joseph HAUS, *Principes généraux du droit pénal belge*, 1879, Nos 314-315.
[996] Decision of 10 March 2000 (Federal Supreme Court, Germany), 1730.
[997] *See*, *e.g.*, for a recent case, Cassazione Penale (Sez. I, Case No. 16585) (Court of Cassation, Italy).
[998] *See*, *e.g.*, Judgement No. 510/1998 (Supreme Tribunal, Spain); Judgement No. 529/2005 (Supreme Tribunal, Spain).
[999] 1997 Criminal Code of Poland, Art. 9(1) (not available in English) (emphasis added); 1969 Criminal Code of Poland, Art. 7(1); 1932 Criminal Code of Poland, Art. 14 ("when foreseeing the possibility of the criminal result or the criminality of the act, he accepts it").

causing of death with the intent to kill or the intent to cause grievous bodily harm.[1000] English courts have accepted the notion of "'oblique' intention, which is that it is sufficient for [the actor] to have foreseen the prohibited result as one which is highly probable, or virtually certain to occur even if achieving that result is not the purpose".[1001] In this sense, the House of Lords affirmed that murder was established not only when the perpetrator intended to kill or to cause grievous bodily harm to the victim, but also when the perpetrator had knowledge or foresight that his or her conduct would probably cause death or grievous bodily harm to another, while being indifferent to the consequences.[1002]

404. In the United States, the Model Penal Code (which has influenced the law-making of several States within the United States) provides that "criminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed *recklessly* under circumstances manifesting extreme indifference to the value of human life".[1003]

405. Similarly, the Canadian Criminal Code does not limit wilful killing to cases of direct intent: "culpable homicide is murder (*a*) where the person who causes the death of a human being (i) means to cause his death, or (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not".[1004]

406. According to the Indian Criminal Code, culpable homicide is murder "if the act by which the death is caused is done with the intention of causing death, or […] [i]f it is done with the intention of causing such bodily injury as the offender knows to

[1000] *Hyam v. R* (House of Lords, United Kingdom), p. 75.
[1001] Glanville WILLIAMS, "Oblique Intention", *The Cambridge Law Journal*, Vol. 46 (1987), p. 417.
[1002] *Hyam v. R* (House of Lords, United Kingdom), p. 75.
[1003] Model Penal Code of the U.S., Section 210.2 (1) (emphasis added); *see also* Section 2.02 (2)(c), which defines recklessness as follows: "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation".
[1004] Criminal Code of Canada, Section 229(a).

be likely to cause the death of the person to whom the harm is caused".[1005] An identical definition of murder is envisaged in the Criminal Code of Singapore.[1006]

407. In Australia, murder is defined as the act or omission causing the death "with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person".[1007] Australian common law also recognises two broad categories of manslaughter: voluntary and involuntary. Involuntary manslaughter encompasses manslaughter by recklessness,[1008] either by unlawful act[1009] or by gross negligence.[1010]

408. In South Africa, "[i]n considering the issue of intention to kill [to find the crime of culpable homicide], the test is whether the [accused] foresaw the possibility that the act in question [...] would have fatal consequences, and was *reckless* whether death resulted or not".[1011]

409. The review of the practices in the above-mentioned jurisdictions thus discloses that, while there is no uniformity as to whether killings with less than direct intent to kill are considered as "murder" (or the equivalent term in the relevant language), the causing of death with less than direct intent but more than mere negligence (such as

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[1005] Criminal Code of India, Section 300.
[1006] Criminal Code of Singapore, Art. 300.
[1007] Crimes Act (New South Wales, Australia), Section 18(1)(a). *See also* Criminal Code (Western Australia, Australia), Section 279; Criminal Code (Queensland, Australia), Section 302; Criminal Code (Australian Capital Territory, Australia), Section 12(1); Criminal Code (Northern Territory, Australia), Section 156; Criminal Code (Tasmania, Australia), Section 157(1). Domestic courts have generally insisted upon a higher level of foresight and contemplation of death or grievous bodily harm as a probable consequence for a positive finding of murder. Murder convictions in Australia can only arise where there is foresight of a probability, as opposed to a mere possibility, of death or grievous bodily harm. *See Hyam v. R* (House of Lords, United Kingdom). *See also Nydam v. R* (Supreme Court, Victoria, Australia); *R v. Sergi* (Supreme Court, Victoria, Australia); R v. Hallett (Supreme Court, South Australia, Australia); *Pemble v. R* (High Court, Australia); *R v. Windsor* (Supreme Court, Victoria, Australia); *La Fontaine v. R* (Supreme Court, Victoria, Australia); *Boughey v. R* (Court of Criminal Appeal, Australia); *R v. Crabbe* (High Court, Australia).
[1008] David LANHAM *et al.*, *Criminal Laws in Australia*, The Federation Press, 2006, pp. 210-211.
[1009] An unlawful act is one which is contrary to criminal law. A dangerous act is one carrying with it an appreciable risk of serious injury. *See Wilson v. R* (High Court, Australia). *See also R v. Holzer* (Supreme Court, Victoria, Australia); *Burns v. R* (High Court, Australia), p. 75; *Lane v. R* (Court of Criminal Appeal, New South Wales, Australia), p. 57.
[1010] Criminal negligence encompasses an intent to do the act which causes the death of the victim where the doing of that act involves a serious shortfall of the standard of care required of a reasonable man in the circumstances and a high degree of risk or likelihood of the occurrence of death or seriously bodily harm. *See Nydam v. R* (Supreme Court, Victoria, Australia), p. 445, approved in *R v. Lavender* (High Court, Australia), p. 136; *Wilson v. R* (High Court, Australia), p. 49; *Burns v. R* (High Court, Australia), p. 19.
[1011] *State v. Malinga* (1963), p. 695 (emphasis added).

dolus eventualis or recklessness) incurs criminal responsibility and is considered as intentional killing. Given that the crime of murder, in international law, is defined as intentional killing, it must be understood that it encompasses direct intent as well as killing with *dolus eventualis*/reckless killing.

410. In sum, the Supreme Court Chamber considers that the *mens rea* of murder as a crime against humanity as it stood in 1975 must be defined *largo sensu* so as to encompass *dolus eventualis*. Accordingly, the Supreme Court Chamber dismisses KHIEU Samphân's ground of appeal.

b) Murder committed during Population Movement Phase One

411. The Trial Chamber identified several categories of killing or deaths amounting to the crime against humanity of murder that occurred during Population Movement Phase One, namely:

i. The killing of civilians for refusing to follow instructions, seeking to return, or for no discernible reasons;

ii. The death of several victims due to the conditions of the evacuation; and

iii. The killing of Khmer Republic soldiers and officials.

412. NUON Chea and KHIEU Samphân do not raise specific arguments as regards the Trial Chamber's finding that the high-ranking officials of the Khmer Republic who had been "ear-marked" for certain death and had not fled the city were killed. However, they impugn the conviction for murder as a whole, as well as the Trial Chamber's findings in respect of the other categories of victims.

(1) Killing of civilians

413. In respect of the killing of civilians during Population Movement Phase One, the Trial Chamber concluded that "numerous victims who refused to leave their homes in Phnom Penh, as well as those who did not immediately follow the instructions of the Khmer Rouge soldiers during the march out of the city were shot and killed on the spot".[1012] The Trial Chamber also concluded that "[t]here was also

[1012] Trial Judgement, para. 553, fn. 1654, referring to paras 474, 486.

substantial evidence of the individual killing of victims both in Phnom Penh and during the course of the evacuation for no discernible reason", referring in a footnote to three earlier paragraphs, two of which do not relate to the killing of civilians, but to that of Khmer Republic soldiers or officials, a discrete category of victims.[1013] While the latter formulation of conclusions is somewhat ambiguous, as it could be read merely as an acknowledgment of the existence of evidence rather than a finding based on the actual evaluation of this evidence, the Supreme Court Chamber understands that the Trial Chamber thereby found beyond reasonable doubt that killings of civilians occurred when they had not followed the Khmer Rouge soldiers' orders as well as "for no discernible reason".

414. The paragraphs of the Trial Judgement to which the Trial Chamber referred in its conclusions on murder contain more concrete factual findings, namely that "[n]umerous civil parties and victims recounted how those who did not immediately obey were shot and killed on the spot", followed by more specific findings;[1014] that "[t]hose who persisted in trying to return to Phnom Penh were shot";[1015] and that "[t]here were also numerous instances of Khmer Rouge soldiers shooting and killing civilians during the course of the evacuation, with victims including a famous film actor, several people driving vehicles and even those who simply became too weak to continue".[1016] In the footnotes to these findings, the Trial Chamber summarised the underlying evidence, identifying fifty-four separate instances of killings of civilians during the evacuation.[1017]

[1013] Trial Judgement, para. 553, fn. 1655, referring to paras 490, 507, 513, (the latter two relate to the killing of Khmer Republic soldiers and officials).
[1014] Trial Judgement, para. 474.
[1015] Trial Judgement, para. 486.
[1016] Trial Judgement, para. 490.
[1017] These accounts are based on murder findings in Trial Judgement, para. 474, fns 1402-1405; para. 486, fn. 1450, para. 490, fns 1462-1463. The Supreme Court Chamber identified forty-five separate accounts of killings of civilians during the evacuation of Phnom Penh provided by forty-three individuals, namely: PAM Moeun, SOT Sem, POK Sa Èm, SUONG Khĭt, MEA Chhin, SEN Sophon, CHEY Yeun, PAL Rattanak, YANN Nhâr, EAM Teang, MEAS Mut, BENG Boeun, refugee account from a law student, refugee account from "Mr Worker", PECH Ling Kong/PECH Lim Kuon, KHOEM Naréth, Denise AFFONÇO, PIN Yathay, Brigadier-General SOR Buon, HUM Ponak, SEANG Chăn, KHIEV Horn, PHUONG Mom, SUN Henri, SUM Chea, MORM Phai Boun, Sydney SCHANBERG, LAY Bony, YIM Sovann, THOUCH Phandarasar, YUOS Phal, MOM Sam Oeurn, CHUM Sokha, MEAS Saran, KUNG Narin, NORNG Ponna, KEV Chhem, PHUONG Phâlla, LY Ream, TIENG Sokhom, CHOU Kim Lan, SAM Pha, SEM Virak, CHHENG Eng Ly. *Compare* Co-Prosecutors' Response, para. 145 (identifying forty-eight instances of killing). It is possible that where an individual gave multiple accounts of wilful killings, some referred to the same instance. *See*, *e.g.*, SOT Sem Civil

415. NUON Chea alleges that the Trial Chamber's conviction for the killings of civilians during Population Movement Phase One was based on errors of fact leading to a miscarriage of justice because the evidence of murders was so weak that no reasonable trier of fact could have concluded beyond reasonable doubt that a single killing had taken place.[1018] He avers that every individual killing constituting a murder finding was unsubstantiated.[1019] In particular, he submits that the Trial Chamber: (i) failed to properly weigh and assess the probative value of evidence, either at all or in light of the circumstances in which it was collected;[1020] and (ii) made its findings in the absence of compelling evidence that was subject to cross-examination.[1021] Further, he submits that any alleged killing, even if sufficiently proven, could have been legally justified by military necessity, but the Trial Chamber failed to explore this issue.[1022]

416. The Co-Prosecutors respond that NUON Chea's arguments in relation to the killings of civilians must fail because he (i) miscategorises evidence;[1023] (ii) makes unsubstantiated arguments that some killings were lawful;[1024] (iii) wrongly dismisses categories of evidence, including victim impact testimony, documentary evidence and civil party applications;[1025] and (iv) ignores corroborative evidence.[1026] The Co-Prosecutors also contend that the correct approach is not to assess each killing in isolation from the rest of the evidence, but to assess whether it has been established beyond reasonable doubt that murders occurred during the evacuation of Phnom Penh.[1027]

417. In light of the above, the Supreme Court Chamber has to determine, first, whether it was indeed required that individual instances of killing, to which the Trial

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Party Application, E3/4689, dated 19 December 2007, p.8, ERN (En) 00446581, (stating that the civillians were ordered to take National Road 1 and that those who resisted were shot dead); SOT Sem Interview Record, E3/4654, dated 15 October 2009, pp. 3-4, ERN (En) 00400463-64 (stating that he saw the Khmer Rouge soldiers shoot few people dead, they were likely house owners who refused to leave their houses).

[1018] NUON Chea's Appeal Brief, paras 289-294, 296-320.
[1019] NUON Chea's Appeal Brief, para. 285.
[1020] NUON Chea's Appeal Brief, paras 289-293.
[1021] NUON Chea's Appeal Brief, paras 293, 302-307, 312-318.
[1022] NUON Chea's Appeal Brief, para. 294.
[1023] Co-Prosecutors' Response, paras 146-150.
[1024] Co-Prosecutors' Response, para. 149.
[1025] Co-Prosecutors' Response, paras 151-153.
[1026] Co-Prosecutors' Response, paras 154-156.
[1027] Co-Prosecutors' Response, paras 143-145.

Chamber referred primarily in the footnotes, be established beyond a reasonable doubt – a suggestion that underpins NUON Chea's arguments and which the Co-Prosecutors dispute.[1028]

418. According to the relevant jurisprudence of the *ad hoc* tribunals, which the Supreme Court Chamber finds to be persuasive, not each and every fact in the Trial Judgement must be proved beyond reasonable doubt, but all facts underlying the elements of the crime or the form of responsibility alleged as well as all those which are indispensable for entering a conviction, especially facts forming the elements of the crime or the form of responsibility alleged against the accused.[1029] In practical terms, there might be other facts that need to be established beyond reasonable doubt due to the way in which the case was pleaded.[1030] However, where only indirect evidence is available, "if one of the links is not proved beyond a reasonable doubt, the chain will not support a conviction".[1031] As to how to prove the necessary elements, this jurisprudence disapproves of piecemeal approach – that is, to apply the beyond reasonable doubt standard to individual items of evidence in isolation from one another. Rather, the finder of fact must be satisfied beyond reasonable doubt, on the basis of the totality of the evidence, that all facts forming the elements of the crime and mode of liability are established, as well as the facts indispensable for entering a conviction.[1032] Similarly, the ICC Appeals Chamber has found that, when determining whether this standard has been met, the finder of fact is required to carry out a holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue.[1033]

419. The Supreme Court Chamber emphasises, however, that a cumulative, or holistic, approach is contemplated mainly in respect of the reliability of individual pieces of evidence in light of available corroboration[1034] and, at times, the term is used

[1028] Co-Prosecutors' Response, para. 144; T. 18 February 2016, F1/7.1, p. 4.
[1029] *Halilović* Appeal Judgement (ICTY), para. 129, referring to *Ntagerura* Appeal Judgement (ICTR), para. 174 and *Blagojević and Jokić* Appeal Judgement (ICTY), para. 226; *D. Milosević* Appeal Judgement (ICTY), para. 20, referring to, *inter alia*, *Ntagerura* Appeal Judgement (ICTR), paras 174-175.
[1030] *Halilović* Appeal Judgement (ICTY), para. 129.
[1031] *Ntagerura* Appeal Judgement (ICTR), para. 175.
[1032] *Ntagerura* Appeal Judgement (ICTR), para. 174; *Mrkšić and Šljivančanin* Appeal Judgement (ICTY), para. 217.
[1033] *Lubanga* Appeal Judgement (ICC), para. 22.
[1034] *See*, *e.g.*, *Ntagerura* Appeal Judgement (ICTR), para. 174; *Halilović* Appeal Judgement (ICTY),

as regards sufficiency of indirect evidence for establishing the main fact beyond a reasonable doubt from predicate facts.[1035] This jurisprudence lends no support to the claim that a multiplicity of evidentiary items may add up to meet the burden of proof beyond reasonable doubt by virtue of their sheer number, irrespective of their probative value. Indeed, such an approach would mean that an accused could be convicted merely on the basis of widespread rumours.

420. As regards murder specifically, the Supreme Court Chamber agrees with the ICTY Trial Chamber in *Stakić*, that a conviction for murder is not precluded because of the impossibility to accurately establish the total number of deaths or to identify, case-by-case, the direct perpetrators and their victims.[1036] The Supreme Court Chamber also agrees with the ICTY Appeals Chamber in *Kvočka* that proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered; rather, the fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Trial Chamber.[1037] However, in order to sustain an overall finding that killings occurred beyond reasonable doubt, specific instances of killing must be proved beyond reasonable doubt, irrespective of whether a specific conviction for murder for each instance has been entered. By the same token, the overall conclusion that murder occurred cannot be said to have been established beyond a reasonable doubt if none of the specific instances that underpin that conclusion has been established to this standard. The quantity of killings that would need to be so established depends on how an individual case is pleaded, with one potentially sufficing to support a finding of murder,[1038] a greater number required to establish a pattern or massive character.[1039]

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para. 119; *Martić* Appeal Judgement (ICTY), para. 233; *Limaj* Appeal Judgement (ICTY), paras 153-154.
[1035] *Martić* Appeal Judgement (ICTY), para. 234.
[1036] *Stakić* Trial Judgement (ICTY), para. 201, cited by the Co-Prosecutors in T. 18 February 2016, F1/7.1, p. 6.
[1037] *Kvočka* Appeal Judgement (ICTY), para. 260, referred to in Trial Judgement, para. 413.
[1038] *See* *Kvočka* Appeal Judgement (ICTY), para. 74: "A conviction on any given count may be reached as long as there are findings as to one incident contained therein. […] The Trial Chamber established beyond reasonable doubt that some instances of persecutions, murder, torture and cruel treatment had been committed against prisoners of the Omarska camp".
[1039] *Kvočka* Appeal Judgement (ICTY), paras 357-360.

421. The Supreme Court Chamber has also reviewed the other cases to which the Co-Prosecutors referred at the appeal hearing in support of their submission that individual murders did not have to be established beyond reasonable doubt, given that the Accused had been charged with, and convicted of, the crime of extermination, which subsumed murder.[1040] The Supreme Court Chamber considers that this jurisprudence is largely irrelevant to the issue at hand. In *Ntakirutimana*, the ICTR Appeals Chamber addressed the question of whether the victims of the crime against humanity had to be named or described and found that this was not the case.[1041] While the Supreme Court Chamber agrees with this statement as such, this does not mean that killings need not be established beyond reasonable doubt. In *Gacumbitsi*, the ICTR Appeals Chamber found that, even though the prosecution had not established that the individuals whom the indictment had named by way of example as victims of extermination at a particular locality had actually been killed, the Trial Chamber was nevertheless not unreasonable in concluding that killings had been established; the ICTR Appeals Chamber found that the material fact that had to be established was that "many refugees were killed", but it did not find that these did not have to be established beyond reasonable doubt.[1042] Finally, in the passage cited from the *Rukundo* Appeals Judgement (ICTR), the ICTR Appeals Chamber discussed how the trial chamber in that case had reached its findings as to the occurrence of killings on a massive scale. The passage does not suggest that these killings did not have to be established beyond reasonable doubt.

422. Turning to the case at hand, the Supreme Court Chamber recalls that the charges laid against NUON Chea and KHIEU Samphân for the crimes against humanity of murder and extermination committed during Population Movement Phase One did not focus on individual acts of killing, but on the overall allegation that Khmer Rouge troops killed numerous civilians in the course of the evacuation of Phnom Penh. The Trial Chamber, as described above, found that civilians were killed

[1040] T. 18 February 2016, F1/7.1, pp. 4-6, referring to *Ntakirutimana* Appeal Judgement (ICTR), para. 518; *Rukundo* Appeal Judgement (ICTR), paras 187, 189; *Gacumbitsi* Appeal Judgement (ICTR), para. 89; *Stakić* Trial Judgement (ICTY), para. 654. The Supreme Court Chamber recalls that it has already addressed the *Stakić* Trial Judgement (ICTY).
[1041] *Ntakirutimana* Appeal Judgement (ICTR), para. 518.
[1042] *Gacumbitsi* Appeal Judgement (ICTR), para. 89.

if they disobeyed orders as well as for "no discernible reasons".[1043] However, the Trial Chamber did not discuss the basis for its findings, *i.e.* the individual killings; it merely summarised the underlying evidence, mostly in footnotes.[1044] These specific instances of killings were, however, constituent elements of the Trial Chamber's overall factual findings and therefore facts on which the conviction for murder in respect of Population Movement Phase One was based. This is the case because, unless specific instances of killing have been proved beyond reasonable doubt, it cannot be said that the findings that civilians were killed if they disobeyed orders as well as for "no discernible reasons" have been established to that standard. For that reason, the Supreme Court Chamber will have to determine whether, on the basis of the evidence that was put before the Trial Chamber, specific instances of killing may be considered as having been reasonably established.

423. As noted above, the Trial Chamber identified fifty-four instances of killing. Among these, two were based on witness testimony and ten on civil party testimony, who gave either eyewitness or hearsay accounts of killings; three on interview records of witnesses and two on interview records of civil parties, evidence collected under the authority of the Co-Investigating Judges, which however the Defence, along with the Trial Chamber and the other Parties, have not had the opportunity to subject to in-court examination. The remaining findings of killings were based on documents, namely twenty on civil party applications, one on information contained in a submission by the Government of Norway to a United Nations body, nine on victim complaints, four on refugee accounts and three on a letter sent by the French Ambassador in Thailand.[1045]

[1043] Trial Judgement, para. 553 and fns 1654, 1655 referring to paras 474, 486, 490 (in fn. 1655, reference is also made to paras 507, 513, which, however, address the killing of Khmer Republic soldiers and officials).
[1044] *See* Trial Judgement, para. 474, fns 1402-1405; para. 486, fn. 1450.
[1045] **Witness Testimony**: T. 5 November 2012 (SUM Chea), E1/140.1 p. 24; T. 7 June 2013 (Sydney SCHANBERG), E1/203.1 pp. 4-6. **Civil Party Testimony**: T. 12 December 2012 (Denise AFFONÇO), E1/152.1 p. 71; T. 7 February 2013, (PIN Yathay), E1/170.1 pp. 64, 71; T. 23 October 2012 (LAY Bony), E1/137.1 p. 23; T. 19 October 2012 (YIM Sovann), E1/135.1 p. 81; T. 29 May 2013 (THOUCH Phandarasar), E1/198.1 p. 5; T. 27 May 2013 (YOS Phal), E1/197.1 p. 76; T. 6 November 2012 (MOM Sam Oeurn), E1/141.1 p. 15; T. 22 October 2012 (CHUM Sokha), E1/136.1 p. 92; T. 29 May 2013 (CHHENG Eng Ly), E1/198.1 pp. 92, 98. **Witness Interview Records**: KHOEM Naréth Interview Record, E3/1747, dated 16 July 2008, ERN (En) 00243009; NORNG Ponna Interview Record, E3/5131, dated 14 November 2007, ERN (En) 00223185; SEANG Chăn Interview Record, E3/5505, dated 23 October 2009, ERN (En) 00399168. **Civil Party Interview Records**: SOT

424. The Supreme Court notes that, as recalled by NUON Chea, in respect of each of these specific instances of killings, there was only *one* single direct source of evidence – either in the form of live testimony or written document. There is no general rule that a finding beyond reasonable doubt cannot be reasonably entered unless there is more than one item of evidence to support it. Rather, the reasonableness of the finding will have to be determined in light of the relevance and reliability of the evidence.[1046] Moreover, the evidence relating to specific incidents of killing during Population Movement Phase One should not be assessed in isolation. Its probative value may be strengthened by evidence relating to instances of killings that occurred under similar circumstances and, through this corroboration, may become capable of satisfying the burden of proof beyond reasonable doubt. The Supreme Court Chamber shall assess in respect of each of the Trial Chamber's findings whether they have been reasonably made.

Sem Interview Record, E3/4654, dated 15 October 2009, pp. 3-4 ERN (En) 00400463-64; KHIEV Horn Interview Record, E3/5559, dated 9 September 2009, p. 3, ERN (En) 00377368. **Civil Party Applications:** SOT Sem Civil Party Application, E3/4689, dated 19 December 2007, p. 8, ERN (En) 00446581**;** POK Sa Èm Civil Party Application, E3/4724, dated 8 December 2008, p. 3, ERN (En) 00487675; SUONG Khĭt Civil Party Application, E3/4734, dated 15 June 2009, p. 4, ERN (En) 00865178; MEA Chhin Civil Party Application, E3/4680, dated 21 May 2008, p. 6, ERN (En) 00885702; SEN Sophon Civil Party Application, E3/4821, dated 29 April 2009, pp. 1-2, ERN (En) 00916889; CHEY Yeun Civil Party Application, E3/4824, dated 11 January 2008, p. 2, ERN (En) 00891213; PAL Rattanak Civil Party Application, E3/4839, dated 20 February 2008, p. 2, ERN (En) 00893370; YANN Nhâr Civil Party Application, E3/4987, dated 24 July 2009, p. 6, ERN (En) 00873677; MEAS Mut Civil Party Application, E3/4703, dated 22 April 2008, p. 7, ERN (En) 00417844; BENG Boeun Civil Party Application, E3/4719, dated 31 August 2009, p. 5, ERN (En) 00436830; KHOEM Naret Civil Party Application, E3/4687, dated 12 May 2008, p. 3, ERN (En) 00375736; HUM Ponak Civil Party Application, E3/4759, dated 10 January 2010, p. 1, ERN (En) 00887719; MORM Phai-Boun *alias* MEI Monyroath Civil Party Application, E3/4901, dated 31 January 2008, pp. 2, 4, ERN (En) 00944521, 00944523**;** MEAS Saran Civil Party Application, E3/3966, dated 17 September 2008, p. 3, ERN (En) 00362196; KUNG Narin Civil Party Application, E3/4773, dated 21 October 2008, p. 2, ERN (En) 00890598; PHUONG Phâlla Civil Party Application, E3/4757, dated 29 January 2008, p. 4, ERN (En) 00864243; LY Ream Civil Party Application, E3/4980, dated 25 May 2009, p. 2, ERN (En) 00893407; SAM Pha Civil Party Application, E3/5005, dated 26 July 2009, p. 3, ERN (En) 00871750; SEM Virak Civil Party Application, E3/4678, dated 24 March 2008, p. 3, ERN (En) 00877009. **Government Submission and Embassy Letter:** *Submission from the Government of Norway under Commission on Human Rights decision 9 (XXXIV)* (ECOSOC), E3/1805, 18 August 1978, p. 21, ERN (En) 00087557 (PAM Moeun); French Embassy Letter, Subject: Testimony of Brigadier-General SOR Buon, E3/2666, dated 23 June 1975, p. 3, ERN (En) 00517765. **Victim Complaints**: EAM Teang Victim Complaint, E3/5482, dated 3 February 2010, p. 7, ERN (En) 00824222; PHUONG Mom Victim Complaint, E3/5416, dated 29 October 2008, p. 6, ERN (En) 00869941; SUN Henri Victim Complaint, E3/5457, dated 20 September 2009, pp. 6-7, ERN (En) 00474753-54; KEV Chhem Victim Complaint, E3/5407, dated 22 October 2008, p. 6, ERN (En) 00828255; TIENG Sokhom Victim Complaint, E3/5402, dated 23 October 2008, p. 6, ERN (En) 00870347; CHOU Kim Lan Victim Complaint, E3/5469, dated 27 August 2008, p. 6, ERN (En) 00746218. **Refugee Accounts**: Refugee Accounts collected by François PONCHAUD, E3/4590, undated, pp. 30, ERN (En) 00820450, 50, ERN (En) 00820348, 205, ERN (En) 00820523.

[1046] *See above*, para. 295 *et seq*.

425. At the outset, the Supreme Court Chamber notes NUON Chea's argument that "the Trial Chamber failed to identify a *single person* who described seeing a *single killing* first-hand".[1047] This argument stands to be rejected. As will be seen below, some of the in-court testimony upon which the Trial Chamber relied related eyewitness accounts of killings.

(a) Killings for disobeying orders

426. The Trial Chamber's finding regarding killings of those who disobeyed the Khmer Rouge's orders[1048] is based on the in-court testimony of Civil Parties PIN Yathay and Denise AFFONÇO and of witness SUM Chea as well as out-of-court statements and documentary evidence.[1049]

427. As to the in-court evidence, NUON Chea challenges the Trial Chamber's reliance on Civil Party PIN Yathay's testimony primarily on the basis of a purportedly faulty summary of his testimony by the Trial Chamber.[1050] The Supreme Court Chamber recalls that, when testifying spontaneously in court, PIN Yathay described the evacuation of Phnom Penh as strenuous but not violent.[1051] NUON Chea alleges that PIN Yathay did not actually testify to the aforementioned killing in court, but merely confirmed he had authored the relevant passage of a book he had written.[1052] However, a review of the Khmer transcript shows that the witness did, in fact, confirm that the passage he had been read was factually accurate.[1053] Moreover, PIN Yathay indeed provided only hearsay testimony as to the apparent reasons why a Khmer Rouge soldier had shot a young man who purportedly had attempted to return home. This account nevertheless carries weight in as much as it attests to the killing of a civilian by a Khmer Rouge soldier. While PIN Yathay did not witness the killing itself, he heard the gunshot and shortly thereafter saw the dead body and an armed Khmer Rouge soldier in close distance, who stated that "This is what happens to

[1047] NUON Chea's Appeal Brief, para. 296.
[1048] Trial Judgement, para. 474.
[1049] *See* Trial Judgement, para. 474, fns 1402-1405.
[1050] NUON Chea's Appeal Brief, para. 298.
[1051] *See*, *e.g.*, T. 7 February 2013 (PIN Yathay), E1/170.1, pp. 5-8, 14-15, 20-21, 25-26.
[1052] NUON Chea's Appeal Brief, para. 298.
[1053] T. 7 February 2013 (PIN Yathay), E1/170.1, (Kh) pp. 43 (line 25)-44 (line 1) ("Is what you saw at that time exactly what you are answering now?"). The fact that the Co-Prosecutors hastily confirmed NUON Chea's interpretation of their prior questioning is irrelevant (T. 7 February 2013 (PIN Yathay), E1/170.1, p. 54).

recalcitran[ts]".[1054] Considering that the account concerning the killing of the young man was not the focus of either the book or of PIN Yathay's layered and specific testimony and that it is not essential for his status as a civil party or any other conceivable interest, the Supreme Court Chamber sees no reason to discredit this particular piece of his testimony. It is worth noting in this context that NUON Chea declined to examine PIN Yathay at trial.[1055]

428. In relation to Civil Party Denise AFFONÇO, who testified to the killing of a school friend,[1056] NUON Chea argues that the Trial Chamber did not specify in the summary of her testimony that her evidence was hearsay.[1057] The Supreme Court Chamber notes that, even though Denise AFFONÇO indeed did not witness the killing of her school friend, her testimony presents a reasonable level of detail, establishing a high probability of the killing of her school friend in the circumstances that she described.[1058] Nevertheless, because of the hearsay character of her testimony and the uncertainty as to the sources of her knowledge, which the Trial Chamber did not address, Denise AFFONÇO's testimony was an insufficient basis for a finding beyond reasonable doubt that the killing of her school friend occurred. It may, however, serve as general corroboration of PIN Yathay's account, in that it describes a killing under similar circumstances.

429. In relation to witness SUM Chea, who testified that the head of his battalion had told him that people who had resisted the evacuation had been shot "to scare the hell out of other people" and that the treatment of the population by soldiers from the East Zone had been the harshest,[1059] NUON Chea argues that his testimony was another reason why the Trial Chamber should have called HENG Samrin to testify.[1060] However, as the credibility of SUM Chea is undisputed, this does not

[1054] T. 7 February 2013 (PIN Yathay), E1/170.1, p. 51.
[1055] T. 7 February 2013 (PIN Yathay), E1/170.1 p. 65.
[1056] T. 12 December 2012 (Denise AFFONÇO), E1/152.1, p. 71.
[1057] NUON Chea's Appeal Brief, para. 297.
[1058] T. 12 December 2012 (Denise AFFONÇO), E1/152.1, p. 71: "Well, nobody resisted where I lived; everybody did what they were told. What I did learn afterwards was that some people stayed behind. I had a school friend, for example, who stayed to wait for her husband. Her husband never came back, and she, herself, was executed. She was killed on the spot, and her brothers and sisters later told me how she died".
[1059] T. 5 November 2013 (SUM Chea), E1/140.1, pp. 24-25.
[1060] NUON Chea's Appeal Brief, para. 299. As for NUON Chea's challenge to the accuracy of the English interpretation of a passage of SUM Chea's testimony (NUON Chea's Appeal Brief, fn. 814), this Chamber, upon review of the Khmer original (T. 5 November 2013 (SUM Chea), E1/140.1, (Kh) p.

establish unreasonableness of the Trial Chamber's findings and its reliance on SUM Chea's account as corroboration of that provided by PIN Yathay. NUON Chea's additional allegation[1061] that the Trial Chamber neglected to cite evidence of soldiers claiming no civilians were killed is factually incorrect: the Trial Chamber did take note of the testimony according to which no violence was applied.[1062]

430. The remaining evidence in support of the finding that civilians who disobeyed the Khmer Rouge's orders were killed is out-of-court evidence, namely a submission by the Norwegian Government to the U.N. Commission on Human Rights relating the account of killings by a former Khmer Republic soldier, a letter from the French Embassy in Thailand relating the account of former Khmer Republic Brigadier-General SOR Buon, accounts of refugees, interview records collected in the course of the investigation, civil party applications and victim complaints. This evidence is of an inherently low probative value, a fact the Trial Chamber had only acknowledged in general terms, but apparently not applied in practice.[1063] Indeed, in relation to the evidence at issue, the Trial Chamber did not explain why it considered that, despite its inherently low probative value, it could, on this basis, reach findings beyond reasonable doubt as to individual incidents of killings. A review of the evidence cited by the Trial Chamber discloses that this evidence is often not very detailed and/or amounts to hearsay.[1064] Accordingly, while this evidence indicates that there may

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20 (lines 1-3)), finds no significant error in the interpretation.

[1061] NUON Chea's Appeal Brief, para. 299.

[1062] *See* Trial Judgement, fn. 1402 (citing MEAS Voeun Interview Record, E3/424, dated 16 December 2009), para. 475 ("Some people stated that they did not see any resistance to the orders or subsequent violence") and fn. 1406 (which contains references to testimony and other evidence that there was no violence).

[1063] *See above*, para. 295 *et seq*.

[1064] As for undetailed and/or hearsay evidence, *see*, *e.g.*, *Submission from the Government of Norway under Commission on Human Rights decision 9 (XXXIV)* (ECOSOC), E3/1805, 18 August 1978, p. 21, ERN (En) 00087557 (PAM Moeun); MEA Chhin Civil Party Application, E3/4680, dated 21 May 2008, p. 6, ERN (En) 00885702; SEN Sophon Civil Party Application, E3/4821, dated 29 April 2009, p. 2, ERN (En) 00916889; CHEY Yeun Civil Party Application, E3/4824, dated 11 January 2008, p. 2, ERN (En) 00891213; YANN Nhâr Civil Party Application, E3/4987, dated 24 July 2009, p. 6, ERN (En) 00873677; BENG Boeun Civil Party Application, E3/4719, dated 31 August 2009, p. 5, ERN (En) 00436830; HUM Ponak Civil Party Application, E3/4759, dated 10 January 2010, p. 1, ERN (En) 00887719; KUNG Narin Civil Party Application, E3/4773, dated 21 October 2008, p. 2, ERN (En) 00890598; KEV Chhem Victim Complaint, E3/5407, dated 22 October 2008, p. 6, ERN (En) 00828255; CHOU Kim Lan Victim Complaint, E3/5469, dated 27 August 2008, p. 6, ERN (En) 00746218; SAM Pha Civil Party Application, E3/5005, dated 26 July 2009, p. 3, ERN (En) 00871750. Moreover, some accounts were unclear as to whether the declarants were referring to killings that they had either seen or heard of, or to threats by Khmer Rouge soldiers that those who did not obey orders would be killed: *see*, *e.g.*, POK Sa Èm Civil Party Application, E3/4724, dated 8 December 2008, p. 3, ERN (En) 00487675; SUONG Khĭt Civil Party Application, E3/4734, dated 15 June 2009, p. 4, ERN

have been other instances of killings of civilians who disobeyed orders by the Khmer Rouge and therefore provides general corroboration to the in-court testimony, it was not in itself a reasonable basis for a finding beyond reasonable doubt that the killings mentioned in the evidence occurred.

431. Despite the conclusion that the above-mentioned out-of-court evidence was, as a whole, inapt to serve as a basis for a finding beyond reasonable doubt, the Supreme Court Chamber considers that it is nevertheless of value to consider NUON Chea's arguments regarding particular items of this evidence.

432. NUON Chea challenges the Trial Chamber's reliance on SEANG Chan's interview record, according to which SEANG Chan saw people being "shot to death because they were hesitating and did not know which route to take".[1065] NUON Chea argues that this statement does not relate to people being killed because they disobeyed the order to leave the city.[1066] The Supreme Court Chamber finds this argument unpersuasive, as hesitation may be considered a form of disobedience.

433. The Trial Chamber referred also to the interview record of KHIEV Horn, who stated that he had witnessed that anyone who opposed the evacuation was shot dead[1067] and, in the same footnote, to the interview record of SOT Sem, who said that he had seen Khmer Rouge soldiers shoot a few people dead.[1068] NUON Chea's argument that the statements in the interview records were too short for a trier of fact to assess their reliability[1069] is well-founded. The statements about the shooting, in contrast to the remainder of the statements which describe personal experiences during the evacuation, and in spite of the drama which witnessing the killing of several persons must have been, are extremely laconic and likely to derive from common narrative rather than personal experience; as such, in the Supreme Court

(En) 00865178; PAL Rattanak Civil Party Application, E3/4839, dated 20 February 2008, p. 2, ERN (En) 00893370; Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 132, ERN (En) 00820450.
[1065] SEANG Chăn Interview Record, E3/5505, dated 23 October 2009, p. 3, ERN (En) 00399168, referred to in Trial Judgement, para. 474, fn. 1404.
[1066] NUON Chea's Appeal Brief, para. 303.
[1067] KHIEV Horn Interview Record, E3/5559, dated 9 September 2009, p. 3, ERN (En) 00377368, referred to in Trial Judgement, para. 474, fn. 1404.
[1068] SOT Sem Interview Record, E3/4654, dated 15 October 2009, pp. 3-4, ERN (En) 00400463-64, referred to in Trial Judgement, para. 474, fn. 1404.
[1069] NUON Chea's Appeal Brief, paras 304-305.

Chamber's opinion, they are incapable of constituting, in and of themselves, proof of killings and may only provide limited, if any, general corroboration of other killings.

434. In relation to the interview record of KHOEM Naret,[1070] NUON Chea argues that his statement was anonymous hearsay evidence.[1071] The Supreme Court Chamber finds that, indeed, the civil party provided only limited detail as to the source from which he had heard about the killings. As such, the interview record could not reasonably serve as a basis for a finding of murder or corroboration thereof.

435. In sum, the Trial Chamber's finding that Khmer Rouge soldiers had killed civilians who disobeyed their orders rested on the evidence of one killing recounted by PIN Yathay, as corroborated by the testimonies of Denise AFFONÇO and SUM Chea and out-of-court evidence, which, while not providing a sufficient basis for a finding beyond reasonable doubt, nevertheless provided corroboration for the in-court evidence. The Supreme Court Chamber concludes that the Trial Chamber's findings that killings of those who disobeyed orders had occurred was not unreasonable.

(b) Killings of those who sought to return

436. The Trial Chamber's finding that "[t]hose who persisted in trying to return to Phnom Penh were shot"[1072] rested exclusively on LAY Bony's testimony, which NUON Chea challenges.[1073] The Supreme Court Chamber notes that, indeed, LAY Bony's testimony was of hearsay nature as to the reason for killing, and although eyewitness testimony for similar circumstances was potentially available, it was not tested in court.[1074] Accordingly, and in the absence of any explanation by the Trial Chamber as to why it considered LAY Bony's testimony sufficiently reliable, it was unreasonable to enter a finding beyond reasonable doubt on that basis.

[1070] KHOEM Naret Civil Party Application, E3/4687, dated 12 May 2008, p. 3, ERN (En) 00375736 and KHOEM Naréth Interview Record, E3/1747, dated 16 July 2008, 16 July 2008, p. 3, ERN (En) 00243009, referred to in Trial Judgement, para. 474, fn. 1402.
[1071] NUON Chea's Appeal Brief, para. 305.
[1072] Trial Judgement, para. 486, referring to T. 23 October 2012 (LAY Bony), E1/137.1, p. 91; T. 24 October 2012 (LAY Bony), E1/138.1, p. 26; LAY Bony Interview Record, E3/3958, dated 26 August 2009, p. 3, ERN (En) 00379156.
[1073] NUON Chea's Appeal Brief, para. 300.
[1074] *See*, *e.g.*, SEM Virak Civil Party Application, E3/4678, dated 24 March 2008, p. 3, ERN (En) 0087709 (armed with AK47s, the Khmer Rouge soldiers did not hesitate to execute those who did not follow the indicated route or strayed from it, he witnessed such executions); HUM Ponak Civil Party Application, E3/4759, dated 10 January 2010, p. 1, ERN (En) 00887719 (witnessed people who opposed orders killed in front of her).

(c) Killings for "no discernible reason"

437. In relation to a finding that "[t]here were numerous instances of Khmer Rouge soldiers shooting and killing civilians during the course of the evacuation", the Trial Chamber cited, in addition to out-of-court evidence, the accounts of six civil parties, who testified at trial that they had seen civilians being killed:[1075] YIM Sovann testified that she saw Khmer Rouge soldiers shoot dead the driver of a car, as well as an incident at Orussey Market, where Khmer Rouge soldiers forced open a house and shot dead the people coming out from the house;[1076] YOS Phal testified that he saw Khmer Rouge soldiers shoot dead the driver of a truck at Chem Dam Dek Pagoda;[1077] THOUCH Phandarasar testified that she had heard a gunshot and saw a man who had just been shot at;[1078] MOM Sam Oeurn testified that she saw the shooting of people along the street;[1079] CHUM Sokha testified that Khmer Rouge soldiers shot dead people who were trying to loot a warehouse for rice;[1080] and CHHENG Eng Ly testified that she saw how, close to Monivong Bridge, Khmer Rouge soldiers killed a baby by tearing her apart.[1081]

438. NUON Chea challenges the Trial Chamber's reliance on Civil Party YIM Sovann, alleging that she had not been involved in the events she described, did not explain why the driver had been shot and was not questioned by any of the Parties about the killing. The Supreme Court Chamber sees no apparent reason why it would have been unreasonable for the Trial Chamber to rely on her account, insofar as it attests to one instance of killing of people who had locked themselves in a house around the Orussey Market[1082] and one instance of killing the driver of a car.[1083] Under the circumstances, considering that the lack of detail may reasonably be attributed to YIM Sovann having seen the incident in passing while being forcibly evacuated, and given that the record reflects that NUON Chea was not prevented from asking about them in trial,[1084] the Supreme Court Chamber sees no unreasonableness

[1075] *See* Trial Judgement, para. 490, fns 1462-1464.
[1076] T. 19 October 2012 (YIM Sovann), E1/135.1, pp. 81, 83-85.
[1077] T. 27 May 2013 (YOS Phal), E1/197.1, p. 76.
[1078] T. 29 May 2013 (THOUCH Phandarasar), E1/198.1, p. 5.
[1079] T. 6 November 2012 (MOM Sam Oeurn), E1/141.1, p. 15.
[1080] T. 22 October 2012 (CHUM Sokha), E1/136.1, p. 92.
[1081] T. 29 May 2013 (CHHENG Eng Ly), E1/198.1, pp. 92, 98.
[1082] T. 19 October 2012, (YIM Sovann), E1/135.1, p. 81.
[1083] T. 19 October 2012, (YIM Sovann), E1/135.1, p. 85.
[1084] T. 19 October 2012, (YIM Sovann), E1/135.1, p. 116.

in the Trial Chamber's reliance on this evidence. The same applies to NUON Chea's challenge to Civil Party MOM Sam Oeurn's testimony.[1085]

439. NUON Chea also challenges the Trial Chamber's reliance on the testimony of Civil Party CHUM Sokha to establish the killing of people who had looted a warehouse.[1086] CHUM Sokha had managed to run away with a sack of rice. The Trial Chamber used this evidence to support its finding that "[t]here were also numerous instances of Khmer Rouge soldiers shooting and killing civilians during the course of the evacuation".[1087] NUON Chea argues that this evidence should have supported a finding that violence was only used to counter unlawful activity such as looting.[1088] This, however, merely represents an alternative interpretation of the evidence – whose credibility is not disputed – and does not demonstrate that it was unreasonable for the Trial Chamber to rely on this evidence to support its finding that civilians were murdered, in particular since killing civilians for stealing rice is evidently a disproportionate response.

440. The Supreme Court Chamber notes that the remaining evidence upon which the Trial Chamber relied was out-of-court evidence of inherently low probative value. The Supreme Court Chamber finds that this evidence was insufficient to establish killings beyond reasonable doubt. Turning to the specific challenges directed against individual items of evidence, NUON Chea argues that the Trial Chamber erred when it relied on MEAS Saran's civil party application because it used the English translation of the document, which significantly differs from the Khmer original and because MEAS Saran stated in court only that he had seen that people had been taken away, which the Trial Chamber failed to acknowledge and analyse.[1089] The Supreme Court Chamber notes that there is indeed a significant discrepancy between the Khmer version of MEAS Saran's civil party application, which refers to co-travellers being taken away to be killed without any reason, and its English translation, according to which "[a]long the road [on his travel from Phnom Penh to Battambang],

[1085] T. 6 November 2012, (MOM Sam Oeurn) E1/141.1, pp. 15 (MOM Sam Oeurn witnessed the shooting of people along the street), 60-65 (NUON Chea did not question the civil party on killings or her evidence of the evacuation).
[1086] NUON Chea's Appeal Brief, para. 310.
[1087] Trial Judgement, para. 490, fn. 1462.
[1088] NUON Chea's Appeal Brief, paras 291, 310.
[1089] NUON Chea's Appeal Brief, para. 314.

[he] saw many people were unreasonably killed".[1090] The Khmer original, which aligns more directly with his in-court testimony that that "people who were travelling with me were taken away",[1091] suggests that he had not observed the actual killing or seen the corpses, but merely assumed that the people had been killed. Hence, the Supreme Court Chamber considers that it was unreasonable for the Trial Chamber to have relied on the excerpt of MEAS Saran's statement without addressing the Khmer original of his civil party application and his in-court testimony.

441. NUON Chea challenges the Trial Chamber's reliance on the refugee account of PECH Ling Kong.[1092] The Trial Chamber relied on this account in support of its findings that everybody was forced to leave, including "the sick and injured from the city's hospitals",[1093] and that Khmer Rouge killed civilians during the evacuation, notably those who became too weak to continue.[1094] NUON Chea argues that the Trial Chamber failed to assess the reliability of this account, even though PECH Ling Kong's account provides information the source of which is dubious.[1095] He also notes that it is likely that PECH Ling Kong is the same person as PECH Lim Kuon, an assumption that the Supreme Court Chamber indeed considers to be likely correct.[1096] As it appears that PECH Ling Kong/PECH Lim Kuon had arrived in Phnom Penh only shortly after the evacuation, as NUON Chea correctly notes, he could not have been an eyewitness to killings.[1097] However, contrary to NUON Chea's submission,[1098] the Trial Chamber never stated that he had actually seen such incidents.[1099] Similarly unpersuasive are NUON Chea's challenges to PECH's

[1090] MEAS Saran Civil Party Application, E3/3966, dated 17 September 2008, p. 3, ERN (En) 00362196.
[1091] T. 22 November 2012 (MEAS Saran), E1/145.1, p. 35.
[1092] NUON Chea's Appeal Brief, para. 316.
[1093] Trial Judgement, para. 476, fn. 1411.
[1094] Trial Judgement, para. 490, fn. 1462.
[1095] NUON Chea's Appeal Brief, para. 316.
[1096] *See* NUON Chea's Appeal Brief, para. 316, referring to T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 54, 101-103 (references have been adjusted to reflect the corrected version of the transcript).
[1097] *See* Conversation with PECH Lim Kuon, E3/4060, dated 11 August 1976, p. 1, ERN (En) 00823177 (PECH "was assigned to Pochentong Airport [in Phnom Penh] on 27 April 1975"; it is therefore unlikely that he was in Phnom Penh when patients were forced out of the city's hospitals), p. 2, ERN (En) 00823178 (he reportedly declared that, while his colleagues told him about massacres, he did not see anybody being killed).
[1098] NUON Chea's Appeal Brief, para. 316.
[1099] It was instead NON Thol who, according to the Trial Chamber, "saw" patients being chased out of a hospital: Trial Judgement, para. 476, fn. 1411, referring to Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 250, ERN (En) 00820568. The Supreme Court Chamber notes that

reliability based on his alleged confusion regarding the CPK's leadership – this was unrelated to the parts of the account on which the Trial Chamber relied. In sum, NUON Chea's argument that the Trial Chamber failed to consider specific circumstances affecting PECH's reliability fails. That said, and as noted above, given that his account is both hearsay and untested in court, it cannot establish killing beyond reasonable doubt and is, therefore, incapable of rendering support to the Trial Chamber's finding that Khmer Rouge soldiers shot and killed civilians during the evacuation including "those who simply became too weak to continue".[1100]

442. NUON Chea also challenges[1101] the Trial Chamber's finding, based on a refugee account recorded by François PONCHAUD, that the Khmer Rouge beheaded a famous film actor, KONG Sam Oeun,[1102] during the evacuation of Phnom Penh.[1103] The Supreme Court Chamber finds that the Trial Chamber inaccurately cited the evidence, as it is clear from the French original of the document containing the refugee account that the refugee stated that it was a pharmacist, and not KONG Sam Oeun, who was beheaded.[1104] Furthermore, contrary to the Co-Prosecutors' submissions, the civil party application of PAL Rattanak does not corroborate the evidence as to KONG Sam Oeun's death.[1105] Whilst the refugee account does indicate that the Khmer Rouge unlawfully beheaded a civilian, the Supreme Court Chamber agrees with NUON Chea that it is not clear whether the person who gave the account had been an eyewitness to this incident. The anonymous source of information, compounded by the fact that it may be double hearsay, means that it was unsafe to base a finding of killing upon this evidence.

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the Trial Chamber in this footnote did not spell out the name of NON Thol when referring to his account, thereby creating the impression that PECH was its source.

[1100] Trial Judgement, para. 490.

[1101] NUON Chea's Appeal Brief, para. 317.

[1102] The Supreme Court Chamber notes that the refugee account recorded by François PONCHAUD gives the name "KONG Savuon", which is also the name used by the Trial Chamber. In contrast, PAL Rattanak Civil Party Application, E3/4839, dated 20 February 2008, p. 4, ERN (En) 00893372, uses the name "KONG Sam Oeun", who was indeed a famous film actor, whose name appears to have been incorrectly recorded by François PONCHAUD.

[1103] Trial Judgement, para. 490, fn. 1462, referring to Refugee Accounts, E3/4590, undated, p. 30, ERN (En) 00820348.

[1104] *See* Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 22, ERN (Fr) 00410357: "*Des gens rouspètent, notamment un pharmacien: les KR lui coupent la tête, et laissent le cadavre sur la route*".

[1105] PAL Rattanak Civil Party Application, E3/4839, dated 20 February 2008, p. 4, ERN (En) 00893372.

443. In support of the finding that those "who simply became too weak to continue" were shot by Khmer Rouge soldiers, the Trial Chamber referred in a footnote, *inter alia*, to Brigadier-General SOR Buon's account, as reflected in a letter by the French Ambassador to Thailand, that "those along the way who were no longer willing or able to follow others were executed".[1106] NUON Chea claims that the evidence was double hearsay and that the Trial Chamber failed to reconcile SOR Buon's account with its own findings or to consider his reliability, but nevertheless based its finding "unquestioningly and on that basis alone" on this account.[1107] The Supreme Court Chamber notes that Brigadier-General SOR Buon is said to have been eyewitness to killings of those who refused or were unable to follow orders and saw many bodies strewn along the road.[1108] The record of SOR Buon's testimony is almost contemporaneously drawn, eloquent and detailed in certain respects; this said, it remains unsworn and untested, had been drawn up by a third party for purposes different than criminal proceedings and is lacking specificity as to the executions SOR Buon purportedly witnessed, including that it is unclear whether he saw a single instance or multiple instances. It was therefore unreasonable of the Trial Chamber to rely on this letter for its finding that those too weak to continue had been shot and killed by the Khmer Rouge during the evacuation.[1109] The Supreme Court Chamber further notes that this finding receives no support in live testimony or even in interview records. Although, testimony to this effect was potentially available based on certain civil party statements,[1110] it was not administered at trial.

444. NORNG Ponna's interview record is one of several sources used in support of the Trial Chamber's finding that there were numerous instances of Khmer Rouge soldiers shooting and killing civilians.[1111] According to the interview record, "[n]othing was done inside the pagoda; they just ordered us to leave; but outside the pagoda they were shooting people to death".[1112] NUON Chea argues that the interview record lacks detail in respect of those killings and that the witness did not

[1106] Trial Judgement, para. 490, fn. 1462.
[1107] NUON Chea's Appeal Brief, para. 318.
[1108] French Embassy Letter, Subject: Testimony of Brigadier-General SOR Buon, E3/2666, dated 23 June 1975, p. 3, ERN (En) 00517765.
[1109] Trial Judgement, para. 490.
[1110] *See* Trial Judgement, para. 490, fn. 1462.
[1111] Trial Judgement, para. 490, fn. 1462. *See also* above, para. 437 *et seq.*, which discusses the arguments relating to a finding contained in the same paragraph.
[1112] NORNG Ponna Interview Record, E3/5131, dated 14 November 2007, p. 3, ERN (En) 00223185.

explain how he came to know about them.[1113] This account indeed lacks detail as to the shooting and is most likely hearsay evidence attracting a low probative value.

445. Contrary to NUON Chea's submission,[1114] there is no indication that any of the killings relied upon by the Trial Chamber were committed lawfully or were justified by military necessity. In fact, the Trial Chamber specified that it did not rely on killings that "may reasonably appear to be in a combat situation" or where evidence was insufficient to establish whether in combat or not.[1115] To the extent that NUON Chea argues that the Trial Chamber unreasonably relied on civil party applications and victim complaints when finding that there were killings for "no discernible reason", as this means that it was impossible to conclude that the killings were unlawful,[1116] the Supreme Court Chamber recalls that it has found that findings of killings that were based on this type of evidence were in any event unreasonable; accordingly, NUON Chea's argument does not have to be addressed further. However, the killing of civilians, even in a combat situation, may not be presumed lawful.

446. Accordingly, as far as the Trial Chamber's findings of killings are based on live testimony by civil parties who saw the killings with their own eyes, given their mutual corroboration and the corroboration by indirect live evidence and documentary evidence, the Supreme Court Chamber does not find that no reasonable trier of fact could have concluded, without more, that these killings were established beyond reasonable doubt merely because there is just one account for each instance of killing. It would have been more consistent with good practice and respectful of fair trial principles if the Trial Chamber had set out more clearly its findings in relation to the individual instances of killing and explained how the live testimony was strengthened by the other evidence.[1117] Nevertheless, since it is assumed that the Trial Chamber accepted in its entirety the evidence it cited, not articulating in a more narrative

[1113] NUON Chea's Appeal Brief, para. 312.
[1114] NUON Chea's Appeal Brief, para. 294.
[1115] Trial Judgement, para. 554.
[1116] NUON Chea's Appeal Brief, para. 313.
[1117] *See* *Kvočka* Appeal Judgement (ICTY), para. 73 "making factual findings in relation to each incident […] would have been the appropriate approach. An accused is entitled to know whether he has been found guilty of a crime in respect of the alleged incidents under the principle of a fair trial". Whereas this statement refers to allegations in the indictment, the Supreme Court Chamber considers that *a fortiori* an accused is entitled to know whether he has been found guilty in respect of incidents listed in the judgement.

manner the basis of each murder finding does not in itself, as argued by NUON Chea,[1118] amount to an error of law of such gravity that it would invalidate the verdict, unless it could be demonstrated that, in accepting this evidence, the Trial Chamber acted unreasonably.

447. In conclusion, the Supreme Court Chamber finds NUON Chea's arguments persuasive to the extent that the Trial Chamber entered factual findings regarding specific instances of killings on the basis of out-of-court evidence and in the absence of any explanation as to how it assessed this evidence, which has inherently lower probative value than in-court evidence and which, in addition, was generally quite unspecific. Nevertheless, the Supreme Court Chamber considers that there is still a sufficiently sound basis in in-court evidence for the Trial Chamber's overall finding that civilians were unjustifiably killed during Population Movement Phase One.

448. Whereas the written evidence indicates a probability that the killings were more widespread than those proven, the evidence discussed by the Trial Chamber as to the number, frequency and circumstances of the killings was no reasonable basis to extrapolate conclusions about the number of victims, a pattern or a massive scale of the killings. In this light, failing to evaluate the evidence from the former Khmer Rouge soldiers according to whom there had been no orders to kill civilians, as well as failing to weigh evidence from victims who did not encounter violence during the evacuation, was also unreasonable as this evidence indicates, at a minimum, that orders to kill civilians during the evacuation, if any, had not been uniformly issued or implemented.

(2) Deaths resulting from the conditions during the evacuation of Phnom Penh

449. The Trial Chamber found that "[i]nnumerable victims also died along the way from a range of illnesses as a result of the failure by Khmer Rouge soldiers to provide the evacuees with food, water, medical assistance and shelter or hygiene facilities",[1119] and that "the deaths of […] those who died due to the conditions and lack of any assistance constitute murder".[1120] As a basis for this conclusion, the Trial

[1118] NUON Chea's Appeal Brief, para. 291.
[1119] Trial Judgement, para. 556.
[1120] Trial Judgement, para. 559.

Chamber referred to specific factual findings elsewhere in the Trial Judgement,[1121] in particular that: "those evacuated experienced terrible conditions throughout their journey including extreme heat and a lack of sufficient food, clean water, medicine or adequate accommodation. Expelled at the height of the hot season and forced to walk for days if not weeks on end, evacuees, and young children in particular, soon suffered from exhaustion and could barely walk […] Many evacuees were soon rendered weak or fell sick due to the conditions; some even died" [1122] and that "[i]n the face of severe and unrelenting conditions during the course of the evacuation, some evacuees either killed themselves or soon died from a combination of exhaustion, malnutrition or disease".[1123]

450. NUON Chea submits that the Trial Chamber erred in fact and law by concluding that murder was committed due to the conditions of the evacuation of Phnom Penh.[1124] He argues that the Trial Chamber "wildly exaggerates the uniformity and severity of the conditions"[1125] and largely relied on inadmissible out-of-court statements, civil party testimony [1126] or insufficient evidence [1127] to describe the conditions during the evacuation and therefore wrongly concluded that they caused deaths. NUON Chea also challenges the reliance by the Trial Chamber on its findings about the presence of dead bodies to conclude that people died due to the conditions during the evacuation.[1128]

451. The Co-Prosecutors argue that NUON Chea's submissions are without merit as the evidence overwhelmingly supports the Trial Chamber's finding that the conditions of the evacuation and lack of assistance caused the death of evacuees.[1129]

452. In relation to NUON Chea's challenge of the Trial Chamber's assessment of the overall conditions during the evacuation,[1130] the Supreme Court Chamber notes

[1121] Trial Judgement, para. 556, referring to paras 491-492, 495-498.
[1122] Trial Judgement, para. 491 (footnote(s) omitted).
[1123] Trial Judgement, para. 497.
[1124] NUON Chea's Appeal Brief, paras 323-326; *see also* paras 422-429, where NUON Chea challenges more generally the Trial Chamber's findings regarding the conditions during the evacuation of Phnom Penh. The Supreme Court Chamber addresses these arguments below at para. 597 *et seq*.
[1125] NUON Chea's Appeal Brief, para. 322.
[1126] NUON Chea's Appeal Brief, paras 323, 325-326.
[1127] NUON Chea's Appeal Brief, paras 323-324.
[1128] NUON Chea's Appeal Brief, para. 326, referring to Trial Judgement, paras 499, 500.
[1129] Co-Prosecutors' Response, paras 176-187.

that NUON Chea does not develop these arguments in the section of his appeal brief that addresses the crime of murder, but refers to submissions elsewhere regarding the crime of "other inhumane acts".[1131] The Supreme Court Chamber considers that these arguments are indeed most directly relevant to that crime and shall dispose of them in that context;[1132] accordingly, the present section addresses only the arguments relating to the Trial Chamber's finding that people died because of the conditions that were inflicted during the evacuation.

453. At the outset, the Supreme Court Chamber reiterates that, for murder as a crime against humanity to be established, it is necessary that instances of deaths inflicted by conditions of the evacuation be proved beyond reasonable doubt. The Supreme Court Chamber observes that the Trial Chamber's findings as to deaths resulting from the conditions inflicted during the evacuation from Phnom Penh rested, *inter alia*, on the live testimony of two witnesses, Sidney SCHANBERG and SUM Chea, and the live testimony of Civil Parties YIM Sovann, CHAN Sopheap *alias* CHAN Socheat, CHHENG Eng Ly, NOU Hoan, PECH Srey Phal and PIN Yathay. In respect of the latter, NUON Chea argues that some of the civil parties only gave victim impact statements, which he considers to be inadmissible as evidence.[1133] The Supreme Court Chamber has already addressed – and dismissed – this argument.[1134]

454. Turning to the substance, the Supreme Court Chamber notes that the only live testimony supporting the finding that "evacuees […] killed themselves"[1135] due to the conditions of the evacuation was the testimony of PIN Yathay, who stated that on the way out of Phnom Penh he "observed that two women hanged […] themselves in two separate locations".[1136] PIN Yathay, however, did not provide any details, nor did the Trial Chamber or the Parties ask him any questions on the point. Given the lack of specificity of this passage of his testimony and the fact that nothing indicates on what basis PIN Yathay concluded that the two women had killed themselves and the reasons therefor, the Supreme Court Chamber finds that no reasonable trier of fact

[1130] NUON Chea's Appeal Brief, para. 322.
[1131] *See* NUON Chea's Appeal Brief, para. 322, fns 862, 863.
[1132] *See below*, para. 592 *et seq*.
[1133] NUON Chea's Appeal Brief, para. 323.
[1134] *See above*, para. 317 *et seq*.
[1135] Trial Judgement, para. 497.
[1136] T. 7 February 2013 (PIN Yathay), E1.170.1, p. 25.

could have concluded that the incidents recounted by PIN Yathay established beyond reasonable doubt suicide resulting from the conditions of the evacuation.[1137] The only other piece of evidence relating to alleged suicides is the civil party application of SOTH Navy, according to which she had seen "people taking their own lives" while "on the road".[1138] Not only does this account lack specificity, it also amounts to wholly untested evidence of low probative value, which was insufficient for a finding beyond reasonable doubt.

455. On the other hand, the Trial Chamber's conclusion that, due to "severe and unrelenting conditions during the course of the evacuation, some evacuees [and children in particular] died from a combination of exhaustion, malnutrition or disease"[1139] was supported by the reasonably detailed live testimony of Civil Parties PECH Srey Phal and BAY Sophany, who recounted how their young children had died because of malnutrition and disease.[1140] NUON Chea does not dispute the substance of BAY Sophany's testimony.[1141] With regard to NUON Chea's challenge of PECH Srey Phal's testimony,[1142] the Supreme Court Chamber considers that the fact that she solely explained that her baby had died due to the lack of food, medicine, breast milk or water,[1143] without further elaborating on the cause of the death, does not render the Trial Chamber's inference that the death was caused by conditions unreasonable, considering that the likelihood of such cause of death is confirmed by corroborating evidence as well as common sense. The Trial Chamber's conclusion is further corroborated by the testimony of Sidney SCHANBERG that those who had

[1137] The Supreme Court Chamber further notes that the Co-Prosecutors, during their examination of PIN Yathay, did not seek confirmation as to the truth of the content of his book, but confirmation that it was PIN Yathay who wrote that passage. Accordingly, the account of the deaths cannot be said to have been repeated in court (*see* Trial Judgement, para. 497, fn. 1489, referring to T. 7 February 2013 (PIN Yathay), E1/170.1, p. 51).
[1138] Trial Judgement, para. 497, fn. 1487, referring to SOTH Navy Civil Party Application, E3/4921, dated 23 June 2009, p. 5, ERN (En) 00858006.
[1139] Trial Judgement, para. 497.
[1140] *See* Trial Judgement, para. 498, referring to Civil Party PECH Srey Phal who recounted that, during the evacuation, due to the lack of food, medicine, breast milk or water, her baby died (T. 5 December 2012 (PECH Srey Phal), E1/148.1, p. 25), to Civil Party BAY Sophany, who explained in great detail that, during the evacuation, her children were seriously ill and that, when she brought her baby to a medic, the baby died from seizures after the doctor injected something in her head (T. 4 June 2013 (BAY Sophany), E1/200.1, pp.11-12).
[1141] *See* NUON Chea's Appeal Brief, para. 325, fn. 875, where NUON Chea alleges that BAY Sophany's testimony was made during a victim impact hearing and was therefore inadmissible (an argument the Supreme Court Chamber has already dismissed).
[1142] NUON Chea's Appeal Brief, para. 325.
[1143] T. 5 December 2012 (PECH Srey Phâl), E1/148.1, p. 25.

"trickled into the embassy in subsequent days carried stories of bodies on the road and people who died of illness or exhaustion on the march".[1144] While this testimony is of a hearsay nature, it nevertheless comes from a contemporaneous and generally credible witness and as such provides support for the live testimony of PECH Srey Phal and BAY Sophany. Other live testimonies cited by the Trial Chamber[1145] contain generalisations which, absent any follow-up questions from the Parties or the Trial Chamber to confirm the truth and specific sources of the accounts, do not reasonably support the conclusion that the persons concerned had actually witnessed deaths resulting from conditions, as opposed to having seen people who were exhausted or who fell or having heard of people dying.[1146] The value of these testimonies on the point concerned is limited to confirming dire conditions during the evacuation; however, without more, relying on these statements as proof of death from conditions was unreasonable.

456. The live testimonies were, however, corroborated by documentary evidence. Among them, two documents by the U.K. Government and by the U.N. Economic and Social Council contained contemporaneous accounts of a Cambodian physician who is reported to have stated that the conditions of the evacuation, due to the lack of water, medical care and the outbreak of diseases such as cholera, had led to the deaths of many people[1147] and that during the evacuation he had passed "the body of a child every 200 yards", most of them dead because of "gastrointestinal afflictions which cause complete dehydration".[1148] While this evidence is of a hearsay nature and, in the

[1144] Trial Judgement, para. 497, fn. 1487, referring to T. 7 June 2013 (Sydney SCHANBERG), E1/203.1, p. 4.
[1145] T. 5 November 2012 (SUM Chea), E1/140.1, pp. 12, 14-15; T. 19 October 2012 (YIM Sovann), E1/135.1, p. 83; T. 29 May 2013 (CHAN Sopheap *alias* CHAN Socheat), E1/198.1, p. 43; T. 29 May 2013 (CHHENG Eng Ly), E1/198.1, p. 92; T. 30 May 2013 (NOU Hoan), E1/199.1, p. 6; T. 7 February 2013 (PIN Yathay), E1/170.1, pp. 51, 54.
[1146] T. 19 October 2012 (YIM Sovann), pp. 83-84 (recounts how people died along the street and also during what appeared to be a stampede to leave the city). The brevity and generalisation in this statement, contrasting with the detailed, orderly and measured remainder of the testimony of YIM Sovann, indicates hearsay or a figure of speech, possibly meaning to convey the image of people falling and unable to move. Similarly, T. 5 November 2012 (SUM Chea), E1/140.1, pp. 14-15 (saw people dying along the streets); T. 29 May 2013 (CHAN Sopheap *alias* CHAN Socheat), E1/198.1, pp. 42-43 (witnessed some people died along the road) and T. 30 May 2013 (NOU Hoan), E1/199.1, p. 6 (some people died and were left along the street) are likewise scant and imprecise, in contrast to other parts of their testimonies.
[1147] U.K. Government Report: *Human Rights Violations in Democratic Kampuchea*, E3/3319, dated 14 July 1978, para. 6, ERN (En) 00420601.
[1148] U.N. Economic and Social Council: *Analysis Prepared on Behalf of the Sub-Commission by Its Chairman of Materials Submitted to It and the Commission on the Human Rights under decision 9*

absence of information as to the circumstances of the production of the account and analysis of its reliability, inapt to establish the scale of the death toll for children beyond reasonable doubt, it nevertheless corroborates the other evidence before the Trial Chamber, given that the cause of death assumed by the physician is based on a reasonable assessment, given that, evidently, when exposed to conditions like those characterising the evacuation, such as extreme heat, strain, and lack of water, shelter and medical care, children in particular would have been susceptible to fatal dehydration.

457. The Trial Chamber also relied on other documentary evidence, notably diplomatic correspondence, interview records, civil party applications and victim complaints.[1149] In the majority, the civil party applications and victim complaints offer only general conclusions or cursory statements without explaining the source of the knowledge of the authors[1150] and, as such, might represent "collective memory" or "common narrative" rather than personal experiences, which, by itself, is inapt to establish relevant facts. Other documents, however, especially those of a contemporaneous nature, are more specific and either come from outside entities[1151] or clearly detail what appear to be personal experiences[1152] and, as such, provide

(XXXIV), E3/2060, dated 30 January 1979, p. 11, ERN (En) 00078653.
[1149] Trial Judgement, fns 1487-1488, 1491-1492.
[1150] *See* Trial Judgement, para. 497, referring to PHĂT Hân Civil Party Application, E3/4756, dated 25 May 2009, p. 4, ERN (En) 00864559 (witnessed some elderly people who could no longer walk died along the roads); SAM Pha Civil Party Application, E3/5005, dated 26 July 2009, p. 3, ERN (En); 00871750 (some pregnant women who delivered their babies on the way and were forced to continue travelling and could no longer bear the hardship; others had to leave their babies behind); TOCH Monin Civil Party Application, E3/4668, dated 20 January 2008, p. 3, ERN (En) 00238410 (recounted that the elderly could not keep up with the pace and consequently perished during the march); LOAS Vannan Victim Complaint, E3/5327, dated 25 October 2007, p. 6, ERN (En) 00875606 (evacuees died along the way and their bodies decomposed, while others became sick because of insufficient food and a long, exhausting journey); PREAB Ken Victim Complaint, E3/5406, dated 22 October 2008, p. 6, ERN (En) 00749400 (witnessed many die along the way due to starvation and old age).
[1151] Trial Judgement, para. 497, fn. 1487, referring to U.S. Embassy in Bangkok Telegram, Subject: Khmer Refugee Walks Out From Phnom Penh, E3/3004, undated, para. 3, ERN (En) 00495557-00495558 (reporting that an evacuee stated insufficient or unclean water and sunstroke killed the old and the very young, and cholera broke out; by the time they reached Kampong Cham, 4 to 5 people died of cholera daily); U.S. Embassy in Bangkok Telegram, Subject: The New Cambodia, E3/3006, undated, para. 6, ERN (En) 00495565-00495566 (Indian and Filipino nationals who were mistakenly forced out of Phnom Penh say that many old, very young, ill and infirm died during the short time they marched north as cholera broke out, food was short and clean water was unavailable).
[1152] Trial Judgement, fn. 1487, referring to LY Ream Civil Party Application, E3/4980, dated 25 May 2009, p. 3, ERN (En) 00893408 (stating only about 200 of them reached the village as some died due to starvation and disease); Trial Judgement, fn. 1491, referring to SOTH Navy Civil Party Application, E3/4921, dated 23 June 2009, p. 5, ERN (En) 00858006 (her infant sister and brother died of hunger); Refugee Accounts collected by François PONCHAUD, E3/4590, undated, pp. 51, ERN (En) 00820369

corroboration to the live evidence and the overall conclusion of the Trial Chamber, in particular regarding the death of young children. The Trial Chamber also established deaths from the conditions of the evacuation upon accounts reporting the demise of the old and sick. As noted by NUON Chea,[1153] IM Sunthy had stated that her mother-in-law had died during the evacuation because of her old age; in the absence of further information as to the circumstances of her death, it could not be concluded beyond reasonable doubt that her death was exclusively the result of the circumstances of the evacuation.[1154] That said, considering the strenuous conditions during the evacuation, the Supreme Court Chamber does not find it unreasonable to accept that conditions inflicted upon the evacuees had been a relevant factor in the deaths occurring during the evacuation among the vulnerable groups, including IM Sunthy's mother-in-law and the sick abandoned on hospital beds, witnessed by PECH Srey Phal.[1155]

458. Contrary to NUON Chea's suggestion,[1156] the Trial Chamber did not rely on the accounts of SOR Buon, as reflected in the French Embassy Letter – this document does not even refer to deaths caused by the conditions inflicted, but only to SOR Buon's speculation that, because of the miserable conditions to which the evacuees were exposed, many of them would subsequently die.[1157] Finally, to the extent that NUON Chea challenges the Trial Chamber's reliance on evidence that there were dead bodies on the road to establish that evacuees died due to the conditions during the evacuation,[1158] he mischaracterises the Trial Chamber's findings. Contrary to what

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(S recounted that at Banteay, a 7 year old child who had been walking with his parents during the hottest hours of the day died a few hours after drinking water from the lake), 198-199, ERN (En) 00820516 (POK Sareth recounted the death of their 1 month-old baby who was sick and only skin and bones; at Prek Po, in Srey Santhor District, Kampong Cham Province, the Khmer Rouge searched them and took the medicine he was keeping for their sick child. Two days thereafter, their child died due to lack of medicine. Fifteen days thereafter, their fourth child, aged 4, fell sick and died, due to lack of medicine); 251, ERN (En) 00820569 (NON Thol stated that of seven children with whom he had left Phnom Penh, three died from disease and hunger within three months); KEM Koun Victim complaint (her third son died "from starvation" along the way).

[1153] NUON Chea's Appeal Brief, para. 324.

[1154] IM Sunty *alias* Moch Interview Record, E3/5555, dated 14 August 2009, p. 3, ERN (En) 00364783; referred to in Trial Judgement, para. 497, fn. 1487.

[1155] T. 5 December 2013, PECH Srey Phal, E1/148.1, pp. 19-20.

[1156] NUON Chea's Appeal Brief, para. 323.

[1157] The Supreme Court Chamber notes that the French Embassy Letter, Subject: Testimony of Brigadier-General SOR Buon, E3/2666, dated 23 June 1975, p. 5, ERN (En) 00517766, is referred to in Trial Judgement, fn. 1472; in that footnote, reference is made to Trial Judgement, paras 497-498, dealing specifically with deaths. It must therefore be assumed that the Trial Chamber relied on the findings made in these paragraphs, and not on the account of SOR Buon, for its conclusion that people had died because of the conditions.

[1158] NUON Chea's Appeal Brief, para. 326.

NUON Chea suggests, the Trial Chamber did not rely on this evidence and expressed doubt as to whether the dead bodies on the streets that had been described in the testimony were the result of people dying because of the conditions of the evacuation. The Trial Chamber stated that "given the evidence discussed in Section 10.2.13 ("Deaths"), […] the corpses which were seen at the time of the evacuation comprised both soldiers, including those who died during the fighting, and evacuees".[1159] Thus, the Trial Chamber inferred from the evidence of deaths resulting from the conditions of the evacuation that some of the dead bodies mentioned in the evidence were the remains of evacuees who had died because of conditions. It did not infer from the evidence of the dead bodies that the victims died because of the conditions.

459. Overall, the Supreme Court Chamber finds that, in view of the totality of the evidence, which included live testimony, the conclusion that deaths inflicted by conditions have been proved beyond reasonable doubt was not unreasonable. Furthermore, the Supreme Court Chamber considers plausible that, even though the death toll is not identifiable from the evidence on the trial record, it might be greater than what the evidence of individual instances shows.

460. The Supreme Court Chamber thus dismisses NUON Chea's grounds of appeal in relation to the deaths resulting from the conditions of the evacuation of Phnom Penh.

(3) Killing of soldiers and civilian officials

461. The Trial Chamber found that during the evacuation of Phnom Penh military and civilian officials of the Khmer Republic had been identified and then killed.[1160] Victims included high-ranking officials of the Khmer Republic who had been "earmarked" for certain death prior to the fall of Phnom Penh,[1161] ordinary soldiers who were *hors de combat* or otherwise no longer taking active part in hostilities[1162]

[1159] Trial Judgement, para. 500.
[1160] Trial Judgement, para. 553, referring to paras 503, 511, 513-515. The Supreme Court Chamber notes that the Trial Chamber found that numerous victims were "taken aside for execution elsewhere". While this formulation is somewhat ambiguous, as it could be read as a finding that people were taken aside with the intent to kill them but subsequently not necessarily killed, the Supreme Court Chamber understands that the Trial Chamber, given that it was making findings of murder and extermination, considered that killings of military and civilian officials were established beyond reasonable doubt.
[1161] Trial Judgement, para. 554, referring to para. 503.
[1162] Trial Judgement, para. 554, referring to para. 510.

and civilian officials.[1163] The Trial Chamber found that these killings amounted to murder as a crime against humanity; it also found that there had been a "deliberate, organised, large-scale operation to kill former officials of the Khmer Republic, even if not all such officials shared this fate".[1164] The Trial Chamber arrived at these findings without relying on the evidence of killings that had occurred during the so called "second search of the city" (during which the victims may not have been *hors de combat*) and disappearances of Khmer Republic officials who had been identified at checkpoints and whose fate remained unknown.[1165]

462. NUON Chea challenges the finding that soldiers and civilian officials of the Khmer Republic were killed during the evacuation of Phnom Penh, referring to submissions made elsewhere in his appeal brief in connection with the issue of whether the Trial Chamber erred when it found that there had been a policy to target Khmer Republic soldiers and civilian officials.[1166] The Supreme Court Chamber considers it appropriate to address these arguments at this juncture, to the extent that they relate to Trial Chamber's findings that the killings occurred.[1167] Notably, NUON Chea avers that no killings of Khmer Republic soldiers and officials during the evacuation of Phnom Penh have been established beyond reasonable doubt, given that the evidence was misrepresented, of very limited probative value and partly exculpatory.[1168] He further contends that the Trial Chamber's findings of fact, which describe "an arbitrary sequence of disconnected and inconsistent interactions" between the Khmer Rouge forces and Khmer Republic officials, failed to support its overarching conclusion that killings were carried out pursuant to a deliberate, organised and large-scale operation.[1169]

463. KHIEU Samphân likewise calls into question the probative value of evidence relied upon by the Trial Chamber and its attendant conclusions, and posits that the

[1163] Trial Judgement, para. 555, referring to paras 513-514.
[1164] Trial Judgement, para. 561.
[1165] Trial Judgement, paras 554-555, referring to paras 510, 513-514.
[1166] NUON Chea's Appeal Brief, para. 321, referring to paras 588-596.
[1167] NUON Chea's Appeal Brief, paras 592-596. The Supreme Court Chamber shall address the arguments in paras 588-591 of NUON Chea's Appeal Brief in the section dealing with the crime against humanity of extermination (*see below*, para. 529 *et seq*.).
[1168] NUON Chea's Appeal Brief, paras 321, 588, 592-596.
[1169] NUON Chea's Appeal Brief, paras 588-591, 597-599.

theory of a large-scale operation is hardly reconcilable with the fact that most of the events were reported to have occurred in the Southwest Zone.[1170]

464. The Co-Prosecutors respond that, considering the "corroborative strength of the evidence when viewed in its totality", the impugned findings were reasonably reached by the Trial Chamber.[1171]

465. The Supreme Court Chamber understands that the Trial Chamber's conclusion about the killing of Khmer Republic military and civilian officials during the evacuation of Phnom Penh was predicated on more specific factual findings. These may be summarised as follows: (i) high-ranking officials who had been publicly "earmarked" for certain death prior to the taking of Phnom Penh were killed;[1172] (ii) civilian officials and soldiers *hors de combat* were executed on the spot in Phnom Penh;[1173] (iii) soldiers were taken to be killed elsewhere;[1174] (iv) soldiers who heeded radio and loudspeaker announcements to turn themselves in were executed in or around Phnom Penh;[1175] (v) some of the soldiers identified as such at checkpoints were either executed on the spot or led away, with some being killed afterwards;[1176] (vi) those who registered in Kien Svay and Battambang were killed, or "taken away and never seen again".[1177]

(a) High-ranking officials

466. The Trial Chamber did not expressly indicate which killings of high-ranking Khmer Republic officials it considered to have been established beyond reasonable doubt.[1178] The Supreme Court Chamber considers that – in light of the evidence cited, against which the Accused have raised no specific arguments – the Trial Chamber reasonably found that two of the so-called "seven traitors" (LONG Boret and Prince

[1170] KHIEU Samphân's Appeal Brief, paras 354-356.
[1171] Co-Prosecutors' Response, paras 159-175.
[1172] Trial Judgement, paras 503, 553.
[1173] Trial Judgement, para. 507.
[1174] Trial Judgement, para. 508.
[1175] Trial Judgement, para. 511.
[1176] Trial Judgement, para. 513.
[1177] Trial Judgement, para. 514.
[1178] Trial Judgement, para. 553, referring to para. 503.

SIRIK Matak),[1179] as well as high-ranking officials LON Non[1180] and UNG Boun Hor[1181] had been executed.[1182]

[1179] Trial Judgement, para. 503, fns 1508-1510, referring, *inter alia*, to T. 5 June 2013 (Sydney SCHANBERG), E1/201.1, pp. 44-48 (LONG Boret arrived at the Ministry of Information on 17 April 1975 and it was later announced that they had executed him); T. 28 January 2013 (Al ROCKOFF), E1/165.1, p. 48 (confirming that LONG Boret arrived at the Ministry of Information on 17 April 1975 with "a couple of Khmer Rouge" and although there were no guns pointed at them, "it was pretty obvious they were prisoners"; and that LONG Boret was taken away after few minutes); T. 5 June 2013 (Sydney SCHANBERG), E1/201.1, pp. 52-53 (citing S. Schanberg: *Cambodia Diary 1975*, E236/1/4/3.1, p. 85, ERN (En) 00898293, stating that on 20 April 1975 he saw Khmer Rouge soldiers coming to the French Embassy and leading away about a dozen people, including SIRIK Matak and UNG Boun Hor); Bangkok Post: Relations Confirmed as Khmers Leave, E3/604, dated 2 November 1975, ERN (En) 00419043 (reporting IENG Sary's confirmation that LONG Boret had been executed); T. 6 June 2013 (Sydney SCHANBERG), E1/202.1, p. 14 (heard from French Embassy officials that LONG Boret and SIRIK Matak were executed); U.S. Embassy in Bangkok Telegram, Subject: IENG Sary Visit to Thailand, E3/3358, dated 7 November 1975, para. 5, ERN (En) 00413857 (noting that the Cambodian Justice Minister had on another occasion told the Thai that he had heard that of the seven traitors who were marked for execution, those who were in the country, including LONG Boret and SIRIK Matak, had been killed); Documentary by THET S. and R. LEMKIN: *Enemies of the People*, E3/40001R, 2007, (Additional Footage: *One day at Po Chrey*), at 22:07-22:11 (NUON Chea confirmed that the CPK's "political orders" that the super-traitors "were to be liquidated", were in fact carried out). The Supreme Court Chamber notes that Sydney SCHANBERG clarified that, while at the French Embassy on or around 17 April 1975, he had never heard first-hand accounts of any executions of Khmer Republic officials, but "accepted that as a fact", given the acknowledgments by Khmer Rouge leaders he learned about in the following years (T. 7 June 2013 (Sydney SCHANBERG), E1/203.1, pp. 4-7). The Supreme Court Chamber finds that the killing of those two officials was reasonably established in light of the totality of the evidence hereby cited, which was not challenged by the Accused.

[1180] Trial Judgement, fns 1508-1510, referring, *inter alia*, to T. 5 June 2013 (Sydney SCHANBERG), E1/201.1, pp. 44-47 (stating he saw about 50 prisoners standing in front of the Ministry of Information surrounded "by 10 to 15 groups, all heavily armed", among them LON Non, who enquired into the possibility of the prisoners or other Cambodian officials leaving the country); Bangkok Post: Relations Confirmed as Khmers Leave, E3/604, dated 2 November 1975, ERN (En) 00419043 (reporting IENG Sary's confirmation that LON Non had been executed). The Supreme Court Chamber observes that, whereas LON Non was not among the "seven traitors" marked for execution, he was mentioned among the 16 "other super-traitors", who were "to be brought before the State courts to answer to [their] countless heinous crimes" (Kampuchea News Reports: *NORODOM Sihanouk Speech*, E3/1287, dated 9 May 2008, p. 4, ERN (En) S 00771787).

[1181] Trial Judgement, fns 1509-1510, 2597, referring, *inter alia*, to T. 5 June 2013 (Sydney SCHANBERG), E1/201.1, pp. 52-53, 57 (citing S. Schanberg: *Cambodia Diary 1975*, E236/1/4/3.1, p. 85, ERN (En) 00898293, stating that on 20 April he saw Khmer Rouge soldiers coming to the French Embassy and leading away about a dozen people, including UNG Boun Hor); French Ministry of Foreign Affairs Telegram, Subject: Departure of Refugees, E3/2702, dated 20 April 1975, ERN (En) 00504003 (referring to an earlier telegram, French Ministry of Foreign Affairs Telegram, Subject: Political Asylum, E3/2694, dated 18 April 1975, in which the French Consul Dyrac reports that SIRIK Matak and others, including UNG Boun Hor, were taken from the Embassy by members of an unidentified committee, either FUNK or NLA); U.S. Embassy in Bangkok Telegram, Subject: American Talks of Phnom Penh After The Fall, E3/4148, dated 4 May 1975, p. 4, ERN (En) 00413478 (an evacuated American reported that National Assembly President UNG Boun Hor had left the French Embassy escorted by Khmer Rouge guards); UNG Bonavan Civil Party Application, E3/4679, dated 15 June 2008, pp.6-7, ERN (En) 00850654 (son of UNG Boun Hor, noting he had no news of his father since 21 April 1975, the day when French Embassy officials handed him over to the Khmer Rouge). The Supreme Court Chamber has noted the discrepancy between the date given by UNG Donavan and that given by other witnesses as to when UNG Boun Hor left the French Embassy, but believes it to be an insignificant inconsistency. The Supreme Court Chamber is also satisfied that UNG Boun Hor was

(b) Civilian officials and soldiers *hors de combat* killed on the spot

467. In support of the finding that other Khmer Republic civilian officials and soldiers *hors de combat* had been killed on the spot,[1183] the Trial Chamber relied on the live testimony of one civil party, along with two interview records and nine out-of-court documents (*e.g.* civil party applications, victim complaints, refugee accounts, statements and reports).[1184]

468. As to the live testimony, Civil Party KIM Vanndy testified before the Trial Chamber that his uncle, a Khmer Republic colonel wearing a military uniform, had been shot by the Khmer Rouge in front of his house at 6 a.m. on 17 April 1975 after he had parked a jeep that belonged to American soldiers.[1185] His testimony was detailed and credible and it was therefore not unreasonable for the Trial Chamber to conclude that the killing occurred. Nevertheless, as noted by NUON Chea,[1186] this killing occurred a few hours prior to the formal termination of hostilities. This fact and the circumstances surrounding the killing – the victim was wearing a military uniform and driving a military vehicle – suggest that he must be considered to have been a member of the armed forces who at the time he was killed had neither laid down his arms nor was placed *hors de combat* by sickness, wounds or detention[1187] and was as such a military objective. This killing, while reasonably established in terms of the facts, therefore does not qualify as a crime against humanity.

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led away from the French Embassy with SIRIK Matak. It follows that, considering also his disappearance as of that moment, it was not unreasonable for the Trial Chamber to find that he and SIRIK Matak suffered the same fatal outcome.

[1182] The Supreme Court Chamber notes that Civil Party THOUCH Phandarasar gave credible testimony concerning General THACH Sary's execution (T. 29 May 2013 (THOUCH Phandarasar), E1/198.1, pp. 30-31, 37); it cannot however accept this incident as being established beyond reasonable doubt since: (i) the account is hearsay as to the totality of relevant circumstances; (ii) unlike the incidents involving the other aforementioned high-ranking officials, there is no corroborating evidence; and (iii) the killing of this individual was not acknowledged by the Khmer Rouge leadership. Whereas Al ROCKOFF declared that the Khmer Republic officials who gathered at the Ministry of Information on 17 April 1975 were "bludgeoned to death", he learned of this information "much later", when he was not in Cambodia any longer and "from other sources [he was] not aware of" (T. 28 January 2013 (Al ROCKOFF), E1/165.1, p. 57). *See also* T. 5 June 2013 (Sydney SCHANBERG), E1/201.1, p. 59; T. 7 February 2013 (PIN Yathay), E1/170.1, pp. 17-18 (venerable SO Hay attended the meeting at the Ministry of Information, in which LONG Boret was present, and returned unharmed to the Ounalom Pagoda).

[1183] Trial Judgement, para. 507.

[1184] *See* Trial Judgement, para. 507, fn. 1518.

[1185] T. 5 December 2012, (KIM Vanndy), E1/148.1, pp. 83-84, 92; T. 6 December 2012, (KIM Vanndy), E1/149.1, pp. 20-21.

[1186] NUON Chea's Appeal Brief, para. 593.

[1187] *See* Geneva Conventions I-IV, Art. 3(1).

469. Turning to the interview records relied upon by the Trial Chamber, Civil Party KHEN Sok told the Co-Investigating Judges that he had seen a Khmer Rouge soldier shooting a Khmer Republic soldier.[1188] According to the interview record, the victim was unarmed, but was wearing a military uniform and had refused to leave the city. In these circumstances, it cannot be excluded that the victim had not surrendered and therefore remained a military objective, a point with which the Trial Chamber did not engage.[1189] Another interview record, that of KHOEM Sâmhuon, contains the hearsay account of the killing of soldiers who had been treated in the Preah Ket Mealea Hospital.[1190] Given the hearsay character of the evidence and the fact that KHOEM Sâmhuon did not testify before the Trial Chamber, these killings cannot be considered to have been established beyond reasonable doubt. Nevertheless, this interview record provides a strong indication of unlawful killings of Khmer Republic soldiers *hors de combat.*

470. The last interview record cited by the Trial Chamber – that of UT Sēng – refers to an instance in which two persons who "were probably" Khmer Republic soldiers had been killed by female Khmer Rouge soldiers.[1191] While this event took place outside the city of Phnom Penh, and therefore does not support the Trial Chamber's finding that killings took place *in* Phnom Penh,[1192] it is nevertheless clear that it was part of Population Movement Phase One. As noted by the Co-Prosecutors, UT Sēng's account finds corroboration in a letter by the French Embassy in Thailand, reporting on the experience of General SOR Buon. According to this letter, General SOR Buon had observed executions of soldiers in the same region by "communist girls".[1193] Nevertheless, in particular since UT Sēng neither testified before the Trial Chamber, nor explained why he had reached the conclusion that the victims had

[1188] KHEN Sok Interview Record, E3/5556, dated 1 September 2009, p. 3, ERN (En) 00377358.
[1189] As noted in NUON Chea's Appeal Brief, para. 594.
[1190] KHOEM Sâmhuon Interview Record, E3/3962, dated 6 March 2009, p. 4, ERN (En) 00293365. The Trial Chamber relied on this document, albeit apparently in error, in relation to the killing of soldiers who had heeded calls by the Khmer Rouge to surrender. *See* Trial Judgement, para. 511, fn. 1530, which lists evidence in support of the finding that Khmer Republic soldiers who heeded calls to turn themselves in were executed or disappeared.
[1191] UT Sēng Interview Record, E3/5267, dated 14 January 2009, p. 3, ERN (En) 00282352.
[1192] Trial Judgement, para. 507; *see also* fn. 1518, in which the Interview Record of UT Sēng is referenced in relation to killings of Khmer Republic soldiers in Phnom Penh.
[1193] Co-Prosecutors' Response, para. 163, referring to French Embassy Letter, Subject: Testimony of Brigadier-General SOR Buon, E3/2666, dated 23 June 1975, p. 5, ERN (En) 00517767.

probably been soldiers, the interview record cannot be a basis for a finding beyond reasonable doubt.

471. Turning to the accounts of killings mentioned in other out-of-court documents, NUON Chea submits that they should be discounted altogether, given the "limited and sporadic evidence of killing" in the live testimony and interview records.[1194] In this regard, the Supreme Court Chamber recalls that the live testimony of KIM Vanndy does not establish that the killing was unlawful,[1195] and the interview records were also inapt to establish the specific killings of soldiers beyond reasonable doubt – even if considered holistically with the other evidence. As to the remaining out-of-court accounts cited by the Trial Chamber, a number of them either fail to unequivocally establish that the killings were unlawful,[1196] lack sufficient detail,[1197] only establish disappearance,[1198] are irrelevant to the charges in Case 002/01 in terms of location or timeframe,[1199] or are to be regarded as hearsay.[1200] Whereas the Supreme Court Chamber notes that the remaining three accounts signify a potential of specific and first-hand evidence of killings,[1201] the authors of these accounts have

[1194] NUON Chea's Appeal Brief, para. 596.
[1195] *See above*, para. 468.
[1196] KHĂT Khē DC-Cam Statement, E3/5598, dated 15 January 2005, pp. 20-21, ERN (En) 00874735-00874736 (recounting that there was an order to kill the Khmer Republic soldiers found during the evacuation of Phnom Penh, but also suggesting that the killings concerned those who "had locked themselves up in the house or hidden in the drains" and affirming that "after the fall in 1975" the former soldiers would be re-educated and allowed to survive); PAL Rattanak Civil Party Application, E3/4839, dated 20 February 2008, p. 3, ERN (En) 00893371 (witness saw Khmer Republic soldiers who were killed when attempting to escape).
[1197] Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 133, ERN (En) 00820451; Report by Henri LOCARD: *Bophea Region*, E3/3209, dated 31 May 2007, pp. 13, ERN (En) 00403143 (CHHIEUV Si Lang), 27, ERN (En) 00403157 (KET Chhean).
[1198] PRUM Sokha Victim Complaint, E3/5392, dated 3 November 2008, p. 6, ERN (En) 00873794.
[1199] PRUM Sokha Victim Complaint, E3/5392, dated 3 November 2008, p. 7, ERN (En) 00873795 (referring to killings that apparently occurred on 20 January 1978; assuming that the killings had actually occurred on 20 January 1975, as submitted by the Co-Prosecutors (Co-Prosecutors' Response, fn. 612), the Supreme Court Chamber considers such time frame to be hardly realistic, since in January 1975 the Khmer Rouge were yet to gain control of the Royal Palace in Phnom Penh); MEI Nary Victim Complaint, E3/5397, dated 28 May 2008, p. 6, ERN (En) 00834021 (her brother, accused of being a Khmer Republic official, was killed in a village in Kampong Cham province).
[1200] MEI Nary Victim Complaint, E3/5397, dated 28 May 2008, p. 6, ERN (En) 00834021 (since she was evacuated to Kratie province, the killing of her brother, which occurred in Kampong Cham province, is unlikely to have been witnessed by her directly, as conceded by the Co-Prosecutors (Co-Prosecutors' Response, para. 164)); *Submission from the Government of Norway under Commission on Human Rights decision 9 (XXXIV)* (ECOSOC), E3/1805, 18 August 1978, p. 21, ERN (En) 00087557 (PAM Moeun stated that Khmer Republic soldiers and officials, who were gathered near a radio station, were taken to Kompong Kantuot, "where they were executed", but it is unlikely he personally witnessed such executions).
[1201] EAM Tres Civil Party Application, E3/4822, dated 25 December 2008, pp. 4-5, ERN (En) 00893354-5 (he saw six Khmer Republic soldiers, who were tied up, being shot at the river bank,

never testified; as such, these accounts are incapable of proving murder beyond reasonable doubt. In sum, while the evidence strongly indicates that Khmer Republic soldiers were killed in the course of the evacuation of Phnom Penh, in relation to the specific instances of killings referred to in the evidence it could not be established that the victims were soldiers *hors de combat* or had surrendered at the time they were killed. Therefore, the specific killings could not be considered to have been reasonably established to the requisite evidentiary standard.

(c) Soldiers taken to be killed elsewhere

472. The Trial Chamber cited no live testimony in support of its finding that Khmer Republic soldiers were taken to be killed elsewhere.[1202] Whereas some of the written accounts of killings appear to be hearsay evidence,[1203] most of the others actually establish, at the most, disappearance, rather than killing.[1204] The remaining evidence is the report of an interview with a refugee.[1205] According to this report, a refugee referred generally to the execution of Khmer Republic officers who arrived in Amleang "in 1975".[1206] Therefore, it is unclear whether these killings occurred in the context of Population Movement Phase One. In sum, while the evidence makes it appear plausible that killings occurred, it falls short of providing a reasonable basis for a finding to the requisite evidentiary standard.

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before other 500 of them were sent to a prison for re-education); BOTH Soth Civil Party Application, E3/4823, dated 4 December 2008, p. 4, ERN (En) 00840000 (during the evacuation, she saw a government soldier, who was tied up, shot to death); *Submission from the Government of Norway under Commission on Human Rights decision 9 (XXXIV)* (ECOSOC), E3/1805, 18 August 1978, p. 21, ERN (En) 00087557 (PAM Moeun saw the execution of soldiers in uniform on Mao-Tse-Tung Boulevard).

[1202] Trial Judgement, para. 508.

[1203] SEANG Chăn Interview Record, E3/5505, dated 23 October 2009, p. 4, ERN (En) 00399169; ROU Ren Civil Party Application, E3/4694, dated 14 October 2008, p. 6, ERN (En) 00398344; Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 205, ERN (En) 00820523 (PECH Ling Kong).

[1204] SAU Sary Victim Complaint, E3/5372, dated 27 August 2008, p. 5, ERN (En) 00870324; KIM Sarou Victim Complaint, E3/5435, dated 12 May 2009, p.7, ERN (En) 00810026; SAO Thoeun Victim Complaint, E3/5436, dated 10 May 2009, p. 6, ERN (En) 00873857; PHĂNN Yim Victim Complaint, E3/5424, dated 17 February 20097, ERN (En) 00873875.

[1205] UT Sēng Interview Record, E3/5267, dated 14 January 2009, p. 3, ERN (En) 00282352; Report by Stephen HEDER and Masato MATSUSHITA: Interviews with Kampuchean Refugees at Thai-Cambodia Border, E3/1714, dated 25 March 1980, p. 65, ERN (En) 00170756.

[1206] Report by Stephen HEDER and Masato MATSUSHITA: Interviews with Kampuchean Refugees at Thai-Cambodia Border, E3/1714, dated 25 March 1980, p. 65, ERN (En) 00170756.

(d) Executions of soldiers who heeded calls

473. As noted by the Co-Prosecutors,[1207] the Trial Chamber did not separate the evidence of disappearances from evidence of executions of soldiers who heeded the calls to turn themselves in.[1208] The Supreme Court Chamber shall confine its analysis to whether the finding that killings (as opposed to disappearances) occurred was unreasonable, as argued by NUON Chea and KHIEU Samphân.[1209] Among the evidence cited by the Trial Chamber, the live testimony of SUM Chea, and the interview records of SÂM Sithy, KHOEM Sâmhuon and KOY Mon concern killings.

474. As concerns SUM Chea, he testified before the Trial Chamber that, a few days after the evacuation of Phnom Penh, loudspeaker announcements had been made to convince former Khmer Republic soldiers to reveal themselves and that these soldiers had been subsequently killed.[1210] While it is correct that he never heard these particular loudspeaker announcements and had only been told by a person serving a different unit that killings had occurred,[1211] his account was nevertheless detailed and based on a contemporaneous source – a soldier in another unit who was directly involved in the killings. Accordingly, despite the hearsay character of his testimony, it was not unreasonable for the Trial Chamber to base its finding on this testimony, which, as will be discussed further below, finds some corroboration in the other evidence upon which the Trial Chamber relied.

475. SUM Chea also testified to a separate instance of killing of Khmer Republic soldiers in the Tuol Kork area who had been "tricked to reveal their identities" by way of radio broadcast on loudspeakers.[1212] This account, while being of hearsay nature only, finds corroboration in the interview record of KHOEM Sâmhuon who testified to the killing of Khmer Republic soldiers in the Tuol Kork area, describing that he saw the blood-stained clubs that had been used to carry out the killings.[1213] The

[1207] Co-Prosecutors' Response, para. 168.
[1208] Trial Judgement, para. 511.
[1209] NUON Chea's Appeal Brief, paras 590, 593-596; KHIEU Samphân's Appeal Brief, para. 355.
[1210] T. 5 November 2012 (SUM Chea), E1/140.1 pp. 16-18, 31-33.
[1211] T. 5 November 2012 (SUM Chea), E1/140.1 pp. 17, 31-32, 59, 63, 113 (he declared having never witnessed any killings, but learned all information relating thereto from Koeun, who was in a unit attached to his; he also stated that the loudspeaker announcements that targeted Khmer Republic soldiers were made by other units, not his, and he did not personally hear them).
[1212] T. 5 November 2012 (SUM Chea), E1/140.1 p. 42.
[1213] *See above*, para. 469.

Supreme Court Chamber finds that a reasonable trier of fact could conclude that the killings at Tuol Kork were established.

476. As to the interview record of KOY Mon, he stated that his unit "did not cause any harm" to Khmer Republic soldiers who had surrendered, but he believed that those soldiers who, on Southwest Zone troops' instructions, boarded trucks "may probably [have been] killed".[1214] Therefore, the statement provides some corroboration as to the occurrence of unlawful killings.

477. Turning to SÂM Sithy, the Supreme Court Chamber recalls that, on account of the issues surrounding the credibility and reliability of his interview record raised by NUON Chea,[1215] it decided to summon SÂM Sithy to give live testimony on appeal,[1216] which he did on 3 July 2015. This Chamber is therefore called to assess the reasonableness of the Trial Chamber's conclusion based upon the evidence available at trial together with the evidence administered during the appellate proceedings.[1217]

478. The Supreme Court Chamber recalls that in his interview record SÂM Sithy recounted having witnessed the execution of a group of people, including his family, who had been identified as Khmer Republic officials.[1218] He explained that he survived the execution by pretending to be dead, lying behind his mother, who was shot dead.[1219] Although SÂM Sithy largely confirmed this account during his testimony, the Supreme Court Chamber, having observed his demeanour and assessed the particulars of his narration, finds him to be neither credible nor reliable, for the following reasons.

479. Primarily, the Supreme Court Chamber considers that SÂM Sithy's account is inherently implausible to the extent that he affirmed having personally gone through and survived the execution he described. This Chamber finds that several

[1214] KŎY Mŏn Interview Record, E3/369, dated 29 May 2008, p. 7, ERN (En) 00272719.
[1215] NUON Chea's Appeal Brief, para. 595 (noting that the audio recording of SÂM Sithy's interview, reportedly due to malfunctioning of the recording device, cut out precisely at the moment when he described having witnessed the executions, and that the investigator who conducted that interview was allegedly involved in another similar instance).
[1216] Decision on Call for Witnesses on Appeal (F2/5), paras 23, 26.
[1217] *Kvočka* Appeal Judgement (ICTY), para. 426, quoting *Kupreškić* Appeal Judgement (ICTY), paras 75,76.
[1218] SÂM Sithy Interview Record, E3/5201, dated 7 August 2008, p. 3, ERN (En) 00275139.
[1219] SÂM Sithy Interview Record, E3/5201, dated 7 August 2008, p. 3, ERN (En) 00275139.

circumstances recounted during SÂM Sithy's testimony are hardly believable. Firstly, it appears highly improbable that a 13-year-old boy could skilfully and cool-headedly remain still and impassive after having been shot at, hit with a club and dragged into a pit, and after having witnessed his mother's execution.[1220] Nor is it credible that both SÂM Sithy and his two younger cousins could survive relatively unharmed[1221] being shot at by indiscriminate, prolonged, short-range fire from six armed men surrounding them in a circle – followed by a round of hits with clubs to the children's heads.[1222] Secondly, chances are minimal that, out of the seven families who, according to his testimony, were led away by the Khmer Rouge, only SÂM Sithy, his little sister and his two younger cousins survived;[1223] he could provide neither the name of any other victim of the execution (even though declaring that a number of other relatives were part of the group),[1224] nor the identities of other people who were present on the same occasion and are still alive, apart from that of his cousin.[1225] Thirdly, it remains unclear how he could have followed his father's group despite having been chased back in the presence of three armed Khmer Rouge guards,[1226] could have seen that group being taken away to be shot at,[1227] at some point returned to his mother's group only to be disbelieved[1228] and, finally, could have made an overnight journey back to the Wat Chrak Sdech.[1229]

[1220] T. 3 July 2015 (SÂM Sithy), F1/2.1, pp. 27-28, 36-37, 42.
[1221] T. 3 July 2015 (SÂM Sithy), F1/2.1, pp. 28, 37-39 (his two cousins did not sustain any injury; on the other hand, his sister was hit in the head by a club), pp.122-127.
[1222] T. 3 July 2015 (SÂM Sithy), F1/2.1, pp. 25, 28, 39-40, 123-124.
[1223] T. 3 July 2015 (SÂM Sithy), F1/2.1, p. 44.
[1224] T. 3 July 2015 (SÂM Sithy), F1/2.1, p. 22.
[1225] T. 3 July 2015 (SÂM Sithy), F1/2.1, pp.22, 44-45, 119-120.
[1226] T. 3 July 2015 (SÂM Sithy), F1/2.1, pp. 62 ("I who was the smallest person at that time ran after my father, but I was chased backwards to my mother – I was not allowed to go with my father. However, I did not come back; and I sneaked a look at them"), 64-65 ("When reaching a place where stuff were kept, the militiamen split – two guarded the wife and one walked the husband away to cut trees for shelter building as it was getting dark. While they were walking into the forest, I followed my father, hearing they were going to cut trees. Although I was chased backwards, I did not return and kept watching him. After passing the forest, six armed men and one militiaman, who accompanied him, appeared. The other two were guarding the wife and children at the place [where stuff were kept]; men were taken away first. Therefore, only one militiaman took the men away first on the pretext of tree cutting; the other two were with the wife and children").
[1227] T. 3 July 2015 (SÂM Sithy), F1/2.1, p. 28.
[1228] *Compare* T. 3 July 2015 (SÂM Sithy), F1/2.1, p. 62 ("After a while, I heard gunshots. I ran back to tell my mother, aunties, and uncles to run as they had already killed my father, but they did not believe me"; "Yes, I believed they [his mother's group] heard them [the gunshots] because I ran back to tell them to run right after the gunshots") *with* p. 65 ("Having seen them pointing the gun at my father, I ran back and said, 'My father is being taken to be shot'. I told them to run, but they didn't because they did not believe me. After about an hour later, gunshots were heard from the place I suspected they were

480. Moreover, the witness evaded answering questions regarding the details of the events preceding the execution, repeating the same general and vague version of the killing incident.[1230] In addition, the fact that there was past press coverage of his experience[1231] may indicate an interest in repeating the account of that experience, regardless of its truthfulness.

481. In sum, the Supreme Court Chamber finds that the testimony of SÂM Sithy lacks credibility. That said, as noted above, there was other evidence before the Trial Chamber, notably the live testimony of SUM Chea, that formed a reasonable basis for concluding that Khmer Republic soldiers and officials who had heeded calls to identify themselves had been killed.

(e) Soldiers identified at checkpoints

482. The Trial Chamber found that the fate of most Khmer Republic soldiers identified at checkpoints remained unknown and that it cannot unequivocally infer from their disappearance that they were killed.[1232] However, the Trial Chamber also held that an "operation to kill former officials of the Khmer Republic" was demonstrated, *inter alia*, by "the killings of those former Khmer Republic officials identified […] at various checkpoints".[1233] Accordingly, the Supreme Court Chamber understands that the Trial Chamber found it to have been established that at least some of the soldiers who had been identified at checkpoints had been killed.

483. The evidence relating to actual instances of killing of Khmer Republic soldiers who were identified at checkpoints comprises a letter from the French Embassy, an interview record, a victim complaint and a civil party application containing the hearsay accounts of CHHUM Sokha, TIENG Sokhom and BENG Boeun.[1234] As

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taken to be killed") *and with* p. 115 ("And about half an hour, an hour later, we [*i.e.* he and his mother's group] heard the gunshots, and then I was running away from my mother and the group, and my mother was running after me and brought me back to the group").
[1229] T. 3 July 2015 (SÂM Sithy), F1/2.1, pp. 40, 58-59.
[1230] *See*, *e.g.*, T. 3 July 2015 (SÂM Sithy), F1/2.1, pp. 11-13, 15-16, 18-19, 22-23, 26.
[1231] T. 3 July 2015 (SÂM Sithy), F1/2.1, pp. 49-51, 133-134 (two years ago, an article describing his experience was published in a newspaper called "Koh Santepheap").
[1232] Trial Judgement, paras 513, 555.
[1233] Trial Judgement, para. 561.
[1234] French Embassy Letter, Subject: Testimony of Brigadier-General SOR Buon, E3/2666, dated 23 June 1975, p. 5, ERN (En) 00517767; CHUM Sokha Interview Record, E3/5788, dated 2 October 2009, p. 4, ERN (En) 00380712; BENG Boeun Civil Party Application, E3/4719, 30 January 2009, p. 5, ERN (En) 00436830; TIENG Sokhom Victim Complaint, E3/5402, dated 23 October 2008, p. 6,

recognised by the Co-Prosecutors,[1235] the Trial Chamber relied on these accounts to show that some individuals "subsequently *learned*" that Khmer Republic soldiers were killed.[1236] While this evidence provides strong indications that killings occurred, in the absence of relevant live testimony, it is inapt to reasonably establish that killings of Khmer Republic soldiers occurred in connection with their identification at checkpoints.

(f) Reported killings in Kien Svay and Battambang

484. In relation to its findings as to killings in Kien Svay,[1237] the Trial Chamber relied on the testimony of witness François PONCHAUD, who testified that a person he had met at the French Embassy on 22 or 23 April 1975 had told him that soldiers and high-ranking officials had been asked to write their name on a board in Kien Svay and that those who had complied had been killed.[1238] NUON Chea submits that this account was inconsistent, since the man who had talked to François PONCHAUD could hardly have seen the executions in Kien Svay a few days after the evacuation of Phnom Penh to then move to Phnom Penh and enter the French Embassy at a time in which Cambodian nationals were being forced out of that embassy.[1239] Aside from this discrepancy – admitted by the Co-Prosecutors[1240] – the Supreme Court Chamber finds that this evidence was nevertheless a strong indication that killings at Kien Svay, which is located in the vicinity of Phnom Penh, occurred.[1241] Nevertheless, the inherently low probative value of this evidence could not permit a reasonable trier of fact to enter a finding of killings beyond reasonable doubt.

485. The Supreme Court Chamber notes that the Trial Chamber also relied on François PONCHAUD's testimony in relation to the finding that killings occurred in Battambang. As the events in Battambang did not relate to Population Movement

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ERN (En) 00870347 (of note is also that TIENG Sokhom made no mention of identification through checkpoints).
[1235] Co-Prosecutors' Response, para. 167.
[1236] Trial Judgement, para. 513 (emphasis added).
[1237] Trial Judgement, para. 514.
[1238] T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 14, 28-29, 56.
[1239] NUON Chea's Appeal Brief, para. 593.
[1240] Co-Prosecutors' Response, para. 174.
[1241] Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 125, ERN (En) 00820443 (which is the same account relied on in Book by F. Ponchaud: *Cambodia Year Zero*, E243.1, ERN (En) 00862040). The Chamber notes that François PONCHAUD's testimony is not "corroborated" by this account, given that it is not a separate source.

Phase One, the Supreme Court Chamber shall address this evidence below in the context of whether there was a pattern of killings.[1242]

(g) Conclusion regarding killings of Khmer Republic soldiers and officials

486. In conclusion, the Supreme Court Chamber finds that the Trial Chamber's finding as to the killings of high-ranking officials LONG Boret, LON Non, SIRIK Matak and UNG Boun Hor was not unreasonable. In addition, the Supreme Court Chamber finds that the killings of Khmer Republic soldiers and officials who heeded calls was reasonably established, based on the evidence that was before the Trial Chamber, notably the live evidence of SUM Chea, which found corroboration in other evidence. Additional evidence before the Trial Chamber provided strong indications of other unlawful killings of Khmer Republic soldiers and officials in the context of Population Movement Phase One. Accordingly, the Supreme Court Chamber rejects the argument that no killings of Khmer Republic soldiers and officials have been established beyond reasonable doubt.

c) Murder committed at Tuol Po Chrey

487. As regards the events at Tuol Po Chrey, the Trial Chamber found that, after the liberation of Phnom Penh on 17 April 1975 and the surrender of Khmer Republic soldiers, the Northwest Zone Committee held a meeting at which it gave orders to assemble and kill former soldiers and officials of the Khmer Republic.[1243] Accordingly, several hundred former officials were assembled at the Pursat provincial hall and were told that they would be taken to meet NORODOM Sihanouk and to be re-educated.[1244] Following the meeting, a minimum of 250 former Khmer Republic soldiers and civilian officials[1245] were loaded onto trucks,[1246] taken to Tuol Po Chrey and executed.[1247] The Trial Chamber concluded that these killings constituted the crimes against humanity of extermination and political persecution.[1248]

[1242] *See below*, para. 911.
[1243] Trial Judgement, para. 836.
[1244] Trial Judgement, paras 672, 673.
[1245] Trial Judgement, para. 684.
[1246] Trial Judgement, para. 673.
[1247] Trial Judgement, para. 681.
[1248] Trial Judgement, para. 684.

488. In reaching this conclusion, the Trial Chamber relied mainly on three witnesses, *i.e.* LIM Sat, a Khmer Rouge Deputy Commander of a platoon, SUM Alat, a Khmer Republic soldier and UNG Chhat, a Khmer Rouge soldier.[1249]

489. NUON Chea and KHIEU Samphân allege that the Trial Chamber erred by relying for its findings in relation to Tuol Po Chrey on unreliable and "indirect and unpersuasive evidence" and committed an error of fact due to its "flawed approach to its assessment of this evidence".[1250] Specifically, both Accused allege that the Chamber was unreasonable in relying solely on the what is said to be the flawed testimony of LIM Sat to establish that the Zone Committee issued an order to kill former Khmer Republic soldiers and officials which is not corroborated by a pattern of conduct and the communication structures.[1251] Additionally, NUON Chea submits that the Trial Chamber's efforts to reconcile inconsistencies in the evidence were unreasonable.[1252] Finally, NUON Chea and KHIEU Samphân argue that the Trial Chamber committed an error in finding that 250 people were executed as this was based on hearsay and unreliable witness testimony, and therefore that the number of 250 victim soldiers was unsupported.[1253]

(1) The Zone Committee meeting and the order to kill the former Khmer Republic soldiers and officials

490. The Trial Chamber, in support of the finding that the Zone Committee gave orders to assemble and kill former Khmer Republic soldiers and officials, relied solely on the account of witness LIM Sat who testified about the transmission of the said order.[1254]

491. According to an interview record of LIM Sat, there had been a meeting (which he did not attend) of the Zone Committee presided over by RUOS Nhim, Ta Khan and Ta Sot a few days before the events at Tuol Po Chrey, at which "Khmer Rouge chairmen were told that all dignitaries, both military and policemen, from Lon Nol

[1249] Trial Judgement, para. 660.
[1250] KHIEU Samphân's Appeal Brief, para. 436; NUON Chea's Appeal Brief, para. 450.
[1251] NUON Chea's Appeal Brief, paras 460-461; KHIEU Samphân's Appeal Brief, para. 431.
[1252] NUON Chea's Appeal Brief, para. 454.
[1253] NUON Chea's Appeal Brief, paras 449, 463-466; KHIEU Samphân's Appeal Brief, paras 424-425, 427, 430-431.
[1254] Trial Judgement, para. 836.

regime had to be killed".[1255] According to another interview record, the orders received by LIM Sat were "to assemble the soldiers and policemen from low to high rank who had connections to the LON Nol era and kill them".[1256] However, when testifying before the Trial Chamber, the witness claimed that he did not know that the Khmer Republic soldiers and officials were to be killed and that the orders were limited to re-educating the soldiers and officials, following which they would be re-integrated into their previous functions.[1257]

492. In the Trial Judgement, the Trial Chamber observed that during his live testimony, LIM Sat was not credible as to "his limited knowledge of the criminal purpose of the orders".[1258] As a matter of fact, LIM Sat contradicted himself as he had initially said that the order to kill, as recalled by the Co-Prosecutors, "was the order from the Zone Committee [Than Nhim and Ta Kan]".[1259] Then, however, LIM Sat stated that "at that time [he actually talks about the second meeting in the Pursat provincial hall], they assembled those soldiers and policemen, and I did not realize that those people were destined to be killed".[1260] Later on, LIM Sat reiterated that "[he] was not told that they would be shot dead. The only information that [he] received was that the ranking officer would be sent for a study session".[1261]

493. When assessing his credibility and reliability, the Trial Chamber specified that:

> The Chamber is conscious that he may be motivated to diminish or shift responsibility for his involvement in the events in question. The Chamber does not find the testimony of LIM Sat concerning his limited knowledge of the criminal purpose of the orders to be credible. However, his initial evidence before the Co-Investigating Judges as to the content of the orders is corroborated by evidence of a pattern of conduct. […] Further, LIM Sat's evidence as to the way in which orders received from the 'upper echelon' were disseminated also accords with the Chamber's findings on Communication Structures. The Chamber

[1255] LIM Sat Interview Record, E3/4601, 18 November 2009, ERN (En) 00412158.
[1256] LIM Sat Interview Record, E3/364, dated 23 November 2008, pp. 2-3.
[1257] T. 2 May 2013 (LIM Sat), E1/187.1, pp. 19, 23-24, 48-49 (citing LIM Sat Interview Record, E3/4601, 18 November 2009); T. 3 May 2013 (LIM Sat), E1/188.1, pp. 19, 25.
[1258] Trial Judgement, para. 665.
[1259] T. 2 May (LIM Sat), E1/187.1, p. 17.
[1260] T. 2 May 2013 (LIM Sat), E1/187.1, p. 19.
[1261] T. 3 May 2013 (LIM Sat), E1/188.1, p. 25.

> consequently finds his testimony as to the substance of these orders to be credible.[1262]

494. Whilst NUON Chea alleges that LIM Sat's testimony was inconsistent and unreliable and that the Trial Chamber was consequently unreasonable in its finding,[1263] KHIEU Samphân submits that LIM Sat was a "robust and reliable" witness but the Trial Chamber erred in interpreting and favouring his interview records over his live testimony and thereby breached the principle of *audi alteram partem*.[1264]

495. The Supreme Court Chamber considers that the Trial Chamber carefully assessed the evidence and provided a reasoned opinion as to why it relied on LIM Sat's written evidence, as opposed to his in-court testimony. The Supreme Court Chamber recalls that "it is for the Trial Chamber to evaluate inconsistencies in a witness's evidence […], to consider whether the evidence taken as a whole is reliable and credible, and ultimately to accept or reject the fundamental features of the evidence",[1265] and that the Trial Chamber, in the case at hand, found the "substance of these orders to be credible".[1266] As noted by the Co-Prosecutors,[1267] the Trial Chamber was in a position to observe LIM Sat's demeanour and to assess his credibility. It therefore did not breach the principle of adversarial proceedings to rely on his written interview records rather than on his live testimony.

496. In addition, despite the fact that LIM Sat was the only witness supporting this finding, the Trial Chamber found corroboration in (i) common "pattern of conduct" and (ii) "communication structures". In relation to the former, the Supreme Court Chamber refers to its findings below, reversing the Trial Chamber's conclusion as to the existence of a pattern of killing of Khmer Republic soldiers and officials.[1268] Accordingly, the pattern cannot serve as corroboration of LIM Sat's evidence. Nevertheless, this does not *per se* render the Trial Chamber's finding based on the latter evidence unreasonable. The Supreme Court Chamber recalls that a "Trial

[1262] Trial Judgement, para. 665.
[1263] NUON Chea's Appeal Brief, para. 451.
[1264] KHIEU Samphân's Appeal Brief, para. 430.
[1265] *Popović* Appeal Judgement (ICTY), para. 1228.
[1266] Trial Judgement, para. 665.
[1267] Co-Prosecutors' Response, para. 282.
[1268] *See below*, para. 962 *et seq*.

Chamber may thus convict an accused on the basis of a single witness, although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness".[1269] In addition, "a Trial Chamber should at least briefly explain why it accepted the evidence of witnesses who may have had motives or incentives to implicate the accused; in this way, a Trial Chamber shows its cautious assessment of this evidence".[1270] Given that, in the case at hand, the Trial Chamber provided sufficient reasons as to its appreciation of the reliability and credibility of LIM Sat, the Supreme Court is satisfied that the Trial Chamber's approach was not unreasonable.

497. With regard to corroboration from communication structures, the Supreme Court Chamber notes that, while this does not corroborate the substance of the testimony concerning the order to kill, it goes to show that his testimony was reliable. It also shows that the Trial Chamber reasonably found that orders were passed to LIM Sat from his regiment commander.[1271]

498. KHIEU Samphân also argues that the Trial Chamber erroneously relied on LIM Sat's testimony to find that Ta Nhim and Ta Khan had given the orders to assemble the former soldiers and policemen and to kill them because he had not attended the meeting of the Zone Committee.[1272] A review of LIM Sat's testimony shows that he clearly stated that "[t]he regiment commander told [him]".[1273] Given the reasoned opinion of the Trial Chamber recalled above, the Supreme Court Chamber is not satisfied that it should depart from its conclusion on this matter. In addition, the fact that LIM Sat did not attend the meeting – a fact acknowledged by the Trial Chamber[1274] – is not determinative of the credibility and weight of the evidence as he received orders following this meeting from his regiment commander.[1275]

499. Therefore, the Supreme Court Chamber dismisses the Accused's arguments on the reliance to LIM Sat witness record for the finding concerning the order to kill.

[1269] *Kordić and Čerkez* Appeal Judgement (ICTY), para. 274.
[1270] *Krajišnik* Appeal Judgement (ICTY), para. 146.
[1271] Trial Judgement, paras 663-665.
[1272] KHIEU Samphân's Appeal Brief, para. 430.
[1273] T. 2 May 2013 (LIM Sat), E1/187.1, p. 48.
[1274] Trial Judgement, para. 663.
[1275] T. 2 May 2013 (LIM Sat), E1/187.1, pp. 48-49.

(2) Other inconsistencies in witness evidence regarding the Pursat provincial hall meeting

500. The Accused point to inconsistencies and contradictions in the evidence relating to the meeting at Pursat provincial hall.[1276] These arguments concern details which are not expressly referred to in the Trial Chamber's legal findings. However, the Supreme Court Chamber considers that the substance of evidence was taken into account and constitutes the basis for factual findings on which the Trial Chamber must have relied for its legal conclusions. Thus, these arguments need to be addressed.

501. First, NUON Chea alleges that the Trial Chamber committed an error of fact when it solely relied on LIM Sat's testimony for making findings including (i) the way messages concerning the Pursat provincial hall meeting had been conveyed to former Khmer Republic soldiers; (ii) the motive behind assembling former Khmer Republic soldiers (*i.e.* the fear that they would revolt); and (iii) the individuals who drove the trucks.[1277] The Supreme Court Chamber notes that such information was provided in LIM Sat's live testimony and was thus subject to cross-examination.[1278] The Chamber also observes that the Trial Chamber, with regard to the way messages were conveyed, did not rely solely on LIM Sat's evidence.[1279] Considering also that NUON Chea does not show how the Trial Chamber's purported errors of fact led to a miscarriage of justice, the Supreme Court Chamber dismisses these arguments.

502. NUON Chea further contests the Trial Chamber's assessment of the evidence that "[a]lthough many were brought to the meeting by Khmer Rouge units, evidence suggests that attendance was nonetheless voluntary".[1280] The Supreme Court Chamber is of the view that this alleged error does not affect the general finding that the former Khmer Republic soldiers and officials were brought to the Pursat provincial hall to be

[1276] NUON Chea's Appeal Brief, paras 453-457; KHIEU Samphân's Appeal Brief, para. 432.
[1277] NUON Chea's Appeal Brief, para. 453.
[1278] *See* T. 2 May 2013 (LIM Sat), E1/187.1, pp. 22-23; T. 3 May 2013 (LIM Sat), E1/188.1, pp. 21-22.
[1279] *See* Trial Judgement, para. 666, referring to T. 4 July 2013 (SUM Alat), E1/218.1, p. 64 ("The information regarding the invitation for the meeting was done through word of mouth. For example, the message was relayed from one person to another"); SIEM Soeum Interview Record, E3/5235, dated 15 January 2009, p. 3 (heard the Khmer Rouge announce about the former soldiers going to study at Angkor Wat); HEM Sarân Civil Party Application, E3/4808, dated 7 November 2008, p. 3 ("They announced through a microphone"); SUM Alăt *alias* CHHONG Lăt Interview Record, E3/4637, dated 10 June 2008, p. 5 (Sector secretary called those people to meet at the provincial office).
[1280] Trial Judgement, para. 668.

told that they would meet NORODOM Sihanouk and would be re-educated.[1281] A review of the evidence suggests that the fact that Khmer Rouge trucks picked up the said persons to attend the meeting or that some came in their personal vehicles has no impact on the general finding.[1282] Therefore, with this argument, NUON Chea merely proposes a different interpretation of the evidence without showing an error leading to a miscarriage of justice. The Supreme Court Chamber thus dismisses his argument.

503. Furthermore, regarding NUON Chea's argument that SUM Alat could not provide any other names of Khmer Republic soldiers and officials who had attended the meeting at the Pursat provincial hall than the one of the Pursat provincial Governor,[1283] the Supreme Court Chamber, in view of this testimony, considers that NUON Chea misrepresents the witness's statements. Not only did SUM Alat provide another name (namely that of "General Li Huon"),[1284] a review of the transcript also shows that the answer to the question regarding the names of attendees of the second day of the meeting was "[t]he same people with the same names because in the second and the following meeting, they were the same people who would be called to attend that meeting again".[1285]

504. Regarding NUON Chea's argument that the Trial Chamber's finding that trucks made multiple journeys was erroneous because SUM Alat did not witness multiple journeys,[1286] the Supreme Court Chamber notes that the fact that SUM Alat did not see trucks making multiple trips was addressed by the Trial Chamber. In addition, SUM Alat stated that "they spoke about a second trip, but it did not realize".[1287] Therefore, after a couple of hours, he went home. Yet, other witnesses

[1281] Trial Judgement, para. 665.
[1282] T. 2 May 2013 (LIM Sat), E1/187.1, p. 72 ("You said you were asked to wait for the trucks that gathered these people"); T. 29 April 2013 (UNG Chhât), E1/185.1, pp. 80-81 ("I only noticed that former Lon Nol soldiers were taken into the provincial hall in trucks"); ORK Chhoem Interview Record, E3/5500, dated 22 August 2009, pp. 2-3 ("I saw the Khmer Rouge gather up the soldiers and the people to meet at the provincial headquarters". "As for the government officials and soldiers, I saw some drive up to the meeting in their personal vehicles and park outside the walls of the provincial headquarters"); HEM Sarân Civil Party Application, E3/4808, dated 7 November 2008, p. 3 ("After the Khmer Rouge had gathered those people, they asked them to meet at the provincial Hall. They sent military trucks to pick them up"); UN Pon Victim Complaint, E3/5344, dated 22 May 2008, p. 6 ("I saw Khmer Rouge soldiers go and gather former commanders and soldiers").
[1283] NUON Chea's Appeal Brief, para. 457.
[1284] T. 4 July 2013 (SUM Alat), E1/218.1, p. 84.
[1285] T. 4 July 2013 (SUM Alat), E1/218.1, p. 83.
[1286] NUON Chea's Appeal Brief, para. 456.
[1287] T. 4 July 2013 (SUM Alat), E1/218.1, p. 32.

explained that the transfers from the Pursat provincial hall to Tuol Po Chrey lasted the whole day.[1288] Thus, it has not been established that the Trial Chamber's finding was unreasonable.

505. Finally, the Accused's argument, acknowledged by the Trial Chamber,[1289] that none of the witnesses it heard had seen the killings first-hand does not undermine the finding, especially upon review of the evidence.[1290] Indeed, although none of the witnesses saw the killings of the former soldiers and officials, the Supreme Court Chamber considers that the Trial Chamber relied on satisfactory circumstantial as well as hearsay evidence to infer that the execution had occurred. For instance, the Trial Chamber took into account SUM Alat's evidence who "spoke with two LON Nol soldiers named That and Dor, who had escaped the scene of the execution. They told SUM Alat that all those aboard the trucks were forced off approximately 700 meters to one kilometre away from Tuol Po Chrey after which they were tied up, led over to another group of people and killed".[1291] LIM Sat, in addition to the order that he received to assemble the former soldiers and kill them, testified that he heard gun shots through the radio.[1292] UNG Chhat and LIM Sat explained that the trucks that had transported the meeting's participants to Tuol Po Chrey came back empty.[1293] UNG Chhat also heard that villagers who had heard gun-fire had gone to the site and seen corpses with their hands bound.[1294] Taking the totality of evidence into account,

[1288] T. 2 May 2013 (LIM Sat), E1/187.1, p. 30 (the transfer lasted from 9 a.m. to 5 p.m.); SIEM Soeum Interview Record, E3/5235, dated 15 January 2009, p. 3, ERN (En) 00287329 (saw the Khmer Rouge transport the soldiers for one whole day, morning to evening). *See also* Documentary by TH Ē T S. and R. LEMKIN: *Enemies of the People*, E3/4001R, Additional Footage: *One Day at Po Chrey*, at 9:09 (an unidentified male from the "Preventive Unit" said they started hearing trucks approaching Tuol Po Chrey at 7 a.m.). *See also* ORK Chhoem Interview Record, E3/5500, dated 22 August 2009, p. 2, ERN (En) 00367287 (a farmer in the hospital at Pursat at the time, stated the meeting was called at around 9 a.m.).
[1289] Trial Judgement, para. 678.
[1290] NUON Chea's Appeal Brief, para. 457.
[1291] Trial Judgement, para. 678, referring to T. 4 July 2013 (SUM Alat), E1/218.1, pp. 34-35, 93-94. *See also* T. 2 May 2013 (LIM Sat), E1/187.1, p. 29 (also heard through radio communication from Tuol Po Chrey that one person managed to escape); SIEM Soeum Interview Record, E3/5235, dated 15 January 2009, p. 5, ERN (En) 00287331 (stated that two people managed to escape).
[1292] Trial Judgement, para. 679, referring to T. 2 May 2013 (LIM Sat), E1/187.1, p. 29 (heard shots being fired through radio communication and that one person escaped).
[1293] T. 29 April 2013 (UNG Chhat), E1/186.1, pp. 85-86; T. 30 April 2013 (UNG Chhat), E1/186.1, pp. 6, 12; T. 2 May 2013 (LIM Sat), E1/187.1, p. 30.
[1294] T. 30 April 2013 (UNG Chhât), E1/186.1, pp. 11-13, 18-20, 22-23, 25-27, 84-85. *See also* SIEM Soeum Interview Record, E3/5235, dated 15 January 2009, 15 January 2009, p. 3, ERN (En) 00287329 (a farmer living in Pursat Province, he saw the corpses the following day, they were tied together with their hands tied behind their backs and bearing gunshot wounds).

the Supreme Court Chamber finds that this was not an unreasonable inference by the Trial Chamber.

506. KHIEU Samphân also notes inconsistencies among witnesses with regard to the duration of the Pursat provincial hall meeting.[1295] However, the Trial Chamber discussed the discrepancies with regard to the duration of the meeting (one or two days) and concluded, based on the evidence, that the testimonies indicate that there were meetings over at least two days.[1296] The Supreme Court considers that KHIEU Samphân has failed to demonstrate that this conclusion was unreasonable.

507. Finally, with regard to NUON Chea's argument[1297] that the Co-Prosecutors acknowledged during the course of the trial that the evidence was weak and therefore asked the Trial Chamber to call three additional witnesses, of whom only one, SUM Alat, actually testified before the Trial Chamber, the Supreme Court Chamber considers that this does not show that the Trial Chamber's findings were unreasonable and that its assessment of the evidence constituted an error of fact leading to a miscarriage of justice.

508. In view of the above, the Supreme Court Chamber dismisses the Accused's grounds of appeal relating to the crime against humanity of murder at Tuol Po Chrey.

2. Extermination

509. The Trial Chamber found NUON Chea and KHIEU Samphân guilty of the crime against humanity of extermination in relation to Population Movement Phases One and Two and the events at Tuol Po Chrey. As noted above, in relation to Population Movement Phase One and Tuol Po Chrey, the Trial Chamber also found that the crime of murder had occurred, which was, however, subsumed under the more specific crime of extermination, as a result of which convictions for extermination (encompassing murder) were entered against NUON Chea and KHIEU Samphân for the events during Population Movement Phase One and at Tuol Po Chrey.[1298] In relation to Population Movement Phase Two, the Closing Order (D427)

[1295] KHIEU Samphân's Appeal Brief, para. 432.
[1296] Trial Judgement, para. 667.
[1297] NUON Chea's Appeal Brief, para. 458.
[1298] Trial Judgement, para. 1057.

had charged the Accused with extermination but not murder; accordingly, the Trial Chamber entered a conviction only for extermination and did not address the crime of murder.[1299]

a) Grounds of appeal relating to the definition of extermination

510. The Trial Chamber found that, by 1975, extermination had been a crime against humanity under customary international law and that it had been "sufficiently accessible" to NUON Chea and KHIEU Samphân.[1300] The Trial Chamber found the *actus reus* of extermination to "consist of an act, omission or combination of each that results in the death of persons on a massive scale", which is to be assessed on a case-by-case basis.[1301] Relying on the *Duch* Trial Judgement (001-E188) and the *Krstić* Trial Judgement (ICTY), it found the *mens rea* elements of extermination to comprise the intent:

> (1) to kill persons on a massive scale; or (2) to inflict serious bodily injury or create conditions of living that lead to death, in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons (dolus eventualis).[1302]

511. The Trial Chamber noted that the *mens rea* of the crime of extermination had not been consistently defined in the jurisprudence of the *ad hoc* tribunals and that "appeal jurisprudence from these tribunals has seemingly evolved to exclude *dolus eventualis* from the definition of the *mens rea* of extermination", but considered "that there was no reasoned basis for a departure from the original approach taken in the *Krstić* Trial Judgement, which encompassed *dolus eventualis* and was based on a review of pre-1975 jurisprudence".[1303]

512. The Trial Chamber also rejected NUON Chea's argument, based on the *Vasiljević* Trial Judgement (ICTY), that the accused must have been aware that his action was "part of 'a vast murderous enterprise'".[1304] The Trial Chamber noted that the ICTY Trial Chamber in *Vasiljević* identified this requirement based on the

[1299] Trial Judgement, para. 627, fn. 1985, referring to Closing Order (D427), paras 1381-1390. *See also* Trial Judgement, para. 648.
[1300] Trial Judgement, para. 415.
[1301] Trial Judgement, para. 416.
[1302] Trial Judgement, para. 417, referring to *Duch* Trial Judgement (001-E188), para. 338 and *Krstić* Trial Judgement (ICTY), para. 495.
[1303] Trial Judgement, para. 417.
[1304] Trial Judgement, paras 418-419.

Eichmann Case and the IMT Judgement; the Trial Chamber concluded in respect of the latter that it was "not satisfied that those statements established a heightened *mens rea* requirement rather than simply reflecting the facts of the case".[1305]

513. NUON Chea submits that the Trial Chamber committed two errors in its definition of the *mens rea* of extermination, which led to the wrongful finding that the crime of extermination had occurred during Population Movement Phases One and Two.[1306] First, NUON Chea argues that, where extermination is established based on the creation of conditions that lead to death, the conditions must be "calculated to" destroy a part of the population, rather than be "likely" to cause the death of a large number of people (*dolus eventualis*), the standard adopted by the Trial Chamber.[1307] Second, NUON Chea alleges that the Trial Chamber incorrectly held that, to be guilty of the crime against humanity of extermination based on the law as it stood in 1975, the perpetrator need not have had knowledge that his or her actions were part of a "vast murderous enterprise".[1308]

514. KHIEU Samphân alleges that the only *mens rea* standard applicable to extermination by conditions causing death in 1975 was the "intent to kill persons on a massive scale" and the application by the Trial Chamber of an alternative or lesser standard including *dolus eventualis* was in error.[1309] Both Accused further aver that the Trial Chamber's failure to review pre-1975 jurisprudence highlights its erroneous conclusion, which offends the principle of legality.[1310]

515. The Co-Prosecutors respond that, relying on the *Krstić* Trial Judgement (ICTY), the Trial Chamber correctly defined the *mens rea* of extermination as being the same as for the crime against humanity of murder, a definition which has been upheld by the case law of the *ad hoc* tribunals.[1311] Further, the Co-Prosecutors reject NUON Chea's argument that, in order to be convicted for extermination, the accused must have had knowledge that his or her actions contributed to a "vast murderous

[1305] Trial Judgement, para. 419.
[1306] NUON Chea's Appeal Brief, para. 331.
[1307] NUON Chea's Appeal Brief, paras 332-337.
[1308] NUON Chea's Appeal Brief, paras 338-345.
[1309] KHIEU Samphân's Appeal Brief, paras 63-67.
[1310] KHIEU Samphân's Appeal Brief, paras 65-66, 511; NUON Chea's Appeal Brief, paras 330, 335-336, 340.
[1311] Co-Prosecutors' Response, paras 197-198, fns 788-789.

enterprise", given that this approach was not followed by the post-World War II jurisprudence and was rejected in the *Stakić* Appeal Judgement (ICTY).[1312] In any event, the Co-Prosecutors argue that NUON Chea's alleged error does not impact the verdict as, even if the Supreme Court Chamber were to accept his proposed definition, he would still be convicted of extermination, based on the factual findings.[1313]

(1) "Likely" vs. "calculated"

516. The Supreme Court Chamber notes that both Accused argue that, by adopting the "likely" as opposed to the "calculated" standard, the Trial Chamber effectively accepted the notion of *dolus eventualis* for the crime against humanity of extermination. The Supreme Court Chamber recalls its above finding that for the crime against humanity of murder, *dolus eventualis* is indeed sufficient.[1314] However, contrary to the Co-Prosecutors' submission, it would not necessarily lead to an "anomalous situation" if the crimes against humanity of murder and extermination had differing requirements as to the *mens rea* because this could mean that "an accused could be guilty of murder on a massive scale without being guilty of extermination".[1315] "Murder" and "extermination" are separate crimes and their respective definitions must be ascertained independently.

517. The crime against humanity of extermination, which was included in the Charters of the IMT and IMTFE as well as Control Council Law No. 10,[1316] has been generally defined in the jurisprudence of the *ad hoc* tribunals as "the act of killing on a large scale".[1317] The Supreme Court Chamber recalls that, in the IMT jurisprudence, the crime against humanity of extermination encompassed what would later be qualified as genocide, especially in the context of the Final Solution, as evidenced by the passage of the IMT Judgement to which NUON Chea refers.[1318] In this sense, the crime of extermination was a precursor to genocide.

[1312] Co-Prosecutors' Response, para. 200.
[1313] Co-Prosecutors' Response, para. 201.
[1314] *See above*, para. 410.
[1315] Co-Prosecutors' Response, para. 199.
[1316] *See* IMT Charter, Art. 6(c); IMTFE Charter, Art. 5-(c); Control Council Law No. 10, Art. II (1)(c).
[1317] *Karadžić* Trial Judgement (ICTY), para. 483; *Lukić and Lukić* Appeal Judgement (ICTY), para. 536; *Stakić* Appeal Judgement (ICTY), para. 259; *Seromba* Appeal Judgement (ICTR), para. 189.
[1318] NUON Chea's Appeal Brief, para. 335, referring to IMT Judgement, pp. 249-250.

518. As to the arguments relating to the *Eichmann* Case,[1319] the Supreme Court Chamber recalls that the District Court of Jerusalem found Adolf Eichmann guilty, *inter alia*, of extermination as a crime against humanity and as a crime against the Jewish People. The Court found that he had acted with the intent to destroy the Jewish People in whole or in part (as specifically required by the Israeli law setting out the definition of crimes against the Jewish People)[1320] from the summer of 1941.[1321] The Court entertained doubts as to the existence of the requisite specific intent for the period preceding the summer of 1941, and concluded that it "shall, therefore, deal with [the inhuman acts committed during that period] as being crimes against humanity".[1322] However, although the judgement is somewhat ambiguous in this regard, it does not appear that the Court entered a conviction for the crime against humanity of *extermination* in respect of this earlier period.[1323]

519. The Supreme Court Chamber further takes into consideration the discussion of the International Law Commission on the 1996 Draft Code of Offences against the Peace and Security of Mankind (with regard to its Article 18) on the differences between murder, extermination and genocide:

> [Murder and extermination] consist of distinct and yet closely related criminal conduct which involves taking the lives of innocent human beings. Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act used to carry out the

[1319] *See* NUON Chea's Appeal Brief, para. 336; KHIEU Samphân's Appeal Brief, para. 65.
[1320] *See*, *e.g.*, para. 1(b) of the Israeli Act on Bringing the Nazis and their Collaborators to Justice (not available in English) as reproduced in *Eichmann* Judgement (District Court, Israel), para. 16.
[1321] *Eichmann* Judgement (District Court, Israel), paras 164-165.
[1322] *Eichmann* Judgement (District Court, Israel), para. 186.
[1323] *See Eichmann* Judgement (District Court, Israel), para. 201, where the court found that as of August 1941, Eichmann had "participated in all the inhuman acts mentioned in the section of the Law [regarding crimes against humanity] (murder, extermination, enslavement, starvation and deportation of civilian population)"; the court also convicted him "of crime against humanity, instead of crime against the Jewish People, by reason of his activities in the Central Offices for Jewish Emigration in Vienna, Prague and Berlin until October 1941 […] and by organizing deportations to Nisko, the evacuation of Jews from territories annexed to the Reich in the East […], the expulsion of the Jews of Stetting and the expulsion of the Jews of Baden and the Saar-Palatinate". *See also Eichmann* Judgement (District Court, Israel), para. 244(5), where in the concluding part of the judgement, the District Court stated that it convicted Eichmann of a crime against humanity "in that during the period from August 1941 to May 1945 […] he, together with others, caused the murder, extermination, enslavement, starvation and deportation of the Jewish civilian population" as well as "in that he, together with others, caused during the period from March 1938 to October 1941, the expulsion of Jews from their homes in the territories of the Old Reich, Austria and the Protectorate of Bohemia-Moravia" and "in that during the period from December 1939 to March 1941 he, together with others, caused the deportation of Jews to Nisko and the deportation of Jews from Areas in the East annex to the Reich, and from the Reich area itself into the German-occupied area in the East and to France".

> offence of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristics are killed.[1324]

520. Extermination must therefore be viewed as a crime of mass murder, targeting groups or (part of) a population. This is demonstrated by a review of the post-World War II jurisprudence.[1325] In this sense, "[e]xtermination may be differentiated from murder in that it is *directed* against a population rather than individuals".[1326] The aim of extermination is thus to eliminate individuals who are part of a group. This is incompatible with the notion of *dolus eventualis*. However, this does not mean that for the crime of extermination *knowledge* of certain death is required, as the Co-Prosecutors understand NUON Chea to argue;[1327] rather, what is required is a showing that the killing of members of a group is what was desired by the perpetrator, irrespective of whether he was certain that this would actually happen. Mere knowledge that deaths may occur would be insufficient.

521. The Supreme Court Chamber considers that this interpretation of the mental element of the crime against humanity of extermination is in line with the jurisprudence of the ICTY and ICTR, including the *Krstić* Trial Judgement (ICTY), upon which the Trial Chamber relied.[1328] While this judgement, in the passage upon which the Trial Chamber relied, referred to the formulation of the *mens rea* for murder (which includes the notion of *dolus eventualis*),[1329] it went on to further define the elements of extermination, concluding that there must be "evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population".[1330] Clearly, this is incompatible with the notion of *dolus eventualis* and therefore qualifies the earlier statement. Similarly,

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[1324] 1996 Draft Code of Offences Against the Peace and Security of Mankind, p. 48.
[1325] IMT Judgement, pp. 247-255. Other examples include the *Hoess* Case (Supreme National Tribunal, Poland) and the *RuSHA* Case.
[1326] *Semanza* Trial Judgement (ICTR), para. 340 (emphasis added).
[1327] Co-Prosecutors' Response, para. 200.
[1328] Trial Judgement, para. 417
[1329] *Krstić* Trial Judgement (ICTY), para. 495.
[1330] *Krstić* Trial Judgement (ICTY), para. 503.

in the *Ntakirutimana* Appeal Judgement (ICTR), the Appeals Chamber found that the "crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, and that the accused *intended by his acts or omissions this result*".[1331] This language was then affirmed in the *Gacumbitsi* Appeal Judgement (ICTR).[1332]

522. In sum, the Supreme Court Chamber concludes that the Trial Chamber erred in law when finding that the *mens rea* of the crime against humanity of extermination included the notion of *dolus eventualis.* Instead, direct intent to kill on a large scale must be established. The Supreme Court Chamber shall consider the impact of this error on the Trial Chamber's finding that the crime of extermination has been committed in the course of Population Movement Phases One and Two and at Tuol Po Chrey below. First, however, it shall address the second legal error raised by NUON Chea.

(2) "Vast murderous enterprise"

523. NUON Chea argues that, in order to constitute the crime against humanity of extermination, the deaths must be part of a "vast murderous enterprise", of which the accused must have been aware.[1333] This argument was rejected by the Trial Chamber.[1334] NUON Chea submits on appeal that the Trial Chamber failed to analyse relevant post-WWII jurisprudence, including the *Eichmann* Case, when making its decision, even though the *Vasiljević* Trial Judgement (ICTY) had acknowledged the existence of this element based on such case law.[1335] He avers that the Trial Chamber ignored that, whilst there is no explicit acknowledgement of the *mens rea* element of extermination in IMT Judgement or the judgements of the American Military Tribunals sitting in Nuremberg, the elements of crimes can be "routinely deduced from the facts as they were described by the tribunal", an approach taken by the Supreme Court Chamber in the *Duch* Appeal Judgement (001-F28).[1336] NUON Chea

[1331] *Ntakirutimana* Appeal Judgement (ICTR), para. 522 (emphasis added).
[1332] *Gacumbitsi* Appeal Judgement (ICTR), para. 86 (adopting the language "would inevitably lead"), citing *Ntakirutimana* Appeal Judgement (ICTR), para. 522.
[1333] NUON Chea's Appeal Brief, paras 338-340.
[1334] Trial Judgement, paras 418-419.
[1335] NUON Chea's Appeal Brief, para. 338.
[1336] NUON Chea's Appeal Brief, para. 339.

also argues that the Trial Chamber "failed to address key jurisprudence which clearly links extermination to the deliberate campaign of killing undertaken by the Nazis".[1337]

524. The Co-Prosecutors argue that NUON Chea interprets the post-World War II jurisprudence as well as that of the ICTY incorrectly.[1338]

525. The Supreme Court Chamber recalls that extermination is generally defined as "killing on a large scale".[1339] As such, the element of mass killing is inherently part of the notion of extermination. This element is present both in respect of the *actus reus* and the *mens rea* – killings must occur on a large scale and the perpetrator must be aware of the killing on a large scale.[1340] The Supreme Court Chamber also recalls that it has found that the crime of extermination requires a showing of direct intent to kill – *dolus eventualis* is insufficient.[1341]

526. In 2002, the ICTY Trial Chamber in *Vasiljević* held that the Jerusalem District Court in *Eichmann* had required knowledge by the accused of a vast murderous enterprise to satisfy the *mens rea* of extermination.[1342] However, it is of note that the Trial Chamber identified an "intermingling in the [*Eichmann*] Judgment of the factual basis relevant to both 'extermination' as a crime against humanity and 'extermination' as a means to genocidal end" and that extermination has a "descriptive function" in the judgement in *Eichmann*.[1343] As a result, the *Vasiljević* Trial Chamber recognised the difficulty in "identify[ing] the precise elements of the definition of 'extermination' as a crime against humanity which the Israeli court adopted".[1344] Nevertheless, it concluded that *Eichmann* required for "extermination" as a crime against humanity that it be established that there was "killing on a large scale", which was "directed towards members of a collection of individuals (*e.g.*, the Jews); the method used to carry out the killing is irrelevant; knowledge of the vast murderous enterprise is required".[1345] The ICTY Trial Chamber also found that "it is not sufficient to establish

[1337] NUON Chea's Appeal Brief, para. 340.
[1338] Co-Prosecutors' Response, para. 200.
[1339] *See above*, para. 517.
[1340] *See Stakić* Appeal Judgement (ICTY), para. 259.
[1341] *See above*, para. 522.
[1342] *Vasiljević* Trial Judgement (ICTY), para. 224.
[1343] *Vasiljević* Trial Judgement (ICTY), para. 224.
[1344] *Vasiljević* Trial Judgement (ICTY), para. 224.
[1345] *Vasiljević* Trial Judgement (ICTY), para. 224.

extermination for the offender to have intended to kill a large number of individuals, or to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death as in the case of murder. He must also have known of the vast scheme of collective murder and have been willing to take part therein".[1346] In a footnote to the latter sentence, the ICTY Trial Chamber referred, by way of example, to IMT's findings in respect of the accused Sauckel and Fritzsche.[1347] However, the cited passages of the IMT Judgement do not, on their face, support the finding that the accused must have known of the "vast scheme of collective murder".[1348]

527. Accordingly, the Supreme Court Chamber considers that neither the *Eichmann* Judgement nor the IMT Judgement stipulate the existence of a vast murderous enterprise and the accused's knowledge thereof as elements of the crime against humanity of extermination. Indeed, the references to the element of mass killing to which NUON Chea refers are largely encompassed by the requirement that killing took place on a large scale and that the perpetrator was aware thereof. Further, the ICTY Appeals Chamber in *Stakić* expressly rejected knowledge of a vast murderous enterprise as a *mens rea* requirement, noting that there was no support for this alleged element in the jurisprudence of the ICTY. The Appeals Chamber held that, whilst the *Vasiljević* Trial Judgement (ICTY) found the requirement to be "largely consistent" with the jurisprudence of the ICTY, "there is no indication that such a requirement exists" and "the *Vasiljević* Trial Judgement did not include 'knowledge of a vast scheme of collective murder' in its summation of the elements of the crime of extermination".[1349]

528. In sum, the Supreme Court Chamber is not satisfied that the existence and knowledge of a vast murderous enterprise were elements of the crime against humanity of extermination in 1975 and dismisses NUON Chea's ground of appeal in this regard.

[1346] *Vasiljević* Trial Judgement (ICTY), para. 228.
[1347] *Vasiljević* Trial Judgement (ICTY), para. 228, fn. 588.
[1348] It is unclear to which page of the IMT Judgement the ICTY Trial Chamber was referring as it did not indicate which edition of the IMT Judgement it was relying on. However, it appears that the ICTY Trial Chamber referred to those sections of the judgement that addressed the guilt of the two accused for war crimes and crimes against humanity, *i.e.* pp. 320-322, 337-338, respectively, of the IMT Judgement.
[1349] *Stakić* Appeal Judgement (ICTY), para. 258.

b) Extermination committed during Population Movement Phase One

529. As to whether the crime against humanity of extermination was committed in respect of Population Movement Phase One, the Trial Chamber found that "at least several thousand people died" during the evacuation due to "killings, starvation and exhaustion".[1350] On that basis, it found that the scale element for the crime of extermination was established.[1351] As to the *mens rea* of the perpetrators, the Trial Chamber found in respect of the killing of Khmer Republic officials during searches of the city that there was a "deliberate, organised, large-scale operation to kill former officials of the Khmer Republic" and that, in view thereof, "Khmer Rouge soldiers intended to kill Khmer Republic officials on a massive scale".[1352] Further, in relation to deaths resulting from the conditions of the evacuation, the Trial Chamber held that the Khmer Rouge soldiers had acted with *dolus eventualis* and intended to create conditions of life that would lead to death in the reasonable knowledge that such acts or omissions would likely cause the death of a large number of persons.[1353] On that basis, the Trial Chamber concluded that the crime against humanity of extermination had been committed during Population Movement Phase One.[1354]

530. Both Accused appeal their convictions for extermination, *inter alia*, alleging errors of fact in the Trial Chamber's assessment of the evidence.[1355]

(1) Extermination of civilians

531. NUON Chea submits, in relation to deaths resulting from the conditions of the evacuation, that the Trial Chamber failed to distinguish and analyse who died *because of* the evacuation as opposed to who died *during* the evacuation, only the former of which may be taken into account when assessing the scale element.[1356] He recalls that, according to the Trial Chamber's findings, the evacuation took "several weeks" to complete[1357] and avers that, according to statistical data, the normal mortality rate for

[1350] Trial Judgement, para. 521.
[1351] Trial Judgement, para. 560.
[1352] Trial Judgement, para. 561.
[1353] Trial Judgement, para. 562.
[1354] Trial Judgement, paras 561-562.
[1355] *See* NUON Chea's Appeal Brief, paras 346-351; KHIEU Samphân's Appeal Brief, paras 362-364.
[1356] NUON Chea's Appeal Brief, paras 347-351; *see also* para. 429.
[1357] NUON Chea's Appeal Brief, para. 348, referring to Trial Judgement, para. 487.

a population of the size of Phnom Penh would have been 4000 individuals.[1358] He argues that nothing in the evidence upon which the Trial Chamber relied – notably the statements of individuals regarding deaths resulting from the conditions of the evacuation – would establish that the victims died because of the evacuation, noting in particular that the Trial Chamber found that the most vulnerable groups were particularly prone to dying when being evacuated.[1359]

532. In his view, given the size of the population of Phnom Penh, a substantial number of people would have died under any conditions, according to the normal mortality rate, and that therefore there was no causal link between NUON Chea's conduct and the death of victims of the evacuation.[1360] He recalls that the conditions in Phnom Penh at the time of the evacuation had been dire already and submits that the mortality rate may have therefore been much higher.[1361]

533. The Co-Prosecutors respond that the Trial Chamber correctly found that the scale element of the crime of extermination was satisfied in light of the totality of the relevant evidence.[1362] They submit that NUON Chea's reliance on sources outside the trial record to determine that the deaths during the evacuation did not exceed a normal mortality rate is misplaced.[1363]

534. The Supreme Court Chamber recalls the finding of the ICTY Trial Chamber in *Čelebići*, which held that:

> [I]t is a well-recognised legal principle that a wrongdoer must take the victim as he finds him. Thus, if a perpetrator by his acts shortens the life of his victim, it is legally irrelevant that the victim may have died shortly thereafter from another cause. To establish criminal liability in situations where there are pre-existing physical conditions which would cause the victim's death, therefore, it is only necessary to establish that the accused's conduct contributed to the death of the victim.[1364]

[1358] NUON Chea's Appeal Brief, para. 348.
[1359] NUON Chea's Appeal Brief, para. 351.
[1360] NUON Chea's Appeal Brief, paras 347-351.
[1361] NUON Chea's Appeal Brief, para. 349, *see also* para. 429.
[1362] Co-Prosecutors' Response, paras 202-206.
[1363] Co-Prosecutors' Response, para. 205.
[1364] *Čelebići* Trial Judgement (ICTY), para. 909. *See also* *Renoth* Case (British Military Court, Germany), p. 76.

535. As noted above, the Trial Chamber concluded that numerous people died because of the conditions during the evacuation of Phnom Penh. NUON Chea's arguments were inapt to establish that the Trial Chamber's findings were unreasonable, including as regards the causal link between the conditions of the evacuation and the death of the victims. Accordingly, and in keeping with the finding in the *Čelebići* Case, with which the Supreme Court Chamber agrees, it is legally irrelevant whether the victims might have died for other reasons, had they not died because of the conditions to which they were exposed during the evacuation.

536. Nevertheless, the Supreme Court Chamber considers that the Trial Chamber's finding that "at least several thousand people died" during the evacuation due to "killings, starvation and exhaustion"[1365] (which was the basis for the conclusion on the scale element[1366]) was unreasonable. As noted above when discussing the crime against humanity of murder, there was only little reliable evidence as to the occurrence of killings of civilians and of deaths due to the conditions imposed. Although it is plausible that more deaths occurred than those established through the evidence, the number of deaths actually proven is insufficient to establish killings on a large scale. The Trial Chamber, when making its finding as to the scale element, relied[1367] on estimates that had been given as to the death toll of the evacuation of Phnom Penh, notably a 1977 interview of IENG Sary with a German news magazine (stating that "2000 to 3000" people had died during the evacuation of Phnom Penh),[1368] an estimation by Ben KIERMAN (who, based on interviews with 36 evacuees who had told him that the groups with which they had left Phnom Penh comprised 376 individuals, two of which – a one-month old baby and an elderly woman had died in the course of the transfer, which amounted to a death rate of 0.53 percent, which could be extrapolated to a total death toll of 10,600 deaths among the population of 2 million people)[1369] and an estimation given by Philip SHORT (who in

[1365] Trial Judgement, para. 521.
[1366] Trial Judgement, para. 560.
[1367] *See* Trial Judgement, para. 521, fn. 1562.
[1368] IENG Sary Interview by Der SPIEGEL, E3/1589, undated, p. 2, ERN (En) 00185419.
[1369] Ben KIERNAN, *Pol Pot Regime – Race, Power and Genocide in Cambodia under the Khmer Rouge*, E3/1593, p. 48, ERN (En) 01150021.

his book spoke of 20,000 deaths, which he explained to be a "median figure" among the different estimates, but who also stated that the death toll was "unprovable").[1370]

537. Of this evidence, only the estimation by Ben KIERMAN explains in any detail its factual basis, which, however, being based on a small sample, is too weak to sustain a finding beyond reasonable doubt. Philip SHORT specifically noted the impossibility of establishing the death toll.[1371] Seemingly, the Trial Chamber sought to address these limitations in the evidence by not making a concrete finding as to the minimum death toll, but rather stated that "at least several thousand people died".[1372] Nevertheless, in light of the very limited evidence establishing actual deaths during the evacuation and the weakness of the evidence relied upon to establish the overall death toll, the Supreme Court Chamber considers that no reasonable trier of fact could have entered this finding. Accordingly, the scale element of the crime of extermination cannot be said to have been established in respect of Population Movement Phase One.

538. KHIEU Samphân submits with regard to the Trial Chamber's finding that civilians had been exterminated during Population Movement Phase One that the Trial Chamber adopted an incorrect *mens rea* standard.[1373] The Supreme Court Chamber has already addressed and allowed this ground of appeal.[1374] The Trial Chamber specifically found, in respect of deaths by conditions, that the Khmer Rouge had acted with *dolus eventualis*[1375] – which the Supreme Court Chamber has found is insufficient to establish the requisite *mens rea* for extermination.

539. In sum, the Trial Chamber erred when concluding that the crime against humanity of extermination was established in respect of the civilians who had died because of the conditions of the evacuation.

[1370] T. 6 May 2013 (Philip SHORT), E1/189.1, pp. 39-40.
[1371] T. 6 May 2013 (Philip SHORT), E1/189.1, p. 40.
[1372] Trial Judgement, para. 521.
[1373] KHIEU Samphân's Appeal Brief, paras 362-364.
[1374] *See above*, para. 522.
[1375] Trial Judgement, para. 562.

(2) Extermination of Khmer Republic soldiers and officials

540. The Trial Chamber found that there was a "deliberate, organised, large-scale operation to kill former officials of the Khmer Republic".[1376] This conclusion was based on the evidence and related findings concerning the killings of the officials identified through searches, checkpoints or radio announcements.[1377] However, the Supreme Court Chamber has found that the only killings of Khmer Republic officials to be established beyond reasonable doubt are those of four high-ranking officials as well as Khmer Republic soldiers who had heeded calls to identify themselves as such.[1378] However, while the former finding related to a small number of victims, the evidence in respect of the latter does not allow the conclusion that a sufficiently high number of individuals had been killed.[1379] No other unlawful killings of soldiers was established to the requisite standard. Accordingly, there was no reasonable basis for the Trial Chamber's finding that Khmer Republic soldiers and officials had been killed on a large scale and it stands to be reversed.

(3) Conclusion

541. In sum, therefore, the Trial Chamber's finding that extermination occurred during Population Movement Phase One is reversed, as neither the scale element nor the requisite intent has been established beyond reasonable doubt.

c) Extermination committed during Population Movement Phase Two

542. In relation to Population Movement Phase Two, the Trial Chamber found that "[d]uring transfers from southern Cambodia to Battambang and Pursat Provinces (Northwest Zone), people died as a result of the inhumane conditions in which they were moved" and that "Khmer Rouge soldiers shot others".[1380] The Chamber noted that the "exact number of deaths […] is unknown", but that "hundreds of thousands were re-located with insufficient accommodation and assistance under inhumane conditions" and that there was "evidence indicating that many died due to starvation,

[1376] Trial Judgement, para. 561.
[1377] Trial Judgement, para. 561.
[1378] *See above*, paras 466, 481.
[1379] The Supreme Court Chamber notes that the testimony of SUM Chea provides some indication that the number of victims may have been high, as he refers to ten trucks having been used to transport former Khmer Republic soldiers (T. 5 November 2012 (SUM Chea), E1/140.1, p. 32). Nevertheless, this question was not explored by the Trial Chamber or the parties during his testimony.
[1380] Trial Judgement, para. 646.

exhaustion and at the hands of the Khmer Rouge guards during different stages and phases of the transfer".[1381] The Trial Chamber concluded "that the evidence before it of deaths during transfers from southern Cambodia to Battambang and Pursat Provinces […] is but a representative sample of the total number" and that people had "died on a massive scale during these movements".[1382] The Trial Chamber also found that "Khmer Rouge soldiers and officials systematically and intentionally imposed conditions on people moved from southern Cambodia to Battambang and Pursat Provinces […] that would likely lead to death on a massive scale" and that, therefore, the crime of extermination was committed.[1383]

543. KHIEU Samphân challenges the Trial Chamber's conclusion that there was widespread killing of civilians during Population Movement Phase Two[1384] and argues that it had applied the *mens rea* element erroneously.[1385]

544. NUON Chea appeals his conviction for the crime of extermination in respect of Population Movement Phase Two alleging errors of fact, *inter alia*, in the Trial Chamber's assessment of the evidence. His principal submission is that the evidence before the Trial Chamber was insufficient to establish that Population Movement Phase Two had caused any deaths, let alone deaths on a massive scale.[1386]

545. The Co-Prosecutors respond that the Trial Chamber correctly found that the "massiveness" requirement of an extermination conviction was satisfied in light of the totality of the relevant evidence.[1387] They submit that the Trial Chamber relied on "credible, reliable and compelling" evidence to assess the scale of death and that NUON Chea merely disagrees with the Trial Chamber's findings.[1388]

546. The Supreme Court Chamber understands that, in reaching the conclusion that extermination had occurred, the Trial Chamber relied on the instances of deaths during Population Movement Phase Two referenced in the section of the Trial

[1381] Trial Judgement, paras 646-647.
[1382] Trial Judgement, para. 647.
[1383] Trial Judgement, para. 648.
[1384] KHIEU Samphân's Appeal Brief, para. 457.
[1385] KHIEU Samphân's Appeal Brief, para. 594.
[1386] *See* NUON Chea's Appeal Brief, paras 327-328, 352-354.
[1387] Co-Prosecutors' Response, paras 202-206.
[1388] Co-Prosecutors' Response, paras 207-208.

Judgement containing the Trial Chamber's legal findings.[1389] These accounts included individuals dying from starvation, exhaustion and illness,[1390] people drowning from two boats capsizing,[1391] people dying in packed trains,[1392] people generally dying from the conditions[1393] and one individual being shot by Khmer Rouge soldiers.[1394]

[1389] *See* Trial Judgement, paras 646-647, fns 2037, 2039, referring to paras 592, 594-595, 597-598, referring to T. 23 October 2012 (SOKH Chhin), E1/137.1, pp. 22, 25-26; T. 29 May 2013, (CHAN Sopheap *alias* CHAN Socheat), E1/198.1, p. 44; T. 5 December 2012 (PECH Srey Phal), E1/148.1, p. 46; T. 27 May 2013 (AUN Phally), E1/197.1, p. 40; T.7 February 2013 (PIN Yathay), E1/170.1, pp. 40-41; SAN Mom Civil Party Application, E3/4992, dated 11 July 2009, p. 3, ERN (En) 00893412; KONG Vach Civil Party Application, E3/4695, dated 16 February 2009, pp. 6-7, ERN (En) 00391744; DY Roeun Civil Party Application, E3/4656, dated 9 February 2008, pp. 3-4, ERN (En) 00893384; KONG Vach Interview Record, E3/5590, dated 17 December 2009, pp. 3-6, (En) 00426476-8; TREH Eal Victim Complaint, E3/5324, undated, pp. 6-7; Refugee Accounts: Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 240, ERN (En) 00820558; Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 126, ERN (En) 00820558; T. 10 April 2013 (François PONCHAUD), E1/179.1, p. 60; T. 19 June 2013 (NOU Mao), E1/209.1, p. 52. Note that the Supreme Court does not agree with the Co-Prosecutors that the evidence of TOENG Sokha is evidence of killings. *See* Co-Prosecutors' Response, para. 189, referring to T. 4 December 2012 (TOENG Sokha), E1/147.1, pp. 48, 50 (TOENG heard gunfire and was told that Khmer Rouge soldiers shot at those who tried to escape).

[1390] KONG Vach Civil Party Application, E3/4695, dated 16 February 2009, pp. 6-7, ERN (En) 00391744 (stating that her fifth child died on the way to Samroang Yaong, and that her baby died soon after from the lack of milk, when a truck left Samroang Yaong); KONG Vach Interview Record, E3/5590, dated 17 December 2009, pp. 3-6, (En) 00426476, 00426478 (describing how her one year old son died from diarrhoea and swollen diseases); Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 240, ERN (En) 00820558 (stating that many children and elderly died in the second transfer of more than 500 km from starvation given the lack of food); T. 7 February 2013 (PIN Yathay), E1/170.1, pp. 40-41 (PIN Yathay states that on the truck that he travelled, two people fainted and subsequently died); Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 126, ERN (En) 00820444 (stating that, during the journey, children died due to exhaustion or illness).

[1391] SAN Mom Civil Party Application, E3/4992, 11 July 2009, p. 3, ERN (En) 00893412 (recalling that two boats sank and people died because there was no intervention from the Khmer Rouge).

[1392] T. 5 December 2012 (PECH Srey Phal), E1/148.1, pp. 45-47 (describing that she boarded a cargo wagon of a train headed to Kampong Chhnang province and that four wagons were being fully loaded, that the Khmer Rouge soldiers blocked the doors of the wagons and that people died on the wagon because of exhaustion or of overcrowding of the wagon); TREH Eal Victim Complaint, E3/5324, undated, pp. 6-7 (describing how his grandmother died from starvation inside a train); T. 10 April 2013 (François PONCHAUD), E1/179.1, p. 60 (he heard refugees describing the conditions during the second transfer, where people were placed in packed wagons with other people and they were not given food or water, had to relieve themselves in the wagon and there were many casualties among them); Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 240, ERN (En) 00820558 (stating that Khmer Rouge soldiers herded people into the train like cattle, more than 150 of in each coach, and that many children and elderly died in the second transfer of more than 500 km from starvation given the lack of food).

[1393] T. 27 May 2013 (AUN Phally), E1/197.1, p. 40 (describing how the journey was extreme and the people who died along the way were placed on the side of the road covered in a white cloth); T.19 June 2013 (NOU Mao), E1/209.1, p. 52 (stating that he learned about the evacuation from others but that there were many casualties in the course of the evacuation).

[1394] T. 29 May 2013 (CHAN Sopheap *alias* CHAN Socheat), E1/198.1, p. 44 (describing how one man, when passing the Royal Palace, yelled, "Bravo! Now we have arrived in Phnom Pen!" and was subsequently taken outside by Khmer Rouge; CHAN Sopheap *alias* CHAN Socheat heard two shots being fired, and the man fell into the water).

547. In reaching its findings as to the deaths resulting from the conditions imposed, the Trial Chamber relied on the in-court testimonies of three witnesses and three civil parties, as well as out-of-court statements and documentary evidence. Two of the witnesses, François PONCHAUD and NOU Mao, recalled hearing that "the hope of survival was minimal"[1395] and that there had been "many casualties"[1396] caused by inhumane conditions on the trains.[1397] However, neither of the witnesses personally had observed any deaths and their testimony therefore amounts to hearsay evidence. The third witness, SOKH Chhin, was a railway worker in 1975, who testified that he had seen decomposing bodies along the railway tracks which he believed to have been the corpses of evacuees that had had been thrown off the trains; he was unable to estimate the number of bodies he had seen.[1398] In addition, three civil parties testified in court to seeing people dying from the extreme conditions.[1399] One civil party testified to having seen a man being shot by Khmer Rouge soldiers for expressing joy about his arrival at the river front in Phnom Penh.[1400]

548. Of the three witnesses who gave evidence of deaths, each refer to destination locations in Western Cambodia over a range of time periods, including May, June and August 1975 and early 1976.[1401] Three of the four civil party eyewitness accounts date from around September or October 1975 and the other also appears to be from this time period.[1402] The civil party accounts refer to two different destination points, either in Kampong Chhnang (through Phnom Penh) or Battambang.[1403]

[1395] T. 19 June 2013 (NOU Mao), E1/209.1, p. 53.
[1396] T. 19 June 2013 (NOU Mao), E1/209.1, p. 52 ; T. 10 April 2013 (François PONCHAUD), E1/179.1, p. 62.
[1397] T. 10 April 2013 (François PONCHAUD), E1/179.1, p. 60.
[1398] T. 23 October 2012 (SOKH Chhin), E1/137.1, pp. 22, 25-26.
[1399] T. 5 December 2012 (PECH Srey Phal), E1/148.1, pp. 45-47 (some people died in the packed train carriages due to exhaustion); T. 27 May 2013 (AUN Phally), E1/197.1, p. 40 (the journey was extreme and the people who died along the way were placed on the side of the road covered in a white cloth); T. 7 February 2013 (PIN Yathay), E1/170.1, pp. 40-41 (two people collapsed and fainted, subsequently dying).
[1400] T. 29 May 2013 (CHAN Sopheap *alias* CHAN Socheat), E1/198.1, p. 44.
[1401] SOKH Chhin worked as a railway repairmen around August 1975 in Pursat province (T. 23 October 2012 (SOKH Chhin), E1/137.1, pp. 22, 25-26); François PONCHAUD heard from refugees about the second wave of population movement in May or June 1975 or early 1976 of people taken from Takeo through Phnom Penh to Phnom Thipakdei (near Mongkol Borei) (T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 59-60, 63); NUO Mao heard people were evacuated to Battambang and Kampong Chhnang province but is unclear on the timeframe (T.19 June 2013 (NOU Mao), E1/209.1, p. 52).
[1402] AUN Phally cannot recall the date clearly but speaks of being evacuated by motorboat to Phnom Penh and then later boarding a train to Battambang province "probably in late 1976 or late 1977" (T. 27

549. The remaining six sources of evidence of deaths during Population Movement Phase Two are documentary sources, namely three Civil Party Applications (one of which is repeated in an Interview Record), one Victim Complaint and two Refugee Accounts.[1404] None of these accounts refer conclusively to the same destination point or of the same month of transfer.[1405]

550. The Trial Chamber did not provide any express analysis of the probative value of the evidence on which it relied, nor is any one instance of death supported by more than one piece of evidence. As noted above,[1406] in particular when the probative value of the evidence on which a finding rests is inherently low (as is the case with out-of-court statements by witnesses and civil parties), the explanation provided by the Trial Chamber as to why it was confident that findings beyond reasonable doubt could be based thereon are of particular importance when determining whether the Trial Chamber's findings were reasonable. In the absence of any such explanation, the Supreme Court Chamber considers that the findings regarding deaths during Population Movement Phase Two that were based on Civil Party Applications, a Victim Complaint and Refugee Accounts cannot be said to have been reasonably reached. Similarly, in the absence of any explanation by the Trial Chamber as to how it evaluated the evidence, the very general hearsay evidence given by François PONCHAUD and NOU Mao provides an insufficient basis for a reasonable finding of deaths resulting from the conditions. Conversely, as to the findings regarding deaths and one killing that were based on in-court testimony of civil parties and witness SOKH Chhin, the Supreme Court Chamber considers that NUON Chea has not

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May 2013 (AUN Phally), E1/197.1, pp. 35-36).
[1403] T. 29 May 2013 (CHAN Sopheap *alias* CHAN Socheat), E1/198.1, pp. 43-45 (transfer to Kampong Chhnang through Phnom Penh); T. 5 December 2012 (PECH Srey Phal), E1/148.1, pp. 45-46 (train from Phnom Penh to Kampong Chhnang); T. 27 May 2013 (AUN Phally), E1/197.1, pp. 35-36, 40 (Prey Veng to Battambang); T. 7 February 2013 (PIN Yathay), E1/170.1, pp. 40-41 (truck heading to Battambang).
[1404] DY Roeun Civil Party Application, E3/4656, dated 9 February 2008, pp. 3-4, ERN (En) 00893384-00893385; SAN Mom Civil Party Application, E3/4992, 11 July 2009, p. 3, ERN (En) 00893412; KONG Vach Civil Party Application, E3/4695, dated 16 February 2009, pp. 6-7, ERN (En) 00391744-00391745; KONG Vach Interview Record, E3/5590, dated 17 December 2009, pp. 3-6, (En) 00426476-00426478; TREH Eal Victim Complaint, E3/5324, undated, pp. 6-7, ERN (En) 00873761-00873762; Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 240, ERN (En) 00820558; Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 126, ERN (En) 00820444.
[1405] The time periods in which the individuals were transferred range from April 1975 (KONG Vach), November 1976 (SAN Mom), late 1976 (TREH Eal), September 1975 (AUN Chan Syavuty) and December 1975 (anonymous refugee account).
[1406] *See above*, para. 90.

established that no reasonable trier of fact could have found that these deaths or killings were established beyond reasonable doubt.

551. The Supreme Court Chamber will now turn to whether the Trial Chamber erred when it found that killings occurred on a large scale. In this regard, it is recalled that there is no numerical minimum; extermination has been found to have been committed in relation to thousands of killings as well as for fewer than sixty individuals.[1407] When determining whether killings occurred on a large scale, factors to be taken into consideration include the time and place of killings, the selection of victims, the manner of targeting the victims and whether the killings were aimed at a collective group or individual victims.[1408] According to the *Perišić* Trial Judgement (ICTY), it is not required that a massive number of killings occurred during a single incident in a concentrated place over a short period.[1409] Similarly, ICTY trial chambers have found that the scale element of the crime of extermination may also be established "on an accumulation of separate and unrelated incidents, meaning on an aggregated basis".[1410]

552. Some months after the *Perišić* Trial Judgement (ICTY), the ICTR Appeals Chamber in *Bagosora* held, without addressing the holding in *Perišić*, that it was unreasonable for a trial chamber to conclude that the "large scale" requirement for extermination be satisfied "based on a collective consideration of events committed in different *prefectures*, in different circumstances, by different perpetrators, and over a period of two months".[1411] The events that form the basis for the accused's responsibility must be found to "constitute one and the same crime sharing the same *actus reus*".[1412] The ICTR Appeals Chamber in *Karemera and Ngirumpatse* adopted the same approach and found that, although the Trial Chamber in that case appeared

[1407] *Lukić and Lukić* Appeal Judgement (ICTY), para. 537; *Ndahimana* Appeal Judgement (ICTR), para. 231.
[1408] *Lukić and Lukić* Appeal Judgement (ICTY), para. 538.
[1409] *Perišić* Trial Judgement (ICTY), para. 107.
[1410] *Martić* Trial Judgement (ICTY), para. 63, adopting language from *Brđanin* Trial Judgement (ICTY), para. 391. *See also Stakić* Trial Judgement (ICTY), para. 640.
[1411] *Bagosora* Appeal Judgement (ICTR), para. 396.
[1412] *Bagosora* Appeal Judgement (ICTR), para. 396.

to have aggregated some of the killings in making findings on extermination, each incident of killing individually satisfied the element of killings on a large scale.[1413]

553. Further, in *Nizeyimana*, whilst acknowledging there is no numerical threshold to establish extermination, an ICTR Trial Chamber held that killings must occur on a large scale.[1414] The Chamber was not satisfied:

> that the killing of the Ruhutinyanya family, the killing of Rosalie Gicanda and others taken from her home, the killing of Remy Rwekaza and Beata Uwambaye as well as the attack on Witness ZAV at the Gikongoro / Cyangugu and Kigali roads junction roadblock, the killing of Pierre Claver Karenzi at the Hotel Faucon roadblock as well as the killing of persons taken from the Matabaro and Nyirinkwaya residences amount to extermination. The evidence related to the number of deaths in each instance is too ambiguous and or too low to establish killing on a large scale.[1415]

554. Turning to the case at hand, the Supreme Court Chamber notes that the evidence of killings and deaths resulting from the conditions imposed during Population Movement Phase Two, particularly the live evidence, was sparse and sometimes vague, also considering that the Trial Chamber found that over 300,000 Cambodians had been affected by the transfers.[1416] The Supreme Court Chamber recalls that it has found that only those findings of deaths due to the conditions of the transfer and killings by Khmer Rouge soldiers that were based on in-court evidence (except for the uncorroborated hearsay evidence) were reasonably made. These deaths occurred in different provinces, under different circumstances, by different perpetrators and over a period of two years. Only one person appearing before the Trial Chamber testified to the killing of a transferee by Khmer Rouge soldiers.[1417] Neither individually nor combined do these findings reach the requisite massive scale.

555. It is presumably for that reason that the Trial Chamber, when finding that the element of large scale was established, did not rely on the individual deaths and killings it had identified, but reasoned that those were but a "representative sample of

[1413] *Karemera* Appeal Judgement (ICTR), para. 661 (thousands of civilians were killed by 12 April 1994 at Kigali area roadblocks and thousands were killed following the mid-May and June 1994 attacks in Bisesero Hills).
[1414] *Nizeyimana* Trial Judgement (ICTR), para. 1546.
[1415] *Nizeyimana* Trial Judgement (ICTR), para. 1549.
[1416] Trial Judgement, para. 630.
[1417] T. 29 May 2013 (CHAN Sopheap *alias* CHAN Socheat), E1/198.1, p.44.

the total number" of deaths and killings.[1418] As noted by NUON Chea, the Trial Chamber did not cite any evidence in support of this assumption. There was, however, evidence before the Trial Chamber that attests to scale of deaths. Notably, according to the Refugee Account of AUN Chok, 10% of the people on her journey died.[1419] François PONCHAUD stated that during Population Movement Phase Two there were many casualties, likening the situation to when "the Jewish were being taken by the Nazis in the past".[1420] Witnesses and civil parties testifying before the Trial Chamber stated that there had been "many casualties in the course of the evacuation",[1421] that they had seen "several" corpses of people in transfer who had died[1422] and that "some people" had died.[1423] Out-of-court evidence also indicates that many deaths occurred because of the conditions and circumstances of the population transfers.[1424]

556. The Supreme Court Chamber considers that it must be assumed that the Trial Chamber relied on this evidence, which it cited elsewhere in the section of the Trial Judgement discussing Population Movement Phase Two, when finding that the actual instances of deaths owing to the conditions of the transfers were but examples of deaths on a massive scale. Indeed, the evidence makes it appear plausible that more deaths than those established through the evidence had occurred during Population Movement Phase Two. Nevertheless, this evidence provides insufficient support for the Trial Chamber's extrapolation that deaths occurred on a "massive scale". The Supreme Court Chamber notes in this regard that the Trial Chamber did not attempt to estimate the actual number of deaths, which means that it is entirely unclear whether the Trial Chamber considered that dozens, hundreds or thousands of deaths had occurred.

[1418] Trial Judgement, para. 647.
[1419] Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 240, ERN (En) 00820558.
[1420] T. 10 April 2013 (Francois PONCHAUD), E1/179.1, pp. 60-62. However, it must be noted that François PONCHAUD did not witness any aspects of Population Movement Phase Two himself; his testimony was based on the accounts he had collected from refugees.
[1421] T. 19 June 2013 (NUO Mao), E1/209.1, p. 52.
[1422] T. 23 October 2012 (SOKH Chhin), E1/137.1, pp. 22, 25-26 .
[1423] T. 5 December 2012 (PECH Srey Phal), E1/148.1, p. 46. *See also* T. 27 May 2013 (AUN Phally), E1/197.1, p. 40.
[1424] SAN Mom Civil Party Application, E3/4992, 11 July 2009, p. 3, ERN (En) 00893412 (two boats with "many" people capsized and the people drowned); Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 126 ERN (En) 00820444 ("[d]uring the journey, two children out of 5 died of exhaustion or illness").

557. In sum, the Supreme Court Chamber considers that the scale element of the crime against humanity of extermination has not been reasonably established in respect of Population Movement Phase Two.

558. Turning to the Trial Chamber's findings as to the mental element of extermination, in relation to the deaths resulting from the conditions of the transfer, there is no indication that the perpetrators had the intent to kill people on a massive scale; rather the Trial Chamber found that the "Party leadership ignored the lessons of phase one [of the Population Movement] and took no measures to ensure that people were provided with adequate assistance or accommodation during phase two".[1425] This implies that the perpetrators acted with *dolus eventualis*, which the Supreme Court Chamber has already found to be insufficient to establish the *mens rea* of extermination.[1426]

559. While the Trial Chamber also made a finding that one individual was shot by Khmer Rouge soldiers (presumably with direct intent), the findings as to the *mens rea* do not rely upon this incident, which, in any event, would be insufficient to establish "killing on a large scale".

560. Accordingly, the *mens rea* element of the crime against humanity of extermination has not been established and the Trial Chamber erred by finding that extermination occurred during Population Movement Phase Two. The Trial Chamber's finding is therefore reversed.

561. The Supreme Court Chamber recalls that, pursuant to Internal Rule 110(2), it has the power "to change the legal characterisation of the crime adopted by the Trial Chamber". This power is limited in that the Supreme Court Chamber may not "introduce new constitutive elements that were not submitted to the Trial Chamber".[1427] The Supreme Court Chamber notes that the findings made by the Trial Chamber, to the extent that they were confirmed on appeal, while not fulfilling the elements of the crime against humanity of extermination, do fulfil the elements of the crime against humanity of murder, notably the act of causing the death of another

[1425] Trial Judgement, para. 648.
[1426] *See above*, para. 522.
[1427] Internal Rule 110(2).

person with, at least, *dolus eventualis*. Therefore, the Supreme Court Chamber considers it appropriate to change the legal characterisation of the findings and enter a finding that the crime against humanity of murder was committed in the course of Population Movement Phase Two.

562. The Supreme Court Chamber notes in this regard that the Closing Order (D427) did not charge the Accused with the crime of murder in relation to Population Movement Phase Two, but only with extermination.[1428] This, however, does not limit the Supreme Court Chamber's power to modify the legal characterisation of the facts in the present instance. Internal Rule 98(2) stipulates that the Trial Chamber is limited by the factual allegations set out in the closing order, but not by their legal characterisation. Thus, it was open to the Trial Chamber – and it is now open to the Supreme Court Chamber on appeal – to recharacterise the factual allegations contained in the Closing Order (D427), which the Co-Investigating Judges had considered to amount to the crime of extermination, to the crime of murder.

d) Extermination committed at Tuol Po Chrey

563. In relation to the events at Tuol Po Chrey, the Trial Chamber found that "a minimum of 250 former LON Nol officials died in this period".[1429] The Trial Chamber based this finding on seven pieces of evidence – the testimony of two live witnesses, three written records of interview, one civil party application and one secondary source discussing the number of trucks and persons transported to Tuol Po Chrey to be executed. The estimates ranged from six to eight trucks to 100 trucks, each transporting between twenty-five to sixty persons. Some evidence also specified that trucks had returned on three or four occasions.[1430] The Trial Chamber based its estimation as to the number of people killed on LIM Sat's testimony that between ten and fifteen trucks had been used, which it found to accord with other evidence on the record, and testimony that each truck had carried on average twenty-five to thirty people, even though some evidence also suggested higher numbers per truck.[1431] The

[1428] *See* Closing Order (D427), paras 1373 ("The legal elements of murder have also been established in regard to phases 1 and 3 of the population movements"), 1381 ("The legal elements of extermination have also been established in regard to phases 1 and 2 of the population movement").
[1429] Trial Judgement, para. 681.
[1430] T. 2 May 2013 (LIM Sat), E1/187.1, pp. 24, 29-31.
[1431] Trial Judgement, para. 676, fn. 2125.

Trial Chamber concluded that this number of victims "is of a scale that satisfies the requirements of extermination"[1432] The Trial Chamber also found that "the Khmer Rouge soldiers from the North-west Zone at Tuol Po Chrey intended to kill on a massive scale".[1433]

564. NUON Chea argues that there was no basis for Trial Chamber's finding as to the number of deaths, which was based on inconsistent evidence.[1434] He submits that this problem was compounded by the fact that not every former Khmer Republic soldier who responded to the announcement was executed, and that some of them were merely sent to worksites for re-education.[1435] NUON Chea avers that it was not possible to determine beyond reasonable doubt how many people were killed.[1436] Finally, he argues that there is no physical evidence of the deaths or evidence that would disclose the names of the victims.[1437]

565. The Supreme Court notes that the Trial Chamber reached its conclusion as to the *minimum* number of victims based on the available evidence. It calculated the minimum number based on the information available,[1438] erring on the side of caution in keeping with the principle of *in dubio pro reo*. The fact that other, better evidence was not available does not render the Trial Chamber's approach unreasonable. Accordingly, NUON Chea's ground of appeal in this regard is rejected.

566. The Supreme Court Chamber notes that the Trial Chamber's legal error as to the *mens rea* of extermination has no impact on the Trial Chamber's conclusion as to the occurrence of this crime at Tuol Po Chrey, given that the Trial Chamber's conclusion was based on direct intent to kill and not on *dolus eventualis.* Accordingly, there is no reason to reverse the Trial Chamber's conclusion in this regard.

3. Other inhumane acts

567. The Trial Chamber held that committing "[o]ther inhumane acts" was "a crime against humanity under customary international law before 1975 and was thus both

[1432] Trial Judgement, para. 684, fn. 2140, referring to para. 681.
[1433] Trial Judgement, para. 684.
[1434] NUON Chea's Appeal Brief, para. 466; KHIEU Samphân's Appeal Brief, para. 429.
[1435] NUON Chea's Appeal Brief, para. 590.
[1436] NUON Chea's Appeal Brief, para. 463-466.
[1437] NUON Chea's Appeal Brief, para. 465.
[1438] *See* Trial Judgement, para. 676.

"accessible and foreseeable to the Accused".[1439] It noted that the crime of other inhumane acts is a residual category, covering intentional conduct that causes "serious bodily or mental harm or constitut[es] a serious attack on human dignity".[1440] It found that the conduct in question "must be of a nature and gravity similar to other enumerated crimes against humanity", which has to be assessed on a case-by-case basis.[1441]

568. Following the approach of the Closing Order (D427), the Trial Chamber considered charges related to Population Movement Phase One and Population Movement Phase Two. As regards Population Movement Phase One, the Trial Chamber found that, starting on 17 April 1975, the Khmer Rouge forcibly transferred, under coercive and inhumane conditions, at least two million people from Phnom Penh to the countryside, thus committing the crime against humanity of other inhumane acts in the form of forcible transfer.[1442] It also found that the conditions and the violent circumstances of the evacuation of Phnom Penh constituted the crime of other inhumane acts in the form of attacks against human dignity.[1443]

569. As regards Population Movement Phase Two, the Trial Chamber held that the displacement, between September 1975 and early 1977, of at least 300,000 to 400,000 people to various locations constituted other inhumane acts in the form of forcible transfer.[1444] The Trial Chamber further found that the Khmer Rouge "deprived people of their liberty and refused to disclose information regarding the fate and whereabouts of some [of the transferred] people", concluding that this amounted to other inhumane acts in the form of enforced disappearances.[1445] The Trial Chamber also held that the conditions of transfer caused serious bodily and mental harm and thus constituted attacks against human dignity as other inhumane acts.[1446]

[1439] Trial Judgement, para. 435.
[1440] Trial Judgement, para. 437.
[1441] Trial Judgement, para. 438.
[1442] Trial Judgement, paras 547, 552.
[1443] Trial Judgement, para. 565.
[1444] Trial Judgement, paras 638-639.
[1445] Trial Judgement, paras 642-643.
[1446] Trial Judgement, para. 645.

570. In sum, the Trial Chamber found the Accused guilty of "other inhumane acts (comprising of forced transfer, enforced disappearances and attacks against human dignity)".[1447]

571. On appeal, NUON Chea and KHIEU Samphân challenge the Trial Chamber's approach and findings in relation to the crime against humanity of other inhumane acts. The Supreme Court Chamber shall address these arguments in turn.

a) Trial Chamber's approach to enforced disappearance and forced transfer as "other inhumane acts"

572. The Trial Chamber dismissed the Accused's arguments that enforced disappearances and forced transfer did not, in the period relevant to the charges, amount to other inhumane acts, finding that both acts, as with attacks against human dignity, may, depending on the circumstances of the case, be of similar gravity as other crimes against humanity and thus fall within the ambit of other inhumane acts.[1448]

573. Referring to post-World War II jurisprudence as well as to other international jurisprudence and legal instruments after 1975, the Trial Chamber provided a definition of forced transfer and enforced disappearances.[1449] The Trial Chamber found that forced transfer was committed during Population Movement Phases One and Two, since the displacements caused "serious bodily and mental harm" to the transferred people, thereby rising to the level of other crimes against humanity.[1450] Further, the Trial Chamber established that the conditions under which Population Movement Phases One and Two had been carried out, including the deaths resulting therefrom, had amounted to serious attacks against human dignity and hence rose to the level of severity of other crimes against humanity.[1451] In addition, it found that enforced disappearances had occurred during Population Movement Phase Two and, on account of the great suffering that they had caused, rose to the level of other crimes against humanity.[1452] Accordingly, the Trial Chamber concluded that Khmer Rouge

[1447] Trial Judgement, p. 622.
[1448] Trial Judgement, paras 443, 448, 452, 455, 458.
[1449] Trial Judgement, paras 448, 450; *see also* paras 451-455.
[1450] Trial Judgement, paras 552, 639.
[1451] Trial Judgement, paras 565, 645.
[1452] Trial Judgement, para. 643.

officials and soldiers had committed the crime against humanity of other inhumane acts through enforced disappearances, forced transfer and attacks against human dignity.[1453]

574. NUON Chea challenges the Trial Chamber's findings concerning the crime against humanity of other inhumane acts in the form of enforced disappearances and forced transfer in two respects.[1454] First, he submits that the Trial Chamber erred by violating the requirements of accessibility and foreseeability stemming from the principle of legality,[1455] given that, in 1975, enforced disappearances and forced transfer "did not exist in any form under customary international law".[1456] He argues in respect of forced transfer that only deportations across international borders or within occupied territory were criminalised and,[1457] with regard to enforced disappearances, that the Trial Chamber's analysis of the *Justice* Case was incorrect.[1458] Second, he submits that the Trial Chamber failed to carry out the required case-by-case assessment of whether the conduct in question was of similar gravity to other enumerated crimes against humanity.[1459] NUON Chea avers in this regard that, instead of carrying out the required case-by-case assessment, it "articulated the elements of specific crimes and held that conduct which satisfied those elements was criminal as such".[1460]

575. The Co-Prosecutors respond that NUON Chea misrepresents the Trial Judgement and its assessment of the principle of legality, which, they argue, is "preserved with respect to each alleged sub-category of other inhumane acts" for which the convictions have been entered.[1461] The Co-Prosecutors also submit that the Trial Chamber correctly assessed the conduct on a case-by-case basis. The Trial Chamber considered the conduct in the context of the acts, the circumstances of and impact on the victims; and correctly determined that the CPK's commission of forced

[1453] Trial Judgement, paras 552, 565, 639, 643, 645.
[1454] NUON Chea's Appeal Brief, paras 400-421.
[1455] NUON Chea's Appeal Brief, paras 401-406, referring to Trial Judgement, paras 435-436.
[1456] NUON Chea's Appeal Brief, para. 405.
[1457] NUON Chea's Appeal Brief, paras 409-414.
[1458] NUON Chea's Appeal Brief, paras 415-421.
[1459] NUON Chea's Appeal Brief, paras 407-408.
[1460] NUON Chea's Appeal Brief, para. 408.
[1461] Co-Prosecutors' Response, para. 231.

transfers and enforced disappearances were of a "sufficiently similar nature and gravity to enumerated crimes in the ECCC Law".[1462]

576. In the view of the Supreme Court Chamber, there is no doubt that under customary international law as it stood in 1975, "other inhumane acts" was accepted as a residual category of crimes against humanity. This is illustrated by the existence of international legal instruments[1463] as well as jurisprudence deriving from post-World War II cases.[1464] Moreover, several international courts and tribunals have subsequently applied this category.[1465] In all these instances, courts did not rely on State practice post-1975 to establish the customary status of "other inhumane acts". To the contrary, they drew on the same post-World War II State practice. For all these reasons, it has been established that "other inhumane acts" constituted an established component of international criminal law at the time pertinent to the present case.

577. Nevertheless, the Supreme Court Chamber must determine whether the concept of "other inhumane acts" is sufficiently specific, so as to comply with the principle of *nullum crimen sine lege certa* as an element of the principle of legality.[1466]

578. Noting that "other inhumane acts" as a category of crimes that is meant to serve as a "residual clause" to avoid opportunities for evading the laws of humanity[1467] will be in natural tension with the requirement of *lex certa*,[1468] the

[1462] Co-Prosecutors' Response, paras 233, 234, 236.
[1463] *See* IMT Charter, Art. 6(c); IMTFE Charter, Art. 5(c); Control Council Law No. 10, Art. II(1)(c); Nuremberg Principles, Principle VI(c).
[1464] *See* *Ministries* Case, pp. 467-468 (the Accused were indicted for a range of crimes, "including murder, extermination, enslavement, imprisonment, killing of hostages, torture, persecutions on political, racial, and religious grounds, and other inhumane and criminal acts"); *Medical* Case, p. 198 (accused found guilty for taking a consenting part in "atrocities, in the course of which murders, brutalities, cruelties, tortures and other inhumane acts were committed"); *Gerbsch* Case (Special Court, Netherlands), p. 134 ("[a]cts of ill-treatment are covered by the terms 'other inhumane acts'"); *Zuehlke* Case (Special Court, Netherlands), p. 145 (illegal detention "fell under the notion of 'other inhumane acts committed against any civilian population'").
[1465] *See* M. Cherif BASSIOUNI, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press: 2014, p. 411 (BASSIOUNI reports that, as of November 2010, international courts and tribunals have entered sixty five convictions for other inhumane acts as crimes against humanity, with these crimes having been charged in a far greater number of cases).
[1466] *See* NUON Chea's Appeal Brief, para. 403.
[1467] Decision on IENG Sary's Appeal Against Closing Order (D427/1/30), para. 383, referring to *Duch* Trial Judgement (001-E188), para. 367; *Kupreškić* Trial Judgement (ICTY), para. 563; *Stakić* Appeal Judgement (ICTY), paras 315-316. *See also* ICRC Commentary on Geneva Convention IV, pp. 38-39.
[1468] *See* *Stakić* Trial Judgement (ICTY), para. 719.

Supreme Court Chamber is, nonetheless, satisfied that, if interpreted and applied in a way so as to restrain the scope of this residual category, the notion of other inhumane acts is sufficiently clear and precise to be consistent with the tenets of accessibility and foreseeability deriving from the principle of legality. In particular, the Supreme Court Chamber considers that the interpretative maxim of *ejusdem generis* provides an essential safeguard in this respect, as borne out by the Pre-Trial Chamber's extensive analysis of this issue, which concluded that, by 1975, "the principle that an individual may be held criminally responsible for committing crimes which are 'similar in nature and gravity' to the other listed crimes against humanity was established and generally understood".[1469] It is also of note that Article 7(1)(k) of the ICC Statute expressly adopts this concept when defining as crimes against humanity "[o]ther inhumane acts *of a similar character* [to those practices listed before]".[1470]

579. Other limitations have gradually emerged through the adjudication of crimes against humanity, both before and since the crimes that are the subject of the present proceedings were alleged committed. The Supreme Court Chamber draws on these developments to establish restraints on this category of crimes, considering that nothing prevents a court from drawing on subsequent legal developments consistent with the *lex mitior* principle to restrict the scope of established criminal law norms. Thus, in elaborating the meaning of gravity, a number of courts have sought to determine whether alleged conduct produced "serious mental or physical suffering", although they have not always used uniform language. The ICC Statute defines other inhumane acts as "acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".[1471] The *ad hoc* tribunals, on the other hand, have used the slightly different wording of "severe mental or physical suffering" or "serious bodily or mental harm".[1472] On the strength of this analysis and

[1469] Decision on IENG Sary's Appeal Against Closing Order (D427/1/30), paras 384-396. *See also* Max Planck Institute for Comparative Public Law and International Law, "Max Planck Encyclopedia of Public International Law - Nulla peona nullum crimen sine lege", 2010, para. 30, http://www.uni-koeln.de/jur-fak/kress/NullumCrimen24082010.pdf.
[1470] ICC Statute, Art 7 (1)(k) (emphasis added). *See also* *D. Milošević* Trial Judgement (ICTY), para. 934, citing *Vasiljević* Trial Judgement (ICTY), para. 234, confirmed in *Vasiljević* Appeal Judgement (ICTY), para. 165; *Galić* Trial Judgement (ICTY), para. 152. *See also* *Kordić and Čerkez* Appeal Judgement (ICTY), para. 117; *Martić* Trial Judgement (ICTY), para. 83; *Blagojević and Jokić* Trial Judgement (ICTY), para. 626; *Krnojelac* Trial Judgement (ICTY), para. 130; *Kajelijeli* Trial Judgement (ICTR), paras 932-933; *Kayishema and Ruzindana* Trial Judgement (ICTR), para. 151.
[1471] ICC Statute, Art. 7(1)(k).
[1472] *Vasiljević* Appeal Judgement (ICTY), para. 165; *Kordić and Čerkez* Appeal Judgement (ICTY),

recognising this minor linguistic variation, the Supreme Court Chamber is satisfied that the following limitations on "other inhumane" acts enjoy broad support within the corpus of modern international criminal law, and that they adequately circumscribe "other inhumane acts".

580. The particular elements of the crime of inhumane acts are: (i) there was an act or omission of similar seriousness to the other acts enumerated as crimes against humanity; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (iii) the act or omission was performed intentionally.

581. The Supreme Court Chamber notes that a variety of judicial bodies have applied this definition restrictively. The ICC found in the *Kenyatta* Case that forcible circumcision,[1473] castration,[1474] killings in front of children[1475] and injuries to demonstrators might amount to "other inhumane acts",[1476] while destruction of property might not.[1477] Similarly, other international courts and tribunals have reasoned that forced transfers,[1478] deplorable detention conditions,[1479] forcing individuals to witness the murder of a family member[1480] and using detainees as human shields[1481] all rose to the level of "other inhumane acts", but relatively minor assaults[1482] such as, for example, forcing the Tutsi to remain in Rwanda during the genocide,[1483] and forcing prisoners to turn a private property into a military headquarters did not amount to "other inhumane acts".[1484] As a matter of practice,

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para. 117; *D. Milošević* Trial Judgement (ICTY), para. 934; *Galić* Trial Judgement (ICTY), para. 152; *Blagojević and Jokić* Trial Judgement (ICTY), para. 626; *Krnojelac* Trial Judgement (ICTY), para. 130; *Kajelijeli* Trial Judgement (ICTR), paras 932-933 ("serious injury to the mental of physical health); *Kayishema and Ruzindana* Trial Judgement (ICTR), para. 151. *See also* *Stakić* Appeal Judgement (ICTY),, para. 366 (the Appeals Chamber found that "other inhumane acts require "proof of an act or omission causing *serious mental or physical suffering* or injury or constituting a serious attack on human dignity") (emphasis added).

[1473] *Kenyatta* Confirmation of Charges Decision (ICC), paras 270-273.
[1474] *Kenyatta* Confirmation of Charges Decision (ICC), paras 270-273.
[1475] *Kenyatta* Confirmation of Charges Decision (ICC), para. 276-277.
[1476] *Kenyatta* Confirmation of Charges Decision (ICC), para. 280.
[1477] *Kenyatta* Confirmation of Charges Decision (ICC), para. 279.
[1478] *Đordjević* Trial Judgement (ICTY), para. 1621.
[1479] *Krnojelac* Trial Judgement (ICTY), para. 133.
[1480] *Kupreškić* Trial Judgement (ICTY), para. 819.
[1481] *Naletilić* Trial Judgement (ICTY), para. 245; *Blaškić* Trial Judgement (ICTY); *Kordić and Čerkez* Trial Judgement (ICTY), para. 773.
[1482] *Krnojelac* Trial Judgement (ICTY), paras 200-204.
[1483] *Nyiramasuhuko* Trial Judgement (ICTR), para. 6144.
[1484] *Naletilić* Trial Judgement (ICTY), para. 311-312.

therefore, the Supreme Court Chamber observes that the limits set out above are applied with regularity across the different jurisdictions that enforce crimes against humanity, showing that these restraints are meaningful in application.

582. The Supreme Court Chamber notes the jurisprudence in the *Kupreškić* Case, where an ICTY Trial Chamber found that the *ejusdem generis* rule "does not prove to be of great assistance" to identify conduct qualifying as other inhumane acts.[1485] Instead, the ICTY Trial Chamber considered that:

> Less broad parameters for the interpretation of 'other inhumane acts' can instead be identified in international standards on human rights […]. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity.[1486]

583. The *Kupreškić* Trial Chamber cited provisions of humanitarian law and resolutions of the U.N. General Assembly to identify conduct amounting to inhumane treatment.[1487]

584. The Supreme Court Chamber is of the view that relating "other inhumane acts" to conduct infringing basic rights appertaining to human beings, as identified under international legal instruments, is a tenable concept in that, in addition to the material element traditionally identified through the criterion of *ejusdem generis*, it also introduces a requirement of formal international unlawfulness and, in this way, a further limitation on a blanket authorisation to interpret "other inhumane acts". Whereas this concept does not seem to have received broader acceptance, the Supreme Court Chamber notes its advantage for assuring the requirement of foreseeability. However, it is not required that the specific conduct was expressly criminalised under international law, as acknowledged by the Pre-Trial Chamber[1488] and endorsed by the Supreme Court Chamber; this is because to stipulate such a requirement would render futile and ineffective the very concept of other inhumane acts as a residual category of crimes against humanity. Rather, the "formal

[1485] *Kupreškić* Trial Judgement (ICTY), para. 564.
[1486] *Kupreškić* Trial Judgement (ICTY), para. 566.
[1487] *Kupreškić* Trial Judgement (ICTY), para. 566.
[1488] Decision on IENG Sary's Appeal Against Closing Order (D427/1/30), para. 389. *See also* Co-Prosecutors' Response, paras 231-232.

unlawfulness" requirement is to be achieved by identifying affirmative articulation of rights and prohibitions contained in human rights instruments, applicable at the time relevant for charges of "other inhumane acts". Among them, and prominently for the case at hand, Article 3 common to Geneva Conventions I to IV requires humane treatment of persons not taking an active part in hostilities and prohibits, *inter alia*, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, outrages upon personal dignity and, in particular, humiliating and degrading treatment and summary executions.[1489] Moreover, the Universal Declaration of Human Rights, which was adopted almost contemporaneously to the Nuremberg Principles, protects the right to life, liberty and security of person[1490] and the right to freedom of movement and residence within the borders of each State,[1491] while prohibiting, among other things, torture or cruel, inhuman or degrading treatment or punishment,[1492] discrimination,[1493] persecution,[1494] arbitrary arrest, detention or exile,[1495] arbitrary interference with privacy, family, home or correspondence and attacks upon honour and reputation.[1496]

585. In practical terms, an inhumane act reaching the gravity of other crimes against humanity usually will also violate the broad tenets of human rights articulated at the onset of crimes against humanity, with the right to liberty, freedom of movement and residence within the borders of a State and prohibition of cruel, inhuman or degrading treatment being particularly relevant to the present charges. Further developments in human rights standards and the refining of their norms might only be of relevance to the principle of *lex mitior* in the unlikely event of a subsequent abolition or limitation of a given human rights norm or its attendant proscription. Otherwise, the subsequent emergence of new, more specific human rights norms, including those of international criminal law – such as, for example, norms against forcible transfer or enforced disappearances – may serve to provide additional confirmation of the international unlawfulness of the prior specific conduct charged as

[1489] Geneva Conventions I-IV, Art. 3.
[1490] Universal Declaration on Human Rights, Art. 3.
[1491] Universal Declaration on Human Rights, Art. 13(1).
[1492] Universal Declaration on Human Rights, Art. 5.
[1493] Universal Declaration on Human Rights, Art. 7.
[1494] Universal Declaration on Human Rights, Art. 14(1).
[1495] Universal Declaration on Human Rights, Art. 9.
[1496] Universal Declaration on Human Rights, Art. 12.

"other inhumane acts" and be used as a tool to assess whether the conduct in question reaches the requisite level of gravity; however, the existence of more specific norms does not, as such, determine the compliance of the charge with the legality principle.

586. Accordingly, the Supreme Court Chamber dismisses NUON Chea's argument that, since "these offences as they were defined by the Trial Chamber did not exist in any form under customary law", the criminality of the conduct was not sufficiently foreseeable.[1497] Rather, the Supreme Court Chamber considers that the principle of *nullum crimen sine lege certa* is respected if the specific conduct which is found to constitute other inhumane acts violates a basic right of the victims and is of similar nature and gravity to other enumerated crimes against humanity. In the view of the Supreme Court Chamber, this requires a case-specific analysis of, in particular, the impact of the conduct on the victims and whether the conduct itself is comparable to the enumerated crimes against humanity. In these circumstances, the Supreme Court Chamber considers it unnecessary to analyse NUON Chea's arguments seeking to demonstrate that the forcible transfer of the population within a non-occupied State did not give rise to criminal liability or was prohibited under international law in 1975 or that the notion of "enforced disappearance" did not exist.[1498]

587. NUON Chea submits further that the Trial Chamber erred because it failed to carry out a case-specific analysis of the gravity of the conduct in question and instead "articulated the elements of specific crimes and held that conduct which satisfied those elements was criminal as such".[1499]

588. The Supreme Court Chamber recalls that the Trial Chamber indeed set out the elements of enforced disappearance[1500] and forced transfer;[1501] it subsequently

[1497] NUON Chea's Appeal Brief, para. 405.
[1498] *See* NUON Chea's Appeal Brief, paras 409-419.
[1499] NUON Chea's Appeal Brief, para. 408.
[1500] Trial Judgement, para. 448, (the Trial Chamber concluded that "enforced disappearances may be of similar gravity to the other crimes against humanity […] and thus may fall within the ambit of 'other inhumane acts'". The Trial Chamber then provided a definition of enforced disappearances, identifying three objective elements: "(i) an individual is deprived of his or her liberty; (ii) the deprivation of liberty is followed by the refusal to disclose information regarding the fate or whereabouts of the person concerned, or to acknowledge the deprivation of liberty, and thereby deny the individual recourse to the applicable legal remedies and procedural guarantees, and (iii) the first and second elements were carried out by state agents, or with authorisation, support or acquiescence of a State or political organisation").
[1501] Trial Judgement, para. 450 (the Trial Chamber provided a definition of forced transfer comprising

assessed the relevant facts against these elements.[1502] Nevertheless, the Trial Chamber also assessed in respect of both enforced disappearances and forced transfer whether, in this case, the conduct it found to have been established rose to the level of other crimes against humanity enumerated in the ECCC Law so as to qualify as an "inhumane act" as a crime against humanity.[1503] Accordingly, NUON Chea's argument is factually incorrect and therefore stands to be dismissed.

589. Nonetheless, the Trial Chamber's approach discloses confusion as to the methodology applicable in identifying the criminality of "other inhumane acts", discussed above. While it is clear that other inhumane acts was an accepted category of crimes against humanity in 1975,[1504] it is equally clear that enforced disappearances and forced transfer had not yet crystallised into separate categories of crimes against humanity. Indeed, such crystallisation would occur only many years later, as eventually evidenced by their inclusion as separate categories of crimes against humanity in Article 7(1)(d) and (i) of the ICC Statute.[1505] Accordingly, enforced disappearances or forced transfer did not, in 1975, form discrete categories of crimes against humanity, nor did enforced disappearances and forced transfer have specific *legal* definitions and elements. For that reason, stipulating elements of enforced disappearance or enforced transfer as though they constituted separate categories of crimes against humanity was anachronistic and legally incorrect, whereas subsequently analysing the conduct under the same sub-headings as "legal findings", among other discrete crimes against humanity, was, at a minimum, confusing. Rather, the guiding issue – and indeed the only one of relevance – was whether the conduct in question, in light of all the specific circumstances of the case at hand, actually fulfilled the definition of other inhumane acts.

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four elements: "(i) intentional, (ii) forced displacement of individuals (iii) from an area in which they are lawfully present, (iv) not justified by concerns regarding the security of the civilian population or military necessity").

[1502] Trial Judgement, paras 547-552, 630-639 (for forced transfer), 640-643 (for enforced disappearance). The Supreme Court Chamber notes that in respect of "attacks against human dignity", the Trial Chamber did not define elements, but merely referred to judicial decisions that have classified "deprivations of food, water, adequate shelter and medical assistance and sub-par sanitary conditions" as amounting to crimes against humanity (Trial Judgement, para. 457).

[1503] *See* Trial Judgement, paras 639, 643.

[1504] *See above*, para. 576.

[1505] ICC Statute, Art 7 (1)(d), (i).

590. The Supreme Court Chamber recalls that the Trial Chamber's findings regarding the crime against humanity of other inhumane acts committed through practices of forced transfer, enforced disappearances and attacks against human dignity, rested essentially on the same set of events established in relation to Population Movement Phases One and Two, namely the forcible displacement of large groups of the population under harsh conditions.[1506] Each set of events was, due to the uniformity of the established mode of commission, purpose, *modus operandi*, direct perpetrators and defined time frame qualified as one "act" or "conduct" in the sense of criminal law.[1507] Therefore, rather than dissecting elements of this conduct and testing it separately against the purported elements of "forced transfer", "enforced disappearances" and "attacks against human dignity", as if they were discrete crimes, the Trial Chamber should have considered the conduct during Population Movement Phases One and Two holistically for each phase, with a view to determining whether its nature and gravity was similar to that of enumerated crimes against humanity. As the Trial Chamber did not carry out the required holistic analysis, the Supreme Court Chamber will do so, based on the relevant factual findings contained in the Trial Judgement. As several of these factual findings are challenged on appeal, the Supreme Court Chamber will first consider the relevant grounds of appeal.

b) Conditions of the evacuation and the use of violence during Population Movement Phase One

591. The Trial Chamber, when finding that the evacuation of Phnom Penh amounted to the other inhumane act of forced transfer and attacks against human dignity, noted the "coercive and threatening"[1508] and "violent circumstances"[1509] of the evacuation of Phnom Penh as well as the "inhumane conditions"[1510] to which the evacuees were subjected and their "severity".[1511] The Trial Chamber found that "[a]t least two million people in Phnom Penh were forcibly evicted […] at gunpoint" and

[1506] *See* Trial Judgement, paras 548 and 563-565 (Population Movement Phase One), 630-638, 640-642, 644-645 (Population Movement Phase Two).
[1507] *See* Closing Order (D427), paras 221-261 (regarding Population Movement Phase One), 262-282 (regarding Population Movement Phase Two).
[1508] Trial Judgement, para. 552.
[1509] Trial Judgement, para. 565.
[1510] Trial Judgement, para. 552.
[1511] Trial Judgement, para. 565.

that "[t]hey were forced to abandon their houses and property".[1512] The Trial Chamber also found that the "majority [of the evacuees] witnessed beatings, shootings and killings".[1513]

592. NUON Chea and KHIEU Samphân submit that the Trial Chamber erred in fact when making findings regarding the conditions of the evacuation to convict the Accused of other inhumane acts through attacks against human dignity and forced transfer.[1514] NUON Chea accepts that the population of Phnom Penh had to leave the city and that "some evacuees faced poor conditions, threats and/or violence".[1515] He argues, however, that the Trial Chamber "grossly exaggerate[d] both the severity of the conditions and the uniformity with which they were experienced by evacuees".[1516] Similarly, KHIEU Samphân argues, in particular, that the Trial Chamber did not accord sufficient weight to inconsistencies in witness testimony concerning the treatment of the population.[1517]

593. As to the implementation of the evacuation of Phnom Penh, NUON Chea recalls that a large part of the population of the city consisted of refugees; he submits that "[t]he mere fact that people were required to leave the city on short notice […] does not necessarily prove that threats or physical force were employed to ensure that they left".[1518] NUON Chea also submits that there is no, or limited, evidence of forced travel outside the general vicinity of Phnom Penh after the first few hours of the evacuation and therefore the Trial Chamber's finding that "under all circumstances, evacuees were forced to keep moving" was erroneous.[1519] NUON Chea submits that several factual findings regarding the conditions of the evacuation were exaggerated, not based on sufficient evidence,[1520] or unsupported by eyewitness testimony.[1521]

[1512] Trial Judgement, para. 563.
[1513] Trial Judgement, para. 563.
[1514] NUON Chea's Appeal Brief, paras 422-429; KHIEU Samphân's Appeal Brief, paras 351-352.
[1515] NUON Chea's Appeal Brief, para. 423.
[1516] NUON Chea's Appeal Brief, para. 423.
[1517] KHIEU Samphân's Appeal Brief, paras 347, 351-352.
[1518] NUON Chea's Appeal Brief, para. 424.
[1519] NUON Chea's Appeal Brief, para. 425, referring to Trial Judgement, para. 492.
[1520] NUON Chea's Appeal Brief, paras 426-429; *see also* paras 322-326.
[1521] NUON Chea's Appeal Brief, paras 426, 428.

594. The Co-Prosecutors respond that the Accused take an unnecessarily narrow and fragmented approach to the Trial Chamber's findings, fail to accord due weight to civil party evidence and mischaracterise the Trial Chamber's use of the evidence.[1522]

595. In respect of NUON Chea's argument that "[t]he mere fact that people were required to leave the city on short notice […] does not necessarily prove that threats or physical force were employed to ensure that they left", referring to the testimony of a witness that refugees wanted to return to where they had come from once the war was over,[1523] the Supreme Court Chamber considers that, even though refugees residing in Phnom Penh may have generally been open to the idea of returning to their homes in the countryside, there is no indication that the refugees willingly left Phnom Penh at the time and under the conditions imposed by the Khmer Rouge. Further, as noted by the Co-Prosecutors,[1524] this argument is based on too narrow an understanding of what constitutes force. The Trial Chamber defined force as including "coercion, fraud, exploitation of a panic and the pressure of terror".[1525] This definition conforms with the approach taken by the ICTY, which has found that force is not limited to physical force, but includes threats of force or coercion, such as those caused by fear of violence, duress, psychological oppression, abuse of power, or by taking advantage of a coercive environment.[1526] Thus, the conclusion that force had actually been used to make the evacuees leave Phnom Penh once the Khmer Rouge had gained control over the city was not unreasonable.

[1522] Co-Prosecutors' Response, para. 238; *see also* paras 239-247.
[1523] NUON Chea's Appeal Brief, para. 424, referring to T. 29 January 2013 (Al ROCKOFF), E1/166.1, pp. 11-13.
[1524] Co-Prosecutors' Response, para. 241.
[1525] *See* Trial Judgement, fn. 1329.
[1526] *Krajišnik* Appeal Judgement (ICTY), para. 319; *Stakić* Appeal Judgement (ICTY), paras 279, 281; *Đorđević* Appeal Judgement (ICTY), para. 727 ("forced displacement requires, *inter alia*, that the victims had no genuine choice"). Fear of violence or use of force may create an environment where one is forced to leave. Whether the transferees had a genuine choice is to be determined bearing in mind the context of each case. For example, accused were charged and/or convicted based on the following acts which contributed to conditions that constituted forced transfer: ordering people out of their homes and in some instances going house to house to implement transfers (*Milutinović* Trial Judgement (ICTY), Vol. II, paras 1, 49-50, 288, 694, 731, 801-802, 891-892, 950); employing armed force and intimidation in carrying out transfers (*Brđanin* Trial Judgement (ICTY), paras 548, 1027; *Martić* Trial Judgement (ICTY), paras 427, 429; *Milutinović* Trial Judgement (ICTY), Vol. II, paras 463, 950); sexually assaulting evacuees (*Milutinović* Trial Judgement (ICTY), Vol. II, paras 50, 694, 802); beating and killing evacuees (*Martić* Trial Judgement (ICTY), para. 427, 429; *Milutinović* Trial Judgement (ICTY), Vol. II, paras 288, 463, 557, 731, 802, 1005); looting and stealing from evacuees (*Stakić* Trial Judgement (ICTY), para. 321; *Martić* Trial Judgement (ICTY), para. 426, 429; *Milutinović* Trial Judgement (ICTY), Vol. II, paras 50, 288, 557, 694, 731, 802, 1005); and imposing intolerable living conditions (*Brđanin* Trial Judgement (ICTY), para. 1027).

596. As to NUON Chea's argument that the Trial Chamber erred when it found that "under all circumstances, evacuees were forced to keep moving",[1527] as most of the evidence on which it relied related to the first hours of the evacuation, and that, subsequently, the evacuees had been largely allowed to go where they liked,[1528] the Supreme Court Chamber notes that NUON Chea accepts that the evacuees were told, for whatever reason, that they could not return to Phnom Penh.[1529] Thus, once they had left the city, the evacuees had no genuine choice but to keep moving away from Phnom Penh. In addition, the evidence shows that force was applied during the evacuation and not just within the first few hours of the commencement of the evacuation. While it is correct that the testimony of MEAS Saran as well as some of the out-of-court evidence on which the Trial Chamber relied related to events in Phnom Penh, the Trial Chamber also referred to the testimony of Civil Party NOU Hoan, who stated more generally that he had been forced to keep moving.[1530] The Supreme Court Chamber notes that in the section of the Trial Judgement dealing with the situation three days after the fall of Phnom Penh,[1531] the Trial Chamber relied on additional evidence, namely thirteen separate accounts expressly demonstrating that during the evacuation of Phnom Penh the Khmer Rouge had "forced",[1532] "told"[1533] or

[1527] NUON Chea's Appeal Brief, para. 425, referring to Trial Judgement, para. 492.
[1528] NUON Chea's Appeal Brief, para. 425.
[1529] NUON Chea's Appeal Brief, para. 425.
[1530] *See* Trial Judgement, para. 492, fn. 1476, referring to T. 30 May 2013 (NOU Hoan), E1/199.1, pp. 6-7.
[1531] Trial Judgement, paras 486-488.
[1532] Trial Judgement, paras 481, 486-487, referring to T. 19 October 2012 (YIM Sovann), E1/135.1, pp. 83, 93 (YIM Sovann recalled that it had taken her about five or six days to reach Steung Kampong Tuol and that she then had to continue her journey "after we were forced to do so"; afterwards, it had taken her about a month to reach Pouthi Ban); T. 29 May 2013 (THOUCH Phandara), E1/198.1, p. 6 (THOUCH Phandara described how the Khmer Rouge soldiers had kept forcing her family to move forwards with the mass of people after leaving Phnom Penh. She further stated that "the soldiers forced us to move on").
[1533] Trial Judgement, paras 486-487, referring to T. 5 December 2012 (KIM Vanndy), E1/148.1, pp. 98-99, 102-103 (KIM Vanndy stated his mother had been told by a Khmer Rouge soldier, after the third night, to continue to her village); T. 22 October 2012 (CHUM Sokha), E1/136.1, pp. 43, 47, 82, 99 (CHUM Sokha stated that when leaving Phnom Penh during the first days they "were not allowed to stay in one place" so they "continued walking further" and they were told they could not return to Phnom Penh); T. 5 December 2012 (PECH Srey Phal), E1/148.1, pp. 22, 25, 29 (PECH Srey Phal recalled that she had heard through loudspeakers an announcement stating that people should continue moving forward until they found their way to their hometowns); T. 12 December 2012 (Denise AFFONÇO), E1/152.1, pp. 104-105 (Denise AFFONÇO stated that it had taken her three days to get to an island and that the Khmer Rouge had instructed people where to go); T. 4 December 2012 (TOENG Sokha), E1/147.1, pp. 41-42, 44 (TOENG Sokha described that, she had been asked to evacuate her house in Phnom Penh, she walked south until reaching Kbal Thnal province the following day, and then being instructed to head east); T. 27 May 2013 (SOU Sotheavy), E1/197.1, pp. 11, 25 (SOU Sotheavy stated that she had been forced to continue along National Road 1).

"ordered"[1534] people to continue moving forward, even though, in some cases, civilians did not know where they were heading. To the extent that NUON Chea argues that the evacuees could move at a slow pace,[1535] the Supreme Court Chamber considers that the pace of evacuation or how quickly people travelled does not negate the application of force or the coercive circumstances thereof; in this regard, the Trial Chamber did not enter a finding that people were required to move fast, but that they had no choice. It was therefore not unreasonable for the Trial Chamber to conclude that "under all circumstances, evacuees were forced to keep moving".[1536]

597. Furthermore, NUON Chea complains about findings of the Trial Chamber that were, in his view, exaggerations or unjustified generalisations.[1537] He refers, in particular, to the Trial Chamber's findings that "[c]onditions throughout the journey were miserable and most lacked even the most basic equipment with which to cook",[1538] "[t]he journey of most evacuees was marked by terror and threats or incidents of violence"[1539] by Khmer Rouge soldiers, "those evacuated experienced terrible conditions throughout their journey including extreme heat and a lack of sufficient food, clean water, medicine or adequate accommodation",[1540] "[t]he majority [of those evacuated from their homes] witnessed beatings, shootings and killings and saw countless dead bodies lying along the roads as they exited Phnom Penh",[1541] and "[t]he evacuees' journeys were marked by the almost complete absence of food, water, medical care, shelter and hygiene facilities for periods ranging from several days to several weeks".[1542] KHIEU Samphân further challenges the Trial Chamber's assessment of evidence in this respect, arguing that the evidence does not lead to a finding of consistency in the treatment of the population.[1543]

[1534] Trial Judgement, para. 486, referring to T. 6 November 2012 (MOM Sam Oeurn), E1/141.1, p. 17 (MOM Sam Oeurn described that, after nearly one week of travelling, they had arrived at their first destination from leaving Phnom Penh in Samraong, roughly 40 kilometres from the city, and afterwards they had been ordered to move Preaek Koy, which is about 10-20 kilometres from Samraong).
[1535] NUON Chea's Appeal Brief, para. 425.
[1536] Trial Judgement, para. 492.
[1537] NUON Chea's Appeal Brief, paras 426-429.
[1538] NUON Chea's Appeal Brief, para. 426, referring to Trial Judgement, para. 487.
[1539] NUON Chea's Appeal Brief, para. 426, referring to Trial Judgement, para. 489.
[1540] NUON Chea's Appeal Brief, para. 426, referring to Trial Judgement, para. 491.
[1541] NUON Chea's Appeal Brief, para. 428, referring to Trial Judgement, para. 563.
[1542] NUON Chea's Appeal Brief, para. 429, referring to Trial Judgement, para. 564.
[1543] KHIEU Samphân's Appeal Brief, para. 347.

598. NUON Chea's and KHIEU Samphân's arguments raise two issues. The first issue relates to the question of whether the Trial Chamber was entitled to make generalised findings about the experience of all or the majority of the evacuees based on the testimony of a relatively small number of witnesses. The Supreme Court Chamber considers that in cases involving alleged mass criminality, it will often be impossible to call all witnesses that could testify to the set of events in question. In such situations, the fact finder may be called upon to make inferences from the evidence as to the broader experience. Such an approach is not *per se* erroneous; to the extent, however, that the conviction depends on such a generalised finding, it has to be established beyond reasonable doubt. Nevertheless, the burden remains on the appellant alleging a factual error to demonstrate that the extrapolation made by the first-instance chamber in reaching the finding was unreasonable.

599. The second issue relates to the assessment of the evidence underlying the Trial Chamber's findings. The Trial Chamber considered extensive evidence of the 17 April 1975 evacuation of Phnom Penh, reflecting a range of differing experiences and conditions.[1544] Given the sheer scale of the population movement in a short period of time[1545] and the range of divisions of Khmer Rouge soldiers who took part in the evacuation,[1546] individual accounts varied, which, contrary to what KHIEU Samphân submits,[1547] has been reflected in the Trial Judgement.[1548]

600. The Trial Chamber, nevertheless, found that the "*majority* witnessed beatings, shootings and killings and saw countless dead bodies lying along the road as they exited Phnom Penh".[1549] The Supreme Court Chamber notes that the Trial Chamber, in the same paragraph of the Trial Judgement, found that "[a]t least two million people in Phnom Penh were forcibly evicted from their houses".[1550] Thus, the "majority" of evacuees refers to at least one million people. In support of this finding,

[1544] Trial Judgement, paras 460-574.
[1545] *See* Trial Judgement, para. 520.
[1546] *See* Trial Judgement, para. 470 (some forces were in charge of evacuation whilst others were responsible for monitoring the evacuation).
[1547] KHIEU Samphân's Appeal Brief, paras 347, 351-352.
[1548] *See*, *e.g.*, Trial Judgement, para. 588 (in some places, "New People" were displaced, while in others, both "Old People" and "New People" were displaced; conditions during transports varied).
[1549] Trial Judgement, para. 563 (emphasis added); *See also* para. 489 ("[t]he journey of most evacuees was marked by terror and threats or incidents of violence by Khmer Rouge soldiers")
[1550] Trial Judgement, para. 563.

the Trial Chamber referred to eight paragraphs in preceding sections,[1551] which include findings as to the experiences and conditions of the evacuation of Phnom Penh, based on a variety of evidence, including out-of-court evidence and eyewitness testimony.[1552] While these more concrete factual findings recount the experiences of several evacuees, the Trial Chamber did not explain how it was able to infer that at least one million people shared the same experience of witnessing beatings, shootings and killings and reach such a finding beyond reasonable doubt, nor is such an explanation evident. In the absence of any such explanation, the Supreme Court Chamber considers that the Trial Chamber's finding amounted to an unreasonable extrapolation. The Supreme Court Chamber shall consider the impact of this factual error below. Similarly, the Trial Chamber's findings that "*most* lacked even the most basic equipment with which to cook",[1553] "[t]he journey of *most* evacuees was marked by terror and threats or incidents of violence by Khmer Rouge soldiers",[1554] are extrapolations that are not reasonably supported by the underlying evidence.

601. In contrast, the Supreme Court Chamber considers that the findings that "those evacuated experienced terrible conditions throughout their journey including extreme heat and a lack of sufficient food, clean water, medicine or adequate accommodation"[1555] and that "[t]he evacuees' journeys were marked by the almost complete absence of food, water, medical care, shelter and hygiene facilities for periods ranging from several days to several weeks"[1556] are sufficiently supported by evidence. Further, these findings, while formulated in a generalised manner, do not speculate as to the proportion of the evacuees affected. The Trial Chamber relied on mutually corroborative evidence including three accounts of live witness testimony and numerous accounts of live civil party testimony describing the lack of food,[1557]

[1551] Trial Judgement, fn. 1674, paras 473-474, 486, 489-491, 497-498.
[1552] Trial Judgement, paras 471, 473-474, 486, 489-491, 497-498.
[1553] Trial Judgement, para. 487 (emphasis added).
[1554] Trial Judgement, para. 489 (emphasis added).
[1555] NUON Chea's Appeal Brief, para. 426, referring to Trial Judgement, para. 491.
[1556] NUON Chea's Appeal Brief, para. 429, referring to Trial Judgement, para. 564.
[1557] Trial Judgement, paras 487, 491, referring to, *inter alia*, T. 31 May 2012 (SAKIM Lmut *alias* SAR Kimlomouth), E1/79.1, pp. 6-8 (SAKIM Lmut stated that there had been no proper arrangement for people to have food and every family had to find their own food); T. 5 December 2012 (KIM Vanndy), E1/148.1, pp. 100-103 (KIM Vanndy testified that along the road, on the east side of the river, the situation had been miserable; he and his family lacked everything, food and even a cooking pot; they had survived from day to day hoping the situation would not last long); T. 30 May 2013 (PO Dina), E1/199.1, p. 98 (PO Dina stated that they had not had food, or even a spoon or cooking pot along the way and that the life had been miserable); T. 19 October 2012 (YIM Sovann), E1/135.1, p. 84 (YIM

clean water,[1558] accommodation or shelter[1559] as well as medicine,[1560] and the fact that some of the evacuees had to exchange their belongings for food or what was necessary to survive.[1561] In addition, the Trial Chamber relied on evidence that the peak of the hot season worsened the situation.[1562] The Supreme Court Chamber is not

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Sovann testified that there had been no food, along the road);. *See also* T. 22 November 2012 (OR Ry), E1/145.1, p. 101 (OR Ry described how her younger siblings had cried because of hunger); T. 30 May 2013 (NOU Hoan), E1/199.1, p. 7 (NOU Hoan stated that the main challenge had been the lack of food and the lack of medical treatment).

[1558] Trial Judgement, para. 487, referring to, *inter alia*, T. 22 October 2012 (CHUM Sokha), E1/136.1, pp. 45, 47 (CHUM Sokha recalled that during the month they had travelled, they had struggled to find clean water to drink or cook rice; if they could not find drinking water or water to cook the rice, they had to try to locate a pond or a lake nearby so that they could use the water.); T. 19 October 2012 (YIM Sovann), E1/135.1, p. 84 (YIM Sovann testified that there had been no water along the road; T. 29 May 2013 (HUO Chanthar *alias* HUO Chantal), E1/198.1, p. 73 (HUO Chanthar stated that she had been so desperate for water on the second day after evacuation that she drank from a pond, even though it had smelled terribly and appeared contaminated.).

[1559] Trial Judgement, para. 488, referring to T. 22 October 2012 (CHUM Sokha), E1/136.1, pp. 45, 99-100 (CHUM Sokha stated that they had rested along the road, or at the entrance of pagodas or sometimes under a tree; that nobody had given them specific instructions as to where to gather and rest); T. 4 June 2013 (BAY Sophany), E1/200.1, p. 9 (BAY Sophany indicated that along the way they had stopped and rested at empty houses that belonged to Chinese families); T. 5 December 2012 (PECH Srey Phal), E1/148.1, pp. 21-22, 24 (PECH Srey Phal stated that she had spent the first night at the roadside; she explained that some had slept on a bed in market stalls and people could even sleep on the roads as there was no traffic; they had rested wherever they reached that night and used tree leaves to cover the ground and sleep on); T. 30 May 2013 (PO Dina), E1/199.1, p. 96 (PO Dina testified that they had slept on the way and just went on without knowing where they were heading.); T. 6 November 2012 (MOM Sam Oeurn), E1/141.1, pp. 11-12 (MOM Sam Oeurn recounted how she and her family had slept on the floor of a pagoda); T. 22 November 2012 (OR Ry), E1/145.1, p. 101 (OR Ry stated that during the night, they had slept on the ground in the middle of the forest swamped by mosquitoes); T. 4 June 2013 (BAY Sophany), E1/200.1, pp. 10-11 (BAY Sophany stated that she and her children had been chased to the outskirts of Traeuy Sla village; they had built a shelter out of palm tree leaves and tree branches).

[1560] Trial Judgement, para. 491, referring to, *inter alia*, T. 30 May 2013 (NOU Hoan), E1/199.1, p. 7 (NOU Hoan stated that the main challenge had been the lack of food and the lack of medical treatment); YIM Sovann Interview Record, E3/5787, dated 27 August 2009, p. 4, ERN (En) 00379312 (YIM Sovann testified that during the walk, nothing had been provided to them: there had been no food, water and medicine); T. 27 May 2013 (YOS Phal), E1/197.1, pp. 72, 77 (YOS Phal testified that during the course of his journey, his health had deteriorated; he had fever and no proper medicine, so he had to pick some bitter leaves along the road to pound them and cook and drink as a form of medicine; during the journey, he had been pale and emaciated, sick and hungry); T. 23 October 2012 (LAY Bony), E1/137.1, pp. 94-95 (LAY Bony stated that her younger daughter had experienced bowel problems because her stomach could not sustain the food, and they had had no medicine to treat her).

[1561] Trial Judgement, paras 487, f. 1454 referring to, *inter alia*, T. 25 April 2013 (RUOS Suy), E1/184.1, p. 89 (RUOS Suy described that people had had to stop midway to exchange their clothes for some food); T. 23 October 2012 (LAY Bony), E1/137.1, p. 94 (LAY Bony recalled that she had begged for corn from "Base People" in exchange for some of the possessions that she had); T. 4 December 2012 (TOENG Sokha), E1/147.1, p. 45 (TOENG Sokha stated that she had had to exchange their gold and jewellery for some foodstuff and things they needed to survive); T. 23 November 2012 (CHAU Ny), E1/146.1, p. 55 (CHAU Ny stated that during the first few months, they had had to exchange belongings for food to survive on).

[1562] Trial Judgement, para. 491, referring to T. 30 May 2013 (NOU Hoan), E1/199.1, p. 6 (NOU Hoan explains that the evacuation of Phnom Penh had taken place in a middle of the dry season and hence the weather had been very hot; as people had not brought many belongings, some had used banana stalk for shoe replacement; he recalls that flies had been everywhere, that there had been no public toilets and people had to go into the woods to relive themselves).

persuaded by NUON Chea's argument that, had the conditions been as difficult as found by the Trial Chamber, "hundreds of thousands of people would have died".[1563] This argument is based on mere speculation.

602. As to KHIEU Samphân's argument that the Trial Chamber ignored evidence regarding disparities in the treatment of the evacuees and erred when finding that, "overall", the Khmer Rouge had not made available sufficient assistance,[1564] the Supreme Court Chamber considers, in light of what has been said above, that it has not established that the Trial Chamber's conclusion was unreasonable – in fact, by making the finding as to the "overall" lack of assistance, the Trial Chamber reflected that the evidence on this issue was not entirely uniform.

603. In sum, and subject to what has been said above, the Supreme Court Chamber rejects the Accused's arguments regarding the Trial Chamber's findings on the conditions during the evacuation of Phnom Penh.

c) Purported justifications of Population Movement Phase One

604. The Trial Chamber rejected the Accused's arguments that the evacuation of Phnom Penh was a legitimate and lawful population transfer undertaken for economic or military reasons, including fear of an imminent American bombing campaign.[1565] In respect of the latter, the Trial Chamber found that the American bombing campaign had ended by August 1973,[1566] with only an isolated (and unrelated) incident occurring in May 1975.[1567] On the basis of, *inter alia*, witness statements and a CPK publication, the Trial Chamber concluded that "the decision to evacuate was not motivated by a desire to protect the people of Phnom Penh from U.S. bombing", but was based on previous practices and experience in other areas and on "military, economic and ideological reasons", so that people could be better controlled.[1568]

605. Discussing the argument that there had been a food crisis in Phnom Penh, which the evacuation of the city allegedly sought to alleviate, the Trial Chamber

[1563] NUON Chea's Appeal Brief, para. 429.
[1564] KHIEU Samphân's Appeal Brief, paras 351-352.
[1565] Trial Judgement, paras 525-545.
[1566] Trial Judgement, para. 527.
[1567] Trial Judgement, para. 528.
[1568] Trial Judgement, para. 534.

found that, while the situation in Phnom Penh had been dire, the Khmer Rouge had been in control of all transportation routes, including the airport, yet rejected any humanitarian assistance from perceived enemies, and instead decided to evacuate the city with only little prior planning and preparation.[1569] The Trial Chamber noted that "it would [have been] easier to feed a static population rather than millions of people streaming out of the city in all directions".[1570] It concluded that the food situation in Phnom Penh had not been the "principal reason" for the evacuation of Phnom Penh.[1571]

606. In its legal findings regarding other inhumane acts through forced transfer, the Trial Chamber concluded that Phnom Penh had neither been evacuated for "imperative military reasons", nor for humanitarian objectives.[1572] It noted the contention that the evacuation had been part of a legitimate resettlement policy, but concluded that "[e]conomic policy is not one of the grounds recognised under international law that justifies forced transfer of a population".[1573] The Trial Chamber found that, in any event, the evacuation was disproportionate.[1574]

607. NUON Chea disputes the Trial Chamber's findings and conclusions.[1575] He submits that, "[s]een in its totality in light of the state of the law in 1975, the evacuation was lawful and therefore not criminal".[1576] He repeats arguments from trial that the evacuation was driven by legitimate factors and that hardship would have been likely with or without an evacuation.[1577] Similarly, KHIEU Samphân submits that the evacuation was legitimate and that the Trial Chamber committed errors of fact by minimising the historical context of the decision to evacuate.[1578]

608. The Co-Prosecutors argue that the Trial Chamber applied the correct legal standard to its assessment of other inhumane acts through forced transfer and

[1569] Trial Judgement, para. 537-539.
[1570] Trial Judgement, para. 539.
[1571] Trial Judgement, para. 540.
[1572] Trial Judgement, para. 549.
[1573] Trial Judgement, para. 549.
[1574] Trial Judgement, para. 551.
[1575] NUON Chea's Appeal Brief, paras 433-441.
[1576] NUON Chea's Appeal Brief, para. 434.
[1577] NUON Chea's Appeal Brief, para. 434.
[1578] KHIEU Samphân's Appeal Brief, paras 224-228.

reasonably concluded, based on the totality of the evidence, that the evacuation was unlawful.[1579]

609. The Supreme Court Chamber recalls that the Trial Chamber made findings regarding the potential justification of the evacuation of Phnom Penh in the context of determining whether it constituted "forced transfer" as a subcategory of the crime against humanity of other inhumane acts.[1580] The Supreme Court Chamber has found this approach to have been in error, as the Trial Chamber's analysis ought to have been aimed at determining whether, under the circumstances of the case, the conduct found to have taken place during Population Movement Phase One qualified as an "inhumane act".[1581] Nevertheless, the Supreme Court Chamber considers that the question of the potential justification of the evacuation arises regardless of the approach and will consider the arguments of NUON Chea and KHIEU Samphân in turn.

610. NUON Chea challenges, first, the Trial Chamber's finding that the evacuation of Phnom Penh had not been motivated by fear of an American bombing.[1582] He submits that the Trial Chamber unreasonably relied on a subsequent CPK statement that the decision to evacuate was made to "smash" American "dark manoeuvres and […] criminal plans", as the bombing of Phnom Penh was precisely the type of attack the CPK had feared; accordingly, the CPK statement in question corroborated rather than disproved that fear of American bombing had been the reason for the evacuation.[1583] The Supreme Court Chamber considers that the Trial Chamber's approach was not unreasonable. If considered in context, the passage relied upon can be reasonably understood as not referring to potential aerial bombing attacks, but resistance within the city. Similarly, to the extent that NUON Chea challenges the Trial Chamber's findings regarding the change in the political and military situation and, in particular, the decision of the U.S. Congress to withdraw funding for aerial bombing,[1584] NUON Chea merely presents an alternative evaluation of the evidence without demonstrating that the Trial Chamber's assessment of the evidence was

[1579] Co-Prosecutors' Response, paras 252-263.
[1580] *See* Trial Judgement, paras 549-552.
[1581] *See above*, para. 590.
[1582] NUON Chea's Appeal Brief, paras 435-438.
[1583] NUON Chea's Appeal Brief, para. 435, quoting Trial Judgement, para. 531.
[1584] NUON Chea's Appeal Brief, para. 436.

unreasonable. The same holds true for NUON Chea's argument that the Trial Chamber erred when relying on the fact that the CPK leadership had decided to move to Phnom Penh in April 1975 to conclude that there had been no genuine concern of aerial bombing.[1585] In this regard, it is worth noting that the Trial Chamber not only relied on the fact that the CPK leadership had moved to Phnom Penh, but also that the members of the CPK leadership had "based themselves in prominent locations apparently without any significant attempt to take precautions against aerial bombing".[1586] As to the argument that the Trial Chamber relied on the testimony of a single, low-ranking soldier to find that fear of American bombing had been merely a pretence used to deceive the population of Phnom Penh,[1587] the Supreme Court Chamber notes that the Trial Chamber found this testimony to "further undermine" NUON Chea's claim that the CPK leadership had believed in the need for immediate evacuation. Thus, the testimony of the witness was but one element of the Trial Chamber's analysis.

611. In sum, NUON Chea has not demonstrated that the Trial Chamber's finding as to fear of American bombings as a justification for the evacuation of Phnom Penh was such that no reasonable trier of fact could have reached it. NUON Chea's arguments are therefore rejected.

612. Similarly, KHIEU Samphân argues that the Trial Chamber erred in fact by rejecting the contention that the CPK leadership had believed that the U.S. bombing had been a present and a real danger at the time of the evacuation.[1588] He argues that the Trial Chamber analysed the events from the perspective of 2014 rather than from the perspective of the Cold War, but does not substantiate his argument or demonstrate how the Trial Chamber's findings were unreasonable. He refers to evidence that, in his submission, shows fear of American intervention or resistance by Khmer Republic forces, but he fails to demonstrate that the Trial Chamber's assessment of the evidence, which he does not even discuss, was unreasonable.

[1585] NUON Chea's Appeal Brief, para. 437.
[1586] Trial Judgement, para. 528.
[1587] NUON Chea's Appeal Brief, para. 438.
[1588] KHIEU Samphân's Appeal Brief, para. 226.

613. NUON Chea further argues that the Trial Chamber "rejected entirely [his] explanation that food supplies within Phnom Penh affected the decision to evacuate the city".[1589] The Supreme Court Chamber notes that this is factually wrong. The Trial Chamber did not find that lack of sufficient food supplies in Phnom Penh was of no relevance to the decision to evacuate, but that it was not the "principal reason" for it.[1590]

614. As to NUON Chea's contention that the Trial Chamber was unreasonable in finding that aid could have been obtained from outside sources without specifying where, and that therefore the lack of food in Phnom Penh should not have been rejected as a basis for the evacuation,[1591] the Supreme Court Chamber notes, first, that the Trial Chamber found that the Khmer Rouge forces had been in control of the transport routes, but had generally rejected foreign aid unless it was offered unconditionally.[1592] Importantly, the Trial Chamber concluded that, had it been the CPK leadership's concern to alleviate the food situation facing the people of Phnom Penh, it would have been easier to have them remain in the city, rather than move them around without any preparation.[1593] Thus, the issue of whether there had actually been potential donors to provide humanitarian aid was not at the fore of the Trial Chamber's reasoning and it was therefore not unreasonable not to consider whether such concrete aid would have been available. NUON Chea's argument is therefore rejected.

615. Similarly, KHIEU Samphân's argument that the Trial Chamber failed to address the purported ambivalence of American humanitarian aid stands to be rejected as it is inapt to establish that the Trial Chamber's finding was unreasonable.[1594]

616. KHIEU Samphân and NUON Chea submit that the blockade of the Mekong River by Khmer Rouge forces prior to the taking of Phnom Penh should not be seen as an aggravating factor to the humanitarian crisis, but as a legitimate military

[1589] NUON Chea's Appeal Brief, para. 439.
[1590] Trial Judgement, para. 540.
[1591] NUON Chea's Appeal Brief, para. 439.
[1592] Trial Judgement, para. 538.
[1593] Trial Judgement, paras 539-540.
[1594] KHIEU Samphân's Appeal Brief, para. 227.

strategy.[1595] They have not demonstrated how the Trial Chamber unreasonably relied on corroborated sources, including statements by KHIEU Samphân himself, that the blockade cut the sole route for the transportation of rice and other food.[1596] The natural conclusion is that the blockade contributed to the humanitarian crisis. In any event, the Supreme Court Chamber notes that at issue is not whether the Mekong blockade was or was not a legitimate military strategy, but whether Phnom Penh was evacuated primarily in order to address the food shortage in the city. The reasons for the food shortage are of limited, if any, relevance to this question.

617. In sum, the Supreme Court Chamber dismisses the arguments raised by NUON Chea and KHIEU Samphân in respect of the Trial Chamber's findings as to the unlawfulness of the evacuation of Phnom Penh. To the extent that NUON Chea argues that whether the evacuation of Phnom Penh amounted to an inhumane act must be assessed bearing in mind all relevant circumstances "in light of the unambiguous state practice and *opinio juris* recognizing broad sovereign prerogative in that regard",[1597] the Supreme Court Chamber will address these arguments below.[1598]

d) Conditions and circumstances of Population Movement Phase Two

618. In relation to the conditions and circumstances of Population Movement Phase Two, the Trial Chamber concluded in the section on "forced transfers" that "the overwhelming majority of persons displaced during phase two were Cambodians already re-located by the Khmer Rouge prior to September 1975",[1599] that most people had been "ordered to leave", had been "transferred under armed guard"[1600] and that they were coerced and had no genuine choice but to move.[1601] The Trial Chamber further found that "people were often separated from their families and [were] provided no, or insufficient, comfort, assistance and accommodation".[1602]

619. In the section on "attacks against human dignity", the Trial Chamber found that the Khmer Rouge systematically "provided insufficient food, water, shelter,

[1595] NUON Chea's Appeal Brief, para. 440; KHIEU Samphân's Appeal Brief, para. 225.
[1596] Trial Judgement, para. 537, fn. 1608.
[1597] NUON Chea's Appeal Brief, para. 433.
[1598] *See below*, para. 654 *et seq*.
[1599] Trial Judgement, para. 631.
[1600] Trial Judgement, para. 632.
[1601] Trial Judgement, para. 633.
[1602] Trial Judgement, para. 639.

medical assistance and hygiene facilities", causing the deaths of some evacuees, whose families were deprived of the opportunity to mourn the deceased.[1603]

620. NUON Chea submits that the Trial Chamber's findings as to the conditions during Population Movement Phase Two were based on "plainly inadequate evidence".[1604] He notes that the Trial Chamber made generalised findings even though each of them relied on single pieces of evidence, relating to single incidents, and despite the Trial Chamber's own finding that the conditions of the transfers were variable.[1605] He further impugns the Trial Chamber's finding, made in the context of attacks against human dignity, that the conditions had been imposed systematically throughout Population Movement Phase Two, arguing that the evidence on which the Trial Chamber relied "concerns an arbitrary selection of events which was decidedly unsystematic" and "not uniform".[1606]

621. KHIEU Samphân argues that the Trial Chamber's finding that, before 17 April 1975, there had been a pattern of population movement concerning "New People" was erroneous because the Trial Chamber anachronistically relied on population movements before the fall of Phnom Penh, even though the term "New People", according to the Trial Chamber, had come into use only after April 1975.[1607] Similarly, KHIEU Samphân sees a contradiction in the Trial Chamber's findings[1608] because it found that "[o]ften, 'New People' were targeted for displacement",[1609] while also finding that in some regions both "Old People" and "New People" had been transferred.[1610] KHIEU Samphân submits further that the Trial Chamber's finding that "people were steadily forced, coerced or deceived to move"[1611] is inconsistent with its finding elsewhere that some people left voluntarily or faced no negative consequences if they decided not to leave.[1612] KHIEU Samphân submits furthermore that the evidence put before the Trial Chamber indicates that "Khmer

[1603] Trial Judgement, para. 644 (footnote(s) omitted).
[1604] NUON Chea's Appeal Brief, para. 430.
[1605] NUON Chea's Appeal Brief, para. 430-432.
[1606] NUON Chea's Appeal Brief, para. 447-448, referring to Trial Judgement, paras 430-432, 644.
[1607] KHIEU Samphân's Appeal Brief, paras 191, 452.
[1608] KHIEU Samphân's Appeal Brief, para. 453.
[1609] Trial Judgement, para. 803.
[1610] Trial Judgement, para. 588.
[1611] KHIEU Samphân's Appeal Brief, para. 454 (emphasis removed), referring to Trial Judgement, para. 803.
[1612] KHIEU Samphân's Appeal Brief, para. 454, referring to Trial Judgement, para. 588.

Rouge officials had reason to believe that those sent there would enjoy better living conditions" rather than that the officials had systematically deceived people.[1613] Referring to the Trial Chamber's finding that, *inter alia*, deception was used to make people relocate,[1614] KHIEU Samphân argues that the Trial Chamber did not establish that deception was used during Population Movement Phase Two and that the finding must therefore be invalidated.[1615] KHIEU Samphân argues, further, that the Trial Chamber failed to enter findings relevant to the *mens rea* of forced transfer, notably as regards to the "Khmer Rouge soldiers and officials' knowledge of the alleged false pretext of the transfers".[1616]

622. The Co-Prosecutors respond that the evidence supports the Trial Chamber's findings on the conditions of Population Movement Phase Two. First, they assert that none of the statements on single incidents that NUON Chea challenges amount to generalised findings.[1617] They argue that the Trial Chamber relied on individual accounts which cumulatively formed part of a pattern of inhumane conditions.[1618] In their submission, the evidence, including civil party testimony, was correctly assessed in its totality and clearly demonstrates the poor conditions and pattern of widespread suffering throughout Population Movement Phase Two.[1619] In addition, the Co-Prosecutors submit that there is ample evidence to demonstrate that the conditions characterising the transfers amounted to attacks against human dignity, including minimally sufficient food, water, shelter, medicine and hygiene.[1620] Finally, the Co-Prosecutors argue that the Trial Chamber did not contradict itself by finding that that, while both "Old People" and "New People" had been transferred for production quotas, the "New People" had been forcibly displaced.[1621]

(1) Generalised findings as to conditions of Population Movement Phase Two

623. As to NUON Chea's argument that the Trial Chamber entered generalised findings regarding the conditions of Population Movement Phase Two on the basis of

[1613] KHIEU Samphân's Appeal Brief, para. 455.
[1614] Trial Judgement, para. 633.
[1615] KHIEU Samphân's Appeal Brief, para. 504.
[1616] KHIEU Samphân's Appeal Brief, para. 508.
[1617] Co-Prosecutors' Response, para. 248.
[1618] Co-Prosecutors' Response, para. 248.
[1619] Co-Prosecutors' Response, para. 249-251.
[1620] Co-Prosecutors' Response, paras 268-270.
[1621] Co-Prosecutors' Response, para. 225.

insufficient evidence, the Supreme Court Chamber considers that the findings relating to the conditions on boats, trains and trucks[1622] are indeed formulated misleadingly, in that they create the impression of general conditions, even though they are based on single pieces of evidence, relating to specific incidents.

624. Nevertheless, the Supreme Court Chamber notes that, in addition to the specific findings impugned by NUON Chea, the Trial Judgement contains several other findings on the conditions of the population transfer, which also have to be taken into account when considering the reasonableness of the Trial Chamber's conclusion as to the conditions during Population Movement Phase Two. With regard to the lack of food and water during the transfer, the Trial Chamber relied on thirteen different accounts to support its finding, seven of which are live testimony, the remaining ones providing corroboration as to insufficient food.[1623] These testimonies

[1622] Notably, regarding the conditions on boats, that the "Khmer Rouge did not distribute food" to those who were transported by boat, based on one account contained in a civil party application (Trial Judgement, para. 594, fn. 1810); that "[m]any people on board were ill, but the Khmer Rouge guards did not care for them", based on the testimony of a civil party (Trial Judgement, para. 594, fn. 1812); that no assistance was provided "when boats capsized in strong currents and some people drowned", based on one civil party application (Trial Judgement, para. 594, fn. 1813); that "[s]ome children on boat cried because they were hungry and Khmer Rouge soldiers threatened to throw them overboard", based on the testimony of a civil party (Trial Judgement, para. 594, fn. 1811). Regarding the conditions on trains, that "soldiers provided no assistance to sick or vulnerable people", based on the testimony of a civil party (Trial Judgement, para. 597, fn. 1834); that "[p]eople had to ask the soldiers to stop the train to relieve themselves", based on the testimony of two civil parties (Trial Judgement, para. 597, fn. 1835). Regarding the conditions on trucks, that "Khmer Rouge soldiers shot at those who tried to escape", based on the testimony of a civil party (Trial Judgement, para. 598, fn. 1845). *See* NUON Chea's Appeal Brief, paras 430-431. *See also* KHIEU Samphân's Appeal Brief, para. 456.

[1623] Trial Judgement, paras 591-592, 594-595, 597, referring to T. 19 June 2013 (NOU Mao), E1/209.1, pp. 52, 55 (stating that there was not sufficient food during the [second] evacuation); T. 27 May 2013 (SANG Rath), E1/197.1, pp. 58-59, 64-65 (describing how people did not have, were not allowed to bring, and were given no food or water by the Khmer Rouge during their travels); T. 12 December 2012 (Denise AFFONÇO), E1/152.1, pp. 87-88, 108-109 (stating that the Khmer Rouge gave them barely any food and or water during their travels); T. 5 December 2012 (PECH Srey Phal), E1/148.1, pp. 44-46 (recounting how the Khmer Rouge provided no food for the people, and how they only had crude rice with them, which they had previously taken from the villages); T. 19 October 2012 (YIM Sovann), E1/135.1, p. 100 (stating that they had to drink water from a pond and were not given any food except for some rice and a loaf of bread); T. 24 October 2012 (LAY Bony), E1/138.1, pp. 12-13 (recalling how people became more sick as the food got more scarce, and how even pigs were given more food than humans); T. 29 May 2013 (CHAN Sopheap *alias* CHAN Socheat), E1/198.1, pp. 44-45, 58 (describing how her family received three cans of rice during their travel, of which each can had to be shared between three people); SAN Mom Civil Party Application, E3/4992, 11 July 2009, p. 3, ERN (En) 00893412 (stating that the Khmer Rouge soldiers provided no food or water for their journey, and only in the evening did they distribute a rice portion); KONG Vach Civil Party Application, E3/4695, dated 16 February 2009, p. 7, ERN (En) 00391744 (stating how there was not enough food to eat, and how her baby died from a consequence of this starvation); CHEA Sowatha Civil Party Application, E3/5084, undated, pp. 6, ERN (En) 00569478 (stating that the Khmer Rouge soldiers provided no food for people during their time traveling by boat); TREH Eal Victim Complaint, E3/5324, undated, pp. 6-7, ERN (En) 00873761-2 (stating that there was insufficient food during the

indicate generally that, during the population movement, people had little or no food. The Supreme Court Chamber observes that there were some accounts showing that some displaced individuals received food.[1624] This evidence, however, in view of the scale and duration of Population Movement Phase Two, does not undermine the finding that, generally, there was insufficient food. The Supreme Court Chamber therefore finds no error in the Trial Chamber's finding that the Khmer Rouge provided insufficient food during this population movement.

625. As regards the finding that the Khmer Rouge provided insufficient shelter, the Trial Chamber relied, among other evidence, on the live testimony of four civil parties.[1625] The Supreme Court Chamber observes that, while three testimonies attest that people had to wait for a few days for transport but do not specifically complain about the lack of shelter, there is no indication in the entirety of the evidence that the Khmer Rouge actually had provided shelter as a matter of principle, as opposed to opportune usage of shelter that may have been available. NUON Chea does not refer to any evidence that was put before the Trial Chamber that would indicate that, generally, shelter had been provided.

626. Turning to the lack of hygiene facilities, the Trial Chamber relied on two pieces of evidence: the live testimony of witness SOKH Chhin[1626] and a secondary source – a passage from a book by Elizabeth BECKER, based on interviews with four survivors.[1627] In addition, other evidence referred to in other sections of the Trial

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population transfer, and in his case this led to the death of his grandmother, who passed away from starvation); Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 240, ERN (En) 00820558 (stating that many children and elderly died in the second transfer of more than 500 km from starvation given the lack of food). *See also* Trial Judgement, para. 608, fn. 1898, referring to Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 186, ERN (En) 00820504 (stating that people had to travel great distances during this time, which, had it not been for the lack of food, would have been endurable for the people).

[1624] Trial Judgement, para. 597, fn. 1834, referring to T. 19 October 2012 (YIM Sovann), E1/135.1, p. 100 (Witness and her family given three kilograms of rice and a loaf of bread at different locations by Khmer Rouge soldiers).

[1625] *See* Trial Judgement, para. 591, fn. 1792, referring to T. 5 December 2012 (PECH Srey Phal), E1/148.1, p. 44; T. 19 October 2012 (YIM Sovann), E1/135.1, p. 100; T.12 December 2012 (Denise AFFONÇO), E1/152.1, p. 87-88; T. 27 May 2013, (SANG Rath), E1/197.1, pp. 58-59; SAN Mom Civil Party Application, E3/4992, 11 July 2009, p. 3 ERN (En) 00893412.

[1626] Trial Judgement, para. 600, fn. 1856, referring to T. 23 October 2012 (SOKH Chhin), E1/137.1, pp. 45-46 (people drank from, and bathed in, the same water in the paddy fields).

[1627] Trial Judgement, para. 600, fn. 1856, referring to Book by E. BECKER: *When the War was Over: Cambodia and the Khmer Rouge Revolution*, E3/20, p. 232, ERN (En) 00237937 (thousands of "New People" camped outside a train depot in Pursat Province, which was littered with human faeces and swarming with flies; there was insufficient food and water and nowhere to rest but the open ground).

Judgement illustrates and sustains the finding of lack of hygiene facilities. A review of the evidence shows twenty-five pieces of evidence,[1628] among which some show instances of lack of care and proper treatment towards the transferred people in respect of their hygiene.[1629] On that basis, the Supreme Court Chamber does not consider unreasonable the Trial Chamber's findings as to the lack of hygiene facilities during Population Movement Phase Two.

627. Finally, turning to the lack of medicine and assistance, the Supreme Court Chamber notes that nine pieces of evidence support this finding, four of which are live testimonies of civil parties. Denise AFFONÇO testified that during journeys lasting days or weeks, people did not receive any medical assistance and medication was not available.[1630] OR Ry and YIM Sovann stated that many people had fallen sick

[1628] *See* T. 23 October 2012 (SOKH Chhin), E1/137.1, pp. 45-46; T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 62, 77; T. 7 February 2013 (PIN Yathay), E1/170.1, p. 7; T. 4 December 2012 (TOENG Sokha), E1/147.1, p. 68; T. 5 December 2012 (PECH Srey Phal), E1/148.1, pp. 47, 73; T. 30 May 2013 (SOPHAN Sovany), E1/199.1, p. 53; T. 29 May 2013 (CHAN Sopheap *alias* CHAN Socheat), E1/198.1, pp. 58-59; T. 23 November 2012 (OR Ry), E1/145.1, p. 15; T. 12 December 2012 (Denise AFFONÇO), E1/152.1, pp. 87-88, 108-109; T. 29 May 2013 (THOUCH Phandarasar), E1/198.1, p. 32; T. 27 May 2013 (SANG Rath), E1/197.1, p. 59; T. 19 October 2012 (YIM Sovann), E1/135.1, p. 100; T. 24 October 2012 (LAY Bony), E1/138.1, pp. 12-13; T. 27 May 2013 (AUN Phally), E1/197.1, p. 40; T. 19 June 2013 (NOU Mao), E1/209.1, pp. 52, 55; KONG Vach Interview Record, E3/5590, dated 17 December 2009, pp. 3-6, ERN (En) 00426476-8; SUONG Sim Interview Record, E3/4657, dated 9 July 2009, pp. 6-7, ERN (En) 00353703-4; KONG Vach Civil Party Application, E3/4695, 16 February 2009, p. 7, ERN (En) 00391744; MORM Sokly Civil Party Application, E3/5022, dated 26 October 2009, p. 3, ERN (En) 00950254; DY Roeun Civil Party Application, E3/4656, dated 9 February 2008, p. 3, ERN (En) 00893384; CHHIT Savun Civil Party Application, E3/5006, dated 28 July 2009, p. 4, ERN (En) 00893421; SAN Mom Civil Party Application, E3/4992, 11 July 2009, p. 3, ERN (En) 00893412; CHEA Sowatha Civil Party Application, E3/5084, undated, pp. 5-6, ERN (En) 00569477-8; UM Proeung Interview Record, E3/3957, dated 8 December 2009, pp. 5-6, ERN (En) 00422351-3; TREH Eal Victim Complaint, E3/5324, undated, pp. 6-7, ERN (En) 00873761-2.

[1629] Trial Judgement, para. 598, fn. 1847, referring to, *inter alia*, T. 7 February 2013 (PIN Yathay), E1/170.1, p. 7 (PIN Yathay stated that people had to relieve themselves on the truck); T. 4 December 2012 (TOENG Sokha), E1/147.1, p. 68 (TOENG Sokha stated that the Khmer Rouge had stopped when they had relieve themselves but no one on the truck had been allowed off during the day-long journey until they had reached Pursat). *See also* T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 62, 77 (François PONCHAUD testified that he had heard people describing the conditions during the second transfer that they were not given water and had to relieve themselves in the wagon.); T. 5 December 2012 (PECH Srey Phal), E1/148.1, pp. 47, 73 (PECH Srey Phal stated that people who had wanted to relieve themselves on the train had to report this to the Khmer Rouge militiamen, and after a while, the train would stop to let the person get off, with escorted by the militiamen; once a person in a wagon was shot dead for relieving himself or herself in the wagon).

[1630] T. 12 December 2012 (Denise AFFONÇO), E1/152.1, p. 87 (Denise AFFONÇO stated that during her second transfer, the deportees had requested medical assistance but got no response). *See also* KONG Vach Interview Record, E3/5590, dated 17 December 2009, p. 5, ERN (En) 00426477 (KONG Vach stated that when further evacuated to Battambang, the Khmer Rouge soldiers had not provided them with any medicine); KONG Vach Civil Party Application, E3/4695, 16 February 2009, p. 7, ERN (En) 00391744 (KONG Vach stated that, in 1977, there no medicine had been provided to cure the malaria to her oldest daughter); CHEA Sowatha Civil Party Application, E3/5084, undated, pp. 5-6,

during their second transfer and the Khmer Rouge soldiers had not cared for them.[1631] PIN Yathay indicated that he had seen someone faint and subsequently die, an account corroborated by a similar refugee account.[1632] The Supreme Court Chamber also notes the account of a civil party application detailing that the civil party had received painkilling balm and medicine from the Khmer Rouge.[1633] Nevertheless, the Supreme Court Chamber considers that, despite some variations in the evidence, there is sufficient evidence to show that medication and medical assistance were often absent.

628. In sum, based on the evidence, it was not unreasonable for the Trial Chamber to find that there was general lack of food, water and hygiene facilities, as well as medicine and medical assistance. While the Supreme Court Chamber acknowledges that some individuals suffered from lack of shelter, the evidence relied upon is insufficient for a generalised finding in this regard.

(2) Generalised findings of people dying and disposal of their bodies

629. The Trial Chamber found that "[d]ue to these conditions, some died. Their bodies were disposed of along the way, some thrown out of the windows of moving trains, thereby depriving the families the opportunity to mourn the deceased".[1634] NUON Chea challenges this finding as an excessive generalisation.[1635]

630. As to the Trial Chamber's finding that "due to these conditions, some died", the Supreme Court Chamber recalls that it has concluded that the Trial Chamber's finding as to the deaths from conditions was not unreasonable to the extent that they

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ERN (En) 00569477-8 (CHEA Sowatha stated that in the harvest season of early 1976, she and her family, including her husband and grandfather who had malaria, had been told by the Khmer Rouge to pack all their belonging and prepare to leave; they had carried her grandfather because he could not walk. Her husband could barely walk with a cane); SAO Thoeun Victim Complaint, E3/5436, dated 10 May 2009, p. 7, ERN (En) 00873858 (SAO Thoeun stated that, in 1977, his second oldest sibling, named KIM Sayorn had died of malaria because lack of medicine for treatment).

[1631] T. 23 November 2012 (OR Ry), E1/146.1, p. 15 (OR Ry stated that, after having been evacuated from Phnom Penh, her family had been re-evacuated from their hometown, during which his sister had fallen sick and needed medical assistance, but no one took any notice); T. 19 October 2012 (YIM Sovann), E1/135.1, pp. 100-101 (YIM Sovann stated that, during her further evacuation in late 1975, the deportees had not been provided with any medicine).

[1632] T. 7 February 2013 (PIN Yathay), E1/170.1, pp. 40-41 (PIN Yathay stated that he had seen two people faint and subsequently die); Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 126, ERN (En) 00820444 (during the journey, children died due to exhaustion or illness).

[1633] SAN Mom Civil Party Application, E3/4992, 11 July 2009, p. 3, ERN (En) 00893412.

[1634] Trial Judgement, para. 644 (footnote(s) omitted).

[1635] NUON Chea's Appeal Brief, para. 446.

were based on in-court testimony.[1636] Accordingly, the Supreme Court Chamber cannot see any unreasonable generalisation in the Trial Chamber's finding that *some* people died. As to the finding that dead bodies had been disposed of along the way or thrown out of moving trains, the Trial Chamber relied on the testimony of Civil Party PECH Srey Phal,[1637] whose account was corroborated by witness SOKH Chhin, who had deduced that the bodies he had found along the railway had been of people who had been on a train.[1638] Therefore, the Supreme Court Chamber finds that it was not unreasonable for the Trial Chamber to reach such a finding, though it notes that the formulation of the finding is somewhat misleading in that it suggests that the disposal of bodies in that way had been systematically applied, which is not supported by the evidence.

631. In contrast, the factual finding that some parentless children who were crying continuously were thrown out of the window by Khmer Rouge soldiers[1639] was based only on one Civil Party Application and the testimony of a witness who stated that he had heard of similar stories without, however, providing any details.[1640] On such a weak evidentiary basis, no reasonable trier of fact could have entered that finding.

(3) Conclusion that the majority of the people moved were "New People"

632. As to KHIEU Samphân's arguments relating to the Trial Chamber's finding that there was a pattern of conduct of displacement of "New People",[1641] and the purported contradiction in the Trial Chamber's finding as to whether exclusively "New People" were transferred,[1642] the Supreme Court Chamber observes that the finding that "the overwhelming majority of persons displaced during phase two were Cambodians already re-located by the Khmer Rouge prior to September 1975", is based on findings made in five paragraphs of preceding sections of the Trial

[1636] *See above*, paras 536 *et seq.*, 550.
[1637] Trial Judgement, para. 597, fn. 1837, referring to T. 5 December 2012 (PECH Srey Phal), E1/148.1, p. 46.
[1638] Trial Judgement, para. 597, fns. 1838-1840 referring to T. 23 October 2012 (SOKH Chhin), E1/137.1, pp. 22, 25-26. *See also* DY Roeun Civil Party Application, E3/4656, dated 9 February 2008, pp. 3-4, ERN (En) 00893383-5 (in which DY Roeun stated that crying children were thrown off the train, out of the windows). This was confirmed in T. 15 July 2013 (Stephen Heder), E1/223.1, pp. 91-94.
[1639] Trial Judgement, para. 597.
[1640] Trial Judgement, para. 597, fn.1838, referring to T. 15 July 2013 (Stephen HEDER), E1/223.1, pp. 91-94.
[1641] KHIEU Samphân's Appeal Brief, para. 191, 453, referring to Trial Judgement, para. 803.
[1642] KHIEU Samphân's Appeal Brief, para. 453, referring to Trial Judgement, para. 588.

Judgement.[1643] One of these paragraphs contains a finding that "hundreds of thousands of people" were displaced, referring, by way of example, to six provinces, in relation to each of which the Trial Chamber based its findings on the experience of between one and six individuals, referring to in-court testimony, interview records and/or victim applications of the individuals concerned.[1644] In total, the Trial Chamber analysed the experience of nineteen people in this paragraph. It further found that "[i]n some locations, exclusively 'New People' were displaced, while in others both 'Old People' and 'New People' were transferred", citing evidence in support originating from thirteen and three different sources, respectively.[1645] The following paragraph discusses the reasons that the people were given for their relocation, including that "they were being returned to their homes", suggesting that they had been previously evacuated from a city and may therefore qualify as "New People", though no finding to that effect is made.[1646] The remaining two paragraphs cited by the Trial Chamber are located in the section dealing with the population transfer for the purpose of "class struggle", recounting the experiences of eight other individuals

[1643] Trial Judgement, para. 631, fn. 2000.
[1644] Trial Judgement, para. 588, fns 1764 -1770, referring to T. 29 May 2013 (THOUCH Phandarasar), E1/198.1, pp. 4-7; THOUCH Phandarasar Civil Party Application Supplementary Information, E3/5732, undated, p. 1, ERN (En) 00852179; T. 29 May 2013 (CHAN Sopheap *alias* CHAN Socheat), E1/198.1, pp. 42-44; T. 19 October 2012 (YIM Sovann), E1/135.1, pp. 92-94; T. 30 May 2013 (SOPHAN Sovany), E1/199.1, pp. 44-50, 52; T. 23 October 2012 (LAY Bony), E1/137.1, pp. 96-97; T. 24 October 2012 (LAY Bony), E1/138.1, pp. 2-3, 52; OR Ry Civil Party Application, E3/3967, dated 16 August 2009, p. 3, ERN (En) 00860730; SOURN Sopha Civil Party Application, E3/4837, dated 26 May 2008, pp. 2-3, ERN (En) 00891225-6; T. 7 February 2013 (PIN Yathay), E1/170.1, pp. 5-6; T. 4 December 2012 (TOENG Sokha), E1/147.1, pp. 38-48; KONG Vach Interview Record, E3/5590, dated 17 December 2009, pp. 3-6, ERN (En) 00426475-7; T. 27 May 2013 (AUN Phally), E1/197.1, pp. 34-36; SEM Virak Civil Party Application, E3/4678, dated 24 March 2008, pp. 3-4, ERN (En) 00877009-10; CHHIT Savun Civil Party Application, E3/5006, dated 28 July 2009, pp. 2-4, ERN (En) 00893419-21; SENG Mardi Interview Record, E3/5613, dated 21 March 2010, p. 3, ERN (En) 00494399; PUT Pum Civil Party Application, E3/4714, dated 27 July 2008, pp. 4-5, ERN (En) 00434305-6; CHUON Sam At Civil Party Application, E3/4707, dated 23 December 2008, p. 4, ERN (En) 00417897; SAY Kanal Civil Party Application, E3/4699, dated 7 July 2008, pp. 7-8, ERN (En) 00414895-6; LI Him Civil Party Application, E3/3978, dated 12 October 2009, pp. 1-2 ERN (En) 00893433-4; T. 2 May 2013 (LIM Sat), E1/187.1, p. 58.
[1645] Trial Judgement, para. 588, fns 1771-1772, referring to T. 19 October 2012 (YIM Sovann), E1/135.1 pp. 99-100; T. 30 May 2013 (SOPHAN Sovany), E1/199.1, p. 52; T. 12 December 2012 (Denise AFFONÇO), E1/152.1, pp. 84-85; T. 4 December 2012 (TOENG Sokha), E1/147.1, p. 47; T. 27 May 2013 (AUN Phally), E1/197.1, pp. 46, 52; T. 23 October 2012 (LAY Bony), E1/137.1, pp. 99-100; T. 22 November 2012 (OR Ry), E1/145.1, p. 106; OR Ry Civil Party Application, E3/3967, dated 16 August 2009, p. 3, ERN (En) 00860730; THĒNG Huy Interview Record, E3/5244, dated 17 September 2008, pp. 4-5, ERN (En) 00233301-2; LIM Him Civil Party Application, E3/3978, dated 12 October 2009, p. 2, ERN (En) 00893434; MĂN Saroeun Interview Record, E3/5258, dated 4 December 2008, pp. 2-3, ERN 00251699-700; SUONG Sim Interview Record, E3/4657, dated 9 July 2009, p. 5, ERN (En) 00353702; T. 27 May 2013 (SANG Rath), E1/197.1, pp. 57, 64; PREAB Proeun Interview Record, E3/5132, dated 15 November 2007, p. 3, ERN (En) 00223190.
[1646] Trial Judgement, para. 589.

and their families.[1647] The Trial Chamber acknowledged that there were instances where both "New People" and "Old People" were transferred.[1648]

633. The Supreme Court Chamber notes that the majority of the *evidence* that the Trial Chamber considered related to the transfer of "New People". At the same time, the Trial Chamber also considered evidence of transfers of "Old People" and specifically acknowledged that they had taken place. In addition, the evidence that the Trial Chamber considered related only to a small sample of the individuals who had been affected by the population transfer. Accordingly, there was no basis that would have allowed the Trial Chamber to extrapolate that the "overwhelming majority" of evacuees had indeed been "New People".

(4) Findings regarding killings

634. KHIEU Samphân challenges the Trial Chamber's finding that "during the movement or on arrival at their destination", the Khmer Rouge shot people,[1649] on two basis, namely the scope of the trial and the paucity of the evidence.[1650] With regard to the former, KHIEU Samphân argues that the scope of the trial is limited to events that occurred *during* population movements, not after.[1651]

635. NUON Chea argues that the Chamber erred by entering a generalised finding that people who tried to escape were shot at, based on the testimony of a single civil party.[1652]

636. As to KHIEU Samphân's argument regarding the scope of the trial, the Supreme Court Chamber notes that he misquotes the Trial Judgement: the Trial Chamber did not find that people were shot either during the movement or on their arrival.[1653] The argument is therefore dismissed.

[1647] Trial Judgement, paras 622-623, fns 1965-1970.
[1648] Trial Judgement, para. 588.
[1649] Trial Judgement, para. 803.
[1650] KHIEU Samphân's Appeal Brief, para. 457.
[1651] KHIEU Samphân's Appeal Brief, para. 458.
[1652] NUON Chea's Appeal Brief, para. 431, referring to Trial Judgement, para. 598 ("Khmer Rouge soldiers shot at those who tried to escape").
[1653] *See* Trial Judgement, para. 803 ("during the movement or on arrival" relates to the lack of provision of food, water and shelter).

637. As regards other contested findings related to the killings of civilians during Population Movement Phase Two, the Supreme Court Chamber refers to its previous conclusion[1654] and therefore finds that the Trial Chamber's generalisations were unreasonable as the evidence does not support the inference that killings during transfers formed part of "a consistent pattern of conduct".[1655] There is merit in NUON Chea's complaint that the Trial Chamber's finding that "Khmer Rouge soldiers shot at those who tried to escape"[1656] was an undue generalisation, since it was solely based hearsay testimony relating to a single incident.

(5) Finding that the people were forced, coerced or deceived to move

638. The Trial Chamber found that people "were forced, coerced or deceived to move".[1657] In addition, the Trial Chamber found that "[t]hose who refused transfer or attempted escape were arrested, detained or transferred in a further round of movements".[1658] Both Accused challenge those findings, alleging that the evidence cited by the Trial Chamber is inadequate and contradictory.[1659]

639. The impugned findings of the Trial Chamber are based on evidence cited elsewhere in the Trial Judgement. The first relevant paragraph refers to six accounts[1660] as to the potential consequences of not following an order to relocate, though it appears that four of those statements relate to *threats* as to the consequences of failure to comply with an order to relocate, as opposed to actual consequences.[1661] The second relevant paragraph contains a finding that "Khmer Rouge soldiers shot at those who tried to escape", relying solely on the testimony of TOENG Sokha, already summarised above.[1662] Another paragraph recounts that one of the civil parties had explained that "some who attempted to escape were chased by Khmer Rouge soldiers.

[1654] *See above*, paras 556-557.
[1655] Trial Judgement, para. 803.
[1656] Trial Judgement, para. 598, referring to T. 4 December 2012 (TOENG Sokha), E1/147.1, p. 50.
[1657] Trial Judgement, para. 803, referring to paras 591-599.
[1658] Trial Judgement, para. 632, referring to paras 588, 598, 609.
[1659] NUON Chea's Appeal Brief, para. 432; KHIEU Samphân's Appeal Brief, para. 454.
[1660] Trial Judgement, fn. 1776 (three live civil party testimonies and three written records of interview are relied upon).
[1661] Trial Judgement, para. 588, fn. 1776.
[1662] Trial Judgement, para. 598, fn. 1845, referring to T. 4 December 2012 (TOENG Sokha), E1/147/.1, p. 50.

He heard their screams after they were caught, although he did not specify their fate".[1663]

640. The Supreme Court Chamber considers that it was unreasonable to enter a broad finding regarding the consequences of failure to comply with an order to relocate based on evidence of threats, hearsay or imprecise evidence as to the consequences; and in the absence of any further explanation as to how the Trial Chamber evaluated the evidence. This, however, does not call into question the finding that the relocation had been forced. The evidence shows that the Khmer Rouge, who, having overthrown the previous regime by military force, were in full control of the country at the time, told, threatened or ordered people to move, who, therefore did not have a genuine choice whether or not to comply.[1664] The Supreme Court Chamber recalls in this regard that, contrary to what the Accused appear to suggest, force includes threats of force or coercion, such as those caused by fear of violence, duress, psychological oppression or abuse of power, or by taking advantage of a coercive environment.[1665]

641. KHIEU Samphân also challenges the Trial Chamber's finding that people were deceived in order to be moved, as Khmer Rouge officials had genuine reason to believe that those moved would enjoy better conditions at their new locations, which, according to KHIEU Samphân, would have provided a justification for their removal.[1666] The Supreme Court Chamber notes that the finding that deception had

[1663] Trial Judgement, para. 609, referring to T. 27 May 2013 (AUN Phally), E1/197.1, p. 40.
[1664] Trial Judgement, para. 588, fns 1774-1776, referring to, *inter alia*, T. 27 May 2013 (SANG Rath), E1/197.1, pp. 57, 64 (in late 1975, the village chief ordered SANG Rath, her husband, four sons and four or five other families to leave their village in Samraong District, Kampong Speu Province for Moung Russei District, Battambang. They requested to remain, but it was an "absolute order" and they had to go); T. 23 October 2012 (LAY Bony), E1/137.1, pp. 99-100 (the village chief instructed the new people in Kandal Province to prepare for departure); T. 24 October 2012 (LAY Bony), E1/138.1, p. 30 (They were ordered to depart from Khsach Kandal to Battambang by the village chief); T. 30 May 2013 (SOPHAN Sovany), E1/199.1, p. 52 (SOPHAN said under the "direction of Angkar", the family and other New People then in Roka Kaong village in Kandal were displaced to Pursat and Battambang); T. 27 May 2013 (AUN Phally), E1/197.1, pp. 45-46 (they were ordered to leave Prey Veng Province and had to obey or face the consequences; they were compelled by order of the Khmer Rouge); T. 19 October 2012 (YIM Sovann), E1/135.1, p. 98 (YIM testified that six months after being evacuated from Phnom Penh to Village Number 5, her family was told that if they refused to leave, they would be detained); T. 4 December 2012 (TOENG Sokha), E1/147.1, pp. 64-66 (approximately in July of 1975, TOENG Sokha and others who had fled to the forest rather than be evacuated for a second time were rounded up and confronted by the Khmer Rouge. They were evacuated to the Northwest about a month later).
[1665] *See above*, para. 595.
[1666] KHIEU Samphân's Appeal Brief, paras 454-455, referring to Trial Judgement, para. 803, which, in

been used related to the *destination* of, not the reason for, the transfer.[1667] This finding rested, among other evidence, on the live testimony of Civil Parties LAY Bony[1668] and PIN Yathay.[1669] Elsewhere in the Trial Judgement, the Trial Chamber also referred to the live testimony of another civil party and two out-of-court statements, stating that the Khmer Rouge told displaced people they would return to their homes, but that they had actually been taken somewhere else.[1670] In light of this evidence, the Supreme Court Chamber considers that it was not unreasonable to find that, *inter alia*, deception was used to make people move. Whether some of the Khmer Rouge officials believed that the transferees would face better conditions at their destinations is irrelevant in this regard.

(6) Unlawfulness of Population Movement Phase Two

642. The Trial Chamber found that the transfers during Population Movement Phase Two, including those to move people away from the Vietnamese border, had no legitimate reason and were thus "not justified on the basis of civilian security or military necessity, and, in any event, were neither necessary nor proportional".[1671] Specifically in relation to transfers away from the Vietnamese border, the Trial Chamber found that the "Khmer Rouge soldiers and officials transferred some of these people either to be re-educated, some of whom disappeared, or to the front lines

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turn, refers to 591-599.
[1667] Trial Judgement, para. 599 ("[t]he location in which people were unloaded was often not the place they were told they would be transferred to").
[1668] T. 24 October 2012 (LAY Bony), E1/138.1, pp. 4-5.
[1669] T. 7 February 2013 (PIN Yathay), E1/170.1, p. 8.
[1670] Trial Judgement, para. 589, fn. 1783, referring to T. 29 May 2013 (CHAN Sopheap *alias* CHAN Socheat), E1/198.1, p. 44 (CHAN Sopheap *alias* CHAN Socheat testified that after six months being evacuated from Phnom Penh, her family were informed by the "Angkar leader" that they would be allowed to return from Kien Svay District to Phnom Penh, but instead they were sent to Moung Ruessei district); CHEA Lēng Interview Record, E3/5231, dated 18 December 2008, p. 3, ERN (En) 00279250 (CHEA Leng said that, in late 1976, she and her husband had thought they would be taken to their birth place in Kampong Cham Province, but were actually taken to Pursat instead); Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 239, ERN (En) 00820557 (People were told that they were returning to Phnom Penh where accommodation was waiting and they therefore were not permitted to carry anything with them), p. 247, ERN (En) 00820565 (in late 1975, Khmer Rouge had announced that the government had allowed people from Battambang, Kampong Thom and Kampong Chhnang to return to their home villages; in reality, they did this in order to force people to go to Battambang Province).
[1671] Trial Judgement, para. 636; *see also* para. 635.

to work" and concluded that "[t]his placement of people in situations of high risk undermines any justification based on the security of the population".[1672]

643. KHIEU Samphân argues that the population was transferred because "those sent there would enjoy better living conditions", an argument he submits the Trial Chamber failed to address,[1673] and to build the country's economy through agriculture;[1674] thus he argues that these transfers were justified and not criminal in nature. KHIEU Samphân also challenges the Trial Chamber's findings as to the transfers of the population away from the Vietnamese border, arguing that those transfers were undertaken to protect the civilian population or out of military necessity and were therefore justified.[1675] As to the disproportionality of those transfers, he submits that the Trial Chamber did not make any finding as to the conditions of the transfers at the Vietnamese border and that its conclusion must therefore be invalidated.[1676] He also argues that the finding was erroneous because the obligation to transfer the population back to their homes arises only once hostilities have ceased, which the Trial Chamber did not find to have occurred.[1677]

644. The Supreme Court Chamber notes that the Trial Chamber considered the issue of the potential justification of the population movement in respect of forced transfer only.[1678] Nevertheless, the Supreme Court Chamber will consider the issue of a potential justification and KHIEU Samphân's arguments in that regard in respect of the crime against humanity of other inhumane acts as a whole.

645. As to the overall purpose of the population transfer, the Supreme Court Chamber notes that the Trial Chamber did consider the issue, but rejected it as a justification based on the consideration that the Khmer Rouge had been in large part responsible for the dire situation of the population[1679] and that, in any event, the

[1672] Trial Judgement, para. 635.
[1673] KHIEU Samphân's Appeal Brief, para. 455.
[1674] KHIEU Samphân's Appeal Brief, para. 516.
[1675] KHIEU Samphân's Appeal Brief, para. 505.
[1676] KHIEU Samphân's Appeal Brief, para. 507.
[1677] KHIEU Samphân's Appeal Brief, para. 506.
[1678] *See above*, para. 604 *et seq.*
[1679] Trial Judgement, paras 634-635. *See also* *Stakić* Appeal Judgement (ICTY), para. 287 ("[a]lthough displacement for humanitarian reasons is justifiable in certain situations, the Appeals Chamber agrees with the Prosecution that it is not justifiable where the humanitarian crisis that caused the displacement is itself the result of the accused's own unlawful activity") (footnote(s) omitted); *Krajišnik* Appeal

transfers were neither necessary nor proportionate.[1680] KHIEU Samphân does not properly engage with this reasoning or demonstrate that it was erroneous.

646. With regard to the relocation of people away from the Vietnamese border, allegedly to protect them from Vietnamese incursions,[1681] the Supreme Court Chamber recalls that the Trial Chamber found that some of the relocated civilians had been sent to the front line to work,[1682] which undermined any justification based on the security of the people concerned.[1683] KHIEU Samphân does not specifically address this issue, nor does he challenge the Trial Chamber's finding in that regard. The Supreme Court Chamber observes that the Trial Chamber relied on two pieces of direct documentary evidence from 1977, namely DK telegrams showing that mobile units had been caught and captured by Vietnamese troops,[1684] as well as one corroborating out-of-court statement explaining that some people had been assigned to go to the Vietnamese border to work.[1685] In view of this evidence, the Supreme Court Chamber concludes that it was reasonable for the Trial Chamber to find that the transfers away from the Vietnamese border had not been carried out based on concern for the safety of the population concerned. There is therefore no need to examine KHIEU Samphân's subsequent argument that the transfers were not disproportionate.

e) Findings regarding the disappearance of evacuees

647. The Trial Chamber found that the Khmer Rouge "intentionally deprived people of their liberty, intentionally refused to disclose information of their whereabouts and thereby intentionally caused great suffering to those who disappeared, as well as to those who remained behind".[1686]

Judgement (ICTY), para. 308, fn. 739.
[1680] Trial Judgement, paras 634-636.
[1681] KHIEU Samphân's Appeal Brief, paras 472-474.
[1682] Trial Judgement, para. 635.
[1683] Trial Judgement, para. 635.
[1684] Trial Judgement, para. 625, referring to DK Telegram, E3/906, dated 22 December 1977, p. 1, ERN (En) 00183637 (Vietnamese troops caught 100 members of a mobile group harvesting rice); DK Telegram, E3/984, dated 10 December 1977, p. 1, ERN (En) 00335210 (the Vietnamese reached Kampong Puoy, destroyed Trasek Dam and captured members of a mobile unit).
[1685] Trial Judgement, para. 625, fn. 1979, referring to KHEM Leng Interview Record, E3/5539, 28 August 2009, p. 8, ERN (En) 00380128 (People were assigned to go to the Vietnamese border to demolish houses and to bring wood and build houses in Svay Rieng town).
[1686] Trial Judgement, para. 643.

648. NUON Chea argues further that the incidents on which the Trial Chamber relied when finding that the locations to which people had been transferred were not those to which they had been told they would be brought did not actually amount to enforced disappearances because, from the underlying evidence, it is clear that these incidents concerned cases where entire families were moved together.[1687] He argues further that other findings were not supported by any evidence,[1688] including that CPK officials had refused to disclose the whereabouts of people. In addition, NUON Chea submits that instances where families had been separated during Population Movement Phase Two were "highly sporadic and highly limited".[1689]

649. KHIEU Samphân makes a similar argument, submitting that the Trial Chamber's speculation is insufficient to sustain a finding that there was a "deliberate refusal" on the part of the Khmer Rouge to provide information to the displaced persons, which, he submits, negates both the *actus reus* and the *mens rea* of enforced disappearances.[1690]

650. The Co-Prosecutors respond that the Trial Chamber correctly found that other inhumane acts through enforced disappearances had occurred. They submit that, given the ongoing nature of the transfers, as well as the continued targeting of "bad elements" or enemies by the CPK, these findings were "inextricable" from Population Movement Phase Two.[1691] Additionally, the Co-Prosecutors argue that there was adequate and supporting evidence for these findings and that, notwithstanding the absence of explicit requests for information, a deliberate refusal to give information about the whereabouts of people could be established.[1692]

651. With regard to the challenges of the findings on enforced disappearances, the Supreme Court Chamber recalls that the Trial Chamber was methodologically incorrect when it analysed specific elements of enforced disappearances, rather than considering generally whether, in the course of Population Movement Phase Two, the

[1687] NUON Chea's Appeal Brief, para. 444.
[1688] NUON Chea's Appeal Brief, para. 444.
[1689] NUON Chea's Appeal Brief, para. 445.
[1690] KHIEU Samphân's Appeal Brief, paras 509-510.
[1691] Co-Prosecutors' Response, para. 265.
[1692] Co-Prosecutors' Response, paras 266-267.

elements of the crime against humanity of other inhumane acts were fulfilled.[1693] The Supreme Court Chamber will nevertheless determine whether the Trial Chamber reasonably found that, in the course of Population Movement Phase Two, there had been a deliberate refusal to provide information with regard to the whereabouts of evacuees, or whether evacuees were brought to another location than that which they had been told.

652. The Supreme Court Chamber notes that the testimonies of two civil parties as well as an out-of-court document[1694] indicate that some individuals were sent to a place other than that which they had been told.[1695] Civil Party PECH Srey Phal also heard rumours that her family had been killed.[1696] In addition, the Trial Chamber referred to instances of individuals who never heard about the fate of those who had been displaced, especially family members.[1697] The Supreme Court Chamber concludes that this constitutes sufficient evidence to support the finding that some families were separated and never heard of the fate of their family members who were thus considered to have disappeared.[1698]

653. As to the Trial Chamber's findings that the Khmer Rouge deliberately refused to give information about the whereabouts of the evacuees and the associated arguments of NUON Chea and KHIEU Samphân,[1699] the Supreme Court Chamber recalls that these findings are relevant only to the purported specific elements of enforced disappearances, but not to whether the elements of other inhumane acts were fulfilled as such. Accordingly, the Supreme Court Chamber does not consider it

[1693] *See above*, para. 589.
[1694] Trial Judgement, para. 599, fn. 1853, referring to Book by E. BECKER: *When the War was Over: Cambodia and the Khmer Rouge Revolution*, E3/20, p. 230, ERN (En) 00237935.
[1695] Trial Judgement, para. 599, referring to T. 7 February 2013 (PIN Yathay), E1/170.1, p. 8; T. 24 October 2012 (LAY Bony), E1/138.1, p. 5.
[1696] T. 5 December 2012 (PECH Srey Phal), E1/148.1, pp. 61-62.
[1697] *See* Trial Judgement, para. 589, fn. 1787, referring to one live witness providing hearsay testimony: T. 19 June 2013 (NOU Mao), E1/209.1, pp. 52-53 (NOU Mao testified that, after April 1975, people had been moved between zones, including some of his relatives. He did not know their fate, but was told their hope for survival was minimal); *see also* fn. 1787: THĂCH Yuong Victim Complaint, E3/5427, dated 19 April 2009, pp. 6-7, ERN (En) 00873843-4; KIM Bohanavuthy Victim Complaint, E3/5478, dated 16 September 2009, pp. 10-13, ERN (En) 00815159-62 (recounting that their family members were displaced and that they never received information about them). *See also* Trial Judgement, para. 601, fn. 1859, referring to PUT Pum Civil Party Application, E3/4714, dated 27 July 2008, p. 5, ERN (En) 00434306.
[1698] *See* Trial Judgement, paras 642-643 (the Trial Chamber found that the Khmer Rouge had refused to disclose information about "*some* people transferred" which caused suffering to those who remained behind").
[1699] Trial Judgement, para. 642.

necessary to entertain this matter any further. Similarly, the issue of whether the transfer of individuals to locations other than that which they had been told amounts to enforced disappearances is irrelevant because, as has already been explained above, enforced disappearances was not established as a separate category of crimes against humanity at the time of the facts.

f) Whether the Population Movement Phases One and Two amounted to "inhumane acts" in the circumstances

654. As noted above, in the absence of holistic findings by the Trial Chamber as to whether, in the circumstances, the transfer of the population in the course of Population Movement Phases One and Two amounted to "other inhumane acts", including whether they were of similar gravity as other enumerated crimes against humanity, it is for the Supreme Court Chamber to make such an assessment.[1700] The Supreme Court Chamber shall do so, based on the factual findings contained in the Trial Judgement, to the extent that they were not found to be unreasonable.

(1) Population Movement Phase One

655. In relation to Population Movement Phase One, the Supreme Court Chamber recalls that the Trial Chamber's finding that at least two million people were forcibly evicted from Phnom Penh in terrifying and violent circumstances and without prior warning has withstood appellate review[1701] as well as the finding that the eviction happened at the peak of the hot season in the general absence of water, food, shelter, hygiene facilities and medical care.[1702] The findings that, in the course of the evacuation of Phnom Penh, civilians were killed and others died because of the conditions of the evacuation have also been upheld, notwithstanding the unreasonableness of some of the Trial Chamber's findings with regard to the number of these events.[1703] The Supreme Court Chamber has further sustained the Trial Chamber's conclusion that the evacuation of Phnom Penh was not justified by

[1700] *See above*, para. 590.
[1701] Trial Judgement, para. 563.
[1702] Trial Judgement, para. 564.
[1703] *See above*, paras 413-460.

military necessity or humanitarian or economic considerations.[1704] It has also confirmed that the evacuation of Phnom Penh was carried out intentionally.[1705]

656. The Supreme Court Chamber considers that the evacuation of Phnom Penh, being legally unjustified, violated the right to liberty, the right to security of person and the right to freedom of movement and residence. In its physical circumstances, it infringed the freedom from cruel, inhuman or degrading treatment. As such, it caused serious mental and physical suffering and injury and constituted a serious attack against human dignity. That the evacuation was of similar nature and gravity as other enumerated crimes against humanity is evidenced by the fact that a large number of individuals were affected thereby and that some of them were killed or died because of its conditions. The Supreme Court Chamber also considers that the conduct in question is similar to the incriminated conduct of enumerated crimes against humanity, notably deportation. In this respect, contrary to NUON Chea's submissions, the Supreme Court Chamber considers it is not of primary relevance whether people were transferred across an international border or whether the territory was under foreign occupation, even though the Supreme Court Chamber acknowledges that deportation across international borders may lead to additional infringement of rights and prejudice for the victims. In the circumstances of the present case, the impact of the transfer on the victims resulted from them being uprooted (a consequence that would have been largely the same, had they been transferred across an international border) and from the inhumane conditions of the transfer.

657. The Supreme Court Chamber therefore concludes that, based on the facts that were established beyond a reasonable doubt, the evacuation of Phnom Penh amounted to the crime against humanity of other inhumane acts.

(2) Population Movement Phase Two

658. As regards Population Movement Phase Two, the Trial Chamber found that at least 300,000 to 400,000 people were transferred between September 1975 and early 1977 between the Zones, as well as more than 30,000 people were transferred

[1704] *See above*, para. 617.
[1705] *See* Trial Judgement, paras 533-534.

between September 1975 and December 1977 within Zones.[1706] These findings were not challenged on appeal, although the Supreme Court Chamber considered unreasonable the Trial Chamber's conclusion that the overwhelming majority of people who were transferred had already been previously transferred. The Trial Chamber's finding that people were forced to move was not successfully challenged on appeal. Further, the Supreme Court Chamber upheld the findings that displaced people endured poor conditions resulting from lack of food, water, shelter, medicine and hygiene facilities. The Supreme Court Chamber also sustained the finding that some people died during Population Movement Phase Two because of the conditions, and an instance of a person being killed by the Khmer Rouge. Finally, during Population Movement Phase Two, there have been proven instances of separations of families.

659. Analogous to the analysis pertinent to Population Movement Phase One in the directly preceding paragraphs, the Supreme Court Chamber considers that, in these circumstances, it has been established beyond reasonable doubt that the transfer of people during Population Movement Phase Two caused serious mental and physical suffering and injury. That the transfers were similar in nature and gravity to other enumerated crimes against humanity is evidenced by the fact that they affected a large number of individuals, some of who were murdered or died because of the conditions of the transfer.

660. The Supreme Court Chamber therefore concludes that, based on the facts that were established beyond a reasonable doubt, Population Movement Phase Two amounted to the crime against humanity of other inhumane acts.

4. Persecution

661. The Trial Chamber convicted NUON Chea and KHIEU Samphân of persecution on political grounds during Population Movement Phases One and Two and at Tuol Po Chrey.[1707]

662. In respect of Population Movement Phase One, the Trial Chamber found that three groups of people were the object of persecution on political grounds: (i) high-

[1706] Trial Judgement, para. 630.
[1707] Trial Judgement, paras 940, 1053.

ranking military and civilian officials of the Khmer Republic; (ii) other military and civilian officers of the Khmer Republic; and (iii) civilians living in Phnom Penh at the time of the fall of the city (also referred to as "17 April People" or "New People").[1708] With regard to Population Movement Phase Two, the Trial Chamber found that "New People" were the object of persecution on political grounds.[1709] As regards the events at Tuol Po Chrey, the Trial Chamber found that the victims of the crimes against humanity of murder and extermination were former soldiers of the Khmer Republic, "a clearly discernible group".[1710]

663. NUON Chea and KHIEU Samphân allege that the Trial Chamber made several interrelated legal and factual errors in its findings regarding the crime against humanity of persecution on political grounds. The alleged legal errors relate to the definition of political persecution adopted by the Trial Chamber, particularly its finding that this crime can be committed against not only political groups or individuals who hold certain political views, but also against discernible groups (not necessarily holding any common political views) who are discriminated against because of political motivations or the political agenda of their persecutors.[1711] NUON Chea and KHIEU Samphân also allege legal and factual errors in the Trial Chamber's findings related to its definition of "New People"[1712] and in relation to its conclusion that the elements of the crime against humanity of political persecution were established during Population Movement Phases One and Two.[1713]

a) Trial Chamber's definition of the crime of persecution

664. The Trial Chamber defined the potential victims of the crime against humanity of persecution on political grounds in the following terms:

> The Chamber notes that individuals who hold political views or are members of a political group or party are the most obvious examples of persons who may be the victims of political persecution. However, while some international jurisprudence has construed 'political grounds'

[1708] Trial Judgement, para. 569.
[1709] Trial Judgement, para. 653.
[1710] Trial Judgement, para. 685.
[1711] NUON Chea's Appeal Brief, paras 355-364.
[1712] NUON Chea's Appeal Brief, paras 365-383; KHIEU Samphân's Appeal Brief, paras 367, 478-482, 512.
[1713] NUON Chea's Appeal Brief, paras 384-394, 399; KHIEU Samphân's Appeal Brief, paras 365-368, 483, 486-489, 491, 513-514.

> narrowly, other jurisprudence has found that political persecution occurred where discrimination has been effected pursuant to political motivations or a political agenda against a group which itself may not hold any political views.[1714]

665. NUON Chea disputes this definition, arguing that political persecution may only be committed against members of a political group or group of people holding common political views; accordingly, in his submission, it is not sufficient that a group is persecuted because of the *perpetrator's* political motivations or political agenda.[1715]

666. The Co-Prosecutors respond that the Trial Chamber correctly applied the law when defining persecution on political grounds, arguing that the situation in which the targeted group is subjectively defined by the perpetrator on negative political grounds fully accords with the rationale and purpose of the crime of political persecution.[1716]

667. The Supreme Court Chamber analysed persecution as a crime against humanity under customary international law for the period 1975-1979 in detail in the *Duch* Appeal Judgement (001-F28).[1717] Notably, the Supreme Court Chamber found that, to qualify as persecution, the perpetrator's conduct must discriminate in fact and it agreed with the Trial Chamber that this requires that "a victim is targeted because of the victim's membership in a group *defined by the perpetrator* on specific grounds, namely on political, racial or religious basis".[1718] Further, the Supreme Court Chamber confirmed that the victim must "*actually belong* to a sufficiently *discernible* political, racial or religious group"[1719] and that "the relevant discriminatory intent necessarily assumes that the victim is a member of a political, racial or religious group".[1720]

668. As noted by NUON Chea, there is no dispute that the victim of persecution on political grounds as a crime against humanity must actually belong to a "sufficiently

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[1714] Trial Judgement, para. 430 (footnote(s) omitted).
[1715] NUON Chea's Appeal Brief, paras 358-364.
[1716] Co-Prosecutors' Response, paras 209-211.
[1717] *Duch* Appeal Judgement (001-F28), paras 215-278.
[1718] *Duch* Appeal Judgement (001-F28), para. 272, referring to *Duch* Trial Judgement (001-E188), para. 377 (emphasis in original).
[1719] *Duch* Appeal Judgement (001-F28), para. 274.
[1720] *Duch* Appeal Judgement (001-F28), para. 265, referring to *Krnojelac* Trial Judgement (ICTY), para. 432, fn. 1294, and *Blaškić* Trial Judgement (ICTY), para. 235.

discernible" group.[1721] This approach is consistent with the ICC Statute, which defines persecution as an act that is perpetrated against a person who belongs to an "identifiable group or collectivity",[1722] and in keeping with the understanding that the purpose of persecution as a crime against humanity is to protect "members of political, racial and religious groups from discrimination on the basis of belonging to one of these groups".[1723] The question raised by NUON Chea's ground of appeal is *which* groups of individuals may actually qualify as victims of the crime against humanity of persecution on political grounds and, more specifically, whether it is required that the members of the group hold common political views.

669. There is ample evidence in the international case law that discriminatory measures against members of political parties may constitute persecution on political grounds.[1724] Moreover, as noted above, in the *Duch* Appeal Judgement (001-F28), the Supreme Court Chamber emphasised that, while the group that is the object of persecution must be discernible, it is the perpetrator who defines the group.[1725] The Supreme Court Chamber found that "[t]he group or groups persecuted on political grounds may include various categories of persons, such as: officials and political activists; persons of certain opinions, convictions and beliefs; persons of certain ethnicity or nationality; or persons representing certain social strata ('intelligentsia', clergy, or bourgeoisie, for example)".[1726] In particular in respect of the latter groups, they may be made the object of political persecution not because all, or even the majority, of their members hold political views opposed to those of the perpetrator, but because they are perceived by the perpetrator as (potential) opponents or otherwise as obstacles to the implementation of the perpetrator's political agenda.[1727] As concerns the specific arguments advanced by NUON Chea, the Supreme Court

[1721] NUON Chea's Appeal Brief, para. 367.
[1722] ICC Statute, Art. 7(1)(h). *See also* ICC Elements of Crimes, Art. 7(1)(h), Element 2.
[1723] *Duch* Appeal Judgement (001-F28), para. 265, citing *Krnojelac* Trial Judgement (ICTY), para. 432, fn. 1293. *See also* *Blaškić* Trial Judgement (ICTY), para. 235 (noting in relation to the object of persecution that "the perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group").
[1724] *Naletilić* Trial Judgement (ICTY), para. 681; *Bagosora* Trial Judgement (ICTR), para. 2178.
[1725] *Duch* Appeal Judgement (001-F28), paras 272-273.
[1726] *Duch* Appeal Judgement (001-F28), para. 272.
[1727] *See* *Kenyatta* Confirmation of Charges Decision (ICC), para. 144 ("attackers chose their individual targets based upon the assumed political allegiance of particular ethnic groups"); *Gbagbo* Confirmation of Charges Decision (ICC), para. 205 ("pro-Gbagbo forces targeted […] inhabitants of areas perceived as supporting Alassane Ouattara"); *Blé Goudé* Confirmation of Charges Decision (ICC), para. 123 ("members of these groups were as such considered as supporters of Alassane Ouattara").

Chamber is not persuaded by his interpretation of the *Kvočka* Appeal Judgement (ICTY) that only groups holding particular views may be the object of persecution.[1728] To the contrary, in this case, the ICTY Appeals Chamber merely described a hypothetical scenario that would amount to persecution on political or racial grounds.[1729] Nothing in the passage of the judgement cited by NUON Chea indicates a requirement that, for persecution on political grounds to occur, the members of the targeted group must actually hold political views.

670. Nor is the Supreme Court Chamber persuaded by the argument that the Trial Chamber's approach was anachronistic. To the extent that NUON Chea appears to argue that in the context of the Cold War the use of revolutionary violence to abolish competing classes within society and to achieve equality would justify acts amounting to persecution under international criminal law,[1730] his argument is unsupported. To the extent he impugns the Trial Chamber's reliance on jurisprudence post-dating the events, this argument, as will be set out below, fails to take into account the post-World War II case law, which shows that persecution on political grounds can also take place where victims are perceived to be political opponents or are associated with a rival political group.

671. In 1946, Egon Schwelb wrote that one of the reasons the Allies had advocated for the inclusion of crimes against humanity in the IMT Charter was to address the persecution of political opponents of National Socialism. In Schwelb's words:

> The writers, politicians, statesmen and organizations who advocated this [the inclusion of crimes against humanity in the IMT Charter] had in mind the atrocities committed, *e.g.* by Germans in Italy and against Italians, both before and after the Italian surrender, the *persecutions by the Nazi Government of its political opponents inside Germany (trade unions, Social Democrats, Communists, the Churches)*, and, of course, the persecution of the Jews, irrespective of their citizenship – cases which were not covered by the traditional notion of war crimes.[1731]

672. There is, of course, no suggestion that *all* the victims of persecutory practices against trade unions, Churches, or political movements were actively manifesting

[1728] *See* NUON Chea's Appeal Brief, paras 359, 363.
[1729] *Kvočka* Appeal Judgement (ICTY), para. 456.
[1730] NUON Chea's Appeal Brief, para. 360.
[1731] Egon SCHWELB, "Crimes against Humanity", *British Yearbook of International Law*, Vol. 23 (1946), p. 183 (emphasis added).

their political opposition to National Socialism or were indeed opponents thereof (for instance, it may be assumed that some members of trade unions or the Churches actually supported National Socialism). Nevertheless, they and the groups to which they belonged were perceived to be potential opponents of the Nazi regime and were therefore made the object of persecution.

673. This understanding is borne out by the post-World War II jurisprudence. For instance, the IMT convicted Hans Frank, Governor-General of Occupied Poland for crimes against humanity, including persecution, for devising Action A-B (*Außerordentliche Befriedungsaktion*),[1732] which aimed at the extermination of the Polish intelligentsia in connection with a greater plan to reduce the "entire Polish economy to an absolute minimum necessary for bare existence. The Poles shall be the slaves of the Greater German World Empire".[1733]

674. In the *Ministries* Case, defendants Richard Walther Darré, Otto Dietrich, Hans Heinrich Lammers, Wilhelm Stuckart and Lutz Schwerin von Krosigk were found guilty of the persecution of Jews, Poles and "enemies and opponents of national socialism" on racial and political grounds.[1734] There was no showing that each victim openly manifested political opposition or that all victims shared a common political view.

675. Similarly, in the *Einsatzgruppen* Case, it was apparent that political symbolism, and not only ethnic or religious discrimination, was a primary rationale for the persecution of Jews. The court reasoned that:

> In two or three instances an attempt was made to show that the Jews in Russia held a high percentage of official positions, a percentage disproportionate to the size of the Jewish population. This was the most common theory utilized in Germany for the oppression and persecution of the Jews. [1735]

676. In the *Buhler* Case, a Polish court convicted the former Deputy to the Governor-General of crimes against humanity for these and other atrocities carried

[1732] IMT Judgement, pp. 296-298.
[1733] IMT Judgement, pp. 237-238.
[1734] *Duch* Appeal Judgement (001-F28), para. 222, citing *Ministries* Case, pp. 563-565, 575-576, 600-605, 645-646, 675-680.
[1735] *Einsatzgruppen* Case, p. 469.

out during the German occupation. According to the U.N. War Crimes Commission, "[a]ll these measures resulted also in general persecutions of Polish citizens".[1736] Here, Polish intellectuals were persecuted not because they held common political views, but because their extermination was in line with the political agenda of the German authorities.

677. Thus, contrary to the argument raised by NUON Chea,[1737] the post-World War II case law is not unsettled: 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 and often with overlay with other grounds for discrimination. As a result, the victims neither necessarily held shared political views nor constituted a political group in an institutionalised sense. This understanding was subsequently confirmed by the case law of the *ad hoc* tribunals. In the *Stakić* Trial Judgement (ICTY), the accused was found guilty of persecution on political grounds because he had intended to discriminate against non-Serbs "or those affiliated or sympathizing with them".[1738] Likewise, an ICTY Trial Chamber noted that a victim of torture was "discriminated against […] on political grounds" because of the victim's "perceived collaboration with Serbs".[1739]

678. Whether these groups were defined in a negative sense, as in "non-Serbs"[1740] or "enemies and opponents of national socialism",[1741] or in cumulative fashion, such as "Serbs, Jews, Gypsies, as well as Croats who did not accept the ideology",[1742] the persecuted groups did not consist of a single homogeneous polity. The Supreme Court Chamber thus confirms the possibility that persecution as a crime against humanity might target aggregated groups without any common identity or agenda.

[1736] *Buhler* Case (Supreme National Tribunal, Poland), p. 37.
[1737] NUON Chea's Appeal Brief, para. 358.
[1738] *Stakić* Trial Judgement (ICTY), para. 826.
[1739] *Haradinaj* Trial Judgement (ICTY), para. 392 (it must be noted, though, that the accused in this case were not convicted of the crime of persecution).
[1740] *Tadić* Trial Judgement (ICTY), paras 714-718; *Krnojelac* Appeal Judgement (ICTY), Disposition, pp. 113-114.
[1741] *Ministries* Case, p. 604.
[1742] *Kupreškić* Trial Judgement (ICTY), para. 602, citing *Artuković* Case (Zagreb District Court, Yugoslavia), p. 23.

679. The Supreme Court Chamber does not consider that the Trial Chamber's approach, which is consistent with the approach in the *Duch* Appeal Judgement (001-F28), is "illogical" because it would mean by extension that a person who, for religious reasons, discriminates against people with red hair would be guilty of persecution on religious grounds even though people with red hair are not a religious group.[1743] To the contrary, this example demonstrates that it is appropriate and necessary to take into account the perpetrator's perspective when defining the group that is the object of persecution – if it were otherwise, discernible groups that are persecuted for abstruse reasons[1744] would be left unprotected.

680. Accordingly, the Supreme Court Chamber finds that the Trial Chamber did not err in holding that persecution on political grounds may be committed against groups other than members of a political group or those holding political views.

b) Finding that "New People" constitute a discernible group

681. NUON Chea asserts that the Trial Chamber erred in finding that "New People" constituted a political group, arguing that, based on the Trial Chamber's definition, "New People" are not a "sufficiently discernible" group and, in addition, that "New People" neither espoused a common set of political views nor were they seen as political opponents by the CPK.[1745] Similarly, KHIEU Samphân argues that the Trial Chamber committed an error in concluding that "New People" constituted a "sufficiently discernible group", submitting that the definition of "New People" adopted by the Trial Chamber was inconsistent and contradictory.[1746]

682. The Co-Prosecutors respond that the Trial Chamber accurately and consistently defined the term "New People" and correctly found that they constituted a sufficiently discernible group.[1747] The Co-Prosecutors also submit that the Trial Chamber was correct in finding that "New People" were regarded as enemies or

[1743] NUON Chea's Appeal Brief, para. 364.
[1744] The Supreme Court Chamber notes that in the eyes of the law, any conduct amounting to the crime against of humanity of persecution must appear abstruse.
[1745] NUON Chea's Appeal Brief, paras 365-383.
[1746] KHIEU Samphân's Appeal Brief, paras 367, 479-482, 512.
[1747] Co-Prosecutors' Response, paras 213-214.

obstacles to the political agenda espoused of Khmer Rouge and thus constituted a political group.[1748]

683. The Supreme Court Chamber recalls that the Trial Chamber utilised several terms for "New People" interchangeably, including "17 April People"[1749] and "city people".[1750] Notwithstanding this ambiguity in the Trial Judgement, it transpires that the Trial Chamber was referring throughout to the same group of people: those who were living in Phnom Penh on 17 April 1975. The Supreme Chamber recalls the Trial Chamber's finding that "New People" included Khmer Republic officials, intellectuals, landowners, capitalists, feudalists, as well as petty bourgeoisie, all of whom were considered to be enemies of the socialist revolution.[1751] According to the Trial Chamber, the term encompassed all city dwellers, who were viewed as the "corrupt" urban elements of the population,[1752] in contrast to the "Base People", who were also referred to as "Old People" or "18 April people".[1753] The Trial Chamber also noted that, already before the evacuation of Phnom Penh, the Khmer Rouge had been "fomenting resentment towards city people".[1754] Moreover, in discussing motives for the evacuation of cities, the Trial Chamber found that "[t]he evacuation of cities therefore served a dual purpose, namely to prevent enemies from destabilising CPK forces, and also to prevent cadres from being corrupted by the urban population".[1755] As such, the Trial Chamber's findings indicate that it was the entire city population who was considered to be a threat to the political objectives of the Khmer Rouge, a discernible group which included both people who had been living in the city for a long time and those originally living elsewhere in the country who had sought refuge from the fighting during the period 1970-75.[1756]

684. NUON Chea and KHIEU Samphân argue that the Trial Chamber misrepresented the evidence because, rather than identifying "New People" or all city

[1748] Co-Prosecutors' Response, paras 215-220.
[1749] Trial Judgement, paras 517, 569, 571, 650.
[1750] Trial Judgement, paras 112, 517, 787, 873.
[1751] Trial Judgement, paras 169, 613.
[1752] Trial Judgement, paras 112, 873.
[1753] Trial Judgement, paras 517, 873.
[1754] Trial Judgement, para. 517.
[1755] Trial Judgement, para. 112.
[1756] Trial Judgement, para. 157 ("[f]rom 1970-1975 there was an influx of refugees from the countryside into Phnom Penh, increasing the city's population from around 0.5 million in 1970-71 to an estimated 2 to 2.5 million in April 1975") (footnote(s) omitted).

dwellers as its enemies, the CPK considered only a small subset of this group to be actually opposed to the revolution, namely "capitalists", "feudalists" and "no-good elements".[1757] The Supreme Court Chamber finds in this regard that, as noted by the Co-Prosecutors,[1758] it not necessary that all members of a persecuted group suffer the same level of discrimination. Thus, there is no contradiction in finding that a subset of "New People" suffered more severe persecution than others. As found by the Trial Chamber, "New People" were generally treated with suspicion because they "*might* harbour individuals who disagreed with the CPK's ideology".[1759]

685. To the extent that KHIEU Samphân argues that the terms "New People" or "17 April People" came into use only after the evacuation of Phnom Penh and that they could therefore not have been used to designate a "discernible group" forming the object of persecution,[1760] the Supreme Court Chamber considers that what is important is not whether a particular name was used at the time of the facts, but whether city dwellers were persecuted. This will be evaluated below.

686. In sum, the Supreme Court Chamber therefore rejects the arguments raised by NUON Chea and KHIEU Samphân regarding the findings of the Trial Chamber concerning the definition of "New People".

c) Persecution in the course of Population Movement Phase One

687. When defining the elements of the crime of persecution, the Trial Chamber noted that, while the requisite "specific intent [to discriminate] may not be inferred merely by reference to the general discriminatory nature of an attack, it may be inferred from such a context as long as, in the view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent",[1761] and that "'discrimination in fact' occurs where a victim is targeted because of the victim's membership in a group defined by the perpetrator".[1762] In relation to Population Movement Phase One, the Trial Chamber

[1757] NUON Chea's Appeal Brief, paras 378-379; KHIEU Samphân's Appeal Brief, paras 478-482.
[1758] Co-Prosecutors' Response, para. 218.
[1759] Trial Judgement, para. 572 (emphasis added). *See also* Trial Judgement, para. 112.
[1760] KHIEU Samphân's Appeal Brief, para. 367.
[1761] Trial Judgement, para. 429, referring to *Duch* Trial Judgement (001-E188), para. 380; *Krnojelac* Appeal Judgement (ICTY), para. 184.
[1762] Trial Judgement, para. 428, referring to *Duch* Trial Judgement (001-E188), para. 377; *Duch* Appeal

found that "[c]onsidering that Khmer Rouge soldiers actively sought out members of the fallen Khmer Republic throughout Phnom Penh […] before arresting or executing them, and that they were considered the enemy, the Chamber is satisfied that the arrest and murders of former Khmer Republic officials were committed with the intent to discriminate on political grounds".[1763] The Trial Chamber further found that "[c]onsidering also the attitudes of the Khmer Rouge and its soldiers towards city people, evidence of criticisms that they were capitalists levelled in their regard, and that evacuees from Phnom Penh were labelled '17 April People' or 'new people' and treated with suspicion in the base villages, the Chamber is satisfied that Khmer Rouge soldiers intended to discriminate against the evacuated city people on political grounds".[1764] The Trial Chamber found that, "[a]dditionally, these identifiable groups were targeted by the Khmer Rouge on a discriminatory basis, namely that they might harbour individuals who disagreed with the CPK's ideology".[1765] The Trial Chamber found further that the acts were "discriminatory in fact as the victims were identified at checkpoints in the course of evacuation as both high-ranking and lower Khmer Republic officials (civilian and military), as well as city people".[1766]

688. NUON Chea and KHIEU Samphân submit that the Trial Chamber committed errors of law and fact in finding that the *mens rea* for political persecution and discrimination in fact were established as regards Population Movement Phase One.[1767] In respect of the requisite *mens rea*, NUON Chea argues that the Trial Chamber relied upon insufficient evidence to find that discriminatory intent was proven as regards "New People" and that it mischaracterised the evidence upon which it did rely in finding that discriminatory intent was established.[1768] NUON Chea further submits that the elements of persecution were not met in respect of Khmer Republic soldiers and officials.[1769] KHIEU Samphân submits that the Trial Chamber conflated the *mens rea* in respect of the first two groups that had been persecuted, *i.e.* (i) high-ranking military and civilian officials of the Khmer Republic and (ii) other

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Judgement (001-F28), para. 272.
[1763] Trial Judgement, para. 571 (footnote(s) omitted).
[1764] Trial Judgement, para. 571 (footnote(s) omitted).
[1765] Trial Judgement, para. 572 (footnote(s) omitted).
[1766] Trial Judgement, para. 572.
[1767] NUON Chea's Appeal Brief, paras 384-388; KHIEU Samphân's Appeal Brief, paras 164, 365-366, 368.
[1768] NUON Chea's Appeal Brief, paras 384-387.
[1769] NUON Chea's Appeal Brief, para. 388.

military and civilian officers of the Khmer Republic.[1770] KHIEU Samphân further argues that the Trial Chamber relied upon evidence postdating the facts at issue when it found that discriminatory intent was established with respect to "New People".[1771] KHIEU Samphân also submits that the Trial Chamber erred in finding that hatred of city people was a motive for their evacuation from certain cities and that it disregarded evidence that "Base People" and evacuees lived together "without friction", shared food, and that the CPK had issued instructions "calling for solidarity between the two groups".[1772]

689. The Co-Prosecutors respond that the Trial Chamber was correct in finding that the *actus reus* and the *mens rea* of persecution on political grounds were proven in respect of Population Movement Phase One, based on its accurate definition of this crime.[1773]

690. Turning to the arguments that the Trial Chamber erred when it established the *actus reus* of discrimination during Population Movement Phase One, the Supreme Court Chamber recalls that "discrimination in fact" occurs when a victim is targeted because of the victim's membership in a group defined by the perpetrator on specific grounds, namely on a political, racial or religious basis.[1774]

691. As for NUON Chea's submission that the Trial Chamber erred in concluding that "New People" were subjected to discrimination in fact during Population Movement Phase One, arguing that the findings of the Trial Chamber did not accord with pertinent evidence,[1775] the Supreme Court Chamber understands his principal argument to be that "New People" were not the CPK's enemies (and were therefore not the object of persecution).[1776] The Supreme Court Chamber considers that the discrimination in fact of "New People" in the context of Population Movement Phase One lay in their expulsion from Phnom Penh, with the concomitant violations of their rights. Although the entire population of Phnom Penh was subjected to evacuation this does not mean that the conduct was indiscriminate and therefore incapable of

[1770] KHIEU Samphân's Appeal Brief, para. 368.
[1771] KHIEU Samphân's Appeal Brief, para. 368.
[1772] KHIEU Samphân's Appeal Brief, para. 164.
[1773] Co-Prosecutors' Response, paras 221-222.
[1774] *Duch* Appeal Judgement (001-F28), para. 272.
[1775] NUON Chea's Appeal Brief, para. 387.
[1776] NUON Chea's Appeal Brief, para. 387.

amounting to persecution. As demonstrated above in reference to the Trial Chamber's findings, all city dwellers were considered "New People",[1777] a group which included those who were actually "enemies", those who, due to their exposure to city life, were potential opponents of the socialist revolution as well as those who by the mere choice of "corrupt" urban lifestyle contradicted political ideology of the Khmer Rouge.

692. Insofar as NUON Chea argues that the killing of high-ranking Khmer Republic military and civilian officers did not take place and thus could not constitute the underlying conduct for persecution,[1778] the Supreme Court Chamber has confirmed that the killings of four high-ranking officials and of some Khmer Republic soldiers and officials who had heeded calls were reasonably established by the Trial Chamber.[1779] Nevertheless, insofar as KHIEU Samphân argues that the Trial Chamber erred in finding that crimes of extermination and forced transfer had been committed and that, therefore, these crimes could not be the basis for a finding that persecution had occurred,[1780] the Supreme Court Chamber has reversed the Trial Chamber's findings in respect of extermination during Population Movement Phases One.[1781] The Trial Chamber's conclusion that instances of extermination constituted persecution on political grounds accordingly also cannot stand.[1782] Nevertheless, the Supreme Court Chamber has confirmed the Trial Chamber's finding that the evacuation of Phnom Penh had amounted to the crime against humanity of other inhumane acts.[1783] Accordingly, contrary to KHIEU Samphân's submissions, the forced evacuation of Phnom Penh could be taken into account as underlying conduct for the crime against humanity of persecution.

693. Regarding NUON Chea's argument that the Trial Chamber erred in relying, as underlying conduct for the crime of persecution, on the arrest of Khmer Republic soldiers because these arrests had been lawful,[1784] the Supreme Court Chamber notes that the Trial Chamber recalled that the Closing Order (D424), in respect of the acts

[1777] *See above*, para. 683.
[1778] NUON Chea's Appeal Brief, para. 388, referring to NUON Chea's Appeal Brief, paras 588-596.
[1779] *See above*, paras 466, 486.
[1780] KHIEU Samphân's Appeal Brief, para. 366.
[1781] *See above*, paras 541, 560.
[1782] Trial Judgement, para. 574.
[1783] *See above*, para. 567 *et seq.*
[1784] NUON Chea's Appeal Brief, para. 388, referring to NUON Chea's Appeal Brief, paras 479-481. *See also* NUON Chea's Appeal Brief, para. 624.

allegedly amounting to persecution on political grounds, had noted that "the arrest *and execution* of low-ranking Khmer Republic officials was effected by murder and/or extermination".[1785] Similarly, in its legal findings regarding the crime of persecution, the Trial Chamber noted that the "arrest *and murders* of former Khmer Republic officials were committed with the intent to discriminate on political grounds".[1786] Accordingly, the Supreme Court Chamber understands that the Trial Chamber did not consider that the mere arrest of former Khmer Republic officials (including the potentially lawful arrest of soldiers) had amounted to their persecution, but only their arrest *and subsequent execution*. Thus, NUON Chea's argument is without a basis.

694. In relation to the submission that the Trial Chamber erred when it relied on the evacuees' treatment in the villages to establish the intent to discriminate against "New People" during the evacuation, the Supreme Court Chamber notes that in support of its finding regarding discriminatory intent, the Trial Chamber referred to a finding that concerned the evacuees' harsh treatment during the evacuation as well as upon their arrival in their destination villages by both villagers and by Khmer Rouge soldiers.[1787] The Trial Chamber found that evacuees were "viewed with suspicion as capitalists or feudalists, and shunned and told to move on" and that "[o]thers subsequently received orders to leave or move elsewhere".[1788] The Trial Chamber also found that, before the evacuation, the Khmer Rouge had been "fomenting resentment towards city people".[1789] The Supreme Court Chamber considers that, contrary to the arguments raised by NUON Chea and KHIEU Samphân,[1790] for the purpose of establishing discriminatory intent, behaviour shortly before and after the conduct in question may be taken into account as indicative of the perpetrator's state of mind at the time of the facts. The Trial Chamber relied upon evidence of physical violence by

[1785] Trial Judgement, para. 568 (emphasis added, footnote(s) omitted), referring to Closing Order (D427), paras 208, 209, 235.
[1786] Trial Judgement, para. 571 (emphasis added).
[1787] *See* Trial Judgement, para. 517.
[1788] Trial Judgement, para. 517.
[1789] Trial Judgement, para. 517.
[1790] NUON Chea's Appeal Brief, para. 385; KHIEU Samphân's Appeal Brief, para. 368.

Khmer Rouge soldiers towards the evacuees,[1791] in addition to psychological pressure and threats,[1792] both during and immediately following the evacuation of the city.

695. To the extent, that NUON Chea argues that the Trial Chamber erred by relying upon its finding that "New People" were "treated with suspicion in the base villages"[1793] by anyone other than the Khmer Rouge soldiers, the Supreme Court Chamber agrees that, to establish the requisite discriminatory intent for persecution, it is only the attitude of the perpetrator(s) that is pertinent. However, as this only concerned an aspect of the Trial Chamber's finding, which also included discriminatory treatment of "New People" by Khmer Rouge soldiers and cadres,[1794] this does not call into question the reasonableness of the Trial Chamber's overall conclusion as to the existence of intent to discriminate against "New People" and the actual discrimination.

696. The Supreme Court Chamber is not persuaded by KHIEU Samphân's argument that the Trial Chamber blurred the distinction between the discriminatory intent established in respect of high-ranking military and civilian officials of the Khmer Republic, on one hand, and "New People", on the other.[1795] The Supreme Court Chamber considers that there is no reason why the circumstances surrounding the commission of the underlying conduct of persecution could not serve to establish discriminatory intent toward more than one group; neither must the conduct amount to the same kind or degree of discrimination. In the absence of submissions supporting KHIEU Samphân's claim, the Supreme Court Chamber rejects this argument.

697. In conclusion, the Supreme Court Chamber dismisses NUON Chea's and KHIEU Samphân's grounds of appeal regarding the Trial Chamber's finding that the crime of persecution was committed during Population Movement Phase One.

[1791] Trial Judgement, paras 471-474, 489-490.
[1792] Trial Judgement, paras 475, 481, 489, 517.
[1793] Trial Judgement, para. 571, referring to Trial Judgement, para. 517.
[1794] Trial Judgement, para. 517, fns 1548-1550
[1795] KHIEU Samphân's Appeal Brief, para. 368.

d) Persecution in the course of Population Movement Phase Two

698. In relation to Population Movement Phase Two, the Trial Chamber found that transfers occurred in order to meet production targets[1796] and that "people", without distinguishing between "New People" and "Base People", were "given a variety of reasons for their re-location", including that there was insufficient foods in their current locations, that they were being returned to their homes, and that "[o]thers considered that the proximity of the Thai border would facilitate their escape from the Khmer Rouge".[1797] The Trial Chamber noted that "in many locations, exclusively 'New People' were forcibly transferred, while, in some locations, both 'Old People' and 'New People' were displaced".[1798] The Trial Chamber concluded that the "latter displacements occurred for specific reasons, either because of a distrust of the whole population living in the East Zone along the border with Vietnam, or because of the CPK leadership's drive to fill their production quotas".[1799] The Trial Chamber found that before or while being moved, people were questioned about their history, the results of which "often determined the location to which people would be sent, including to the jungle where they had to clear land and build their own shelter. Other "New People" were taken to be re-fashioned or re-educated at security centres".[1800] On this basis, the Trial Chamber found that the Khmer Rouge soldiers and officials had the requisite intent to discriminate.[1801]

699. NUON Chea submits that the Trial Chamber erred in finding that discrimination in fact and the requisite *mens rea* for persecution were established in respect of Population Movement Phase Two.[1802] Similarly, KHIEU Samphân challenges the Trial Chamber's finding that "New People" faced discrimination in fact, arguing that the evidence showed no intent to discriminate against "New People" during Population Movement Phase Two.[1803]

[1796] Trial Judgement, paras 576-602.
[1797] Trial Judgement, para. 589.
[1798] Trial Judgement, para. 655.
[1799] Trial Judgement, para. 655.
[1800] Trial Judgement, para. 655 (footnote(s) omitted).
[1801] Trial Judgement, para. 656.
[1802] NUON Chea's Appeal Brief, paras 389-394, 399.
[1803] KHIEU Samphân's Appeal Brief, paras 483, 486-489, 491.

700. The Co-Prosecutors respond that the Trial Chamber correctly found that the elements of persecution as a crime against humanity were proven in respect of Population Movement Phase Two, having relied on ample evidence – including circumstantial evidence – as contextual support for its findings, which was within its discretion.[1804]

701. According to the Trial Chamber, the objects of persecution on political grounds during Population Movement Phase Two were "New People".[1805] The Supreme Court Chamber recalls that, given the scope of Case 002/01, the only conduct that could be taken into account to make a finding as to the *actus reus* of persecution in the context of Population Movement Phase Two is the actual transfer of people, but not what happened to them at their destinations.[1806] Thus, in order to establish persecution of "New People" as covered by the case at hand, it would have had to be established that the population transfers affected exclusively or at least primarily "New People" and was therefore discriminatory, or that, in the course of the transfer, "New People" were treated differently from "Old People".

702. The Supreme Court Chamber recalls in this regard that it has found[1807] that the Trial Chamber was unreasonable in concluding that the "overwhelming majority" of people transferred during Population Movement Phase Two were "New People", given the limited evidence that supported this conclusion.[1808] Further, it appears from the Trial Chamber's findings and the evidence upon which they are based that population transfers for economic reasons and away from the Vietnamese border concerned both 'Old' and "New People" – a fact acknowledged by the Trial Chamber in its legal conclusions.[1809] Thus, since these transfers did not affect only "New People", it cannot be said that they were discriminatory in fact or expressions of discriminatory intent.

703. In addition, regarding disappearances during the transfers as discriminatory acts affecting "New People", the Supreme Court Chamber accepts NUON Chea's

[1804] Co-Prosecutors' Response, paras 223-228.
[1805] Trial Judgement, paras 656, 657.
[1806] *See above*, para. 230 *et seq.*
[1807] *See above*, para. 633.
[1808] Trial Judgement, para. 631.
[1809] Trial Judgement, para. 654.

argument that the Trial Chamber erred in concluding that "[a]fter being moved, many "New People" disappeared",[1810] relying on the general testimony of only one witness.[1811] Although the Trial Chamber found elsewhere that "New People" disappeared during Population Movement Phase Two,[1812] these findings were based on insufficient underlying evidence to prove the disappearance of *many* evacuated "New People". Thus, the disappearance of "New People" during Population Movement Phase Two cannot be a basis for finding discrimination in fact or discriminatory intent.

704. Furthermore, as regards the Trial Chamber's finding that the questioning of "New People" "often determined the location to which people would be sent",[1813] the Supreme Court Chamber accepts NUON Chea's submission that the evidence upon which the Trial Chamber relied in this respect was insufficient to support this conclusion.[1814] Although it was reasonable to conclude that people were asked about their backgrounds "[b]efore or during population movements"[1815] on the basis of the evidence before the Trial Chamber,[1816] much of the evidence indicates that questioning occurred *after* the transfers,[1817] as argued by NUON Chea.[1818] For these reasons, the Supreme Court Chamber considers that, based on this limited evidence, no reasonable trier of fact could have reached the conclusion that the questioning of "New People" about their histories often had an impact on the locations to which they were sent – which could have established discrimination in fact.

705. In light of the above, the Supreme Court Chamber considers that it cannot be said that it has been established that the transfer of people itself was carried out in a discriminatory manner or with discriminatory intent. While Trial Chamber cited

[1810] Trial Judgement, para. 614, referring to T. 19 June 2013 (NOU Mao), E1/209.1, pp. 44, 52-53.
[1811] NUON Chea's Appeal Brief, para. 394, referring to T. 19 June 2013 (NOU Mao), E1/209.1, pp. 44, 52-53. At page 44, NOU Mao testified that, at the time Oudong was evacuated, "some disappeared mysteriously". At pages 52-53, NOU Mao does not mention the disappearance of "New People".
[1812] Trial Judgement, paras 618, 623, 625.
[1813] Trial Judgement, para. 655, referring to Trial Judgement, paras 600-601, 617.
[1814] NUON Chea's Appeal Brief, paras 392-393.
[1815] Trial Judgement, para. 655.
[1816] *See* Trial Judgement, para. 655, fn. 2057, referring to paras 600-601, 617.
[1817] T. 24 October 2012 (LAY Bony), E1/138.1, p. 31 (asked about what she did in Phnom Penh after arriving at the Kaoh Chum cooperative); CHEA Sowatha Civil Party Application, E3/5084, undated, p. 7, ERN (En) 00569479 (information was taken after transfer from Kandal Province to Battambang Province).
[1818] NUON Chea's Appeal Brief, para. 393.

significant evidence of the CPK's class struggle against the "New People" during the period relevant to Population Movement Phase Two,[1819] also noting that former officials of the Khmer Republic were the main enemies of the Party,[1820] these findings primarily demonstrate that the general intent to discriminate against the "New People" – which had been evidenced by the evacuation of Phnom Penh – continued. Nevertheless, given that the transfer of people – primarily for economic goals – appears to have been a widespread practice that affected all parts of the population, the movement of the population during Population Movement Phase Two was not, as such, discriminatory or an emanation of persecutory intent. For these reasons, the Supreme Court Chamber considers that the Trial Chamber's overall conclusion that "people were also moved to further the class struggle"[1821] was not sufficiently supported by evidence.

706. In conclusion, and while Population Movement Phase Two amounted to the crime against humanity of other inhumane acts, in finding that it also amounted to the crime against humanity of persecution the Trial Chamber erred.

5. Contextual element of crimes against humanity

707. In the Trial Judgement, the Trial Chamber found that the underlying acts enumerated in Article 5 of the ECCC Law only constitute crimes against humanity when certain contextual, or *chapeau*, requirements are met, namely: "(i) there is an attack; (ii) that is widespread or systematic; (iii) and directed against any civilian population; (iv) on national, political, ethnical, racial or religious grounds; (v) there is a nexus between the acts of the direct perpetrator and the attack; and (vi) the accused or the perpetrator has the requisite knowledge".[1822] The Trial Chamber further held that the customary international law definition of crimes against humanity in 1975 no longer required "a nexus to an armed conflict".[1823] The Trial Chamber found that an attack consists of conduct "involving the commission of a series of acts of violence […] not limited to the use of armed force"[1824] and that, for an attack to be widespread

[1819] Trial Judgement, fns 1923, 1925-1929.
[1820] Trial Judgement, para. 613.
[1821] Trial Judgement, para. 613.
[1822] Trial Judgement, para. 177, referring to *Duch* Appeal Judgement (001-F28), para. 106; *Duch* Trial Judgement (001-E188), para. 297.
[1823] Trial Judgement, para. 177, referring to *Duch* Trial Judgement (001-E188), paras 291-292.
[1824] Trial Judgement, para. 178.

or systematic, it will usually be of a large-scale or organised nature and consist of an intentional pattern of similar criminal conduct.[1825] The Trial Chamber considered that, according to customary international law as it stood in 1975, crimes against humanity need not be committed pursuant to a "State or organisational plan or policy".[1826] In respect of the requirement that an attack be directed against any civilian population, the Trial Chamber held that the targeted population must be the primary target of the attack and predominantly civilian in nature.[1827] In this regard, the Trial Chamber found that soldiers *hors de combat* ought not to be qualified as civilians for the purpose of assessing whether the object of the attack was a civilian population.[1828] Furthermore, the Trial Chamber found that an attack "must have been carried out against the civilian population on a discriminatory basis, namely on national, political, ethnical, racial or religious grounds".[1829] Finally in this regard, the Trial Chamber considered that the acts of the perpetrator "must be part of the attack", namely that they must be objectively part of the attack "by their very nature or consequences",[1830] and that the accused or perpetrator must have had knowledge about the attack and that his or her acts formed part thereof.[1831]

708. In its legal findings, the Trial Chamber stated that it was satisfied that all of these contextual elements were met,[1832] concluding that, from 17 April 1975 until at least December 1977, there was a widespread and systematic attack,[1833] directed against the civilian population of Cambodia,[1834] carried out on political grounds,[1835] and that there was a nexus between the attack and the acts of NUON Chea and KHIEU Samphân; the Trial Chamber also found that the Accused had had knowledge of the attack and that their acts were part thereof.[1836]

[1825] Trial Judgement, para. 179.
[1826] Trial Judgement, para. 181.
[1827] Trial Judgement, paras 182-183.
[1828] Trial Judgement, para. 186.
[1829] Trial Judgement, para. 188.
[1830] Trial Judgement, para. 190.
[1831] Trial Judgement, para. 191.
[1832] Trial Judgement, para. 198.
[1833] Trial Judgement, para. 193.
[1834] Trial Judgement, para. 194.
[1835] Trial Judgement, para. 195.
[1836] Trial Judgement, para. 197.

709. NUON Chea and KHIEU Samphân argue that the Trial Chamber committed several errors concerning the contextual element of crimes against humanity. First, they contend that the Trial Chamber erred as a matter of law when it held that, by 1975, the definition of crimes against humanity no longer required proof of a nexus to an armed conflict.[1837] Second, they allege that the Trial Chamber erred in law when it found that the definition of crimes against humanity did not require proof of a state plan or policy.[1838] Finally, NUON Chea and KHIEU Samphân submit that the Trial Chamber erred in law and in fact in finding that there was a nexus between their acts and a widespread and systematic attack directed against a civilian population on political grounds from 1975-1979.[1839] In light of these alleged errors, NUON Chea and KHIEU Samphân request that the Supreme Court Chamber invalidate their convictions for crimes against humanity in the Trial Judgement and enter acquittals in respect of the charges against them.[1840]

710. The Co-Prosecutors respond that the Trial Chamber was correct in concluding that the definition of crimes against humanity under customary international law as of 1975 did not require "a nexus with an armed conflict".[1841] Disputing arguments raised by KHIEU Samphân in this regard, the Co-Prosecutors submit that the Trial Chamber correctly interpreted the IMT Charter and decisions of the NMTs in finding that crimes against humanity did not require proof of a State plan or policy in 1975.[1842] Further, the Co-Prosecutors respond that the Trial Chamber was accurate in finding that a widespread and systematic attack on political ground occurred.[1843]

a) Nexus to an armed conflict

711. Turning to the first argument, namely that, in 1975, the definition of crimes against humanity required proof of a nexus to an armed conflict, the Trial Chamber found "that the armed conflict nexus was not part of the definition of crimes against

[1837] NUON Chea's Appeal Brief, paras 467-473; KHIEU Samphân's Appeal Brief, paras 52-54, 333.
[1838] NUON Chea's Appeal Brief, para. 474; KHIEU Samphân's Appeal Brief, paras 55-58, 333.
[1839] NUON Chea's Appeal Brief, paras 475-483; KHIEU Samphân's Appeal Brief, paras 330-340, 358.
[1840] NUON Chea's Appeal Brief, paras 473, 730; KHIEU Samphân's Appeal Brief, paras 54, 58, 358, 659.
[1841] Co-Prosecutors' Response, paras 126-128.
[1842] Co-Prosecutors' Response, para. 131.
[1843] Co-Prosecutors' Response, paras 132-136.

humanity within customary international law between 1975-1979".[1844] In an earlier decision on the subject, the Trial Chamber had reasoned that:

> [h]aving reviewed the pertinent state practice and *opinio juris* between 1945 and 1975, the Trial Chamber concludes that from the earliest inception of crimes against humanity within the [IMT] Charter and [Control Council Law No. 10], there was already a significant tendency to delink these crimes from armed conflict. This tendency to view crimes against humanity as grave international crimes not inherently connected to armed conflict gained momentum in the aftermath of the Nuremberg era and constituted settled law by 1975.[1845]

712. The Supreme Court Chamber notes that neither the IMT Charter nor the Nuremberg Principles refer to an "armed conflict nexus" requirement. Rather, the latter state that acts constituting crimes against humanity must be "carried out in execution of or in connexion with any crime against peace or any war crime",[1846] incorporating language found in the IMT Charter.[1847] This requirement is more onerous than the requirement of a nexus to an armed conflict: it requires a substantive link between the crime alleged and another international crime, either a war crime or a crime against peace.[1848] Accordingly, the question before the Supreme Court Chamber is whether, by 1975, the definition of crimes against humanity required such nexus.

713. The Supreme Court Chamber notes in this regard that the nexus requirement in the IMT Charter could be understood in two ways: as a material element of the definition of crimes against humanity; or, alternatively, as merely a jurisdictional element that limited the IMT's competence to only those crimes against humanity that had a link to a war crime or crime against peace. Although the IMT Judgement does not expressly address this question, various sections thereof indicate that the IMT

[1844] Trial Judgement, para. 177, recalling and confirming *Duch* Trial Judgement (001-E188), paras 291-292; Decision to Exclude Armed Conflict Nexus Requirement of Crimes Against Humanity (E95/8), para. 33.
[1845] Decision to Exclude Armed Conflict Nexus Requirement of Crimes Against Humanity (E95/8), para. 33.
[1846] Nuremberg Principles, Principle VI (c).
[1847] IMT Charter, Art. 6(c).
[1848] The Supreme Court Chamber notes that the term "armed conflict nexus requirement" derives from ICTY Statute, Art. 5. The ICTY has interpreted this nexus to only require proof that an armed conflict existed at the time and place relevant for the indictment, not proof of a material nexus between the acts of the accused and another international crime which may or may not have been committed in the context of an armed conflict. *See* *Kunarac* Appeal Judgement (ICTY), para. 83; *Tadić* Appeal Judgement (ICTY), paras 249, 251. Thus, the nexus requirement in ICTY Statute, Art. 5 is not the same as the nexus requirement found in the Nuremberg Principles.

interpreted the nexus requirement to be a material element of the definition of crimes against humanity under international law.[1849] Notably, when reaching convictions with respect to certain defendants, the IMT applied the nexus requirement seemingly as part of the definition of crimes against humanity, considering that only acts in connection with another crime within its jurisdiction could constitute crimes against humanity.[1850]

714. Nevertheless, even in the immediate aftermath of World War II, the exact nature of the nexus requirement, whether jurisdictional or material, was unclear. In particular, Control Council Law No. 10, which was adopted only four months after the IMT Charter, did not include the nexus requirement in its definition of crimes against humanity.[1851] At the same time, according to its preamble, Control Council Law No. 10 was intended to give effect to the IMT Charter (which included the nexus requirement).[1852]

715. The jurisprudence on the nexus requirement in relation to Control Council Law No. 10 was inconsistent. On one hand, some NMT cases (which were based on this law) seemed to interpret the nexus requirement as a material element of the definition of crimes against humanity.[1853] On the other hand, in the *Flick* Case (U.S. Military Tribunal, Germany), a NMT found that the nexus requirement had to be proved, given that the IMT Charter was an integral part of Control Council Law No. 10, but discussed it in jurisdictional rather than material terms, finding it lacked jurisdiction if not proved.[1854] Importantly, in the *Einsatzgruppen* Case, a NMT held

[1849] *See* IMT Judgement, p. 254 ("To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal"); U.N. War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1948, pp. 192, 201-203; Henri Donnedieu DE VABRES, "The Nuremberg Trial and Modern Principles", in: Guénaël METTRAUX (ed.), *Perspectives on the Nuremberg Trial*, Oxford University Press, 2008, p. 213 *et seq*., at 240-241, noting that the IMT had to take into account the principle of legality, though also stating that crimes against humanity were linked to war crimes and crimes against peace "from a jurisdictional point of view".
[1850] *See*, *e.g.*, IMT Judgement, 304 (Streicher's conduct "constitutes persecution […] in connection with War Crimes […] and constitutes a Crime against Humanity"), 318-319 (Austria's occupation was "a crime within the jurisdiction of the Tribunal'[…].As a result, 'murder, extermination, enslavement, deportation, and other inhumane acts' and 'persecutions on political, racial, or religious grounds' in connection with this occupation constitute a Crime against Humanity under that Article".
[1851] Control Council Law No. 10, Art. II(1)(c).
[1852] Control Council Law No. 10, Preamble.
[1853] *See*, *e.g.*, *Justice* Case, pp. 971; *Ministries* Case, p. 606; *Pohl* Case, pp. 991-992.
[1854] *Flick* Case (U.S. Military Tribunal, Germany), p. 1213.

that, absent an explicit nexus requirement in Control Council Law No. 10, it had jurisdiction to "try all crimes against humanity as long known and understood under the general principles of criminal law", without proof of the nexus.[1855] The Supreme Court Chamber does not consider that this holding in the *Einsatzgruppen* Case was *obiter dictum* simply because the crimes against humanity charged in this case had in any event, been perpetrated during the war.[1856] Irrespective of the circumstances of the case, it was incumbent upon the Tribunal to determine whether the nexus to a war crime or crime against peace was a legal element of crimes against humanity. Furthermore, the *Sch.* Case, which was conducted before German courts on the basis of Control Council Law No. 10, concerned crimes againt humanity committed during pogrom of 9 November 1938, *i.e.* before the outbreak of World War II and with no apparent link to war crimes or crimes against peace.[1857]

716. Further evidence of the exclusion of the nexus requirement from the definition of crimes against humanity in customary international law is found in a series of post-1945 international instruments.[1858] The Supreme Court Chamber considers that this gradual exclusion accords with the evolving view that the prohibition of crimes against humanity aims to protect humanity from the commission of atrocities, thus warranting a definition that does not require a nexus to a war crime or a crime against peace.

717. It is also of note that, in 1954, the ILC dropped the nexus requirement from the definition of crimes against humanity in its second Draft Code of Offences Against the Peace and Security of Mankind.[1859] Although the General Assembly did not adopt

[1855] *Einsatzgruppen* Case, p. 499.
[1856] *See* NUON Chea's Appeal Brief, para. 468; KHIEU Samphân's Appeal Brief, para. 53 (incorporating by reference IENG Sary's Appeal Against Decision to Exclude Armed Conflict Nexus (E95/8/1/1), para. 31).
[1857] *See Sch.* Case (Supreme Court for the British Zone, Germany).
[1858] Resolution on Crimes Against Humanity, 10-11 July 1947; Genocide Convention, Art. I (genocide being a notion that derived from the notion of crimes against humanity); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Art. 1 (broadening the category of acts constituting crimes against humanity to include the IMT Charter definition with its nexus requirement, but also apartheid and genocide, which do not have the requirement, while also confirming that crimes against humanity may be committed "in time of war or in time of peace"); International Convention on the Suppression and Punishment of the Crime of Apartheid, Arts I-II.
[1859] 1954 Draft Code of Offences Against the Peace and Security of Mankind, Art. 2(11). The International Law Commission had voted to delete the nexus requirement from the definition), *see* Summary Record of 267th ILC Meeting, paras 40-62.

the 1954 Draft Code of Offences Against the Peace and Security of Mankind,[1860] when the ILC addressed it again in 1984, it noted that "[t]he 1954 draft itself departed from the Nürnberg context by defining crimes against humanity regardless of any relation to war crimes"[1861] and that "it was only when sufficient time had elapsed after the Nürnberg trials that the concept of a crime against humanity finally acquired its own autonomy and became detached from the state of war".[1862]

718. The ECtHR reached a similar view in *Korbely v. Hungary* when it concluded, with reference to the 1954 Draft Code of Offences Against the Peace and Security of Mankind, that, by 1956, the nexus requirement may not have been an element of the definition of crimes against humanity under customary international law.[1863] The Supreme Court Chamber does not agree with NUON Chea's argument that the Trial Chamber erred relying on *Korbely v. Hungary*.[1864] Although the ECtHR used the word "may" in reaching its conclusion on the nexus requirement, the judgement nevertheless demonstrates that shortly after the definition of crimes against humanity had been codified in the Nuremberg Principles, there was evidence that the definition was evolving to exclude the nexus requirement. In addition, although the ECtHR was not seeking to establish authoritatively the definition of crimes against humanity by 1956 for purposes of individual criminal responsibility, it nevertheless had to establish, for purposes of the principle of legality, that there was a "sufficiently clear basis, having regard to the state of international law […] for the applicant's conviction" for crimes against humanity in Hungary.[1865] The Supreme Court Chamber also notes the ECtHR's decision in *Kolk and Kislyiy v. Estonia*, where it rejected as manifestly unfounded applications that challenged the applicants' conviction for crimes against humanity committed in 1949, without any nexus to a war crime or crime against peace.[1866]

[1860] Adoption of the Draft Code was postponed in order to study further disagreements surrounding the definition of the crime against aggression. *See* U.N. ECOSOC, Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, paras 40, 48.
[1861] ILC Yearbook 1984 (Vol. II, Part 1), p. 90, para. 11.
[1862] ILC Yearbook 1984 (Vol. II, Part 1), p. 94, para. 40.
[1863] *Korbely v. Hungary* Grand Chamber (ECtHR), para. 82.
[1864] NUON Chea's Appeal Brief, para. 470.
[1865] *Korbely v. Hungary* Grand Chamber Judgement (ECtHR), para. 78.
[1866] *Kolk and Kislyiy v. Estonia* Admissibility Decision (ECtHR).

719. Further, national legislation defining crimes against humanity by 1975 omitted a nexus requirement.[1867] Several national court decisions reached convictions for crimes against humanity with respect to conduct occurring prior to 1975 in which they explicitly dispensed with a nexus requirement or did not address the issue.[1868]

720. In addition, all statutes and jurisprudence of international, hybrid and internationalised tribunals established from 1993 omit any reference to such a nexus requirement in their definitions of crimes against humanity (although the ICTY Statute required a nexus to an armed conflict).[1869] Indeed, the ICTY Appeals Chamber found that there was "no logical or legal basis" for requiring a nexus to a crime against peace or war crime.[1870] Likewise, none of the versions of the Draft Code of Offences Against the Peace and Security of Mankind produced by the ILC in 1986,[1871] 1991[1872] and 1996[1873] included a nexus requirement in the definitions of crimes against humanity articulated therein. Finally, while certain delegates on the Preparatory Committee for the creation of the International Criminal Court initially called for a "nexus to an armed conflict" requirement in the definition of crimes against humanity to be included in the Statute of the Court, the overall consensus was against such a nexus under customary international law,[1874] no such requirement was eventually adopted.

[1867] *See*, *e.g.*, Israeli Act on Bringing the Nazis and their Collaborators to Justice, Section 1(b) (not available in English); Hungarian Law-Decree No. 1 of 1971 (promulgating the broader definition of crimes against humanity found in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity); International Crimes Act (Bangladesh), Section 3.(2)(a).
[1868] *See*, *e.g.*, *Eichmann* Judgement (District Court, Israel); *Barbie Case* (Court of Cassation, France) (not available in English); *R.* v. *Finta* (Supreme Court, Canada), p. 813; *Arancibia Clavel* Case (Supreme Court, Argentina), pp. 18, 23, 33-34 (not available in English).
[1869] *See* ICTY Statute, Art. 5; ICTR Statute, Art. 3; SCSL Statute, Art. 2; UNTAET Regulation No. 2000/15, para. 5; Criminal Code of Bosnia and Herzegovina, Art. 172 (over which the War Crimes Chamber in the Court of Bosnia-Herzegovina had jurisdiction, *see* Law on Court of Bosnia-Herzegovina, Art 7(1) read with Art. 14); ECCC Law, Art. 5; Statute of the Extraordinary African Chambers in the Courts of Senegal, Art. 6. *See also* ICC Statute, Art. 7(2). As noted above, while the ICTY Statute includes a "when committed in armed conflict" contextual element in its definition, this is not the same as the nexus found in the Nuremberg Principles. In addition, the ICTY Appeals Chamber held in the *Tadić* Jurisdiction Appeal Decision (ICTY), para. 78 that "customary law no longer requires any nexus between crimes against humanity and armed conflict"; *see also* paras 140-141.
[1870] *Tadić* Jurisdiction Appeal Decision (ICTY), para. 140.
[1871] Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind (1986), pp. 85-86 (Article 12).
[1872] ILC Report on its 43rd Session, pp. 214, 216, 218.
[1873] ILC Report on its 48th Session, pp. 15-56 (Article 18).
[1874] Summary Record of Third Meeting of the Committee concerning the Establishment of an

721. In sum, the Supreme Court Chamber finds that the Trial Chamber did not err in finding that there was no nexus requirement for crimes against humanity by 1975. The nexus requirement to a war crime or crime against peace in the Nuremberg Principles was not part of the definition of crimes against humanity by 1975. The Supreme Court Chamber therefore dismisses the grounds of appeal raised in this regard.

b) State plan or policy

722. NUON Chea and KHIEU Samphân also allege that the Trial Chamber erred in law when it held that the definition of crimes against humanity under customary international law during the time relevant to the crimes charged did not include the existence of a State plan or policy as an element of the contextual requirement ("State plan or policy requirement").[1875] In considering this alleged error, the Supreme Court Chamber recalls that, in the Trial Judgement, the Trial Chamber relied on the *Duch* Trial Judgement (001-E188), as follows:

> In the *KAING Guek Eav* Trial Judgement, this Chamber found that while the existence of a policy or plan may be evidentially relevant in establishing the widespread or systematic nature of the attack, it does not constitute an independent legal element of the crime. While this position accorded with post-1975 jurisprudence from other international tribunals, it was based upon a review of customary international law sources relevant to the operative time period. These sources set out contrasting views on the issue. While the Defence has identified certain sources which support their legal argument, there is also support for the view previously advanced by this Chamber in the *KAING Guek Eav* Trial Judgement, necessitating the conclusion that state practice and *opinio juris* at that time did not clearly support a State […] plan or policy requirement.[1876]

723. At the outset, the Supreme Court Chamber notes that neither the IMT Charter nor the Nuremberg Principles make "the existence of a State plan or policy" expressly part of the definition of crimes against humanity. As such, the questions before the Chamber are whether the definition of crimes against humanity under customary

International Criminal Court, pp. 146-154, para. 176.
[1875] NUON Chea's Appeal Brief, para. 474 (incorporating by reference submissions made in NUON Chea's Closing Submissions (E295/6/3), paras 210-213; KHIEU Samphân's Appeal Brief, paras 55-58, 333.
[1876] Trial Judgement, para. 181.

international law in 1946 implicitly included a State plan or policy requirement which remained by 1975, or evolved and crystallised to include the requirement by 1975.

724. The Supreme Court Chamber agrees with KHIEU Samphân to the extent that crimes against humanity, as set out in the IMT Charter, will, as a matter of fact, often be associated with a State plan or policy.[1877] However, the IMT Charter's definition of these crimes, including the phrase "acting in the interests of the European Axis countries" in the *chapeau* of Article 6 of the IMT Charter, does not make the existence of a State plan or policy a legal element of crimes against humanity.[1878] Nor does the Supreme Court Chamber agree with KHIEU Samphân's argument that the preambles to the London Agreement and the Moscow Declaration show that the IMT Charter made the existence of a State plan or policy part of the legal definition of crimes against humanity.[1879] Neither document makes reference to such a requirement. Indeed, the drafting history of the IMT Charter does not support a finding that the Allies intended for there to be a State policy or plan requirement as part of the definition of crimes against humanity under Article 6(c) of the Charter.[1880]

725. Similarly, the IMT Judgement does not contain any reference to a State plan or policy element as part of the definition of crimes against humanity. In the section of the judgement describing the underlying acts perpetrated before the start of the war in 1939, the IMT did not consider or suggest that the prosecution had to prove that these acts had had a nexus to a State plan or policy as a contextual requirement.[1881] The language describing the acts against civilian populations both before and after the war started does not support such an interpretation either. The IMT described these acts as having been "vast" or, at times, "organised and systematic", or as having been carried out pursuant to a policy. However, there is no explicit or implicit holding by the Tribunal that, in order for convictions to be reached, it had to be proved that the defendants' acts were connected to a State plan or policy, although this was certainly

[1877] KHIEU Samphân's Appeal Brief, para. 57.
[1878] IMT Charter, Art. 6 ("[t]he Tribunal established […] hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, *acting in the interests of the European Axis countries*, whether as individuals or as members of organizations, committed any of the following crimes") (emphasis added).
[1879] KHIEU Samphân's Appeal Brief, para. 57.
[1880] *See* Robert JACKSON, Notes on Proposed Definition of "Crimes" (1945); Robert JACKSON, Conference Minutes, 23 July 1945; Robert Jackson, Conference Minutes, 24 July 1945; Robert JACKSON, Conference Minutes, 25 July 1945.
[1881] IMT Judgement, pp. 254-255.

the case as a factual matter.[1882] Thus, the Supreme Court Chamber cannot conclude that the IMT Charter and, in turn, the Nuremberg Principles, implicitly included a State plan or policy requirement.

726. Second, on the question of whether customary international law evolved subsequent to the Nuremberg Principles to include the State plan or policy requirement by 1975, the Supreme Court Chamber notes that the U.N. War Crimes Commission Legal Committee's interpretation of the definition of crimes against humanity does not refer to such an element.[1883] There is no reference to such a requirement in Control Council Law No. 10.[1884]

727. While the *Justice* Case seems to interpret Control Council Law No. 10 as requiring such a plan or policy in order to distinguish isolated crimes or domestic law offences from crimes against humanity,[1885] several other cases in which convictions were entered for crimes against humanity under Control Council Law No. 10 did not stipulate the existence of a State plan or policy as part of the contextual element.[1886] The Supreme Court Chamber also notes that a number of international legal instruments do not include a State plan or policy as a required contextual element in their definitions of crimes against humanity.[1887]

728. The Supreme Court Chamber observes that in *Korbely v. Hungary*, the Grand Chamber of the ECtHR referred to the existence of a "State action or policy" as an element of the definition of crimes against humanity under customary international

[1882] *See*, *e.g.*, IMT Judgement, pp. 281-282, 287-307, 318-322, 324-325, 327-336, 339-341.
[1883] U.N. War Crimes Commission, History of the U.N. War Crimes Commission and the Development of the Laws of War (1948), p. 179 ("[a]s a rule, systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law"). Authoritative action does not necessarily have to be pursuant to a State plan or policy.
[1884] Control Council Law No. 10, Art. II(1)(c).
[1885] *See* *Justice* Case, pp. 972-973, 981-982, 984.
[1886] *See*, *e.g.*, *Flick* Case (U.S. Military Tribunal, Germany), pp. 1191, 1212-1216 (as noted above, however, the Tribunal did require a link to a war crime or crime against peace); *Medical* Case, pp. 172-173; *Ministries* Case, pp. 653-654, 797; *Farben* Case (U.S. Military Tribunal, Germany), pp. 1129-1130; *High Command* Case, p. 469 *et seq*.
[1887] *See* Resolution on Crimes Against Humanity 10-11 July 1947; Genocide Convention, Art. I; 1951 Draft Code of Offences Against the Peace and Security of Mankind, p. 59, Art. I(9); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Art. I; International Convention on the Suppression and Punishment of the Crime of Apartheid, Art. I-II; U.N. General Assembly Resolution 3074 (1973).

law as it stood in 1956.[1888] However, according to the ECtHR, the overarching issue was to exclude "isolated or sporadic" acts and, as such, it was required that the acts in question should "form part of 'State action or policy' *or* of a widespread and systematic attack on the civilian population".[1889] Thus, as long as there existed a widespread and systematic attack on the civilian population, the existence of a "State action or policy" was not required.

729. Moreover, while some national case law and legislation addressing this issue required proof of a State plan or policy as part of the contextual element for crimes against humanity,[1890] other domestic cases explicitly rejected this requirement or made no reference to it whatsoever.[1891] Accordingly, there does not appear to be any uniform practice in that regard.

730. In the time period following the ECCC's temporal jurisdiction, State practice and *opinio juris* on a State plan or policy contextual requirement continued to present contrasting evidence with respect to such a requirement in the definition of crimes against humanity. The Statutes of nearly all modern international and hybrid criminal tribunals define crimes against humanity without any State plan or policy contextual requirement.[1892] Further, since 2002,[1893] international and hybrid tribunals have consistently held that there is no such requirement.[1894]

[1888] *Korbely v. Hungary* Grand Chamber Judgement (ECtHR), para. 82.
[1889] *Korbely v. Hungary* Grand Chamber Judgement (ECtHR), para. 83 (emphasis added).
[1890] *Barbie* Case (Court of Cassation, France), p. 761 (not available in English); *Touvier* Case (Court of Cassation, France), p. 15 (not available in English); *R. v. Finta* (Supreme Court, Canada). In *Eichmann* Judgement (District Court, Israel) paras 56-88, the District Court entered extensive factual findings regarding the existence of a State policy.
[1891] *In Re Ahlbrecht* (No. 2) (Special Court of Cassation, The Netherlands).
[1892] *See* ICTY Statute, Art. 5; ICTR Statute, Art. 3; SCSL Statute, Art. 2 ; UNTAET Regulation No. 2000/15, para. 5; Criminal Code of Bosnia and Herzegovina, Art. 172; Provisional Criminal Code of Kosovo, Art. 117; ECCC Law, Art. 5; Statute of the Extraordinary African Chambers in the Courts of Senegal, Art. 6; but *see* ICC Statute, Art. 7(2)(a), which specifically requires that the attack be committed "pursuant to or in furtherance of a State or organizational policy to commit such an attack". It has been suggested that the drafters of the ICC Statute may have "deliberately deviated from customaty rules in this regard", *see* *Kenya* Article 15 Decision (ICC), dissenting opinion of Judge Kaul, para. 32.
[1893] *Kunarac* Appeal Judgement (ICTY), para. 98.
[1894] *Blaškić* Appeal Judgement (ICTY), para. 120; *Krstić* Appeal Judgement (ICTY), para. 225; *Kordić and Čerkez* Appeal Judgement (ICTY), para. 98; *Semanza* Appeal Judgement (ICTR), para. 269; *Nahimana* Appeal Judgement (ICTR), para. 922; *Gacumbitsi* Appeal Judgement (ICTR), para. 84; *Brima* Trial Judgement (SCSL), para. 215; *Fofana and Kondewa* Trial Judgement (SCSL), para. 113; *Sesay.* Trial Judgement (SCSL), para. 79.

731. Finally, while the 1986 Draft Code of Offences Against the Peace and Security of Mankind produced by the ILC does not refer to a State plan or policy as part of the contextual element of crimes against humanity, the 1996 Draft Code of Offences Against the Peace and Security of Mankind may be interpreted to have incorporated it, based on the 1954 Draft Code.[1895] Similar to the definition of the contextual element in the ICC Statute, the 1996 Draft Code of Offences Against the Peace and Security of Mankind states that "[a] crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale *and* instigated or directed by a Government or by an organization or group".[1896] Notwithstanding, referencing the IMT's declaration of the criminal character of a number of organisations, the ILC noted in its commentary to the 1996 Draft Code that the instigation or direction may be from the Government *or* any organisation or group "which may or may not be affiliated with a Government".[1897] Accordingly, this language does not support the requirement of proof of a *State* plan or policy as a contextual element, as it broadens the element to allow for proof of a policy or plan emanating from organisations or groups other than States.

732. In view of the foregoing, the Supreme Court Chamber finds that the Trial Chamber did not err when concluding that, "state practice and *opinio juris* [by 1975] did not clearly support a State or organizational plan or policy requirement"[1898] as an independent contextual element of the definition of crimes against humanity. While there were some sources in support of such a requirement, customary international law had not evolved subsequent to the Nuremberg Principles to such an extent that it could be said that this contextual element had crystallised as part of the definition of crimes against humanity during the ECCC's temporal jurisdiction. Consequently, the Supreme Court Chamber dismisses the grounds of appeal raised by NUON Chea and KHIEU Samphân in this respect.

[1895] Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind (1986), p. 86 (Article 12) (*see also* the 1991 proposal for Article 21 of the Draft Code, which likewise does not contain such a requirement – ILC Report on its 43rd Session, p. 222); ILC Report on its 48th Session, pp. 47-50 (Article 18).
[1896] ILC Report on its 48th Session, p. 47 (Article 18).
[1897] ILC Report on its 48th Session, p. 47.
[1898] Trial Judgement, para. 181.

c) Nexus to a widespread or systematic attack directed against a civilian population on national, political, ethnical, racial or religious grounds

733. NUON Chea and KHIEU Samphân contend that the Trial Chamber committed several errors with respect to the requirement under Article 5 of the ECCC Law that acts charged as crimes against humanity have a nexus to a widespread or systematic attack, which is directed against any civilian population, on national, political, ethnical, racial or religious grounds.[1899]

(1) Widespread or systematic attack directed against any civilian population

734. In respect of the requirement that the attack must have been directed against any civilian population, the Trial Chamber found such an attack to have existed, which:

> was directed against the civilian population of Cambodia. The armed conflict between the Khmer Republic and Khmer Rouge ended on 17 April 1975 when the Khmer Rouge captured Phnom Penh and the Khmer Republic forces surrendered. Thereafter, all Khmer Republic soldiers not taking a direct part in hostilities were civilians or, at minimum, *hors de combat*, thereby enjoying the same protections as civilians. In any event, former Khmer Republic soldiers only formed part of the millions of civilians attacked.[1900]

735. NUON Chea submits that the Trial Chamber erred in its finding that the acts of violence on which the Trial Chamber had relied to find the existence of an attack had targeted civilians, as opposed to former Khmer Republic soldiers who had been rendered *hors de combat*.[1901] NUON Chea submits that the findings of the Trial Chamber concerning acts of violence only pertain to Khmer Republic soldiers, who may have had the status of soldiers *hors de combat*, but not of civilians.[1902] Thus, he submits that soldiers *hors de combat* cannot be the target of a widespread or systematic attack directed against any *civilian* population.[1903] NUON Chea further contests the Trial Chamber's finding that the CPK adopted a policy of "smashing

[1899] NUON Chea's Appeal Brief, paras 475-483; KHIEU Samphân's Appeal Brief, paras 330-341, 358.
[1900] Trial Judgement, para. 194 (footnote(s) omitted).
[1901] NUON Chea's Appeal Brief, paras 480-482.
[1902] NUON Chea's Appeal Brief, para. 480.
[1903] NUON Chea's Appeal Brief, paras 481-482.

enemies", which he submits does not meet the standard of "acts of violence" required to establish an attack.[1904]

736. KHIEU Samphân submits that, in finding that there had been a widespread and systematic attack, the Trial Chamber had relied on events and incidents that were not covered by the scope of Case 002/01, as severed, and that the Trial Chamber therefore erred.[1905]

737. The Co-Prosecutors submit that the Trial Chamber correctly found that a widespread and systematic attack existed by relying upon sufficient evidence of attacks against civilians as well as Khmer Republic officials and soldiers who were *hors de combat*.[1906] The Co-Prosecutors also contend that the Trial Chamber did not err in concluding that former Khmer Republic soldiers and officials formed part of the millions of civilians attacked.[1907] Finally in this respect, the Co-Prosecutors argue that it was within the Trial Chamber's discretion to rely on evidence outside the scope of Case 002/01 to corroborate its findings and submit that the outstanding arguments raised by KHIEU Samphân fail to meet the required standard for appellate review.[1908]

738. The Supreme Court Chamber finds that, based on the well-established jurisprudence of ICTY and ICTR,[1909] the Trial Chamber correctly found that, in order to qualify as a civilian population for the purpose of crimes against humanity, "the target population must be of a predominantly civilian nature".[1910] The ICTY Appeals Chamber observed in *Blaškić* that "the presence within a population of […] former combatants, who have laid down their arms, does not alter its civilian characteristic".[1911] As the Trial Chamber correctly observed, this case law, moreover,

[1904] NUON Chea's Appeal Brief, para. 483.
[1905] KHIEU Samphân's Appeal Brief, paras 330-341; *see also* para. 358.
[1906] Co-Prosecutors' Response, para. 132.
[1907] Co-Prosecutors' Response, paras 133-134.
[1908] Co-Prosecutors' Response, paras 135-136.
[1909] *Blaškić* Appeal Judgement (ICTY), para. 107; *Kunarac* Appeal Judgement (ICTY), paras 91-92; *Galić* Appeal Judgement (ICTY), para. 144; *Kordić and Čerkez* Appeal Judgement (ICTY), para. 50; D. *Milošević* Appeal Judgement (ICTY), paras 50-51; *Semanza* Trial Judgement (ICTR), para. 330; *Akayesu* Trial Judgement (ICTR), para. 582; *Rutaganda* Trial Judgement (ICTR), para. 72; *Musema* Trial Judgement (ICTR), para. 207; *Bagilishema* Trial Judgement (ICTR), para. 79; *Kayishema* and Ruzindana Trial Judgement (ICTR), para. 128.
[1910] Trial Judgement, para. 183.
[1911] *Blaškić* Appeal Judgement (ICTY), para. 113.

accords with Article 50(3) of Additional Protocol I,[1912] with the result that "soldiers *hors de combat* do not qualify as 'civilians' for the purposes of Article 5 of the ECCC law".[1913]

739. The Supreme Court Chamber rejects NUON Chea's submission that the only findings in the Trial Judgement concerning "acts of violence" against political opponents of the CPK relate to Khmer Republic soldiers.[1914] First, the Trial Chamber relied upon broad evidence demonstrating that those evacuated from Phnom Penh – a group which comprised persons other than Khmer Republic soldiers – were subjected to physical violence[1915] and psychological pressure and threats[1916] by Khmer Rouge soldiers. Second, NUON Chea's argument is based upon a mischaracterisation of the findings of the Trial Chamber, which held that the widespread and systematic attack was directed at "the civilian population of Cambodia",[1917] not merely the feudalist and capitalist classes, "New People", and actual or perceived opponents of the revolution and collectivisation, as suggested by NUON Chea.[1918]

740. The Supreme Court Chamber notes the Trial Chamber's finding that "former Khmer Republic soldiers only formed part of the millions of civilians attacked".[1919] This could be understood as equating soldiers *hors de combat* with civilians, a supposition which the Trial Chamber itself deemed to amount to an erroneous reading of Article 5 of the ECCC Law.[1920] Therefore, this finding is best understood as meaning that, while former Khmer Republic soldiers were among those who were attacked, this did not make them civilians; yet, it also did not transform the civilian character of the population under attack. As the Supreme Court Chamber has already observed, the Trial Chamber correctly found that a targeted population need only be *predominantly* civilian to meet this *chapeau* element of crimes against humanity and

[1912] Trial Judgement, para. 185, referring to *Blaškić* Appeal Judgement (ICTY), paras 110-113. *See also Galić* Appeal Judgement (ICTY), para. 144; *Martić* Appeal Judgement (ICTY), para. 297.
[1913] Trial Judgement, para. 186, referring to *Mrkšić and Šljivančanin* Appeal Judgement (ICTY), para. 35. The *Mrkšić and Šljivančanin* Appeal Judgement (ICTY) refers, in turn, to *Blaškić* Appeal Judgement (ICTY), paras 110, 113-114; *Kordić and Čerkez* Appeal Judgement (ICTY), para. 97; *Galić* Appeal Judgement (ICTY), para. 144, footnote, 437.
[1914] NUON Chea's Appeal Brief, para. 480.
[1915] Trial Judgement, paras 471-474, 489-490.
[1916] Trial Judgement, paras 475, 481, 489, 517.
[1917] Trial Judgement, para. 194.
[1918] NUON Chea's Appeal Brief, paras 476-480, 483.
[1919] Trial Judgement, para. 194.
[1920] Trial Judgement, para. 186.

that the presence of former combatants does not alter this status.[1921] Consequently, the presence of Khmer Republic soldiers within the civilian population of Cambodia subjected to a widespread and systematic attack does not invalidate the Trial Chamber's conclusion. For the same reason, NUON Chea's argument that the "Khmer Republic soldiers arrested immediately following the termination of the war […] are soldiers *hors de combat*, and accordingly may not be the target of a widespread and systematic attack directed against a civilian population" is dismissed.[1922] The attack was indeed directed against the civilian population and not against soldiers *hors de combat.* In this regard, the Supreme Court Chamber also notes with approval the jurisprudence of the ICTY Appeals Chamber in *Martić*, which clarified that the question of civilian status arises in respect of the object of the attack, but in respect of the victims of individual instances of crimes against humanity.[1923]

741. As to KHIEU Samphân's argument that the Trial Chamber, for its finding as to the existence of an attack, relied on facts that were outside the scope of Case 002/01,[1924] the Supreme Court Chamber considers that it is based on a misreading of the relevant part of the Trial Judgement. In the section containing the Trial Chamber's legal conclusions as to the existence of the contextual element of crimes against humanity, the Trial Chamber relied on earlier findings.[1925] These earlier findings clearly are within the scope of Case 002/01, concerning as they do the evacuation of Phnom Penh, the population transfer between rural areas and the events at Tuol Po Chrey.[1926] While the Trial Chamber also referred to other allegations that were not part of Case 002/01, it stated that these were merely allegations "according to the Closing Order"[1927] and it is therefore clear that the Trial Chamber did not rely on these allegations when determining whether the contextual element had been established. Accordingly, KHIEU Samphân's argument stands to be rejected.

[1921] Trial Judgement, para. 183.
[1922] NUON Chea's Appeal Brief, para. 482.
[1923] *Martić* Appeal Judgement (ICTY), para. 307 ("[t]here is nothing in the text of Article 5 of the Statute, or previous authorities of the Appeals Chamber that requires that individual victims of crimes against humanity be civilians"). *See also* paras 303-306, 308-314; *Mrkšić and Šljivančanin* Appeal Judgement (ICTY), para. 28.
[1924] KHIEU Samphân's Appeal Brief, paras 330-341.
[1925] *See* Trial Judgement, para. 193, fns 578, 579, referring to paras 169-173.
[1926] Trial Judgement, paras 169-172.
[1927] Trial Judgement, para. 173.

(2) On national, political, ethnical, racial or religious grounds

742. As to the requirement under Article 5 of the ECCC Law that the attack must have been carried out "*on national, political, ethnical, racial or religious grounds*", the Trial Chamber found that:

> the attack against the civilian population was carried out on political grounds, pursuant to the plans and policies of the Party to build socialism and defend the country. In order to accomplish this goal, the Party considered that the feudalist and capitalist classes had to be eliminated. These 'New People' were perceived as political and social enemies of the revolution and the collective system. Further, all Cambodians were to be part of the revolution and the collective system. Any [individuals] who opposed, or were perceived to oppose, the revolution and collective system were targets for mistreatment and acts of violence. The Chamber is therefore satisfied that the attack was carried out on political grounds.[1928]

743. NUON Chea argues that there is no evidence that the attack against the civilian population was carried out on discriminatory grounds or that the capitalist and feudalist classes were treated in a discriminatory fashion, noting in particular in respect of the evacuation of Phnom Penh that it was not directed against any particular group.[1929] He acknowledges that "evacuating the cities and populate agricultural cooperatives [were] part of a socialist revolution".[1930]

744. The Supreme Court Chamber recalls that the formulation "on national, political, ethnical, racial or religious grounds" in the *chapeau* of Article 5 of the ECCC Law echoes the definition of the crime against humanity of persecution. Here however, it serves as an element limiting the ECCC's jurisdiction over crimes against humanity.[1931] As to the crime of persecution, the Supreme Court Chamber has found that that the underlying conduct constituting persecution must discriminate in fact[1932] and that the victim(s) must therefore actually belong to a sufficiently discernible group targeted on political, racial or religious grounds.[1933] In other words,

[1928] Trial Judgement, para. 195 (footnote(s) omitted).
[1929] NUON Chea's Appeal Brief, paras 475-479.
[1930] NUON Chea's Appeal Brief, para. 345.
[1931] *See* *Duch* Appeal Judgement (001-F28), para, 100, noting the jurisdictional function of ECCC Law, Art. 5.
[1932] *Duch* Appeal Judgement (001-F28), paras 263-271; *Bagosora* Appeal Judgement (ICTR), para. 414; *Blaškić* Appeal Judgement (ICTY), para. 131; *Naletilić* Appeal Judgement (ICTY), 590; *Stanišić* Trial Judgement (ICTY), para. 1238; *Ruto* Confirmation of Charges Decision (ICC), para. 280.
[1933] *Duch* Appeal Judgement (001-F28), para. 274.

discrimination against a group is a vital element of the crime against humanity of persecution.

745. In contrast, as far as the jurisdictional element in the *chapeau* is concerned, the Supreme Court Chamber does not consider that the attack must be carried out in a discriminatory fashion, as NUON Chea suggests.[1934] The Supreme Court Chamber considers that the terms of the *chapeau* require that the attack be founded on a national, political, ethnical, racial or religious basis – but not necessarily on discriminatory grounds.

746. In this respect, the reasoning of the ICTY Appeals Chamber in the *Tadić* Appeal Judgement – discussing and rejecting the adoption by the ICTY Trial Chamber of an implicit requirement that all crimes against humanity must be committed with discriminatory intent under Article 5 of the ICTY Statute – is particularly instructive:

> [A] logical construction of Article 5 […] leads to the conclusion that, generally speaking, this requirement [*i.e.* discriminatory intent] is not laid down for all crimes against humanity. Indeed, if it were otherwise, why should Article 5(h) specify that "persecutions" fall under the Tribunal's jurisdiction if carried out "on political, racial and religious grounds"? This specification would be illogical and superfluous. It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements.[1935]

747. The Supreme Court Chamber notes further that the ICTR Statute, like the ECCC Law, requires the attack to be "on national, political, ethnical, racial or religious grounds".[1936] In the *Bagilishema* Trial Judgement, the ICTR Trial Chamber held as follows:

> [T]he qualifier "on national, political, ethnic, racial or religious grounds" […] should, as a matter of construction, be read as a characterisation of

[1934] NUON Chea's Appeal Brief, paras 475-479.
[1935] *Tadić* Appeal Judgement (ICTY), para. 284.
[1936] ICTR Statute, Art. 3, provides as follows: "The [ICTR] shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".

> the nature of the "attack" rather than of the *mens rea* of the perpetrator.[1937]

748. The Supreme Court Chamber has not overlooked that, in its jurisprudence regarding the contextual element of crimes against humanity, ICTR Trial Chambers have regularly referred to such grounds as being "discriminatory".[1938] It considers, however, that the reference to specific "grounds" in Article 3 of the ICTR Statute has jurisdictional character, serving to define the jurisdictional limits of the ICTR, which must be seen in the context in which the ICTR was established, namely to prosecute persons responsible for the commission of crimes committed during the course of an ethnic conflict in Rwanda and neighbouring States.[1939] Attacks conducted on ethnic grounds are inherently discriminatory and, for the ICTR, the question of whether the attack must, in fact, be discriminatory was therefore not decisive. In addition, the ICTR has consistently held that acts committed against persons who do not fall within the "discriminatory categories" may nevertheless form part of the attack, where the conduct directed against the outsider supports or furthers, or is intended to support or further, the attack on the group.[1940] This indicates that the ICTR does not attach much, if any, weight to the question of whether the attack was discriminatory.

749. For this reason, the Supreme Court Chamber considers that it is not bound to follow the ICTR's interpretation of the latter's jurisdictional elements and that the overall conclusion reached by the Trial Chamber that the attack took place on political grounds was not erroneous.[1941]

(3) Nexus to the widespread or systematic attack

750. Regarding the requirement that there must be a nexus between the acts of the accused and the widespread or systematic attack, the Trial Chamber stated that it:

[1937] *Bagilishema* Trial Judgement (ICTR), para. 81 (footnote(s) omitted).
[1938] *See* *Akayesu* Trial Judgement (ICTR), para. 583; *Bagilishema* Trial Judgement (ICTR), para. 81; *Rutaganda* Trial Judgement (ICTR), para. 74; *Semanza* Trial Judgement (ICTR), para. 331; *Musema* Trial Judgement (ICTR), para. 209.
[1939] *See* ICTR Statute, Art. 1 ("The [ICTR] shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute").
[1940] *Semanza* Trial Judgement (ICTR), para. 331; *Musema* Trial Judgement (ICTR), para. 209; *Akayesu* Trial Judgement (ICTR), para. 584; *Rutaganda* Trial Judgement (ICTR), para. 74.
[1941] Trial Judgement, para. 196.

> is further satisfied that there is a nexus between the acts of the Accused and the attack. The acts of the direct perpetrators and the Accused during movement of population (phases one and two) and during executions of former Khmer Republic officials at Tuol Po Chrey were committed between 17 April 1975 and December 1977 and were done pursuant to, and in furtherance of, the Party's policies and plans to defend and build socialism.[1942]

751. As regards the requirement that the accused have knowledge of the attack and that their acts formed part thereof, the Trial Chamber found that:

> considering the scale and scope of the attack and the fact that it was undertaken in furtherance of, and pursuant to, Party policies and plans, the Chamber is satisfied that both the direct perpetrators and the Accused knew of the attack on the civilian population and that their acts formed part of this attack.[1943]

752. NUON Chea and KHIEU Samphân submit that the Trial Chamber erred in finding that a nexus existed between the attack and the crimes with which the accused were charged.[1944] KHIEU Samphân also contests the Trial Chamber's finding that he knew of the attack.[1945] As the ICTY Appeals Chamber articulated in the *Kunarac* Appeal Judgement, this nexus comprises the following two elements:

> (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with
>
> (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.[1946]

753. As regards the first element, the Supreme Court Chamber affirms the finding of the Trial Chamber, based on the *Kunarac* Appeal Judgement, that "the acts of the direct perpetrator must be part of the attack, meaning that the acts in question must by their very nature or consequences be objectively part of the attack".[1947] The Supreme Court Chamber notes that the ICTY Appeals Chamber used the terms "accused" and "perpetrator" interchangeably in the relevant section of the *Kunarac* Appeal

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[1942] Trial Judgement, para. 197 (footnote(s) omitted).
[1943] Trial Judgement, para. 197 (footnote(s) omitted).
[1944] NUON Chea's Appeal Brief, para. 478; KHIEU Samphân's Appeal Brief, paras 338, 341.
[1945] KHIEU Samphân's Appeal Brief, paras 338, 341.
[1946] *Kunarac* Appeal Judgement (ICTY), para. 99. *See also Mrkšić and Šljivančanin* Appeal Judgement (ICTY), para. 41; *Tadić* Appeal Judgement (ICTY), para. 248
[1947] Trial Judgement, para. 190, referring to *Duch* Trial Judgement (001-E188), para. 318; *Kunarac* Appeal Judgement (ICTY), para. 85; *Šainović* Appeal Judgement (ICTY), para. 264.

Judgement (ICTY).[1948] The *Mrkšić and Šljivančanin* Appeal Judgement (ICTY) refers in this context only to "an accused".[1949] The *Šainović* Appeal Judgement (ICTY) refers only to a "perpetrator" in the same context.[1950]

754. In light of the above, the Supreme Court Chamber considers that the acts of accused persons – even where they are not the direct perpetrators – must form part of the attack. In this regard, the Supreme Court Chamber notes that the Trial Chamber proceeded to find a nexus between the acts of the accused and the attack and referred to the "acts of the direct perpetrators and the Accused" in so finding.[1951] Accordingly, the Trial Chamber did not err in this regard.

755. Further, the Trial Chamber relied upon evidence that the acts of KHIEU Samphân as well as those of the direct perpetrators were, by their very nature or consequence, part of the widespread and systematic attack against the civilian population of Cambodia,[1952] contrary to the argument by KHIEU Samphân.[1953] In respect NUON Chea's arguments [1954] regarding the Trial Chamber's findings concerning acts of violence directed against a civilian population prior to April 1975, the Supreme Court Chamber notes that, as far as the issue of an attack against the civilian population as part of the *chapeau* element is concerned, the Trial Chamber made a finding as to the existence of an attack only in relation to the period from 17 April 1975 until (at least) December 1977.[1955]

(4) Knowledge

756. KHIEU Samphân challenges the Trial Chamber's finding that "both the direct perpetrators and the Accused knew of the attack on the civilian population and that their acts formed part of this attack",[1956] noting that the Trial Chamber devoted only "a few lines" to this question.[1957] The Supreme Court Chamber notes that in the

[1948] *Kunarac* Appeal Judgement (ICTY), para. 85.
[1949] *Mrkšić and Šljivančanin* Appeal Judgement (ICTY), para. 41.
[1950] *Šainović* Appeal Judgement (ICTY), para. 264.
[1951] Trial Judgement, para. 197.
[1952] Trial Judgement, para. 197, referring to Trial Judgement, paras 169, 547-574, 630-657, 682-687, 690-702.
[1953] KHIEU Samphân's Appeal Brief, para. 338.
[1954] NUON Chea's Appeal Brief, para. 478.
[1955] Trial Judgement, para. 193.
[1956] Trial Judgement, para. 197.
[1957] KHIEU Samphân's Appeal Brief, para. 338.

footnotes accompanying this finding, the Trial Chamber referred to various findings elsewhere in the Trial Judgement, which KHIEU Samphân does not discuss. Accordingly, his argument is rejected.

757. In sum, the Supreme Court Chamber therefore dismisses the grounds of appeal raised by NUON Chea and KHIEU Samphân against the Trial Chamber's findings that the acts with which they were charged had a nexus to the widespread and systematic attack directed against the civilian population of Cambodia on political grounds during the temporal period at issue in Case 002/01 with knowledge of the attack and that their acts formed part thereof.

6. Foreseeability/principle of legality

758. The Trial Chamber considered that, "in the specific context of the ECCC, the principle of legality requires that the offences and modes of responsibility charged must be recognised under Cambodian or international law as it existed between 17 April 1975 and 6 January 1979, and sufficiently foreseeable and accessible to the Accused".[1958] The Trial Chamber further observed in this regard that "charges of crimes against humanity pursuant Article 5 of the ECCC Law accord with the principle of legality, subject to an additional finding that charged offences or modes of responsibility were 'sufficiently foreseeable and that the law providing for such liability [was] sufficiently accessible [to the accused] at the relevant time'".[1959] The Trial Chamber found that "[s]uch analysis is to be conducted at the level of the underlying crime or mode of liability, rather than for the category of crimes against humanity as a whole".[1960] Following this approach, the Trial Chamber held that the crimes against humanity of murder,[1961] extermination,[1962] persecution on political grounds[1963] and other inhumane acts all satisfied the principle of legality.[1964] The Trial Chamber also found that joint criminal enterprise liability in its basic and systemic

[1958] Trial Judgement, para. 16, referring to *Duch* Trial Judgement (001-E188), paras 26-34; *Duch* Appeal Judgement (001-F28), paras 89-97; 2009 Criminal Code of Cambodia, Art. 3.
[1959] Trial Judgement, para. 176, referring to *Duch* Appeal Judgement (001-F28), para. 96, citing *Ojdanić* Jurisdiction Appeal Decision (ICTY), paras 21, 37 (footnote(s) omitted).
[1960] Trial Judgement, para. 176.
[1961] Trial Judgement, para. 411.
[1962] Trial Judgement, para. 415.
[1963] Trial Judgement, para. 426.
[1964] Trial Judgement, para. 435.

forms ("JCE I" and "JCE II", respectively) complied with this principle based on their customary status between 1975 and 1979 and the senior positions of the accused.[1965]

759. KHIEU Samphân submits that the Trial Chamber erred by considering that the senior positions he had held during the temporal period at issue rendered the crimes and modes of liability with which he was charged sufficiently accessible and foreseeable to him.[1966] He further submits that foreseeability and accessibility of the criminal law are dependent upon its clarity and accessibility to "all members of the public", rather than the rank of an accused.[1967] In addition, KHIEU Samphân argues that "the fact that a crime or mode of liability existed under customary international law in 1975 is insufficient to satisfy the criteria of foreseeability and accessibility", particularly in light of the fact that Cambodia has a dualist legal system, which means that, absent domestic implementation, none of the international norms formed part of Cambodian law.[1968] He further contends that the definitions of the crimes and modes of liability adopted by the Trial Chamber were neither accessible nor foreseeable in 1975,[1969] including the contextual element of crimes against humanity,[1970] the *mens rea* of murder and extermination,[1971] and the requisite conduct and intent to establish the modes of liability pursuant to which he was convicted.[1972]

760. The Co-Prosecutors respond that the Trial Chamber did not err by taking into account the senior position KHIEU Samphân had held in finding that the law was accessible to him.[1973] In addition, the Co-Prosecutors submit that the arguments raised under this ground of appeal misconstrue the requirements of foreseeability and accessibility as expounded by the case law of the ICTY Appeals Chamber and the *Duch* Appeal Judgement (001-F28).[1974]

761. The Supreme Court Chamber notes in respect of the submission that the crimes and modes of liability must be clear and accessible to "all members of the

[1965] Trial Judgement, para. 691.
[1966] KHIEU Samphân's Appeal Brief, para. 99.
[1967] KHIEU Samphân's Appeal Brief, para. 100.
[1968] KHIEU Samphân's Appeal Brief, para. 101.
[1969] KHIEU Samphân's Appeal Brief, para. 102.
[1970] KHIEU Samphân's Appeal Brief, para. 103.
[1971] KHIEU Samphân's Appeal Brief, para. 104.
[1972] KHIEU Samphân's Appeal Brief, paras 105-107.
[1973] Co-Prosecutors' Response, para. 26.
[1974] Co-Prosecutors' Response, para. 26.

public" for a conviction not to offend the principle of legality[1975] that it held in the *Duch* Appeal Judgement (001-F28) that fairness and due process concerns underlying the international principle of legality require that charged offences or modes of responsibility be "sufficiently foreseeable and […] sufficiently accessible [to the accused] at the relevant time".[1976] The Supreme Court Chamber considers that the requirements of foreseeability and accessibility must be determined through an objective analysis, namely that the crimes and modes of liability must be foreseeable and accessible in general, as contended by KHIEU Samphân.[1977] Nonetheless, the Supreme Court Chamber considers that the Trial Chamber was not unreasonable in taking into account the senior positions occupied by KHIEU Samphân in determining whether the principle of legality was adhered to for both the offences and modes of liability charged. In this regard, the Supreme Court Chamber recalls that it adopted such an approach in the *Duch* Appeal Judgement (001-F28), explicitly taking into consideration that Duch had been a "member of Cambodia's governing authority" when finding that "the law defining the crime of persecution was sufficiently accessible to the Accused at the time of the alleged crimes".[1978] Such an approach is, moreover, consistent with the purpose of the principle of legality.[1979] For the foregoing reasons, the Supreme Court Chamber rejects the argument raised by KHIEU Samphân in this regard.

762. Turning to the argument that the criteria of foreseeability and accessibility cannot be met merely by the fact that a crime or mode of liability existed under customary international law in 1975, the Supreme Court Chamber recalls the *Duch* Appeal Judgement (001-F28), in which it considered that "offences and modes of liability charged before the ECCC must have existed either under national law or international law at the time of the alleged criminal conduct occurring between 17

[1975] KHIEU Samphân's Appeal Brief, para. 100.
[1976] *Duch* Appeal Judgement (001-F28), para. 96, citing *Ojdanić* Jurisdiction Appeal Decision (ICTY), paras 21, 37, and referring to *Blagojević and Jokić* Trial Judgement (ICTY), para. 695, fn. 2145, and *S.W. v. United Kingdom* Judgement (ECtHR), paras 35-36.
[1977] KHIEU Samphân's Appeal Brief, paras 99-100.
[1978] *Duch* Appeal Judgement (001-F28), para. 280.
[1979] *See* *Vasiljević* Trial Judgement (ICTY), para. 193 ("[a] criminal conviction should […] never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility"), referring to *S.W. v. United Kingdom* Judgement (ECtHR), p. 42; *Giniewski v. France* Judgement (ECtHR), p. 38; *Kokkinakis v. Greece* Judgement (ECtHR), p. 22.

April 1975 and 6 January 1979",[1980] an approach that accords with the purpose of the principle of legality, international human rights standards, and the case law of the ICTY.[1981] The Supreme Court Chamber further recalls that, as to the accessibility requirement, in addition to treaties, "laws based on custom […] can be relied on as sufficiently available to the accused"[1982] and that, as to foreseeability, the accused "must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision".[1983] In this regard, the Supreme Court Chamber accepts the argument of the Co-Prosecutors that, given that the crimes for which KHIEU Samphân was convicted "are some of the gravest known; he cannot seriously contend that he did not understand that his conduct was criminal in the sense generally understood".[1984]

763. As for the argument that, because Cambodia has a dualist legal system, international norms did not form part of Cambodian domestic law at the time of the facts, and that KHIEU Samphân could thus not expect their application, KHIEU Samphân misrepresents the findings of the Pre-Trial Chamber, to which he refers in his appeal brief.[1985] In the paragraph following the one cited by KHIEU Samphân, the Pre-Trial Chamber found that "the ECCC Law […] requires the ECCC to exercise is jurisdiction in accordance [with] the international principle of legality, which allows for criminal liability over crimes that were either national or international in nature at the time they were committed",[1986] a finding clearly consistent with the *Duch* Appeal Judgement (001-F28).

[1980] *Duch* Appeal Judgement (001-F28), para. 91 (footnote(s) omitted).
[1981] *See* *Duch* Appeal Judgement (001-F28), para. 91, referring to ICCPR, Art. 15(1) and (2), *Ojdanić* Jurisdiction Appeal Decision (ICTY), paras 10, 38, and ECCC Law, Art. 1. *See also* Decision on Appeals by NUON Chea and Ieng Thirith against the Closing Order (D427/2/15), para. 98.
[1982] *Duch* Appeal Judgement (001-F28), para. 96, referring to *Hadžihasanović and Kubura* Jurisdiction Appeal Decision (ICTY), para. 34 and *Ojdanić* Jurisdiction Appeal Decision (ICTY), para. 40.
[1983] *Duch* Appeal Judgement (001-F28), para. 96, citing *Hadžihasanović and Kubura* Jurisdiction Appeal Decision (ICTY), para. 34.
[1984] Co-Prosecutors' Response, para. 26. *See also* *Duch* Appeal Judgement (001-F28), para. 96, citing *Ojdanić* Jurisdiction Appeal Decision (ICTY), para. 42 ("[a]lthough the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation […], it may in fact play a role […] insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts").
[1985] KHIEU Samphân's Appeal Brief, para. 101, referring, *inter alia*, to Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order (D427/2/15), para. 97, fn. 215.
[1986] Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order (D427/2/15), para. 98 (emphasis in original).

764. As regards the foreseeability and accessibility of the contextual element of crimes against humanity,[1987] the Trial Chamber held that the analysis of whether the charged offences or modes of liability satisfy the principle of legality ought "to be conducted at the level of the underlying crime or mode of liability, rather than for the category of crimes against humanity as a whole".[1988] The Supreme Court Chamber found in the *Duch* Appeal Judgement (001-F28), a finding to which the Trial Chamber made reference,[1989] that "crimes against humanity were established as an international crime during the ECCC's temporal jurisdiction".[1990] Further, the Supreme Court Chamber found above that the contextual element of crimes against humanity was enshrined in a range of post-World War II international and domestic legal instruments and also formed part of customary international law in 1975.[1991] Consequently, the Supreme Court Chamber considers that this element was sufficiently foreseeable and accessible to KHIEU Samphân as a member of Cambodia's governing authority in 1975. This argument is therefore dismissed.

765. As to the foreseeability and accessibility of the *mens rea* of murder and extermination,[1992] the Supreme Court Chamber has conducted an extensive review of the respective mental elements of these crimes.[1993] In respect of murder, this analysis led to the conclusion that a mental element less restrictive than direct intent formed part of customary international law in 1975.[1994] As noted above, as to foreseeability, it is sufficient that the accused was able to "appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision".[1995] Thus, what is required is not an analysis of the technical terms of the definition of the crimes, but whether it was generally foreseeable that the conduct in question could entail criminal responsibility. Accordingly, there is no need to show that it was foreseeable that criminal responsibility could arise in circumstances was acting with *dolus eventualis*, as opposed to *dolus directus.* The Supreme Court Chamber thus rejects the arguments raised in this regard.

[1987] KHIEU Samphân's Appeal Brief, para. 103.
[1988] Trial Judgement, para. 176.
[1989] Trial Judgement, para. 176.
[1990] *Duch* Appeal Judgement (001-F28), para. 104; paras 99-103.
[1991] *See above*, para. 721.
[1992] KHIEU Samphân's Appeal Brief, para. 104.
[1993] *See above*, para. 387 *et seq.*; *see also*, para. 510 *et seq.*
[1994] *See above*, para. 410.
[1995] *See above*, para. 762.

766. The Supreme Court Chamber will return to arguments concerning the foreseeability and accessibility of the modes of liability under which KHIEU Samphân was convicted below.[1996]

E. THE ACCUSED'S INDIVIDUAL CRIMINAL RESPONSIBILITY

1. Contribution to a common purpose ("joint criminal enterprise")

767. The Trial Chamber found the Accused guilty of the crimes against humanity of murder, extermination, persecution on political grounds and other inhumane acts based on their significant contribution to the implementation of a common purpose.[1997] On appeal, NUON Chea and KHIEU Samphân raise numerous arguments regarding the Trial Chamber's approach to and findings concerning this mode of liability, which the Supreme Court Chamber shall address in turn.

a) Existence and scope of criminal liability based on a significant contribution to common purpose

768. In respect of the allegation that NUON Chea and KHIEU Samphân are criminally liable for the crimes committed during Population Movement Phases One and Two and at Tuol Po Chrey based on a mode of liability which, in the jurisprudence of the *ad hoc* international criminal tribunals, is referred to as joint criminal enterprise in its basic form (JCE I), the Trial Chamber determined that such liability requires that a plurality of individuals share a common purpose, which amounts to or involves the commission of (a) crime(s), and that the accused person must participate in the common purpose by making a significant, but not necessarily indispensable, contribution to its implementation.[1998] Elsewhere in the judgement, in relation to the policy to move the population, the Trial Chamber found that it "*resulted in* and/or involved the commission of crimes, including forced transfers, murders, attacks against human dignity and political persecution".[1999]

769. The Trial Chamber noted that "[p]articipants in a JCE "can incur liability for crimes committed by direct perpetrators who were not JCE members, provided that it

[1996] KHIEU Samphân's Appeal Brief, paras 105-107.
[1997] Trial Judgement, paras 877 (NUON Chea), 996 (KHIEU Samphân).
[1998] Trial Judgement, para. 692.
[1999] Trial Judgement, para. 804 (emphasis added).

has been established that the crimes can be imputed to at least one JCE participant and that this participant, when using a direct perpetrator, acted to further the common purpose".[2000] Furthermore, the Trial Chamber found that liability under JCE in its basic form requires that the "accused must intend to participate in the common purpose and this intent must be shared with the other JCE participants".[2001] The Trial Chamber held that the participants of the JCE "must be shown to share the required intent of the direct perpetrators, including the specific intent for the crime where required".[2002]

770. NUON Chea avers that in the period relevant to the charges, the notion of JCE did not exist in the form envisaged by the Trial Chamber, namely requiring only a significant contribution by the accused to the implementation of a common purpose.[2003] In his submission, "between 1975 and 1979, joint perpetration of a criminal act was a narrower form of individual responsibility limited to joint contributions to *specific* criminal conduct with shared criminal intent".[2004] He submits that the notion of JCE, as understood by the Trial Chamber, was "invented 20 years later by an (over-)activist ICTY Appeals Chamber" in the *Tadić* Case.[2005] NUON Chea recalls that the ICTY Appeals Chamber in *Tadić* primarily relied on eight post-World War II cases and submits that only one of them, the *Ponzano* Case (British Military Court, Germany), discussed indirect contribution to the commission of crimes, without, however, discussing the degree of contribution required.[2006] NUON Chea also questions the reliance of the ICTY Appeals Chamber on other sources, which he dismisses as being insufficient to establish the existence of JCE under customary international law at the relevant time, or as being irrelevant.[2007]

771. Further, NUON Chea submits that the Trial Chamber, by stating that it is sufficient that crimes "resulted from" the implementation of a socialist revolution in Cambodia involving a population movement policy, misstated the applicable standard, which, as recognised by the Trial Chamber, requires that the common

[2000] Trial Judgement, para. 693.
[2001] Trial Judgement, para. 694.
[2002] Trial Judgement, para. 694.
[2003] NUON Chea's Appeal Brief, para. 485, referring to Trial Judgement, para. 692.
[2004] NUON Chea's Appeal Brief, para. 485.
[2005] NUON Chea's Appeal Brief, para. 486.
[2006] NUON Chea's Appeal Brief, paras 488, 490.
[2007] NUON Chea's Appeal Brief, paras 491-492.

purpose must "amount to or involve" the commission of crimes.[2008] He submits that liability under JCE I does not arise if the implementation of the common purpose merely "resulted in" the commission of crimes, arguing that "[t]he notion of a common purpose which 'results' in crimes (dolus eventualis) is associated with and limited to JCE III, which the Trial Chamber held does not apply at this Tribunal".[2009] KHIEU Samphân also challenges the Trial Chamber's definition of the elements of JCE liability and submits that it erred by finding that the common purpose must have "resulted in and/or involved" the commission of the crime, which, in his view, introduces elements of liability under JCE III.[2010]

772. The Co-Prosecutors respond that the notion of JCE was well established as a mode of liability after World War II and refer the Supreme Court Chamber to cases dating from the post-World War II period, the IMT Charter, Control Council Law No. 10, the Nuremberg Principles and statements of the U.N. International Law Commission.[2011] In relation to the standard as to which crimes are encompassed by the common purpose, the Co-Prosecutors respond that the Trial Chamber identified the correct standard, namely that the common purpose must amount to or involve the commission of crimes, and that the Trial Chamber found that this standard was met.[2012]

773. The Supreme Court Chamber observes that the Chambers of the ECCC, as well as the *ad hoc* tribunals, the SCSL and the STL[2013] have addressed at length the question of whether and under which conditions customary international law provides for individual criminal responsibility for international crimes in respect of individuals who made, with the requisite intent, a contribution to the implementation of a common criminal purpose. The *Tadić* Appeal Judgement (ICTY) marked the first time that an international court undertook to set out the elements of criminal liability for what it termed "joint criminal enterprise", based on a review of post-World War II

[2008] NUON Chea's Appeal Brief, para. 499, referring to Trial Judgement, para. 692.
[2009] NUON Chea's Appeal Brief, para. 500.
[2010] KHIEU Samphân's Appeal Brief, para. 69.
[2011] Co-Prosecutors' Response, para. 312.
[2012] Co-Prosecutors' Response, paras 317-321.
[2013] *See*, *e.g.*, Pre-Trial Chamber Decision on JCE (D97/15/9), para. 53 *et seq*.; *Tadić* Appeal Judgement (ICTY), para. 185 *et seq*.; *Brđanin* Appeal Judgement (ICTY), para. 393 *et seq*.; *Rwamakuba* Decision on JCE (ICTR), para. 9 *et seq*.; *Brima* Appeal Judgement (SCSL), para. 75 *et seq*. *See also* Interlocutory Decision on the Applicable Law (STL), para. 237 *et seq*.

case law,[2014] national case law,[2015] national law,[2016] and international treaties.[2017] Based on this review, the ICTY Appeals Chamber identified three forms of JCE liability: the first category, joint criminal enterprise in its "basic" form – JCE I – covers cases where "all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill";[2018] the second category, the so-called "'concentration camp' cases" (JCE II), covers cases "where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps",[2019] requiring "the active participation [of the accused] in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused"[2020] and, as regards the *mens rea*, "knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment";[2021] and the third category ("JCE III"), covers " cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose".[2022]

774. The elements of the notion of JCE were further confirmed by subsequent case law, in particular the *Rwamakuba* Decision on JCE (ICTR)[2023] and the *Brđanin* Appeal Judgement (ICTY).[2024] Notably, based on an analysis of post-World War II case law, the ICTR Appeals Chamber found in the *Rwamakuba* Case that liability based on the notion of JCE was not necessarily limited to "crimes with great specificity", but that in particular the *Justice* Case demonstrated that "liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts

[2014] *Tadić* Appeal Judgement (ICTY), para. 195 *et seq*.
[2015] *Tadić* Appeal Judgement (ICTY), para. 214 *et seq*.
[2016] *Tadić* Appeal Judgement (ICTY), paras 224-225
[2017] *Tadić* Appeal Judgement (ICTY), paras 221-223.
[2018] *Tadić* Appeal Judgement (ICTY), para. 196.
[2019] *Tadić* Appeal Judgement (ICTY), para. 202.
[2020] *Tadić* Appeal Judgement (ICTY), para. 203.
[2021] *Tadić* Appeal Judgement (ICTY), para. 220.
[2022] *Tadić* Appeal Judgement (ICTY), para. 204.
[2023] *Rwamakuba* Decision on JCE (ICTR), para. 14 *et seq*.
[2024] *Brđanin* Appeal Judgement (ICTY), para. 393 *et seq*.

to a nation wide government-organized system of cruelty and injustice".[2025] In *Brđanin*, the ICTY Appeals Chamber found that post-World War II case law indicated that liability may arise for participation in a common purpose even "where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose" and that there was no requirement of an agreement between the accused person and the principal perpetrator that the latter commit a specific crime.[2026] The Pre-Trial Chamber's Decision on JCE (D97/15/9) also addressed the notion of JCE. After reviewing the aforementioned case law and other authorities, the Pre-Trial Chamber concluded that "[i]n the light of the London Charter, Control Council Law No. 10, international cases and authoritative pronouncements, the Pre-Trial Chamber has no doubt that JCE I and JCE II were recognized forms of responsibility in customary international law at the time relevant for Case 002".[2027] In contrast, the Pre-Trial Chamber found in respect of the extended form of JCE – *i.e.* JCE III – that the authorities relied upon in *Tadić* did not "constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law at the time relevant to Case 002".[2028] The Pre-Trial Chamber also found that JCE III was not applicable in the proceedings before the ECCC as a general principle of law.[2029]

775. The Supreme Court Chamber notes that the legal categories that the ICTY Appeals Chamber identified in *Tadić* appear to have been based primarily on an assessment of the facts of the underlying cases; the categories were not expressly used in the post-World War II jurisprudence nor are they sharp-contoured legal definitions free from overlap.[2030] As a result, in the view of the Supreme Court Chamber, focusing on the terminology employed by the ICTY Appeals Chamber and the categories of JCE that it identified clouds the real issue that the Supreme Court Chamber has to address – whether and, if so, to what extent, the applicable law as it

[2025] *Rwamakuba* Decision on JCE (ICTR), para. 25.
[2026] *Brđanin* Appeal Judgement (ICTY), para. 404.
[2027] Pre-Trial Chamber Decision on JCE (D97/15/9), para. 69 (footnote(s) omitted).
[2028] Pre-Trial Chamber Decision on JCE (D97/15/9), para. 83.
[2029] Pre-Trial Chamber Decision on JCE (D97/15/9), para. 87.
[2030] For instance, the ICTY Appeals Chamber itself recognised that JCE II is a "variant" of JCE I (*Tadić* Appeal Judgement (ICTY), para. 203); *see also* para. 202 ("[t]he second distinct category of cases is in many respects similar to [JCE I]"); Kai AMBOS Amicus Submission (D99/3/27), para. 2 (which maintains that "JCE II can be treated as a sub-category of JCE I if it is interpreted narrowly. In a broad sense of an extension of liability, JCE II rather resembles JCE III").

stood at the time relevant to the charges provided for individual criminal liability in circumstances where the accused did not carry out the *actus reus* of the international crime charged but had acted in concert with others based on a common purpose and made a contribution to its implementation. In this regard, the Supreme Court Chamber recalls that NUON Chea does not challenge that, under customary international law as it existed between 1975 and 1979, "it was possible to prosecute joint perpetration of a criminal act as a mode of liability".[2031] However, he challenges that criminal liability could arise if the individual merely made a contribution to the implementation of the common purpose, without actually fulfilling at least part of the *actus* reus of the crime in question, submitting that, at the time of the charges, individual criminal responsibility was "limited to joint contributions to *specific* criminal conduct with shared criminal intent".[2032]

776. To the extent that NUON Chea argues that the post-World War II case law often does not even identify the mode of liability relied upon,[2033] the Supreme Court Chamber concedes that the jurisprudence is not always clear in this regard – and therefore, needs to be treated with caution. Nevertheless, his argument disregards that the law regarding individual criminal responsibility for international crimes did not come into being by way of a coherent act of legislation. Rather, in the wake of World War II, the atrocities committed during the war were tried by a variety of courts, based on the IMT Statute, the IMTFE Statute, Control Council Law No. 10, and domestic laws. Accordingly, when determining under what circumstances criminal liability for international crimes arises, one has to analyse the post-World War II case law and distil from it the common threads and elements. This is what the *Tadić* Appeal Judgement (ICTY) and subsequent decisions of the ICTY, ICTR, SCSL, STL and indeed the ECCC have done.

777. The essence of this analysis is not whether particular terms were used in a decision, nor whether there was a differentiated system of modes of criminal liability under customary international law as it stood in 1975, but whether conduct of the type with which the accused were charged could give rise to criminal liability.[2034] To

[2031] NUON Chea's Appeal Brief, para. 487.
[2032] NUON Chea's Appeal Brief, para. 485.
[2033] NUON Chea's Appeal Brief, para. 488.
[2034] Note in this regard *Tadić* Appeal Judgement (ICTY), para. 224 (which refers not only to forms of

expect uniform terminology and clear and consistent distinctions between, for instance, liability as a principal perpetrator and that of an accessory across case law from such a multitude of sources is unrealistic.

778. NUON Chea correctly points out[2035] that the ICTY Appeals Chambers noted in *Tadić* in support of the notion of JCE that holding individuals "who in some way made it possible for the perpetrator physically to carry out [the] criminal act" liable "only as aiders and abettors might understate the degree of their criminal responsibility".[2036] However, this statement of the ICTY Appeals Chamber must be seen in the context of the ICTY Statute, which distinguishes in its Article 7 between those who "committed" crimes and those who "planned, instigated, ordered […] or otherwise aided and abetted" them,[2037] which the ICTY has interpreted as providing for a dualistic system of perpetration.[2038] Nevertheless, in the *Brđanin* Appeal Judgement (ICTY), which dealt with broad joint criminal enterprises in which none of the members of the JCE physically committed the *actus reus* of the crimes at issue, the ICTY Appeals Chamber noted that:

> The jurisprudence of the Tribunal traditionally equates a conviction for JCE with the mode of liability of 'committing' under Article 7(1) [of the ICTY Statute]. The Appeals Chamber declines at this time to address whether this equating is still appropriate where the accused is convicted via JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was used by a member of the JCE.[2039]

Thus, even in the jurisprudence of the ICTY, the categorisation of JCE liability as principal as opposed to accessorial liability is of limited relevance.

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individual criminal liability that may be classified as principal liability, but also to accessorial liability, as well as to jurisdictions (such as Italy) that do not distinguish principal from accessorial liability).

[2035] NUON Chea's Response, para. 15.

[2036] *Tadić* Appeal Judgement (ICTY), para. 192.

[2037] ICTY Statute, Art. 7.

[2038] *See*, *e.g.*, *Kvočka* Appeal Judgement (ICTY), para. 92 ("[a]iding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise") (footnote(s) omitted). The Supreme Court Chamber notes that Article 29(1) of the ECCC Law contains a similar formulation; this, however, does not necessarily imply that distinctions made in the jurisprudence of the *ad hoc* international criminal tribunals would need to followed. For the ECCC, what is of the essence is the state of customary international law at the time relevant to the charges.

[2039] *Brđanin* Appeal Judgement (ICTY), fn. 891. *See also* Judge Meron's separate opinion to the *Brđanin* Appeal Judgement (ICTY), para. 8 (who considers that "where a JCE member uses a non-member to carry out a crime within the common criminal purpose, the other members of the JCE have responsibility for this crime that is derivative of their relationship to this JCE member. I thus would equate their convictions for JCE with regard to that crime with whatever mode of liability reflects the responsibility of the JCE member who used the non-member").

779. The Supreme Court Chamber considers it irrelevant that none of the post-World War II case law actually used the terms "significant contribution to the implementation of the common purpose". These terms, which were coined by the jurisprudence of the ICTY, are intended to express the essence of the post-World War II case law, namely that individual criminal liability may also arise in circumstances where an individual makes a contribution to the implementation of the common criminal purpose, even if that contribution does not amount to the *actus reus* of the crime and is removed from the commission of the crime itself. In the view of the Supreme Court Chamber, this correctly reflects the position taken in the post-World War II case law.

780. For instance, in cases regarding the killing of prisoners of wars or civilians, several accused were convicted for taking part in a common criminal purpose even though they were not the ones who had actually killed the victims, nor did they have a major role in the execution of a plan. Notably, in the *Almelo* Case, relating to the killing of a prisoner of war and a civilian by German soldiers,[2040] two of the accused were found guilty even though they had not killed the victims, but had stayed in the car and had prevented strangers "from disturbing the other two while they were engaged in the crime".[2041] It was noted that "[i]f people were all present together at the same time taking part in a common enterprise which was unlawful, each one in his own way assisting the common purpose of all, they were all equally guilty in law".[2042]

781. Similarly, in the *Schonfeld* Case, some of the accused, who had driven a car to the scene of the crime and searched a house where soldiers were subsequently shot and who had guarded the backyard of the house where the killing occurred, arresting one witness after the killing and subsequently informing the police that soldiers had been shot while trying to escape and instructing them to take care of transportation and burial,[2043] were found to have participated in the murders, despite not having carried out the killings themselves.[2044]

[2040] *Almelo* Case (British Military Court, The Netherlands), pp. 35-36.
[2041] *Almelo* Case (British Military Court, The Netherlands), p. 43.
[2042] *Almelo* Case (British Military Court, The Netherlands), p. 43.
[2043] *Schonfeld* Case (British Military Court, Germany), p. 66.
[2044] *Schonfeld* Case (British Military Court, Germany), p. 67.

782. The *Einsatzgruppen* Case, where an American Military Tribunal sitting at Nuremberg tried twenty-two officers from the German security services for "taking an active part" in war crimes and crimes against humanity, is another example for common purpose liability.[2045] In its closing statement, the prosecution argued that:

> [N]ot only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. […] Any member who assisted in enabling these units to function, knowing what was afoot, is guilty of the crimes committed by the unit.[2046]

783. On that basis, the Tribunal convicted the accused even if they had been removed from the actual crimes. For instance, the Tribunal found that Sandberger, a member of the *Sicherheitsdienst* and *Schutzstaffel*, "willingly and enthusiastically went along with the Fuehrer Order and other Nazi dictates".[2047] It also found that the Accused Seibert had been aware of the activities of *Einsatzgruppe D* and participated as a principal as well as an accessory in its operations which violated international law and was, therefore, guilty under all charges.[2048] With regard to the Accused Haensch, the Tribunal found that:

> A high ranking officer who plans an operation or participates in the planning and has control over officers taking part in the movement certainly cannot escape responsibility for the action by absenting himself the day of execution of the plan. Haensch was not only responsible for the Sonderkommando [a sub-unit of the *Einsatzgruppen*] during the operation, but he admits having been informed on the results thereof.[2049]

He was thus also found guilty.

784. As regards to the Accused von Radetzky, who had worked with *Sonderkommando 4a* as an interpreter/liaison officer and who had been informed that

[2045] *Einsatzgruppen* Case, pp. 411-412.
[2046] *Einsatzgruppen* Case, pp. 372-373.
[2047] *Einsatzgruppen* Case, p. 536.
[2048] *Einsatzgruppen* Case, p. 539.
[2049] *Einsatzgruppen* Case, p. 549.

executions were taking place,[2050] the Tribunal found that he had taken "a consenting part in these executions and was therefore guilty".[2051]

785. The *RuSHA* Case concerned fourteen accused who were, in various capacities, connected to four organisations under the supervision and direction of the *Sicherheitsdienst* Reich Leader Himmler.[2052] Some of the accused in this case were found to be criminally responsible for various aspects of the Nazi racial program, including the kidnapping of "racially valuable" children for Aryanisation, the forcible evacuation of foreign nationals from their homes in favour of German nationals or ethnic Germans,[2053] and the persecution and extermination of Jews throughout Germany and German-occupied Europe.[2054] As in the *Einsatzgruppen* Case, for criminal liability to arise, the Tribunal did not require participation in the actual crime, but relied on activities that were somewhat removed therefrom. For instance, the Accused Greifelt was found to have issued "Regulation 67/I", which was sent to numerous offices and furthered kidnapping plans. The Tribunal concluded that this had resulted in many kidnappings.[2055] The Accused Creutz, "who was deputy to Greifelt, was also found to have been involved in the kidnapping of foreign children"[2056]. Creutz had written to Reich Governors about the value of kidnapping foreign children and had suggested possible procedures.[2057] The Tribunal also found that Creutz had "issued instructions for the carrying out of a 'children's operation', which meant the bringing of children into Germany for Germanisation". On that basis, he bore full responsibility for this programme.[2058]

786. Finally, in the *Justice* Case, sixteen civil servants of the Ministry of Justice and magistrates of the Special Courts and People's Courts of Nazi Germany were tried, some of whom for their participation in a common plan of racial persecution by

[2050] *Einsatzgruppen* Case, p. 573.
[2051] *Einsatzgruppen* Case, pp. 577-578.
[2052] *RuSHA* Case, pp. 89-90.
[2053] *RuSHA* Case, p. 94.
[2054] *RuSHA* Case, p. 89.
[2055] *RuSHA* Case, p. 103.
[2056] *RuSHA* Case, p. 106.
[2057] *RuSHA* Case, p. 106.
[2058] *RuSHA* Case, p. 106.

enforcing laws on high treason against Poles and Jews, leading to deaths sentences and executions.[2059] The Tribunal held that:

> The charge, in brief, is that of conscious participation in a nation wide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist.[2060]

787. As the ICTR noted, the *Justice* Case demonstrates that "liability for the commission of a genocide extended not only to those who physically committed or aided and abetted killings or other genocidal acts, but also to those who intentionally participated in a common plan that yielded such acts".[2061]

788. Moreover, the Supreme Court Chamber observes that Article II(2) of Control Council Law No. 10, which defined the various modes of criminal responsibility, provided that a person has committed a crime if he was "(a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission". Thus, the scope of criminal liability was broad and included more than merely liability for physically committing the *actus reus* of the charged crimes. Notably, accused were held criminally responsible even though others had committed the *actus reus* of the crimes, based on the accused's contribution to the common purpose, *i.e.* a form of liability that has come to be known as JCE.

789. Turning to the elements of JCE liability, the above analysis shows that the common purpose is at the core of this mode of liability, as it is this element that ties the members of the JCE together and provides the justification for the mutual imputation of the members' conduct that gives rise to criminal responsibility.[2062] Nevertheless, to justify such mutual imputation, it is not enough that those who agree to act in concert merely agree to pursue any common purpose. What is required is that

[2059] *Justice* Case, pp. 3, 1123.
[2060] *Justice* Case, p. 985.
[2061] *Rwamakuba* Decision on JCE (ICTR), para. 19.
[2062] *See also* in respect of the related notion of co-perpetration, *Lubanga* Appeal Judgement (ICC), para. 445.

they agree to a common purpose of a criminal character. This understanding is confirmed by the jurisprudence of the ICTY, ICTR, SCSL and that of the post-World War II case law analysed above[2063] in relation to the notion of JCE. In the *Tadić* Case, the ICTY Appeals Chamber required "[t]he existence of a common plan, design or purpose which *amounts to or involves the commission of a crime* provided for in the Statute".[2064] Discussing the participation of an individual in the JCE, it underlined that the "participation need not involve commission of a specific crime under one of those provisions […] but may take the form of assistance in, or contribution to, the execution of the common plan or purpose".[2065] In *Martić*, when considering the objective to make part of the territories of Bosnia and Croatia a "new Serb-dominated State", an ICTY Trial Chamber held that the objective "in and of itself does not amount to a common purpose within the meaning of the law on JCE […]. However, where the creation of such territories is intended to be implemented through the commission of crimes within the Statute this may be sufficient to amount to a common criminal purpose".[2066] In line with this jurisprudence, the SCSL Appeals Chamber in the *Brima* Case, when discussing the nature of the common plan, design or purpose, stated that "[i]t can be seen from a review of the jurisprudence of the international criminal tribunals that the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective. The objective and the means to achieve the objective constitute the common design or plan".[2067] Recently, in the *Karadžić* Case, an ICTY Trial Chamber recalled that it was necessary to "specify the common criminal purpose in

[2063] *See above*, para. 774 *et seq*.
[2064] *Tadić* Appeal Judgement (ICTY), para. 227 (emphasis partially removed).
[2065] *Tadić* Appeal Judgement (ICTY), para. 227. *See also* *Krajišnik* Appeal Judgement (ICTY), para. 218 ("[t]he participation of an accused in the JCE need not involve the commission of a crime, what is important is that it furthers the execution of the common objective or purpose involving the commission of crimes"); *Kvočka* Appeal Judgement (ICTY), para. 99 ("[a] participant in a joint criminal enterprise need not physically participate in any element of any crime, so long as the requirements of joint criminal enterprise responsibility are met"); *Babić* Judgement on Sentencing Appeal (ICTY), para. 38 ("[c]o-perpetratorship in a joint criminal enterprise, for which the Appellant was found guilty, only requires that the accused shares the *mens* rea or 'intent to pursue a common purpose' and performs some acts that 'in some way are directed to the furtherance of the common design'"); *Ntakirutimana* Appeal Judgement (ICTR), para. 466; *Vasiljević* Appeal Judgement (ICTY), para. 100; *Krnojelac* Appeal Judgement (ICTY), para. 81 ("once a participant in a joint criminal enterprise shares the intent of that enterprise, his participation may take the form of assistance or contribution with a view to carrying out the common plan or purpose. The party concerned need not physically and personally commit the crime or crimes set out in the joint criminal enterprise").
[2066] *Martić* Trial Judgement (ICTY), para. 442. *See also* *Martić* Appeal Judgement (ICTY), para. 112.
[2067] *Brima* Appeal Judgement (SCSL), para. 76; *see also* para. 78.

terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims)".[2068] The Supreme Court Chamber also notes that several ICTY Chambers have found JCE liability to arise based on common purposes that related to ultimately non-criminal goals, which, in order to be implemented, involved crimes.[2069]

790. As noted by the Accused,[2070] unlike in the cases cited above, when applying the law to the facts of the case, the Trial Chamber found that the policy of population movement "resulted in and/or involved" the commission of crimes, without pronouncing that the crimes had been intended, contemplated or otherwise encompassed by the common purpose.[2071] This suggests that the Trial Chamber was of the view that crimes that had generally resulted from the implementation of the common purpose could be imputed on the Accused, rather than crimes that were intended or contemplated by it. In the view of the Supreme Court Chamber, such liability would essentially amount to what, since *Tadić*, has been termed extended JCE or JCE III liability.[2072] Accordingly, the next question to be addressed is whether an accused may be held liable based on JCE for crimes whose *actus reus* he or she did not commit and which were not encompassed by the common purpose.

791. In this regard, the Supreme Court Chamber notes with approval the Pre-Trial Chamber Decision on JCE (D97/15/9), in which the Pre-Trial Chamber analysed in detail the jurisprudence of the *ad hoc* tribunals regarding the notion of JCE III and concluded that the decisions upon which the ICTY Appeals Chamber relied in *Tadić* when finding that JCE III was part of customary international law did not constitute a

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[2068] *Karadžić* Trial Judgement (ICTY), para. 563, quoting *Brđanin* Appeal Judgement (ICTY), para. 430.
[2069] *See*, *e.g.*, *Krajišnik* Trial Judgement (ICTY), para. 1142. (the Trial Chamber found that there had been a criminal enterprise that had the objective of ethnically recomposing the territories under the control of the Bosnian-Serb Republic by drastically reducing the proportion of Bosnian Muslims and Bosnian Croats through the commission of various crimes); *Prlić* Trial Judgement (ICTY) ,Vol. I, para. 16 (the ultimate purpose of the JCE was to set up a Croatian entity through ethnic make-up and ethnic cleansing).
[2070] NUON Chea's Appeal Brief, paras 499, 502; KHIEU Samphân's Appeal Brief, para. 69.
[2071] Trial Judgement, para. 804; *see also* Trial Judgement para. 835.
[2072] The Supreme Court Chamber notes that the parties have addressed in detail the question of JCE III liability with regard to the Co-Prosecutors' appeal. *See* Co-Prosecutors' Appeal Brief, para. 23 *et seq*.; NUON Chea's Response, para. 16 *et seq*.; KHIEU Samphân's Response, para. 47 *et seq*. Notwithstanding the Supreme Court Chamber's finding as to the inadmissibility of the Co-Prosecutors' appeal (*see* para. 1122 *et seq*.), the Supreme Court Chamber considers it appropriate to take the parties' arguments into account when determining the issue at hand.

"sufficiently firm basis" for such a finding.[2073] In particular, the Pre-Trial Chamber found that too little was known about the *Essen Lynching* Case (British Military Court, Germany) and the *Borkum Island Case* (General Military Government Court, Germany) to conclude that a notion amounting to JCE III was applied therein.[2074] The Trial Chamber agreed with this assessment.[2075] The Co-Prosecutors' submissions – made in the context of the appeal they have brought against the Trial Judgement – are insufficient to fault the Pre-Trial Chamber's analysis of the *Essen Lynching* and *Borkum Island* Cases: they propose a potential interpretation of those cases, without overcoming the principal problem identified by the Pre-Trial Chamber – the lack of information as to which legal concepts the tribunals in those two cases actually applied. [2076]

792. Similar problems arise in respect of the other cases to which the Co-Prosecutors refer, which were addressed neither in *Tadić* nor in the Pre-Trial Chamber Decision on JCE (D97/15/9).[2077] As to the *Renoth* Case (British Military Court, Germany), the summary of the trial – in the course of which three individuals were found guilty of the killing of an Allied prisoner of war even though the actual killing had been carried out by another accused[2078] – specifically noted that "[i]t is impossible to say conclusively whether the court found that the three accused took an active part in the beating or whether they were liable under the doctrine set out by the Prosecutor", who had argued that even without active participation in the beating, the three accused could be found guilty;[2079] the Co-Prosecutors themselves argue that the requirements of JCE III "appear" to have been fulfilled in this case[2080] – hardly a sufficient basis to identify a rule of customary international law.

793. None of the other cases to which the Co-Prosecutors refer[2081] support the existence under customary international law of criminal liability for crimes in which the *actus reus* was not carried out by the accused and that were not covered by the

[2073] Pre-Trial Chamber Decision on JCE (D97/15/9), para. 83.
[2074] Pre-Trial Chamber Decision on JCE (D97/157/9), paras 79-81.
[2075] Trial Chamber Decision on JCE (E100/6), paras 30-31.
[2076] *See* Co-Prosecutors' Appeal Brief, paras 31-33.
[2077] *See* Co-Prosecutors' Appeal Brief, paras 34-40.
[2078] *Renoth* Case (British Military Court, Germany), p. 76.
[2079] *Renoth* Case (British Military Court, Germany), pp. 76- 77.
[2080] Co-Prosecutors' Appeal Brief, para. 34.
[2081] Co-Prosecutors' Appeal Brief, paras 28-40.

common purpose. Notably, the passages of the IMT Case Judgement relating to the Accused Sauckel and Speer,[2082] the *RuSHA* Case in relation to the Accused Hildebrandt[2083] and the *Einsatzgruppen* Case in relation to the Accused Six[2084] cited by the Co-Prosecutors do not suggest that there was a dispute as to which crimes were encompassed by the common purpose; rather, the question was whether the accused had *knowledge* of these crimes, failing which no form of intent could have been established. The cases of *Pohl* (on which the Co-Prosecutors rely in respect of the findings regarding Accused Hohberg and Baier[2085]) and *Dachau Concentration Camp*[2086] relate to crimes committed in concentration camps. In the *Pohl* Case, the tribunal hearing the case noted that the Accused Hohberg had "accused Pohl of crimes and expressed indignation at the concentration camp excesses".[2087] However, contrary to the Co-Prosecutors' submission, there is no indication that the tribunal found that the crimes committed in the concentration camps had not been part of the common purpose and that Hohberg had nevertheless been held responsible for them because they had been foreseeable.[2088] Similarly, in respect of Baier, there is no indication that the tribunal held him responsible for crimes not encompassed by the common purpose: the tribunal found that there was "systematic persecution, impoverishment,

[2082] Co-Prosecutors' Appeal Brief, paras 28-30, referring to IMT Judgement, pp. 331-333, 245, 321, 331-333. In relation to Sauckel, the Supreme Court Chamber notes that the Co-Prosecutors' reference to his purported lack of intent is based on a misreading of the IMT Judgement – in the passage to which the Co-Prosecutors cite (p. 245), the reference to Sauckel's intention is made in a non-technical sense. It is clear from the context that Sauckel was indeed aware of the inhumane treatment of the victims and in the section of the judgement discussing his guilt, the IMT expressly stated that he had been "aware of ruthless methods being used to obtain labourers and vigorously supported them on the ground that they were necessary to fill the quotas" (p. 321). The Co-Prosecutors' argument that this amounted to liability akin to JCE III is obscure. Similarly, contrary to the Co-Prosecutors' submissions, there is no indication that Speer was convicted for his participation in the slave labour programme based on a notion of liability akin to JCE III – the IMT found that Speer had knowledge of the victims' violent recruitment, which resulted from Speer's high demands (pp. 331-333).
[2083] Co-Prosecutors' Appeal Brief, para. 37, referring to *RuSHA* Case, pp. 1-192. The Co-Prosecutors note that the tribunal found in relation to the Accused Hildebrandt that he first denied that he had been aware of the fact that the "special treatment" that would be imposed on foreign nationals for having sexual intercourse with German women could include hanging; the tribunal then discussed evidence that demonstrated that Hildebrandt was aware of the meaning of the term and had "actually handled special treatment cases" (p. 120). The section of the judgement discussing Hildebrandt's guilt does not return to the question of intent, but merely finds that "[b]y an abundance of evidence, it has been established beyond a reasonable doubt that the defendant Hildebrandt actively participated in and is criminally responsible for the following criminal activities: […] the illegal and unjust punishment of foreign nationals for sexual intercourse with Germans" (p. 161). Again, how this case could support the existence of the notion of JCE III is obscure.
[2084] Co-Prosecutors' Appeal Brief, para. 38, referring to *Einsatzgruppen* Case, pp. 427-433, 526.
[2085] Co-Prosecutors' Appeal Brief, paras 35-36, referring to *Pohl* Case, pp. 1041-1042, 1047.
[2086] Co-Prosecutors' Appeal Brief, para. 40, referring to *Dachau Concentration Camp* Case, p. 141.
[2087] *Pohl* Case, p. 1042.
[2088] *See* Co-Prosecutors' Appeal Brief, para. 35.

confinement, and eventual slaying of these persecutees" and that Baier "took a consenting and active part in the exploitation of slave labor".[2089] As regards the *Dachau Concentration Camp* Case, nothing suggests that the tribunal held any of the accused criminally responsible for crimes that were outside the common criminal design at the Dachau Concentration Camp. The case report of the U.N. War Crimes Commission notes in this regard that "there was in the camp a general system of cruelties and murders of the inmates […] and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation".[2090] The passage upon which the Co-Prosecutors rely is contained in the submissions of a Staff Judge Advocate in the context of the review of the case – there is no indication that the tribunal that issued the judgement in *Dachau Concentration Camp* actually shared that view.[2091] As to the *Sch.* Case,[2092] it rather contradicts than supports the notion of extended joint criminal enterprise; in remanding the case to the lower court, the Supreme Court for the British Zone instructed that court to further consider whether the accused, when bringing the victim to the synagogue, had been aware that the latter would be mistreated there, noting that the accused would bear responsibility for such mistreatment at least because he had failed to protect the victim, who had been under his care. Importantly, however, there is no indication that the Supreme Court for the British Zone considered that the accused bore responsibility for the subsequent shooting of the victim, which had occurred when he was led back to the police station and to which no contribution by the accused had been established.[2093] Finally, in the *Ikeda* Case, the court established the accused's participation in formulating and elaborating a plan to establish brothels and to use girls and women from internment camps as prostitutes in these brothels.[2094] It further

[2089] *Pohl* Case, p. 1047.
[2090] *Dachau Concentration Camp* Case, p. 14.
[2091] *See* *Dachau Concentration Camp* Case, pp. 5 ("[t]wo charges alleged that the accused 'acted in pursuance of a common design to commit acts hereinafter alleged and as members of the staff of the Dachau Concentration Camp, and camps subsidiary thereto […] wilfully, deliberately and wrongfully aid, abet and participate in the subjection of civilian nations'"), 8 (where the findings are summarised as follows: "[a]ll 40 accused were found guilty and the finding was confirmed in each case. […]. The sentence of one further accused was reduced by the Reviewing authority […]. The Confirming authority commuted 5 of the remaining 33 death sentences, two of them to 20 years' hard labour and 3 to 10 years' hard labour").
[2092] *See* Co-Prosecutors' Appeal Brief, para. 39.
[2093] *Sch.* Case (Supreme Court for the British Zone, Germany) pp. 13 *et seq*. (in German) (the fact that the accused was not held responsible for the killing of the victim is also reflected in the charges pressed against him under German law, which did not include crimes of murder or homicide).
[2094] *Ikeda* Case (Temporary Court Martial, Batavia), p. 4.

found that the accused had knowledge that the plan was carried out.[2095] Given the position of authority of the accused, the court found that he should have been aware of the lack of consent of the girls and that he should have prevented any furtherance of the crime, as well as investigated it. The court concluded that:

> [T]he accused – who was also fulfilling the role of a *heitan* officer – by approving a plan of this sort, by participating in the further elaboration of the plan and by failing to check in hindsight how the plan had actually been carried out and how the brothels that had been established on the basis of that plan were operating, must be held liable for the criminal offences committed in the process.[2096]

794. The judgement in the *Ikeda* Case (Temporary Court Martial, Batavia) does not address specifically the modes of liability. Based on the facts of the case, it is possible that liability was found to arise based on common purpose liability for crimes actually not encompassed by that common purpose. However, it is also possible that the Court in *Ikeda* found that the crimes at issue were implicit in the common purpose or that the accused bore command responsibility – in particular since the court noted the role and rank of the accused and his failure to investigate. Given these uncertainties and in the absence of other relevant state practice, the *Ikeda* Case (Temporary Court Martial, Batavia) is clearly insufficient to demonstrate that liability for crimes not encompassed by the common purpose existed under customary international law at the time relevant to the charges.

795. In this regard, the Supreme Court Chamber notes that the post-World War II cases from Italy that were cited in *Tadić* do not offer strong support to the notion of JCE III. The *Tadić* Appeals Chamber relied on the Italian cases to conclude that "a person may be held criminally responsible for a crime committed by another member of a group and not envisaged in the criminal plan", provided that such crime was predictable.[2097] In the *D'Ottavio* Case, however, the members of the group were *not* convicted of a crime falling outside the common plan. The Italian Court of Cassation confirmed that D'Ottavio, who had shot at the fugitive's arm, did not intend to kill the fugitive, but only to prevent his flight and thus capture him, which was precisely the

[2095] *Ikeda* Case (Temporary Court Martial, Batavia), p. 4.
[2096] *Ikeda* Case (Temporary Court Martial, Batavia), p. 4.
[2097] *Tadić* Appeal Judgement (ICTY), para. 218.

objective pursued by the group.[2098] The death of the victim only occurred due to unforeseen circumstances, an infection not promptly treated.[2099] Indeed, the four members of the group were convicted of *omicidio preterintenzionale* (not voluntary homicide), an offence which only requires intention to cause bodily harm, with the death being attributed to the accused – according to the jurisprudence as it stood in the 1940s – through strict liability.

796. The *Aratano* Case is equally misplaced. The Italian Court of Cassation *overturned* the conviction for a homicide perpetrated during an operation aimed at arresting some partisans, since the common purpose of the operation did not encompass killing.[2100] Therefore, the "unintended event" of killing, which fell outside the group's plan, could not be imputed to all the members of the group. This is notwithstanding the fact that, arguably, the killing was foreseeable, given that the militiamen were armed and that partisans were unlikely to surrender voluntarily. Recalling the case of *Beraschi*, the Court of Cassation explicitly held that liability for killings that had occurred during mopping-up operations carried out by several people required proof of a "wilful activity [*attività volontaria*] also concerning the killing".[2101]

797. As to the cases concerning the applicability of the Italian amnesty law of 22 June 1946,[2102] the Supreme Court Chamber notes that they are highly context-dependent, as shown by the somewhat inconsistent case law.[2103] This class of cases can therefore hardly provide a firm guidance.

[2098] *D'Ottavio* Case (Court of Cassation, Italy), pp. 6-7.
[2099] *D'Ottavio* Case (Court of Cassation, Italy), p. 2.
[2100] *Aratano* Case (Court of Cassation, Italy), p. 13 (not available in English).
[2101] *Aratano* Case (Court of Cassation, Italy), p. 14 (not available in English).
[2102] *Tadić* Appeal Judgement (ICTY), para. 217.
[2103] For example, compare *Tossani* Case (Court of Cassation, Italy), pp. 88-89 (not available in English) (amnesty found to be applicable, since the accused neither performed any activity in the mopping-up operation nor carried weapons, and because the killing was an exceptional and unforeseen event) and *Ferrida* Case (Court of Cassation, Italy), p. 88 (not available in English) (amnesty applicable, given that the accused had participated in the mopping-up operation only as a nurse and because the crime of homicide was different from the crime the accused intended to commit, *i.e.* collaboration with the enemy) with *Palmia* Case (Court of Cassation, Italy), p. 89 (not available in English) (holding that the applicability of the amnesty, in cases of homicide perpetrated in the course of a mopping-up operation carried out by several individuals, is excluded when such operation is causally – or even just incidentally – linked to the killing (*rapporto di causalità o anche solo di occasionalità*)). Moreover, the headnotes provide insufficient detail to accurately discern the role, if any, that foreseeability played in attributing liability for killings to all the participants of a mopping-up operation.

798. The final category of Italian cases does not concern war crimes, but ordinary crimes under Italian law, perpetrated by and against Italian nationals, and adjudicated before Italian domestic authorities.[2104] They may accordingly be regarded as being of limited relevance in this context. The *Tadić* Appeals Chamber relied on them to satisfy itself that the requisite *mens rea* to attribute responsibility for acts committed by another participant in a criminal transaction, but not included in the common design, revolves around foreseeability.[2105] However, the judgement in the *Mannelli* Case, which the Appeals Chamber extensively quoted in its analysis of the *mens rea* issue, does not seem to be entirely apposite. In *Mannelli*, the Court of Cassation expanded on the topic of material causality (*rapporto di causalità materiale*) to articulate the principle that, responsibility for a crime committed by another person and different from the crime agreed upon by the participants, may arise where the former crime constitutes a logical and predictable development of the latter (*logico e prevedibile sviluppo*).[2106] Of particular note is that the requirement of logical development pertains, according to the Court of Cassation, to the element of material causality, not to *mens rea*. It follows that, for example, the state of mind of the participant is irrelevant to the assessment of *material* causality.

799. The Supreme Court Chamber has reviewed a number of other cases dating from the post-World War II period relating to liability for participation in the implementation of a common purpose. The vast majority of these cases does not lend any support to the argument that accused may incur criminal responsibility for crimes that were not encompassed by the common purpose and the *actus reus* of which they did not commit.[2107] Five cases, however, deserve further discussion.

[2104] *Tadić* Appeal Judgement (ICTY), paras 218-219.
[2105] *Tadić* Appeal Judgement (ICTY), paras 218-219.
[2106] *Mannelli* Case (Court of Cassation, Italy), columns 696-697.
[2107] The Supreme Court Chamber has reviewed in addition to other cases developed above, the *Belsen* Case (British Military Court, Germany), which is similar to The *Dachau Concertation Camp* Case, as it regards the participation in furtherance of a system of ill-treatment (p. 1); the *Farben* Case (U.S. Military Tribunal, Germany), where some of the accused were charged with participating in the formulation and execution of a common plan or conspiracy to commit crimes against peace (p. 1), the Tribunal specified that "[i]t must be shown that they *were parties to the plan or conspiracy*, or, knowing of the plan, *furthered its purpose and objective by participating* in the preparation for aggressive war" (p. 16, emphasis added); the *Hadamar* Case (U.S. Military Commission, Germany), where the accused were convicted for their participation in the common plan of murdering hundreds of civilians at a sanatorium (pp. 47, 51); the *Hostage* Case, where the accused were charged *inter alia* for their participation in a deliberate scheme of terrorism and intimidation – though they were not found

800. Two of these cases, the *Rüsselsheim* Case (U.S. Military Commission, Germany) and the *Tashiro* Case (U.S. Military Commission, Japan) were, held before American military commissions. In the *Rüsselsheim* Case, eleven German civilians were charged with assault and homicide for the deaths of six American airmen who, after having crash-landed, were attacked by a mob and eventually shot dead by one of the defendants.[2108] The Prosecution argued that the accused had participated in a common purpose and were therefore responsible for any killing that was its natural and probable consequence, "although not specifically contemplated by the parties or even forbidden by the defendant".[2109] Thus, the prosecution apparently was of the view that common purpose liability extended to crimes not encompassed by the common purpose, as long as they were foreseeable. Yet, as in the *Essen Lynching* Case (British Military Court, Germany), it is unclear whether the court actually shared this view and applied it to the case. Notably, one defendant was acquitted because he had been a mere bystander and convictions for the others were entered for "acting jointly […] willfully, deliberately and wrongfully encourage[ing], aid[ing], abet[ting], abet[ting], and participat[ing] in the killing of […] members of the United States Army",[2110] suggesting that murder had eventually become part of the common purpose.

801. In the *Tashiro* Case, five members of the personnel from the Tokyo Military Prison were held responsible for the deaths of American prisoners of war who burned to death in a fire during a bombing raid because they had not been released from their

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guilty as there was no evidence of participation to a preconceived plan (pp. 1230, 1260); the *Mauthausen* Case (U.S. Military Courts, Germany), where the Tribunal convicted sixty-one accused for "acting in pursuance to a common design to subject the persons" to various crimes (pp. 2-4; *see also* pp. 14-15), thus recognising the participation in a common design as a mode of liability, though not indicating that this would include liability for crimes not encompassed by the common design (p. 14); the *IMTFE* Judgement, where it was held that some of the accused participated in the formulation and execution of a common plan or conspiracy to secure Japan's dominance in the region by waging wars of aggression (pp. 49768-49769), which the IMTFE held was a criminal act as "[a]ll of those who at any time were parties to the criminal conspiracy or who at any time with guilty knowledge played a part in its execution are guilty of the charge contained in Count I" (p. 49770); the *Ulrich and Merkle* Case (U.S. Military Courts, Germany), where the accused were found guilty of acting in pursuance of a common design to commit crimes in the operations of the Dachau Concentration Camp (p. 1); the *Wuelfert* Case (U.S. Military Courts, Germany), where the accused were charged with the killing, beating and torture of members of enemy armed forces, acting in pursuance of a common design by wilfully and deliberately encouraging, aiding and abetting and participating in the crimes (p. 1).

[2108] *Rüsselsheim* Case (U.S. Military Commission, Germany), pp. 2-3, 6.

[2109] Trial transcript of the *Rüsselsheim* Case, as quoted by Robert CLARKE, "Return to Borkum Island, Extended Joint Criminal Enterprise Responsibility in the Wake of World War II", *Journal of International Criminal Justice*, Vol. 9 (2009), pp. 839 at 854.

[2110] *Rüsselsheim* Case (U.S. Military Commission, Germany), p. 1.

cells.[2111] The prosecution in that case argued that "the American prisoners met their deaths during the fire designedly, and in accordance with a preconceived plan; or, at least, as a result of the gross negligence of TASHIRO and KOSHIKAWA, in not earlier releasing them".[2112] While the reference to gross negligence could be construed as a reference to common purpose liability for crimes not actually encompassed by it, it is more likely a reference to responsibility for unintentional killing. Therefore, one cannot conclude that this case demonstrates attribution based on an extended form of JCE.

802. Also of potential relevance are three post-World War II cases before Australian military courts. In the *Hatakeyama* Case, seven Japanese were charged with the murder of a Chinese civilian who had died subsequent to beating and cruel treatment.[2113] In his submissions before the court, the Judge Advocate referred to a textbook on domestic criminal law discussing "common design" as well as other modes of liability.[2114] However, nothing indicates that the court based the convictions of the accused on a form of liability resembling an extended form of JCE liability.[2115]

803. In the *Matsumoto* Case, three accused were charged with the murder of a Chinese civilian suspected of spying activities who had died subsequent to torture and ill-treatment.[2116] The Judge Advocate submitted that, in respect of Accused Matsumoto, the court should consider whether he had been "one of several persons who combined together for an unlawful purpose, or for unlawful purpose to be effected by unlawful means".[2117] He added that Matsumoto should not be held liable if he had no knowledge or if he had not approved that the interrogation of the victim was to be carried out by murderous violence.[2118] Thus, the submissions of the Judge Advocate indicate that, according to his view, there was no liability for crimes not foreseen by the common purpose. The Court found Matsumoto not guilty.[2119]

[2111] *Tashiro* Case (U.S. Military Commission, Japan), pp. 7-8, 11.
[2112] *Tashiro* Case (U.S. Military Commission, Japan), p. 11.
[2113] *Hatakeyama* Case (Military Court, Australia), p. 4.
[2114] *Hatakeyama* Case (Military Court, Australia), p. 51.
[2115] *See* *Hatakeyama* Case (Military Court, Australia), p. 52.
[2116] *Matsumoto* Case (Military Tribunal, Australia), p. 46.
[2117] *Matsumoto* Case (Military Tribunal, Australia), p. 17.
[2118] *Matsumoto* Case (Military Tribunal, Australia), p. 17.
[2119] *Matsumoto* Case (Military Tribunal, Australia), p. 46.

804. Finally, in the *Ishiyama and Yasusaka* Case, two accused were charged with the murder of two Indian prisoners of war.[2120] The accused intimidated the prisoners of war them by tying them to a tree. When Yasusaka told Ishiyama that they should "let them go", the latter had answered that "[w]e have gone this far, we may as well finish it" and shot them.[2121] In his address to the court, the Judge Advocate highlighted the following:

> Common design includes a concerted design to commit murder or a felony. If an act done by some one of the party in the course of his endeavors to effect the common object of the offenders results in the death of some person the others are equally liable for the murder as principals in the second degree.
>
> If you believe that the only agreement between the two accused was to frighten the two Indians and that one of the accused decided to shoot them and that the shooting was not done by him in an endeavour to effect a common purpose then the other would not be liable as a principal in the second degree under the doctrine of common design.[2122]

Thus, contrary to the *Matsumoto* Case, the Judge Advocate in the *Ishiyama and Yasusaka* Case appears to have been of the view that, where the common purpose was to commit a felony, liability arose also in respect of felonies not encompassed by the common purpose. However, there is no indication that the court had found that murder or another felony had been encompassed by the common purpose, as only Ishiyama was found guilty.[2123] Accordingly, there is no indication that the court applied this concept.

805. To the extent that the Co-Prosecutors suggest that the existence under customary international law of JCE liability for crimes not encompassed by the common purpose may be established based on a review of domestic criminal law,[2124] this argument is based on a fundamental misunderstanding: the vast majority of cases and legislation to which the Co-Prosecutors refer relates to ordinary domestic criminal law without any international element.[2125] The exercise of domestic criminal

[2120] *Ishiyama and Yasusaka* Case (Military Court, Australia), p. 4.
[2121] *Ishiyama and Yasusaka* Case (Military Court, Australia), pp. 4-5.
[2122] *Ishiyama and Yasusaka* Case (Military Court, Australia), pp. 24-25.
[2123] *Ishiyama and Yasusaka* Case (Military Court, Australia), p. 27.
[2124] Co-Prosecutors' Appeal Brief, paras 50-57.
[2125] Among the case law cited, in addition to cases already cited in relation to post-World War II jurisprudence, it appears that only the Polish case *Goeth* Case (Supreme National Tribunal, Poland), includes an international element.

jurisdiction over, for instance, international crimes committed by foreigners may qualify as state practice relevant to the identification of a rule of customary international law, including in respect of the modes of liability. In contrast, general domestic criminal practice cannot be the basis for establishing a rule of customary international law, given that it lacks an international element. Such domestic practice may only be used to identify a general principle of (domestic) law or be a reference point for interpreting international crimes and attendant principles and concepts, given that international criminal law concepts were developed based on domestic concepts of criminal law.[2126] Based on the methodology proposed by the Co-Prosecutors, a significant number of rules of domestic substantive criminal law would qualify as customary international law – despite the absence of any international element. This would undermine the distinction between the spheres of international law and domestic law – as well as that between customary *international* law and general principles of *domestic* law.[2127]

[2126] *See above*, para. 387 *et seq*. *See also* Boris BURGHARDT, "Die Rechtsvergleichung in der völkerstrafrechtlichen Rechtsprechung", in: Susanne BECK, Christoph BURCHARD, Bijan FATEH-MOGHADAM (eds), *Strafrechtsvergleichung als Problem und Lösung*, Nomos, 2001, p. 235 *et seq*. at 250 *et seq*.

[2127] *See* ICJ Statute, Art. 38; Joseph L. KUNZ, "The Nature of Customary International Law", *American Journal of International Law*, Vol. 47 (1953), p. 666, stating with regard to the identification of customary law that, "[t]here must be a 'practice,' whether of positive acts or omission, whether in time of peace or war. This practice must refer to a type of situations falling within the domain of international relations"; Éric DAVID, *Principes de droit des conflits armés*, 5th ed., Bruylant, Bruxelles, 2012 p. 63, explaining that the "general principles of humanitarian law" discussed in the *Nicaragua* Case (ICJ) should not be confused with general principles of law of civilised nations as the former are fundamental principles of international customary law; Ian BROWNLIE, *Principle of Public International Law*, 7th edition, Oxford University Press, 2008, p. 17, noting in respect of general principles if law that they are "[general principles of law are] principles in terms of rules accepted in the domestic law of all civilized states" […]. The intention is to authorize the Court to apply the general principles of municipal jurisprudence […] in so far as they are applicable to relations of States". The Supreme Court Chamber notes that the ICTY jurisprudence in this regard is not free from ambiguity: in the *Kunarac* Case, the ICTY Appeals Chamber concluded, "that rape […] constitutes a recognised war crime under *customary international law*, which is punishable under Article 3 of the Statute. The *universal criminalisation of rape in domestic jurisdictions*, the explicit prohibitions contained in the fourth Geneva Convention and in the Additional Protocols I and II, and the recognition of the seriousness of the offence in the jurisprudence of international bodies, including the European Commission on Human Rights and the Inter-American Commission on Human Rights, all lead inexorably to this conclusion" (footnote(s) omitted, emphasis added) (*Kunarac* Appeal Judgement (ICTY), para. 195), thus suggesting that domestic practice may be relevant to the identification of a rule of customary international law, whereas in the *Čelebići* Case, the ICTY Appeals Chamber stated that, "[i]t is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to '*general principles of law*' recognised by all legal systems" (footnote(s) omitted, emphasis added) (*Čelebići* Appeal Judgement (ICTY), paras 179-180). The Supreme Court Chamber considers that the reference in *Kunarac* to domestic law is best understood as referring to domestic criminalisation of rape as a war crime, as proscriptions against rape at the municipal level are insufficient to show the emergence of rape as an international crime (*see Duch* Appeal Judgement (001-

806. Nor are the Co-Prosecutors' examples of domestic legislation and case law sufficient to establish the existence of a general principle of law that crimes of others may be imputed on an accused who did not personally carry out the *actus reus*, when these crimes were not encompassed by a common purpose. It is true that several jurisdictions identified by the Co-Prosecutors, mostly those following the Common Law tradition, provide for the imputation of crimes that resulted from the implementation of a common purpose even if they were not necessarily part of it.[2128] However, even in some of those jurisdictions, there appear to be limitations, for instance to certain categories of crimes (*e.g.*, felony murder in the United States[2129]). At the same time, other jurisdictions provide, if at all, for a much more limited imputation – for instance, in respect of specific crimes,[2130] or regarding specific constellations in respect of instigation or aiding and abetting crimes.[2131] It would appear that in all these jurisdictions, the general principle is that criminal responsibility is ordinarily limited to the perpetrator's own actions; as far as actions of others are concerned, a specific condition for their imputation must be determined by law – for instance that the crime in question was encompassed by an agreement or a common criminal purpose. This principle would be turned on its head if the broad liability advocated by the Co-Prosecutors were to be followed.

807. Thus, the Supreme Court Chamber finds that criminal liability based on making a contribution to the implementation of a common criminal purpose was, at the time relevant to the charges in the case at hand, limited to crimes that were actually encompassed by the common purpose. In light of this conclusion, the criteria for deciding which crimes are encompassed by a common purpose are of great

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F28), para. 182).

[2128] *See* Co-Prosecutors' Appeal Brief, paras 52-53 (the examples cited by the Co-Prosecutors from Australia, Bermuda, Botswana, Canada, Fiji, Israel, Kenya, Malawi, New Zealand, Nigeria, Papua New Guinea, Seychelles, South Africa, Tanzania, Uganda, United States, Western Samoa and Zambia; the examples from Egypt, Iraq and Uruguay also appear to closely resemble such form of liability).

[2129] *See* Co-Prosecutors' Appeal Brief, fn. 141, the example cited from Texas.

[2130] *See*, *e.g.*, Co-Prosecutors' Appeal Brief, fn. 176, referring to the 1810 Criminal Code of France, Arts 97 (relating to crimes against the Emperor and crime of sedition) and 313 (relating to crimes of murder etc.), 265-266, (deal with the crime of "association de malfaiteurs" and therefore not with a mode of liability). Other examples include those cited by the Co-Prosecutors from Bangladesh, Cambodia, Greece, India, Japan, South Korea, Thailand, Uruguay and the U.S.S.R., which either address specific crimes, crimes committed from within crowds or crimes that lead to a particular, aggravating result (Co-Prosecutors' Appeal Brief, para. 53).

[2131] *See* Co-Prosecutors' Appeal Brief, paras 52-53 (the examples cited from Bangladesh, Ethiopia, Ghana, Pakistan and Thailand).

relevance. As noted above, the jurisprudence since *Tadić* requires that the common purpose "amounts to" or "involves" the commission of a crime. The Supreme Court Chamber finds in this regard that the common purpose "amounts to" the commission of a crime if the commission of the crime is the, or among the, primary objective(s) of the common purpose. This would, for example, be the case in a situation where the common purpose is to kill a group of political enemies. In such a scenario, there would be no doubt that the members of the joint criminal enterprise acted with direct intent to kill.

808. In contrast, the common purpose "involves" the commission of a crime if the crime is a *means* to achieve an ulterior objective[2132] (which itself may not be criminal). In such a scenario, it is not necessary that those who agree on the common purpose actually *desire* that the crime be committed, as long as they recognise that the crime is to be committed to achieve an ulterior objective. This may include crimes that are foreseen as means to achieve a given common purpose, even if their commission is not certain. For instance, if a gang agrees to break into a house to steal and to use, if necessary, deadly force to overcome any resistance that they may encounter, it would be unconvincing to conclude that the eventual murder was not encompassed by the common purpose because it was not certain that murder would actually be committed in the course of the break-in. Rather, in such scenario, the crime of murder was a constituent element of the plan that was conceived, even if the members of the gang did not know whether it would actually be committed. Thus, if attaining the objective of the common purpose may bring about the commission of crimes, but it is agreed to pursue this objective regardless, these crimes are encompassed by the common purpose because, even though not directly intended, they are contemplated by it. Whether a crime was contemplated by the common purpose is primarily a question of fact that – absent an express agreement – has to be assessed taking into account all relevant circumstances, including the overall objective of the common purpose and the likelihood that it may be attained only at the cost of the commission of crimes. What is of note is that the common purpose may

[2132] *Brima* Appeal Judgement (SCSL), para. 80 ("the Appeals Chamber concludes that the requirement that the common plan, design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, or contemplate crimes within the Statute as the means of achieving its objective").

encompass crimes in which the commission is neither desired nor certain, just as it is sufficient for the commission of certain crimes that the perpetrator acted with *dolus eventualis* and therefore neither desired that the crime be committed nor was certain that it would happen.

809. What deserves emphasising is that in all scenarios described above there is a meeting of minds – express or implicit – in respect of this crime of those who agree on the common purpose. Thus, the members of the JCE must accept the commission of the crime either as a goal, as an inevitable consequence of the primary purpose or as an eventuality treated with indifference. To the extent that those agreeing on the common purpose are not expected to carry out the *actus reus* of the crime themselves, but rely on others to do so, this may be construed as a form of delegated authority for the direct perpetrator to make a decision as to the ultimate implementation of the *actus reus*; again this bears resemblance with the concept of *dolus eventualis*. Conversely, where the crime was not encompassed by the common purpose in the sense specified above, its commission was an autonomous decision of the direct perpetrator and there is no basis for its imputation to others.

810. In conclusion, although the jurisprudence summarised above may not always have used consistent terminology, it is sufficient to establish that accused were held criminally liable for crimes committed in the course of the implementation of a common purpose to which they had made some kind of contribution beyond being a bystander. NUON Chea's argument that this was an insufficient basis to give rise to criminal liability is rejected. That said, criminal liability for making a contribution to the implementation of a common criminal purpose arose only with respect to crimes actually encompassed by the common purpose, in the sense discussed above. For that reason, by referring to crimes that merely "resulted" from the implementation of the common purpose, the Trial Chamber erred in law by importing a notion of criminal liability that did not exist either under customary international law at the time of the charges or as a general principle of law. Nevertheless, as set out above,[2133] not any error of law will lead to a reversal of the judgement on appeal, but only those that invalidate it, in the sense that without the error, the Trial Chamber would have entered a different verdict, in whole or in part. In this regard, the Supreme Court Chamber

[2133] *See above*, para. 84.

notes NUON Chea's submission that the Supreme Court Chamber does not have "jurisdiction to reverse the relevant finding of fact: that the evidence does not establish beyond a reasonable doubt that [the] CPK policy 'involved' the commission of the crimes" and that, therefore, every conviction in relation to the population movements based on JCE I liability must be reversed.[2134] The Supreme Court Chamber is not persuaded by this argument. The Trial Chamber used a legally incorrect formulation in respect of the mode of liability. It did not enter a factual finding that would negate the criminal character of the population movement policy; to the contrary, it rebutted justifications for the population movement offered by the Accused. Likewise, the Supreme Court Chamber is not persuaded that it has to enter a finding *de novo* whether the common purpose involved the commission of crimes.[2135] At issue is essentially a legal question that the Supreme Court Chamber will rule upon based on the factual findings established by the Trial Chamber. Therefore, in the sections that follow, the Supreme Court Chamber will conduct its assessment of whether the legal error invalidates the Trial Judgement on the basis of, primarily, the Trial Chamber's factual findings, taking into account the Accused's relevant arguments in that respect.

b) Criminality of the common purpose

811. The Trial Chamber found that, "at the latest, by June 1974 until December 1977, there was a plurality of persons who shared a common purpose to "implement rapid socialist revolution through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary'".[2136] The Chamber noted that "[t]his common purpose was not in itself necessarily or entirely criminal", but recalled that the Closing Order (D427) alleged that it was implemented "through the Population Movement Policy […] and Targeting Policy […] which resulted in and/or involved crimes".[2137] The Trial Chamber then proceeded to analyse whether the existence of those two policies had been established.[2138]

[2134] NUON Chea's Appeal Brief, para. 501.
[2135] *See* NUON Chea's Appeal Brief, para. 502.
[2136] Trial Judgement, para. 777.
[2137] Trial Judgement, para. 778.
[2138] Trial Judgement, paras 779-834.

812. NUON Chea takes issue with the Trial Chamber's finding that the common purpose was to be implemented "by whatever means necessary".[2139] Referring to the jurisprudence of the ICTY, he submits that criminal liability based on the notion of JCE requires the existence of an agreement to commit a crime and that it must be demonstrated that the intention was to implement the common purpose through the commission of a crime if the common purpose as such was non-criminal.[2140] Recalling a finding of the *Brđanin* Appeal Judgement (ICTY), he submits that the content and scope of the criminal purpose must be specified and argues that, by stating that the common purpose was to be implemented "by any means necessary", the Trial Chamber circumvented the requirement that the criminal objective be defined with specificity, which, in his submission, resulted in him being "automatically responsible for criminal acts which follow from his participation in the common purpose – the hallmark of JCE III – before the relevant standard for *mens rea* is even identified".[2141] He recalls furthermore the limited scope of Case 002/01 and submits that the Trial Chamber's finding was not factually meaningful, but an expression of its bias against the Accused,[2142] though he accepts that it is "difficult to discern" the purported error's impact on the outcome.[2143]

813. In response, the Co-Prosecutors submit that NUON Chea's arguments fall short of the standard of review on appeal and were not raised during either the pre-trial or trial phases of the proceedings and, therefore, ought to be dismissed.[2144] They underline that both NUON Chea and KHIEU Samphân fail to address "the *specific* policies the Chamber found the members of the JCE used to achieve their common purpose, and the *specific* crimes that those policies amounted to or involved" and that they were not convicted "simply for being revolutionaries".[2145]

814. The Supreme Court Chamber recalls its finding that, in order to give rise to criminal liability, the common purpose has to be criminal, in the sense that it either

[2139] NUON Chea's Appeal Brief, para. 494.
[2140] NUON Chea's Appeal Brief, para. 495.
[2141] NUON Chea's Appeal Brief, paras 495-496.
[2142] NUON Chea's Appeal Brief, para. 497.
[2143] NUON Chea's Appeal Brief, para. 498.
[2144] Co-Prosecutors' Response, para. 315.
[2145] Co-Prosecutors' Response, para. 316.

amounted to or involved the commission of a crime.[2146] As regards the case at hand, the Trial Chamber, when setting out the applicable law, correctly noted that "there must be a common purpose which amounts to or involves the commission of a crime".[2147] The Trial Chamber, in keeping with the Closing Order (D427), identified the implementation of "rapid socialist revolution through a 'great leap forward'" and the defence of the CPK "against internal and external enemies, by whatever means necessary"[2148] as the common purpose. According to the Trial Chamber, this common purpose was "not in itself necessarily or entirely criminal".[2149] Elsewhere, the Trial Chamber stated that the common purpose was "to implement a socialist revolution in Cambodia", which was "not criminal in itself".[2150] As such, however, it would have been inapt to constitute a common purpose giving rise to *criminal* liability. Similarly, taken on its own, the Trial Chamber's finding that the socialist revolution was to be implemented "by whatever means necessary" would be an insufficient basis for identifying a *criminal* common purpose as it is not clear from this formulation whether this would include the commission of crimes and, if so, which.

815. Nevertheless, as noted by the Co-Prosecutors,[2151] the common purpose in the case at hand (as identified by the Trial Chamber) of implementing a socialist revolution must be seen in the context of the CPK policies that were the object of Case 002/01, notably the policy of population movement and the policy of targeting Khmer Republic soldiers and officials. These policies, according to the Trial Chamber, were utilised to bring the socialist revolution in Cambodia to fruition and involved or resulted in the commission of crimes.[2152] While the Trial Chamber did not expressly state that these policies were actually *part of* the common purpose in the sense of the criminal law – rather, they seemingly distinguished between the (non-criminal) common purpose on one hand and the policies on the other hand – it is nevertheless clear that, in the Trial Chamber's understanding, the policies that were at

[2146] *See above*, para. 789 *et seq*.
[2147] Trial Judgement, para. 692, referring to *Duch* Trial Judgement (001-E188), para. 508; *Tadić* Appeal Judgement (ICTY), para. 227.
[2148] Trial Judgement, para. 777.
[2149] Trial Judgement, para. 778.
[2150] Trial Judgement, para. 804. *See also* para. 835 ("this common purpose was not criminal in nature").
[2151] Co-Prosecutors' Response, para. 316.
[2152] Trial Judgement, para. 804; *see also* para. 835 ("the policies formulated by the Khmer Rouge involved the commission of a crime as a means of bringing the common plan to fruition").

issue at trial were intrinsically linked to the implementation of the socialist revolution in Cambodia.

816. It is in this context that the Trial Chamber's finding that the common purpose was to be implemented "by all means necessary" has to be understood – the "means" at issue in the case at hand were the population movement and targeting policies. Thus, while the Trial Chamber's findings may lack 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 – and not just "any means necessary" to implement the socialist revolution. Thus understood, the common purpose of implementing a socialist revolution through these policies was indeed criminal. Put differently, given that the common purpose was to be achieved through the commission of crimes, as encompassed by the policies, the objective of implementing a rapid socialist revolution in Cambodia was indeed criminal.

817. For that reason, while the Trial Chamber's distinction between the common purpose, which it considered may not have been criminal, and the criminal policies was unfortunate and misleading, the Supreme Court Chamber finds that, given the circumstances of the case, this did not amount to an appealable error. Therefore, the Supreme Court Chamber rejects NUON Chea's ground of appeal in this regard.

c) Existence and content of the population movement policy

818. The Trial Chamber noted that the population movement policy was adopted as part of the overall economic policy to transform Cambodia into an agricultural economy as a basis for industrial development.[2153] The Trial Chamber also found that, as a result of the movement of the population, "enemy networks would be separated, particularly those embedded among the always suspect 'New People'" and "[r]ebellion and/or foreign interference could thus be averted".[2154] The Trial Chamber proceeded to address in more detail the policies to evacuate cities and to move the population between rural areas.[2155]

[2153] Trial Judgement, paras 782-783.
[2154] Trial Judgement, para. 784.
[2155] Trial Judgement, paras 779-834.

819. NUON Chea and KHIEU Samphân raise several arguments regarding the Trial Chamber's findings as to the existence and content of the population movement policy, which the Supreme Court Chamber shall address in turn.

(1) Existence of policy of forced transfer of city dwellers and purpose thereof

820. In relation to the policy to evacuate cities, the Trial Chamber discussed the Khmer Rouge's hostile attitude towards city dwellers and the CPK leadership's decision, made in 1974 and again in February and April 1975, to forcefully transfer city dwellers to the countryside following the liberation of the country, without making any provision for the well-being and health of the evacuees.[2156] The Trial Chamber also found that the rationale for the evacuations was discussed in CPK publications and at meetings, namely to identify "enemies" among the "New People", re-educate them and allocate the work force in accordance with economic priorities.[2157] The Trial Chamber recalled that it had already addressed – and dismissed – the justifications that had been advanced by the CPK leadership for the evacuation of the cities, notably that the cities were evacuated to address food shortages and out of fear of enemy attacks.[2158] Further, the Trial Chamber noted that there was a pattern of evacuation of cities, starting as early as 1972 in regions brought under the control of the CPK and continuing until June 1975.[2159] The Trial Chamber found that most of these evacuations followed the same pattern, involving false pretexts, threats, use of violence, including execution of Khmer Republic officials, and were "undertaken pursuant to Party plans and policy".[2160]

821. KHIEU Samphân argues that the Trial Chamber erred when it found that there had been a consistent pattern of population movements from the cities to the countryside prior to the evacuation of Phnom Penh.[2161] He recalls that the Trial Chamber found that the populations of Kratie, Kampong Cham, Banam and Oudong[2162] were forcibly moved, but submits that those population movements did not establish a pattern of conduct according to which people were "forcibly evacuated

[2156] Trial Judgement, paras 787-788.
[2157] Trial Judgement, para. 788.
[2158] Trial Judgement, paras 789-790.
[2159] Trial Judgement, para. 791-794.
[2160] Trial Judgement, paras 792, 794.
[2161] KHIEU Samphân's Appeal Brief, paras 177-190; this argument is repeated at paras 232, 234, 353.
[2162] *See* Trial Judgement, para. 791.

from cities and towns under false pretexts, without concern for their well-being or their health" and for the purpose of re-educating them.[2163] As to the evacuation of Kratie, KHIEU Samphân submits that it purportedly took place in 1973, three years after it had come under the control of the Khmer Rouge, and therefore was in no way comparable to the evacuation of Phnom Penh, which took place immediately after the fall of the city.[2164] He also argues that the evidence on which the Trial Chamber relied was insufficient to establish, in particular, that the evacuation of Kratie took place "forcibly" and "under false pretexts" and without any concern for the safety and well-being of the population.[2165] As to the evacuation of Kampong Cham, KHIEU Samphân raises similar arguments, submitting that the witnesses and other evidence relied upon do not disclose what had happened, while the Trial Chamber incorrectly dismissed the evidence of witness PHY Phuon who stated that the city had never been evacuated.[2166] As regards Banam, he notes that the evidence on which the Trial Chamber relied does not specify the conditions under which the evacuation had taken place and was therefore inapt to support the Trial Chamber's finding.[2167] As to Oudong, KHIEU Samphân submits that the Trial Chamber placed much weight on the evacuation of this city, even though there was little tangible evidence as to what had happened.[2168] He notes that the Trial Chamber concluded that the evacuation took place in two stages – first, arrest and interrogation, followed by the relocation of people – which does not create a consistent pattern of conduct.[2169] Moreover, he argues that the Trial Chamber erred by not relying on the testimony of a witness who stated that the population of Oudong fled the city to escape the fighting.[2170]

822. KHIEU Samphân also contends that the Trial Chamber disregarded that the population movements before 17 April 1975 were carried out in the context of an armed conflict, in order to strengthen the war effort, and that the difficult conditions of the population were the result of that armed conflict.[2171] He submits that, as a

[2163] KHIEU Samphân's Appeal Brief, para. 177, referring to Trial Judgement, para. 794.
[2164] KHIEU Samphân's Appeal Brief, para. 178.
[2165] KHIEU Samphân's Appeal Brief, paras 178-181.
[2166] KHIEU Samphân's Appeal Brief, para. 182-184.
[2167] KHIEU Samphân's Appeal Brief, para. 185-187, referring to CPK Magazine: Revolutionary Flag, Special Issue, E3/25, December 1976-January 1977, p. 31, ERN (En) 00491424.
[2168] KHIEU Samphân's Appeal Brief, para. 188.
[2169] KHIEU Samphân's Appeal Brief, para. 188.
[2170] KHIEU Samphân's Appeal Brief, para. 189.
[2171] KHIEU Samphân's Appeal Brief, paras 174-175. *See also* KHIEU Samphân's Appeal Brief, para.

result, the Trial Chamber erred when it concluded the earlier population movements had been carried out for the same reasons as those after 17 April 1975.[2172] He further alleges that the Trial Chamber erred in finding that these evacuations were part of a criminal policy even though the methods used had not been criminal.[2173]

823. KHIEU Samphân further submits that the Trial Chamber erred in its findings as to the objective and purpose of the population movements and the establishment of cooperatives before 1975.[2174] He argues that the Trial Chamber erred when it found that cooperatives were established for ideological reasons, as opposed to in order to ensure a sufficient supply of, in particular, food for the population.[2175] He argues that, since the Trial Chamber's findings were erroneous, they could not serve as a basis for its conclusion that the leadership decided on the evacuation of Phnom Penh "on the basis of pre-1975 experience and an established policy of widespread creation of cooperatives throughout the country", noting that the Trial Chamber itself acknowledged that there were various reasons for the evacuation.[2176]

824. The Co-Prosecutors submit that the Trial Chamber's findings were reasonable, noting that the Trial Chamber relied not only on the evacuations of Kratie, Kampong Cham, Banam and Oudong, but also on those of Battambang, Svay Rieng and Prey Veng.[2177] They further submit that the Trial Chamber's reliance on, and evaluation of, the evidence was reasonable and remained within its discretion.[2178] The Co-Prosecutors further contend that the Trial Chamber did take the circumstances of the population movements before 17 April 1975 into account, including the existence of an armed conflict, food shortages and American bombing, referring to several paragraphs of the Trial Judgement.[2179] As to KHIEU Samphân's arguments regarding cooperatives, the Co-Prosecutors respond that these arguments should be summarily

233.
[2172] KHIEU Samphân's Appeal Brief, para. 176.
[2173] KHIEU Samphân's Appeal Brief, paras 233-234.
[2174] KHIEU Samphân's Appeal Brief, para. 196 *et seq*., referring to Trial Judgement, paras 106, 110, 113-116.
[2175] KHIEU Samphân's Appeal Brief, paras 198-200.
[2176] KHIEU Samphân's Appeal Brief, para. 201.
[2177] Co-Prosecutors' Response, para. 337, referring to Trial Judgement, para. 791.
[2178] Co-Prosecutors' Response, paras 338-339.
[2179] Co-Prosecutors' Response, para. 335.

dismissed because they do not have the potential to invalidate the judgement or occasion a miscarriage of justice.[2180]

825. The Supreme Court Chamber notes that, contrary to what KHIEU Samphân suggests, the Trial Chamber found that there was a pattern of forcible transfer of the population commencing before 17 April 1975,[2181] but not that the earlier population transfers took place under the exact same circumstances and following the same *modus operandi* as the evacuation of Phnom Penh. Accordingly, at issue is not whether the evidence upon which the Trial Chamber relied in relation to Kratie, Kampong Cham, Banam and Oudong established that the population was moved under "false pretexts" and "without concern for [the] well-being or their health" of the people concerned. In this regard, it is noteworthy that an impugned finding of the Trial Judgement states that "[m]ost of these urban evacuations" were examples of forced transfers under such conditions.[2182] As the Co-Prosecutors note, the Trial Chamber addressed not only the evacuations of these four cities, but also of other locations, which KHIEU Samphân does not address in his submissions on appeal.[2183] At the same time, KHIEU Samphân has not established that the finding that forced transfers took place in Kratie, Kampong Cham, Banam and Oudong was erroneous, regardless of the fact that the exact circumstances of these evacuations may be unknown.

826. As to the Trial Chamber's assessment of the testimony of PHY Phuon, who claimed that the Khmer Rouge had captured Kampong Cham for a short period only and therefore could not evacuate it, the Trial Chamber explained that it did not consider his testimony reliable in light of "other, more detailed accounts, describing the transfer of the city's population".[2184] This evidence describes, *inter alia*, that the evacuation took place when "a large part" of the city had been captured and that the attack against the city had been carried out in two prongs.[2185] This suggests that PHY Phuon simply may not have been aware of the evacuation of (parts of) the city.

[2180] Co-Prosecutors' Response, para. 334.
[2181] *See* Trial Judgement, para. 791.
[2182] Trial Judgement, para. 794.
[2183] Co-Prosecutors' Response, para. 337.
[2184] Trial Judgement, para. 107.
[2185] Trial Judgement, fn. 297.

KHIEU Samphân has not established that no reasonable trier of fact could have reached that conclusion; his arguments are rejected.

827. In addition, the Supreme Court Chamber disagrees with KHIEU Samphân's contention that the Trial Chamber made no finding on criminal methods used during the evacuations of cities in the period before 17 April 1975.[2186] Indeed, the Trial Chamber considered evidence describing the destruction of homes to prevent the return of the transferred people and the forced character of the transfer,[2187] which in itself is criminal, and it made findings upon them. Accordingly, the Supreme Court Chamber dismisses KHIEU Samphân's argument in this regard.

828. The Supreme Court Chamber is also not persuaded that the pre-1975 population transfers were carried out for entirely different objectives than the evacuation of Phnom Penh and that it was therefore erroneous to consider that they formed part of the same pattern.[2188] The Trial Chamber found that the pre-1975 population movements were carried out for a variety of objectives, notably for economic, military and ideological reasons.[2189] There is no indication that the evacuation of Phnom Penh was carried out for substantially different reasons. Further, the Supreme Court Chamber finds that the Trial Chamber did not err when considering the establishment of co-operatives as one of the reasons for the population transfers.[2190] While it is correct that crimes allegedly committed at co-operatives and worksites were not included in the scope of Case 002/01, this does not mean that the Trial Chamber could not regard collectivisation as one of the underlying objectives of the population movements. Indeed, it would appear that the enslavement of population was one of the principal objectives of the Khmer Rouge regime, of which the population transfer was but a first step.

829. In sum, the Supreme Court Chamber rejects the arguments challenging the Trial Chamber's findings as to the existence of a policy to transfer city dwellers.

[2186] KHIEU Samphân's Appeal Brief, para. 234.
[2187] Trial Judgement, paras 105, 107.
[2188] KHIEU Samphân's Appeal Brief, paras 174-176, 196-201.
[2189] *See* Trial Judgement, paras 104-112, 115.
[2190] KHIEU Samphân's Appeal Brief, para. 197.

(2) Existence of policy of population movement between rural areas

830. The Trial Chamber found that the policy of population movement included the policy under which "the Khmer Rouge moved people within regions or from one region to another to allocate resources, according to their own estimates, based on labour requirements and production targets, as well as to advance the class struggle".[2191] The Trial Chamber noted various decisions of the Party leadership to move the population, as well as the decision to classify the population into those enjoying "full rights", "candidates" and "depositees".[2192] The Chamber also noted that, throughout the DK period, "Zone secretaries and officials reported to POL Pot, NUON Chea, VORN Vet, SON Sen, Doeun and/or Office 870 on population movements, sometimes requesting further instructions".[2193] The Trial Chamber recalled that it had dismissed justifications for the population movements, which, in any event, would have been disproportionate,[2194] and found that, since at least 1972, there had been a pattern of population movements during which "New People" were often targeted for relocation.[2195]

831. NUON Chea submits that the Trial Chamber's finding was erroneous.[2196] He challenges the finding that there was a policy of forced transfer between rural areas, submitting that the Trial Chamber's finding in this regard was based on: (i) an erroneous finding that the population movement policy was frequently described in CPK publications; (ii) an erroneous finding that the Standing Committee took a decision to move the population in August 1975, which was later confirmed by the Central Committee in September 1975; and (iii) an erroneous finding that NUON Chea took part in these decisions.[2197]

832. KHIEU Samphân submits that the Trial Chamber erred and distorted the evidence when it found that there had been a pattern to relocate people before 1975.[2198] KHIEU Samphân also challenges[2199] the Trial Chamber's reliance on a

[2191] Trial Judgement, para. 795.
[2192] Trial Judgement, para. 797.
[2193] Trial Judgement, para. 798.
[2194] Trial Judgement, para. 799.
[2195] Trial Judgement, paras 800-803.
[2196] NUON Chea's Appeal Brief, para. 514 *et seq*.
[2197] NUON Chea's Appeal Brief, para. 515.
[2198] KHIEU Samphân's Appeal Brief, paras 191-195.

document dated September 1975, which refers, *inter alia*, to the plan to move 500,000 people to the Northwest Zone, as well as the need for additional people in the North and East Zones.[2200] Furthermore, KHIEU Samphân challenges the finding that the 1977 economic plan, which was adopted in November 1976, provided for the "the division of people according to their class", raising several arguments in that regard.[2201]

833. The Co-Prosecutors respond that the Trial Chamber correctly held that the Party Centre, including NUON Chea, were criminally responsible for discussing, formulating and implementing a criminal policy of population movement[2202] through the Zone Secretaries,[2203] as early as 1972,[2204] which consisted of forcibly transferring the population "from the cities and between rural areas" in conditions characterised by suffering, violence and acts of terror,[2205] particularly against "New People",[2206] so as to advance the implementation of a socialist revolution.[2207] The Co-Prosecutors further claim that KHIEU Samphân's arguments as to the Trial Chamber's evaluation of evidence are insufficient to show an error in the Trial Chamber's conclusion, do not invalidate the Trial Judgement and, therefore, should therefore be dismissed.[2208] In their submission, the Trial Chamber correctly took into account facts prior to 1975, which "formed the paradigm" of the movement policy.[2209]

834. As to NUON Chea's challenge of the finding that CPK publications described the population movement, it is true that the excerpts of the CPK publications referred to within the Trial Judgement[2210] do not refer specifically to the movement of the population between rural zones, but to the evacuation of cities. Nevertheless, as the Trial Chamber considered that transfers between rural areas and from cities to rural areas were part of a general population movement policy, the reliance on these

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[2199] KHIEU Samphân's Appeal Brief, para. 459 *et seq*.
[2200] CPK Document: Governing and Carrying Out Policy and Restoring All Fields of the Country (Doc No. 3), E3/781, dated 19 September 1975, pp. 22-23, ERN (En) 00523590, 00523591.
[2201] KHIEU Samphân's Appeal Brief, paras 466-469.
[2202] Co-Prosecutors' Response, para. 318.
[2203] Co-Prosecutors' Response, para. 323.
[2204] Co-Prosecutors' Response, para. 319.
[2205] Co-Prosecutors' Response, paras 319-320.
[2206] Co-Prosecutors' Response, para. 320.
[2207] Co-Prosecutors' Response, para. 317.
[2208] Co-Prosecutors' Response, paras 334-341.
[2209] Co-Prosecutors' Response, para. 335.
[2210] Trial Judgement, para. 577.

publications was not *per se* unreasonable. In this regard, the Supreme Court Chamber also notes that, immediately after the finding that CPK publications contained references to the population movement, the Trial Chamber recalled that generally CPK publications were used to communicate party policies.[2211] NUON Chea's additional argument – that the fact that these publications did not refer to a policy to move people between rural areas shows that there was no Party policy to that effect[2212] – is not convincing. The mere absence of references to a policy in CPK publications is insufficient to demonstrate that the Trial Chamber was unreasonable in finding that such a policy existed.

835. In respect of NUON Chea's argument as to the Trial Chamber's finding regarding the decision of the Standing Committee in August 1975, as evidenced by a report on a study visit, and NUON Chea's participation in the decision-making despite the Trial Chamber's finding that it has not been established that NUON Chea participated in the Standing Committee's study visit,[2213] the Supreme Court Chamber agrees with the Co-Prosecutors that this argument is without merit.[2214] The Trial Chamber did not conclude that NUON Chea participated in the decision-making process based on the study visit, but on his overall role within the CPK.[2215] It bears noting that the Trial Chamber did not find that the decision was taken specifically during the study visit. Rather, the Trial Chamber referred to the report on the study visit as one of the items of evidence on which it relied for its conclusion that a decision had been taken.[2216]

836. As concerns NUON Chea's argument that the Trial Chamber erred when it found that the Central Committee confirmed at a meeting held in September 1975 the decision to move the population between rural areas,[2217] the Supreme Court Chamber notes that, as pointed out by the Co-Prosecutors,[2218] the Trial Chamber did not make

[2211] Trial Judgement, para. 577.
[2212] NUON Chea's Appeal Brief, paras 516-517.
[2213] NUON Chea's Appeal Brief, para. 520. *See also* Trial Judgement, paras 745-746.
[2214] Co-Prosecutors' Response, para. 331.
[2215] Trial Judgement, para. 746.
[2216] *See* Trial Judgement, para. 745 *et seq*.; para. 795 *et seq*., and accompanying footnotes.
[2217] NUON Chea's Appeal Brief, para. 518.
[2218] Co-Prosecutors' Response, para. 330.

such a finding, but merely found that at the meeting "economic policies" had been discussed.[2219] NUON Chea's argument is therefore dismissed.

837. As to KHIEU Samphân's arguments relating to the existence of a pattern of population movement from 1972 onwards,[2220] the Supreme Court Chamber notes that the Trial Chamber's use of the term "New People" in the context of population movements before April 1975 is indeed somewhat misleading as the term came into use only after the fall of Phnom Penh.[2221] Nevertheless, the reference to "New People" is made in a paragraph of the Trial Judgement which sums up the Trial Chamber's findings relating to the period both before and after the fall of Phnom Penh – thus including the period during which the term "New People" was used.[2222] Accordingly, apart from imprecise terminology, the Supreme Court Chamber cannot see any error on the part of the Trial Chamber. As to KHIEU Samphân's remaining arguments regarding the Trial Chamber's findings as to a pre-1975 pattern of population movement,[2223] the Supreme Court Chamber considers that they are largely based on a misreading of the Trial Judgement. Importantly, the Trial Chamber did not find that a clear pattern existed in the period before April 1975 – it found that the pattern emerged "[o]ver the course of these evacuations", which included the period after April 1975.[2224] For the same reason, contrary to KHIEU Samphân's submissions,[2225] it was also not erroneous for the Trial Chamber to rely on evidence relating to the pre-1975 period that did not disclose a full-blown pattern of movement between rural areas. Nor does the Supreme Court Chamber consider that the Trial Chamber erred by assuming that there was a continuum, neglecting the context of an armed conflict during the pre-1975 period.[2226] As noted above, the Trial Chamber did not find that there was such a continuum, but found that the pattern "emerged" over time. Accordingly, KHIEU Samphân's arguments are baseless.

[2219] Trial Judgement, paras 749-751.
[2220] KHIEU Samphân's Appeal Brief, paras 191-194.
[2221] KHIEU Samphân's Appeal Brief, para. 191. *See also* Trial Judgement, paras 800-803.
[2222] Trial Judgement, para. 803.
[2223] KHIEU Samphân's Appeal Brief, paras 192-194.
[2224] Trial Judgement, para. 803.
[2225] KHIEU Samphân's Appeal Brief, paras 192-194.
[2226] KHIEU Samphân's Appeal Brief, para. 194.

838. As to the argument relating to the document dated September 1975,[2227] the Trial Chamber referred to this document and several other items of evidence to conclude that "there was a meeting of the Party leadership in early September 1975 concerning the economic policies later reflected in the September 1975 policy document".[2228] KHIEU Samphân argues that the Trial Chamber could not have reached this conclusion "without offending the *in dubio pro reo* principle"[2229] and that the Trial Chamber could not reasonably rely on the evidence it referred to.[2230] He submits that, given that the "provenance and the authors of the 1975 policy document" could not be identified, the document should have been excluded from the record.[2231] He argues further that all related factual findings should be overturned, including those regarding KHIEU Samphân's involvement in the policies at issue.[2232]

839. The Supreme Court Chamber considers that KHIEU Samphân's arguments raise two issues: first, whether the document dated September 1975 should have been admitted into evidence; and second, whether the Trial Chamber's factual findings in relation to the Central Committee meeting in early September 1975 were unreasonable. In respect of the first issue, the Supreme Court Chamber recalls that, pursuant to Internal Rule 87(1), as a general rule, "all evidence is admissible". Internal Rule 87(3) specifies on which grounds a Chamber may reject a request for evidence. KHIEU Samphân fails to make submissions in this regard. He merely submits that the document has "[no] probative value", given that its authors and provenance are unknown.[2233] The Supreme Court Chamber is not persuaded by this argument. Although the probative value of a document is likely to be significantly diminished if its author and provenance are unknown, this does not mean that the document cannot be admitted into evidence at all.

840. As to the second issue raised by KHIEU Samphân's arguments, the Supreme Court Chamber notes that, in reaching the findings as to a meeting of the Party leadership in early September 1975 concerning economic policies, the Trial Chamber

[2227] KHIEU Samphân's Appeal Brief, para. 459 *et seq*.
[2228] Trial Judgement, para. 749.
[2229] KHIEU Samphân's Appeal Brief, para. 459.
[2230] KHIEU Samphân's Appeal Brief, para. 460.
[2231] KHIEU Samphân's Appeal Brief, para. 465.
[2232] KHIEU Samphân's Appeal Brief, para. 465.
[2233] KHIEU Samphân's Appeal Brief, para. 465 and fn. 1008.

relied on several items of evidence, one of which was the document dated September 1975. It also relied on a statement of KHIEU Samphân as to the general purpose of the Central Committee, a statement by IENG Sary regarding a meeting of party leaders in September 1975, evidence from Philip SHORT regarding a meeting of the Central Committee in "mid-September", a reference in an issue of the *Revolutionary Flag* to a decision of the "Centre Party Congress" that had taken place before November 1975 regarding the target for rice production, as well as David CHANDLER's testimony regarding an overall economic plan which "emerged in late 1975".[2234] KHIEU Samphân points to weaknesses and inconsistences in relation to each of those items of evidence.[2235]

841. While it is correct that there are some inconsistencies in the evidence upon which the Trial Chamber relied, the Supreme Court Chamber does not consider that this means that the Trial Chamber's conclusion was unreasonable or violated the *in dubio pro reo* principle. This principle does not operate at the level of individual items of evidence, in the sense that each item ought to be given the interpretation that is least incriminating. Rather, the fact-finder should consider whether the evidence taken as a whole sufficiently supports a finding beyond reasonable doubt. Individual items of evidence may mutually reinforce each other and lead a fact-finder to a conclusion that this threshold has been met. Only if based on an evaluation of the evidence taken as a whole, a reasonable doubt persists, the *in dubio pro reo* principle commands that the fact-finder not enter a finding to the detriment of the accused.

842. The Supreme Court Chamber does not consider that the Trial Chamber's findings, based on the evidence as a whole, were unreasonable. In particular, despite the inconsistencies, a reasonable trier of fact could have reached these findings. For instance, to the extent that KHIEU Samphân claims that IENG Sary specifically denied that the population movement had been discussed at the meeting in September 1975,[2236] it appears that he was likely referring to the decision to evacuate Phnom Penh.[2237] Similarly, the fact that Philip SHORT referred to a meeting in mid-

[2234] Trial Judgement, para. 749 and accompanying footnotes.
[2235] KHIEU Samphân's Appeal Brief, paras 461-464.
[2236] KHIEU Samphân's Appeal Brief, para. 461.
[2237] *See* IENG Sary Interview by Stephen HEDER, E3/89, dated 17 December 1996, p. 5, ERN (En) 00417603 (the full answer to Stephen HEDER's question of whether the plan to move people to

September, and not early September,[2238] – which the Trial Chamber expressly acknowledged – does not render the Trial Chamber's finding unreasonable. Thus, the Supreme Court Chamber rejects KHIEU Samphân's arguments.

843. KHIEU Samphân also challenges the Trial Chamber's finding that the economic plan for 1977 provided, *inter alia*, for the "division of people according to their class", as he claims that the evidence cited in support does not sustain such a finding.[2239] The Supreme Court Chamber considers that this argument has not been sufficiently substantiated: the relevant finding of the Trial Chamber refers to other parts of the Trial Judgement, including the first paragraph of a section entitled "'[c]learly distinguish the elements' (1977)",[2240] which is based on several items of evidence. KHIEU Samphân does not explain why the Trial Chamber's assessment of this evidence was unreasonable. Instead, he focuses on the Trial Chamber's reliance on an issue of the *Revolutionary Flag* of 1976, which reported on the 1977 economic plan, without specifically referring to the division of people according to their class.[2241] Nevertheless, even this issue of the *Revolutionary Flag* contains several references to class struggle and the opponents of the revolution and also alludes to the fact that the amount of rice that people would receive depended on their categorisation.[2242] In sum, the Trial Chamber's finding does not appear to have been unreasonable. Furthermore, as noted by the Co-Prosecutors,[2243] KHIEU Samphân fails to substantiate the impact that a potential error in respect of this finding could have on his conviction. KHIEU Samphân's additional argument regarding the Trial Chamber's reliance on written statements has been addressed elsewhere in this Judgement.[2244]

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different Zones was discussed at the meeting of September 1975 reads as follows: "[n]o that matter was not discussed at that meeting. *The matter of the evacuation from Phnom Penh had been previously decided.* That's according to what I was told") (emphasis added). The interview does not further follow up on this issue.

[2238] KHIEU Samphân's Appeal Brief, para. 462.

[2239] KHIEU Samphân's Appeal Brief, para. 466, referring to Trial Judgement, para. 1026.

[2240] Trial Judgement, paras 621-623.

[2241] KHIEU Samphân's Appeal Brief, para. 467, referring to CPK Magazine: *Revolutionary Flag*, Issue 11, E3/139, dated 1 November 1976, p. 3, ERN (En) 00455280. The Trial Chamber relied upon this document at Trial Judgement, para. 770, fn. 2430.

[2242] CPK Magazine: *Revolutionary Flag*, Issue 11, E3/139, dated 1 November 1976, pp. 6, 7, 9, 14, ERN (En) 00491399, 00491400, 00491402, 00497407.

[2243] Co-Prosecutors' Response, para. 334.

[2244] *See above*, para. 240 *et seq*.

844. In conclusion, the Supreme Court Chamber dismisses the Accused's arguments regarding the Trial Chamber's findings in relation to the policy to move the population between rural areas.

(3) Crimes encompassed by the common purpose in relation to Population Movement Phase One

845. In respect of Population Movement Phase One, the Trial Chamber found that crimes against humanity of murder, extermination, political persecution as well as other inhumane acts had been committed.[2245] The Trial Chamber also found that the population movement policy "resulted in and/or involved" the commission of crimes "including forced transfers, murders, attacks against human dignity and political persecution".[2246] However, it found that the Closing Order (D427) did not include liability for the crime of extermination under the notion of JCE and therefore did not consider liability for this crime in relation to Population Movement Phase One based on this mode of liability.[2247] In any event, the Supreme Court Chamber has found that the Trial Chamber erred when finding that the crime of extermination was committed during Population Movement Phase One. Similarly, the Supreme Court Chamber has found that no separate convictions ought to have been entered in respect of forced transfers and attacks against human dignity, as these practices were not separate crimes but covered by the crime against humanity of "other inhumane acts".[2248]

846. With respect to the Trial Chamber's findings on Population Movement Phase One, NUON Chea acknowledges that he agreed to the evacuation of Phnom Penh, but denies that this agreement "amounted to, involved or included murder, persecution or other inhumane acts through attacks against human dignity".[2249] He submits that there is no evidence that the decision of the Standing Committee in April 1975 to evacuate the city upon its fall involved any of these crimes, which explains, in his view, why the Trial Chamber found that it merely "resulted in and/or involved" the commission of crimes.[2250] He recalls that he argued before the Trial Chamber that the crimes committed in course of the evacuation of Phnom Penh were committed under the

[2245] *See* Trial Judgement, paras 552, 559, 562, 565, 574.
[2246] Trial Judgement, para. 804.
[2247] Trial Judgement, para. 780.
[2248] *See above*, para. 589 *et seq*.
[2249] NUON Chea's Appeal Brief, para. 503.
[2250] NUON Chea's Appeal Brief, para. 504.

authority of the Zone leaders, not the Party Centre, and notes that the Trial Chamber rejected this argument, finding that the Zone leaders had merely "implemented" the instructions of the Party Centre.[2251] In his view, this finding directly contradicts another finding of the Trial Chamber, namely that at least some Zone leaders took part in the decision of the Standing Committee.[2252] NUON Chea submits that the Party Centre and the Zone leaders had merely agreed to evacuate the city and that any other instructions regarding how to implement this agreement came from the Zone level, over which the Party Centre exercised only limited control, and which was involved, already in April 1975, in a power struggle with the Party Centre.[2253] In this regard, NUON Chea recalls that HENG Samrin, whom the Trial Chamber failed to call, indicated in his interview with Ben KIERNAN that there were inter-zonal conflicts since at least 1973; he argues that "[n]o reasonable trier of fact could conclude that these soldiers, who actively confronted each other and reported to members of the Standing Committee representing competing factions within the Party, also acted pursuant to detailed instructions (of which no evidence exists) from Pol Pot or Nuon Chea".[2254]

847. In relation to the crime of murder, NUON Chea avers that the situation was comparable to a hypothetical described in the *Tadić* Appeal Judgement, in that murder was merely foreseeable, but not part of the agreement among the members of the JCE; accordingly, it could establish liability only under JCE III.[2255] NUON Chea also challenges the Trial Chamber's finding that the population movement followed a pattern of conduct and that it was carried out "using any means", alleging factual errors in that regard.[2256] As to persecution, NUON Chea argues that there is no evidence that the common purpose involved this crime, recalling earlier arguments.[2257] In his submission, the Trial Chamber's finding that the suffering endured during the evacuation of Phnom Penh was meant to re-educate the "New

[2251] NUON Chea's Appeal Brief, para. 505.
[2252] NUON Chea's Appeal Brief, para. 505.
[2253] NUON Chea's Appeal Brief, para. 506.
[2254] NUON Chea's Appeal Brief, para. 507.
[2255] NUON Chea's Appeal Brief, para. 508.
[2256] NUON Chea's Appeal Brief, paras 509-511.
[2257] NUON Chea's Appeal Brief, para. 512.

People" was "absurd" and that treating "New People" at their destinations the same as "Base People" does not qualify as discrimination.[2258]

848. The Co-Prosecutors submit that the argument that it exonerates NUON Chea that it fell on the Zone Secretaries to implement the plan to evacuate Phnom Penh is incorrect, as the Zone Secretaries were members of the JCE.[2259] The Co-Prosecutors distinguish the *Tadić* Case from the case at hand, noting that hypothetical discussed in *Tadić* concerned a situation where murders were not part of the common plan, while in the present case, it has been established that murders "were contemplated as part of the means of implementing the common purpose".[2260] They also note that, for JCE liability to arise, no explicit agreement is required; rather, the existence of an agreement may be inferred from other facts.[2261] The Co-Prosecutors also reject NUON Chea's arguments regarding persecution, submitting that the Trial Chamber relied on "an abundance of evidence".[2262]

849. The Supreme Court Chamber notes that the Trial Chamber's discussion as to which crimes were encompassed by the common purpose in relation to Population Movement Phase One or indeed the population movement policy was brief, merely listing the crimes.[2263] As set out above, the Trial Chamber has also made an error of law in its statement of the applicable standard, stating that crimes that merely *resulted* from the implementation of the common purpose would be included.[2264] Accordingly, the Supreme Court Chamber will now consider whether the crimes of murder, political persecution as well as other inhumane acts were encompassed by the common purpose in the sense that the population movement policy as relevant to Population Movement Phase One amounted to or involved the commission of those crimes, applying the principles set out above.[2265]

[2258] NUON Chea's Appeal Brief, para. 513.
[2259] Co-Prosecutors' Response, para. 323.
[2260] Co-Prosecutors' Response, para. 325.
[2261] Co-Prosecutors' Response, para. 326.
[2262] Co-Prosecutors' Response, para. 327.
[2263] *See* Trial Judgement, para. 804.
[2264] *See above*, para. 810.
[2265] *See above*, para. 807 *et seq*.

(a) Inhumane acts

850. The Supreme Court Chamber recalls that it has found, based on the Trial Chamber's findings to the extent that they were confirmed on appeal, that the evacuation of Phnom Penh, which affected at least two million people, occurred in terrifying and violent circumstances and without prior warning, that civilians were killed and died in its course because of the conditions of the evacuation, and that in these circumstances the evacuation of Phnom Penh amounted to the crime against humanity of an "inhumane act".[2266] As noted above, the policy of population movement involved, according to the Trial Chamber's finding, the transfer of city dwellers to the countryside.[2267] The Supreme Court Chamber notes further the Trial Chamber's finding – not reversed on appeal – that the plan "did not make any provision for the well-being or the health of those being moved, in particular the vulnerable" and that both Accused acknowledged that people would suffer as a result of the evacuation.[2268] The Supreme Court Chamber also recalls that it has rejected the grounds of appeal relating to the purported justification of the evacuation of Phnom Penh.[2269] Accordingly, the crime against humanity of "other inhumane acts" committed in respect of Population Movement Phase One was encompassed by the common purpose.

(b) Murder

851. Turning to the crime against humanity of murder committed in the course of Population Movement Phase One, the Supreme Court Chamber recalls that it has upheld the findings of the Trial Chamber in that regard in respect of several categories of victims. Whether these crimes were encompassed by the common purpose has to be demonstrated in respect of each category.

(i) Deaths resulting from the conditions of the evacuation

852. The Trial Chamber found that people died during the evacuation because of the conditions imposed; the Supreme Court Chamber has confirmed this finding on

[2266] *See above*, paras 655-657.
[2267] The Supreme Court Chamber shall address KHIEU Samphân's arguments that he did not participate in the decision to evacuate Phnom Penh below (*see below*, para. 1004 *et seq*.).
[2268] Trial Judgement, paras 788, 785.
[2269] *See above*, para. 604 *et seq*.

appeal.[2270] As to whether these deaths were encompassed by the common purpose, the Supreme Court Chamber notes that the Trial Chamber found, based in particular on acknowledgments from NUON Chea and KHIEU Samphân, that the Party was aware that the evacuees would suffer and face hardship and even die.[2271] The Trial Chamber also found that no provision was made for the well-being and health of the evacuees, including the most vulnerable.[2272] The Trial Chamber noted the testimony of NUON Chea that the Party leadership did not have enough time to take specific measures regarding hospital patients, but was of the view that evacuation could be adequately managed.[2273] The Trial Chamber also found that there were other urban evacuation during which people were forced to leave the cities "without concern for their well-being or their health".[2274]

853. The Supreme Court Chamber considers that in these circumstances it has been established that the common purpose of moving the population from Phnom Penh to the countryside, as reflected in the population movement policy, involved the death civilians resulting from the conditions of the evacuation. This is because it has been established that the members of the JCE – the Party leadership – were aware of the conditions the evacuees, including the most vulnerable, would have to endure and that it was likely that, in particular, the most vulnerable would die during the evacuation. In this regard, it is recalled that the evacuation concerned the entire population of Phnom Penh during the hottest period of the year within a short period of time.

(ii) Killing of civilians

854. The Trial Chamber found that in the course of the evacuation of Phnom Penh civilians were killed if they did not comply with the orders to leave the city, as well as for no discernible reason. While identifying errors in the Trial Chamber's assessment of some of the underlying evidence, the Supreme Court Chamber has confirmed this overall finding on appeal.[2275]

[2270] *See above*, paras 459-460.
[2271] Trial Judgement, para. 785.
[2272] Trial Judgement, para. 788.
[2273] Trial Judgement, para. 788.
[2274] Trial Judgement, para. 794.
[2275] *See above*, para. 447.

855. The question that arises is whether these killings were encompassed by the common purpose. The Trial Chamber did not refer to any evidence that would demonstrate that the members of the JCE expressly agreed that city dwellers who refused to leave their homes would be killed, nor did the Parties refer the Supreme Court Chamber to any such evidence.

856. The Supreme Court Chamber notes further that, although the Trial Chamber found that there had been a pattern of movement of the population from towns and cities to rural areas prior to 1975, the Trial Chamber did not make a finding that these population movements included the killing of civilians if they refused to follow the orders.[2276] The Trial Chamber did, however, refer to testimony of François PONCHAUD that commune chiefs were executed,[2277] and noted the testimony of Stephen HEDER regarding the execution of Buddhist nuns in the course of the evacuation of Oudong in March 1974, whose corpses he saw.[2278] Thus, there is evidence that violence and deadly force was used in the context of evacuations that took place prior to the evacuation of Phnom Penh.

857. Importantly, the Supreme Court Chamber recalls that the evacuation of Phnom Penh was carried out in a very short time span, and by heavily armed, poorly trained troops that included children and teenagers.[2279] These circumstances, which included the lack of provision for the well-being of the evacuees, indicate that, implicitly, the common purpose encompassed the anticipation that deadly force could be used by the troops tasked with evacuating the city, should they encounter any resistance. This is so because it was evident that the forces tasked with carrying out the evacuation of the city would likely resort to deadly force if they encountered resistance. This is 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. Accordingly, the Supreme Court Chamber is not persuaded by NUON Chea's arguments in this regard.

[2276] *See* Trial Judgement, paras 104-112.
[2277] *See* Trial Judgement, para. 107 and fn. 295.
[2278] Trial Judgement, para. 124 and fns 362, 363.
[2279] Trial Judgement, para. 460.

858. In sum, the Supreme Court Chamber considers that the killing of civilians during the evacuation of Phnom Penh was encompassed by the common purpose.

(iii) Killing of Khmer Republic soldiers and officials

859. As noted above, the Trial Chamber's finding as to the killing of high-ranking officials of Khmer Republic officials, notably LONG Boret, LON Non, SIRIK Matak, UNG Boun Hor and THACH Sary, was not reversed on appeal.[2280] The Trial Chamber found that the Khmer Rouge had publicly announced that these "super-traitors" beforehand were to be killed[2281] and noted NUON Chea's statement that the liquidation of "super-traitors" upon their defeat was based on the CPK's political orders.[2282] As such, the killing of high-ranking Khmer Republic officials was part of the common purpose in relation to the evacuation of Phnom Penh.

860. As regards the murder of Khmer Republic soldiers who had heeded calls to identify themselves as such and who were subsequently killed, the Supreme Court Chamber notes that, as will be discussed in more detail below, there was insufficient evidence to establish the existence of a policy to target by way of execution Khmer Republic soldiers and officials.[2283] Nevertheless, as regards killings of Khmer Republic soldiers in the context of the evacuation of Phnom Penh, the Supreme Court Chamber considers that the killings were encompassed by the common purpose. This is because, as with civilians who were killed for not fulfilling orders to leave, even in the absence of an order to kill Khmer Republic soldiers, in the circumstances in which the evacuation of Phnom Penh was carried out, it was likely that such killings would take place. Thus, murder of Khmer Republic soldiers was implicitly part of the common purpose, as regards the evacuation of Phnom Penh.

(c) Persecution on political grounds

861. In relation to the crime against humanity of persecution on political grounds, the Supreme Court Chamber has upheld the Trial Chamber's conclusion that the evacuation of Phnom Penh amounted to persecution on political grounds of "New

[2280] *See above*, para. 466.
[2281] Trial Judgement, para. 569.
[2282] Trial Judgement, fn. 1510.
[2283] *See below*, para. 869 *et seq*.

People".[2284] In reaching this conclusion, the Supreme Court Chamber addressed – and dismissed – NUON Chea's arguments as to whether "New People" were a sufficiently discernible group and were subjected to discrimination in fact.[2285] NUON Chea repeats these arguments when challenging that persecution was encompassed by the common purpose, but does not add any additional arguments in that regard.[2286]

862. As the persecution of "New People" was an integral part of the decision to evacuate Phnom Penh – by definition, the evacuation would only affect city dwellers – the Supreme Court Chamber considers that it was encompassed by the common purpose.

(4) Crimes encompassed by the common purpose in relation to Population Movement Phase Two

863. In relation to Population Movement Phase Two, the Trial Chamber found that crimes against humanity of extermination, political persecution and other inhumane acts had been committed.[2287] The Supreme Court Chamber recalls that, in relation to the crime of persecution, it has found that the crime has not been reasonably established.[2288] Accordingly, the question of whether persecution was encompassed by the common purpose in relation to Population Movement Phase Two is moot.

864. In contrast, the Supreme Court Chamber has confirmed the Trial Chamber's finding as regards the crime against humanity of other inhumane acts.[2289] Further, the Supreme Court Chamber has found the Trial Chamber's finding in respect of extermination to have been erroneous, but replaced it with a finding that the crime against humanity of murder had been committed in the course of Population Movement Phase Two.[2290]

(a) Inhumane acts

865. As to whether the common purpose encompassed the crime against humanity of other inhumane acts in respect of Population Movement Phase Two, the Supreme

[2284] *See above*, para. 697.
[2285] *See above*, para. 681 *et seq*., and para. 687 *et seq*.
[2286] *See* NUON Chea's Appeal Brief, paras 512-513.
[2287] *See* Trial Judgement, paras 639, 643, 648, 657.
[2288] *See above*, para. 706.
[2289] *See above*, para. 660.
[2290] *See above*, paras 560-562.

Court Chamber recalls that, while it has found that some of the Trial Chamber's generalised findings as to the conditions endured by individuals affected by Population Movement Phase Two to have been unreasonable,[2291] it considered that it had been established beyond reasonable doubt that large numbers of people were affected by it and that people died because of the conditions of the transfers.[2292] The Supreme Court Chamber also confirmed that the CPK leadership had adopted a policy to move people between rural areas.[2293]

866. NUON Chea avers generally that there is no evidence that the leadership of the CPK "agreed to subject the transferees during the Phase II movement to conditions amounting to attacks against human dignity".[2294] The Supreme Court Chamber considers this argument to be unpersuasive because, as set out above, it was the transfer of population in such circumstances that amounted to the crime of an inhumane act, which actually lay at the heart of the CPK policy. No express agreement to attack human dignity was required.

867. Accordingly, the Supreme Court Chamber finds that the crime against humanity of other inhumane acts committed during Population Movement Phase Two was encompassed by the common purpose.

(b) Murder

868. The Supreme Court Chamber recalls that it has decided to recharacterise the facts and enter a finding that the crime against humanity of murder was committed during Population Movement Phase Two, as opposed to the crime against humanity of extermination. This was based on the findings, which the Supreme Court Chamber considered to have been reasonably reached, that people had died because of the conditions under which Population Movement Phase Two was carried out and an instance of killing of a transferee. In the view of the Supreme Court Chamber, these instances of murder were encompassed by the common purpose as relevant to Population Movement Phase Two, in that, given the circumstances under which the transfers were carried out, there is no indication that the population movement policy

[2291] *See above*, para. 618 *et seq.*
[2292] *See above*, para. 550.
[2293] *See above*, para. 830 *et seq*.
[2294] NUON Chea's Appeal Brief, para. 521.

provided for sufficient care for the transferees or protected them from abuses by those tasked with carrying out the transfers. The occurrence of deaths among the transferees was therefore likely; nevertheless, the members of the JCE engaged in the implementation of the common purpose. As such, the policy to move the population encompassed implicitly the crime against humanity of murder.

d) Existence and content of the targeting policy

869. The Trial Chamber found that "there was a policy to target former Khmer Republic officials which involved the murder and extermination of former Khmer Republic officials at Tuol Po Chrey".[2295] In reaching this finding, the Trial Chamber relied on circumstantial evidence. Notably, in a section of the Trial Judgement entitled "Policy", the Trial Chamber considered statements, declarations and orders by members of the CPK or individuals connected to it regarding the CPK's policy *vis-à-vis* Khmer Republic soldiers and officials, none of which, however, directly attested to the existence of a policy involving murder and extermination or a targeting policy in general.[2296] The Trial Chamber discussed (and dismissed as a façade) "justifications and denials" of a policy to target Khmer Republic officials contained in other contemporaneous statements and declarations.[2297] The Trial Chamber also relied on evidence as to a "consistent pattern" of executions,[2298] as well as arrests and disappearances of Khmer Republic officials and soldiers.[2299] Regarding the existence of a policy prior to 1975, the Trial Chamber did not distinguish between, on one hand, findings stemming from CPK statements, declarations and orders, and, on the other hand, facts supporting the finding of a pattern of conduct.[2300]

870. Although the Trial Chamber stated in the "Legal Findings" section relating to the targeting policy that the existence of the pattern "also demonstrated" the existence of the targeting policy,[2301] suggesting that there were two separate bases for this finding, the Supreme Court Chamber will conduct its analysis on the understanding that the Trial Chamber's overall conclusion as to the existence and content of the

[2295] Trial Judgement, para. 835.
[2296] *See* Trial Judgement, paras 814-837.
[2297] *See* Trial Judgement, paras 819-829.
[2298] Trial Judgement, para. 835.
[2299] *See* Trial Judgement, paras 830-834.
[2300] *See* Trial Judgement, paras 120-127.
[2301] Trial Judgement, para. 835.

targeting policy was based cumulatively on evidence relating to CPK statements, declarations and orders *and* the consistent pattern.

871. Accordingly, after addressing an argument relating to the Trial Chamber's definition of the policy, the Supreme Court Chamber will address the Accused's arguments relating to specific evidence, with a view to assessing its individual strengths or weaknesses. It will then consider whether, based on the totality of evidence, the overall conclusion of the Trial Chamber as to the existence and content of the policy was reasonably reached.

(1) Vague formulation of the policy

872. The Trial Chamber found in its legal conclusions that there "was a policy to target former Khmer Republic officials which involved the murder and extermination of former Khmer Republic officials at Tuol Po Chrey".[2302] Elsewhere, the Trial Chamber refers to the "policy to target for arrest, execution and/or disappearance [of] all elements of the former Khmer Republic".[2303]

873. NUON Chea claims that the Trial Chamber deliberately formulated the CPK policy to target Khmer Republic soldiers and officials vaguely, in order to "leverage evidence of *arrests* into criminal responsibility for *killings*".[2304]

874. The Supreme Court Chamber notes that the crimes of which the Accused were convicted in relation to Tuol Po Chrey – namely murder, extermination and political persecution – are all based on the executions that the Trial Chamber found the Khmer Rouge to have carried out at that location.[2305] The Supreme Court Chamber also notes that, according to the Trial Chamber's findings, the Khmer Rouge killed Khmer Republic soldiers and officials at Tuol Po Chrey without regard to the position or

[2302] Trial Judgement, para. 835.
[2303] Trial Judgement, para. 829; *see also* paras 172 ("Khmer Republic officials were targeted for execution, arrest and detention […]. This policy to target Khmer Republic officials continued thereafter with executions, arrests and disappearances"), 832 ("[t]argeting of former Khmer Republic officials through arrests, killings and disappearances continued in late April and May 1975"), 833 ("the Khmer Rouge, through arrest, execution and/or disappearance, continued targeting former Khmer Republic officials and their families"), 834 ("Khmer Republic officials and soldiers were then arrested, executed or disappeared").
[2304] NUON Chea's Appeal Brief, paras 526-527.
[2305] Trial Judgement, paras 683-687.

military rank of their victims.[2306] Therefore, in order to establish that the crimes at Tuol Po Chrey were encompassed by the common criminal purpose, it would need to be demonstrated that the targeting policy included the killing of Khmer Republic soldiers and officials. Accordingly, the Supreme Court Chamber will not assess whether the Trial Chamber erred when concluding that a broad "targeting policy" existed in general, but will confine its review to whether a reasonable trier of fact could have found that there was a policy contemplating the *killing* of Khmer Republic soldiers and officials in non-combat situations. Nevertheless, depending on the circumstances, evidence relating to arrests and disappearances of Khmer Republic soldiers and officials may be indicative of executions, when seen in light of other evidence.

(2) Existence of a pattern

875. As noted above, the Trial Chamber based its conclusion that a policy existed, *inter alia*, on evidence of the existence of a pattern of targeting Khmer Republic soldiers and officials.

(a) Alleged killings at Oudong in 1974

876. The Trial Chamber found that, in 1974, "Khmer Republic soldiers, likely numbering in the thousands, were executed en masse immediately after the seizure of Oudong".[2307]

877. NUON Chea and KHIEU Samphân contend that the evidence upon which the Trial Chamber relied to draw its conclusion about the events at Oudong was insufficient.[2308] In particular, they challenge the probative value of: (i) expert Philip SHORT's testimony; (ii) Philip SHORT's book and the sources cited therein; (iii) the testimony of Duch and UCH Sorn; (iv) Stephen HEDER's testimony; (v) NOU Mao's testimony; (vi) the two speeches by KHIEU Samphân; and (vii) an official publication of the FUNK.

[2306] *See* Trial Judgement, para. 683 ("[t]he victims of the executions at Tuol Po Chrey included both civilians and former LON Nol soldiers who had surrendered and were no longer taking an active part in hostilities").
[2307] Trial Judgement, para. 127.
[2308] NUON Chea's Appeal Brief, paras 529-535; KHIEU Samphân's Appeal Brief, paras 218-223.

878. The Co-Prosecutors respond that the Trial Chamber's conclusion is based on reliable evidence – including hearsay, which a trial chamber is entitled to consider, and evidence mentioned elsewhere in the Trial Judgement – and that, in any event, any error regarding the findings on the events at Oudong would neither impact the verdict nor cause a miscarriage of justice.[2309]

879. The central sources upon which the Trial Chamber relied to make the finding that, following the evacuation of Oudong, thousands of Khmer Republic soldiers were "separated from the rest, led away and killed" are Philip SHORT's book, his expert testimony and witness statements.[2310] Both NUON Chea and KHIEU Samphân contend that the Trial Chamber failed to assess the probative value of what they qualify as anonymous hearsay evidence.[2311] According to the Trial Chamber, Philip SHORT based the conclusions in his book on "interviews with several villagers and other sources".[2312] In his in-court testimony, Philip SHORT specified that his principal source was PHY Phuon,[2313] as well as "one or two" villagers.[2314] He also mentioned a book by Wilfred P. DEAC and an issue of *Réalités Cambodgiennes*, even though he could not recall "which one of those sources specifically refers to the execution of the Lon Nol soldiers".[2315] He explained that his conclusion that executions had taken place in Oudong was grounded on the fact that those sources were consistent with one another and that similar events had "happened everywhere".[2316]

880. The Supreme Court Chamber recalls that Philip SHORT did not observe the events at Oudong himself; his testimony and statements in his book therefore amount to hearsay evidence, which a trier of fact must approach with caution. The probative value of expert Philip SHORT's opinion significantly depends upon the quality of his sources, which the Trial Chamber did not scrutinise in detail. In that regard, the Supreme Court Chamber notes that, in the course of his six-day testimony before the

[2309] Co-Prosecutors' Response, para. 354.
[2310] Trial Judgement, paras 124-127.
[2311] NUON Chea's Appeal Brief, para. 531; KHIEU Samphân's Appeal Brief, para. 219.
[2312] Trial Judgement, para. 124.
[2313] T. 8 May 2013 (Philip SHORT), E1/191.1, pp. 96-97.
[2314] T. 7 May 2013 (Philip SHORT), E1/190.1, p. 72. *See also* T. 8 May 2013 (Philip SHORT), E1/191.1, pp. 96-98.
[2315] T. 8 May 2013 (Philip SHORT), E1/191.1, pp. 96-97.
[2316] T. 8 May 2013 (Philip SHORT), E1/191.1, pp. 98-101.

Trial Chamber, PHY Phuon, *i.e.* Philip SHORT's principal source in respect of the events in Oudong,[2317] did not mention having witnessed any executions of soldiers who were not engaged in hostilities, although he had "travelled back and forth across" Oudong and the surrounding area, and had visited the town a week after its liberation.[2318] Nor did he declare having heard of such executions from Pol Pot or other Party leaders, who had been staying at the B-5 command post, where PHY Phuon was present immediately after Oudong's fall.[2319] On the contrary, PHY Phuon linked the measures against Khmer Republic soldiers to "the battlefields" and "the war time".[2320] He also recalled strict instructions that, once the Khmer Republic soldiers had surrendered, they were not to be harmed.[2321]

881. As for the other sources mentioned by Philip SHORT, the Supreme Court Chamber observes that: (i) "one or two" anonymous villagers cannot, without more, qualify as a reliable source and, thus, little to no probative value should be assigned to information derived therefrom; (ii) the detailed account contained in the book by Wilfred P. DEAC, while failing to specifically mention any killing of Khmer Republic soldiers occurring outside the battlefield, does mention that 600 soldiers "disappeared" and describes a scenario where utter devastation affected also civilians;[2322] and (iii) Philip SHORT's view that similar executions "happened everywhere" does not find sufficient specific support in the rest of his testimony. As to the reference to the publication *Réalités Cambodgiennes*, Philip SHORT did not identify the specific issue upon which he relied. However, considering the context in which Philip SHORT made reference to this magazine, it appears probable that he was actually not referring to an issue of *Réalités Cambodgiennes*, but of *Nouvelles du Cambodge*, the probative value of which is assessed below.

[2317] T. 8 May 2013 (Philip SHORT), E1/191.1, pp. 96-97.
[2318] T. 30 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/98.1, p. 68; T. 26 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/97.1, pp. 25-26.
[2319] T. 26 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/97.1, pp. 25, 27.
[2320] T. 26 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/97.1, p. 8.
[2321] T. 30 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/98.1, p. 88.
[2322] Book by Wilfred P. DEAC: Road to the Killing Fields, E3/3328, 1997, p. 197, ERN (En) 00430777 ("[m]ore than 20,000 civilians were herded into the countryside to be killed or forced to live and work in communes"), p. 198, ERN (En) 00430778 (on March 27-28, "[t]he enemy rushed the defenses […]. Wounded ANK G.I.s were slaughtered. Others turned their M-15 and M-16s on their own families before killing themselves to avoid capture and torture. The K.R. fired indiscriminately […]. On April 21 […] [t]he beaten government troops retreated […]. About six hundred men also 'disappeared'"), pp. 203-204, ERN (En) 00430783-00430784 (on June 29, Oudong was retaken by government forces, which entered a "devastated city").

882. Turning to the remaining evidence upon which the Trial Chamber relied, Duch and UCH Sorn did not convey any information on whether people who had been sent from Oudong to security office M-13 were executed; instead, they indicated that the overwhelming majority of them had been eventually released from detention and relocated.[2323] Stephen HEDER, who was in Oudong shortly after its fall, stated that he did not recall whether he had been told about executions of Khmer Republic troops, but confirmed that people had mentioned the "executions on the spot of some categories of people".[2324] Indeed, he testified to having seen the corpses of several Buddhist nuns;[2325] this, however, could hardly be deemed to be a sufficient indication that other parts of the population had been executed as well. As for NOU Mao's testimony, the Trial Chamber noted that "there was no acknowledgement that soldiers were executed".[2326] To the contrary, the witness said that war captives had been evacuated along with the general population and that deaths had occurred due to lack of food and medicine.[2327] The treatment of the evacuees, which included the prisoners of war, suggests the Khmer Rouge's disregard for their ultimate fate.

883. The issue of *Nouvelles du Cambodge* – an official publication of the FUNK – upon which the Trial Chamber relied contains a reference to a speech that KHIEU Samphân delivered in North Korea one month after the fall of Oudong; contrary to the Trial Chamber's finding, this speech does not provide a "clear indication of what had

[2323] T. 7 April 2009 (KAING Guek Eav *alias* Duch), E3/5791, p. 31 ("The fall of Oudong […] a lot of people were sent to M-13 but temporarily, and then at night those people were sent to Battambang province, leaving just six to seven people for me to interrogate them"); T. 20 March 2012 (KAING Guek Eav *alias* Duch), E1/51.1, p. 63; T. 3 April 2012 (KAING Guek Eav *alias* Duch), E1/58.1, p. 44 ("I had no knowledge of how – or whether people were executed along the way"); T. 9 April 2009 (UCH Sorn), E3/1559, pp. 83 (mentioning the fall of Oudong as one of the "three special occasions" when "people were only sent to M-13 temporarily"), 104-105 (declaring that he was released from M-13 and making no reference to any executions of Oudong evacuees).
[2324] T. 10 July 2013 (Stephen HEDER), E1/221.1, pp. 86-87 ("I also interviewed some people who said that there had been executions on the spot of some categories of people […]. I may have been told that there were executions. I don't specifically recall that I was"), 94 ("[M]y vague recollection is there was talk about executions of military personnel, civil servants").
[2325] T. 10 July 2013 (Stephen HEDER), E1/221.1, p. 86 ("I certainly saw the bodies. I vaguely remember having seen maybe half a dozen bodies, but there definitely [*sic*] bodies of women dressed as Buddhist nuns who had been killed there").
[2326] Trial Judgement, para. 125. *See also* T. 19 June 2013 (NOU Mao), E1/209.1, p. 6 ("Udong was attacked and soldiers, prisoners of war were evacuated […]. I don't know what happened to them").
[2327] T. 19 June 2013 (NOU Mao), E1/209.1, pp. 6, 41 (the witness learned through a meeting of the commune committee that "[Ta Mok forces] captured some soldiers, and then they evacuated some people all the way through Amleang […]. Some people died of starvation. Some died of diseases, because they did not have access to medicines"), 42 ("[T]hose who were evacuated included the war captives").

happened".[2328] First, its language was ambivalent in that it could also be reasonably interpreted as referring to killings in combat.[2329] Second, it clearly had a propagandistic purpose, which diminishes its reliability. Stephen HEDER stated, in this regard, that some FUNK statements had grossly exaggerated events, in that the events in question "either [had] never occurred or include[d] highly inflated numbers", when compared with what he had directly observed on the ground or heard from reliable sources.[2330] Although KHIEU Samphân had praised in his speech the "annihilat[ion]" and "eliminat[ion]" of all "puppet soldiers" – thus using inflammatory language that could incite and provide justification for subsequent killings of "puppet soldiers", whether committed in combat or not – the purpose and nature of the speech do not allow the inference that unlawful killings of Khmer Republic soldiers had occurred at Oudong.

884. In sum, the Supreme Court Chamber finds that the evidence upon which the Trial Chamber relied to conclude that thousands of Khmer Republic soldiers were executed after the capture of Oudong in 1974 was ambiguous, unreliable and generally weak. Moreover, to the extent that certain ambivalent statements referred to killings of Khmer Republic soldiers, the Trial Chamber failed to adequately explain why they could not reasonably refer to killings occurring in combat. It follows that the Trial Chamber committed an error when finding, based on the limited evidence that was before it, that Khmer Republic soldiers had been executed *en masse* in Oudong. This conclusion invalidates also the Trial Chamber's subsequent implication that CPK leaders discussed the mass executions that had supposedly occurred in Oudong during a meeting in June 1974.[2331] The Supreme Court Chamber observes, however, that the underlying evidence does suggest that the Khmer Rouge not only showed neglect toward the population under their control, but also praised, using inflammatory indiscriminate language, the killing of Khmer Republic soldiers.

[2328] Trial Judgement, para. 125.
[2329] FUNK Report: Nouvelles Du Cambodge Kampuchea Information Agency, E3/167, 11 April 1974, pp. 15-16, ERN (En) 00280585-00280586 (reporting the following passage of a speech that KHIEU Samphân gave in North Korea on 5 April 1974: "On 18 March, our People's National Liberation Armed Forces liberated another city, Udong, by annihilating all the puppet soldiers there along with their reinforcements; in other words over 5,000 enemies were eliminated, 1,500 of whom were captured". This passage is part of a section of the speech relating to "news of the victories having a strategic impact", in the context of the "revolutionary war of national and popular liberation against the war of aggression by the American imperialists and their lackeys".
[2330] T. 15 July 2013 (Stephen HEDER), E1/223.1, p. 34.
[2331] Trial Judgement, paras 918, 1039.

(b) Remaining evidence of killings before 1975

885. The Trial Chamber also found that: (i) in 1972, 500 captured Khmer Rouge soldiers had been killed at Phloeng Chheas; (ii) in September 1973 Khmer Republic officials had been targeted in Kampong Cham; (iii) in July 1974 soldiers who had surrendered and their families had been executed in Battambang; and (iv) there had been reports from refugees about executions of enemies in March 1975.[2332] The evidence underpinning these findings, which is divided between two separate sections of the Trial Judgement,[2333] comprises: (i) interviews of refugees by Stephen HEDER and Masato MATSUSHITA; (ii) testimonies of Stephen HEDER and expert Philip SHORT; (iii) two United States Government memoranda; and (iv) a joint public statement by KHIEU Samphân, HOU Yun and HU Nim.

886. NUON Chea and KHIEU Samphân submit that the Trial Chamber's conclusions are illogical and unsupported, given that the evidence is vague and ambiguous, and amounts to uncorroborated double or triple hearsay, which is often anonymous; they argue in addition that the Trial Chamber failed to explain why the killings of Khmer Republic soldiers could not have occurred in combat or as isolated acts of violence, rather than as a result of an organised criminal policy.[2334]

887. The Co-Prosecutors respond that the evidence is sufficient and consistent, and thus, led the Trial Chamber to enter reasonable findings.[2335] Additionally, they point to further evidence that the Trial Chamber did not cite, but nevertheless should be presumed to have been taken into account in coming to the factual conclusion in question.[2336]

888. The Supreme Court Chamber notes that, in reaching its findings regarding the above-mentioned instances of killings, the Trial Chamber relied only on hearsay, out-of-court statements and documents. Only one of the several refugee interviews mentioned by the Trial Chamber refers to executions of Khmer Republic soldiers, with an anonymous refugee recounting that "about 500" of those troops were captured

[2332] *See* Trial Judgement, para. 830; *see also* para. 121 (describing the policy regarding captured Khmer Rouge soldiers and officials from 1970 until 1975).
[2333] Trial Judgement, paras 120-123, 830.
[2334] NUON Chea's Appeal Brief, paras 541-548; KHIEU Samphân's Appeal Brief, paras 202-217.
[2335] Co-Prosecutors' Response, paras 356-360.
[2336] Co-Prosecutors' Response, paras 360-361.

and executed in 1972 at Phloeng Chhes.[2337] This account is thus of very low probative value and must be assessed in light of other corroborating evidence. Stephen HEDER testified having a "general recollection" of villagers talking about people being evacuated and "killed on the spot" when the Khmer Rouge had partially occupied Kampong Cham in September 1973.[2338] The Trial Chamber did not give undue weight to this account, given that, as pointed out by the Co-Prosecutors,[2339] it did not enter a finding that Khmer Republic soldiers were executed in Kampong Cham, but only "targeted".[2340] Expert Philip SHORT stated that he was convinced that executions of former Khmer Republic soldiers and officials "happened everywhere".[2341] Since he did not provide specific support for his opinion,[2342] a reasonable trier of fact could assign only limited weight to this testimony. Furthermore, Philip SHORT clarified twice that the instances he had in mind concerned "soldiers above a certain rank" and "high officials", not all soldiers and officials of the Khmer Republic regime[2343] – in partial contrast to a previous statement.[2344]

889. The Trial Chamber also relied on two memoranda from the U.S. Government as evidence of executions of enemies, including Khmer Republic officials in "Khmer Rouge territory", and of Khmer Republic soldiers who had surrendered and their families in Battambang.[2345] Both memoranda identify their sources as "[r]eports by U.S. Embassy officials" mentioning killings of civilians and surrendered soldiers in Battambang province in 1974.[2346] The two memoranda, therefore, must be presumed to be reflecting the content of the same sources. As noted by NUON Chea and

[2337] Report by Stephen HEDER and Masato MATSUSHITA: Interviews with Kampuchean Refugees at Thai-Cambodia Border, E3/1714, dated 25 March 1980, p. 67, ERN (En) 00170758.
[2338] T. 10 July 2013 (Stephen HEDER), E1/221.1, pp. 95, 99.
[2339] Co-Prosecutors' Response, para. 360.
[2340] Trial Judgement, para. 830.
[2341] T. 8 May 2013 (Philip SHORT), E1/191.1, pp. 99-100.
[2342] *See* T. 8 May 2013 (Philip SHORT), E1/191.1, pp. 127-128.
[2343] T. 8 May 2013 (Philip SHORT), E1/191.1, pp. 94-95.
[2344] T. 7 May 2013 (Philip SHORT), E1/190.1, pp. 87-88 ("There was a pattern all over the country of killing former Lon Nol officers whatever their level and of killing officials – former Lon Nol government officials above a certain level. I think in the – in the case of the officers, the military men, it was much more systematic. For the civil servants, […] it was not – if it was systematic, there were gaps in the system").
[2345] Trial Judgement, para. 830.
[2346] U.S. National Security Council Memorandum, Subject: Cambodia Fact Sheets, E3/4197, dated 17 March 1975, p. 26, ERN (En) 00443228; U.S. National Security Council Memorandum, Subject: Assessment of Developments in Indochina Since the End of the War, E3/3472, dated 15 July 1976, p. 15, ERN (En) 00443172.

KHIEU Samphân,[2347] the memoranda qualify as anonymous double hearsay. Nevertheless, this alone does not detract from their general reliability. The Trial Chamber could, therefore, assess them in light of other corroborating evidence. The Supreme Court Chamber notes that the sources for the reports on killings mentioned in one of the memoranda that allegedly occurred in Khmer Rouge territory were several newspaper articles, which had appeared in different publications and had been authored by different journalists; the articles provide summary descriptions of dramatic events affecting both civilians and Khmer Republic soldiers. The narrations resonate with each other and their credibility is accordingly reinforced through their mutual corroboration, but mostly concern events affecting civilians – not Khmer Republic personnel – and provide a low level of detail, which prevents a reasonable trier of fact from assigning much weight to them.[2348] Further, the Co-Prosecutors point to additional evidence that, they submit, the Trial Chamber must be presumed to have taken into account. The first piece relates to events that took place in a village on an unspecified date, though likely after the fall of Phnom Penh.[2349] The other piece of evidence relates to an event that took place after the seizure of Battambang in April 1975, and will thus be considered in the relevant section below.[2350]

890. Finally, the public statement by KHIEU Samphân, HOU Yun and HU Nim, which refers, *inter alia*, to the "smashing" of "some 1,550 heads of the enemy's military personnel and officers including hundreds of colonels, captains, lieutenants and major lieutenants" at ten sites "along National Road No. 3" and to the "smashing" of "a total of 10,245 heads of the enemies […] up to mid-January 1973",[2351] is similar to the above-mentioned statement praising the killings at Oudong. Even though the figures referred to therein are likely to be inflated due to its propagandistic character, the statement could have aroused violent feelings against Khmer Republic soldiers. On account of its nature and purpose, however, the statement cannot serve as an indication that out-of-combat killings had actually occurred.

[2347] NUON Chea's Appeal Brief, para. 548; KHIEU Samphân's Appeal Brief, para. 203.
[2348] U.S. National Security Council Memorandum, Subject: Cambodia Fact Sheets, E3/4197, dated 17 March 1975, pp. 24-25, ERN (En) 00443226-00443227.
[2349] U.K. Government Report: *Human Rights Violations in Democratic Kampuchea*, E3/3319, dated 14 July 1978, p. 51, ERN (En) 00420648.
[2350] T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 30-32.
[2351] KHIEU Samphân, HOU Yun and HU Nim Statement, E3/637, dated 17 April 1975, pp. 3, 8, ERN (En) 00740933, 00740938.

891. In sum, the evidence upon which the Trial Chamber relied was weak and incapable of reasonably establishing that "mass killings"[2352] of Khmer Republic soldiers and officials had occurred before 1975. The evidence was equally unsuitable to prove the requisite standard that, at the relevant time, a targeting policy already existed. Nonetheless, the evidence contained some signs of violent measures taken outside the battlefield against Khmer Republic officials and soldiers; those signs, however, were included in evidence of inherently low probative value, with hardly any discussion as to their relevance, reliability and potential corroboration.

(c) Alleged killings in late April and May 1975

892. The Trial Chamber found that arrests, killings and disappearances of former Khmer Republic officials in connection with evacuations continued in late April and May 1975, including in Phnom Penh, Battambang, Kampong Thom, Pursat, Kampong Chhnang, Kandal, Takeo, Siem Reap and Tuol Po Chrey.[2353]

893. NUON Chea submits that the Trial Chamber erred in fact and law by referring to only an "arbitrary selection" of the cities that it found had been evacuated and by relying on inadequate and unreliable evidence to establish killings.[2354] KHIEU Samphân avers that the Trial Chamber disregarded the autonomy that the Zones enjoyed in military affairs prior to the establishment of the Revolutionary Army of Kampuchea in July 1975.[2355] He further argues that the evidence about the mistreatment of the Khmer Republic officials is entirely unpersuasive.[2356]

894. The Co-Prosecutors contend that the locations listed by the Trial Chamber are merely illustrative and submit that the evidence to which the Trial Chamber referred was reliable.[2357]

895. In relation to the allegations of killings in the course of the evacuation of Phnom Penh, the Supreme Court Chamber has upheld the Trial Chamber's finding that killings of Khmer Republic soldiers and officials occurred during that event.

[2352] Trial Judgement, para. 127.
[2353] Trial Judgement, paras 831-832.
[2354] NUON Chea's Appeal Brief, paras 581-585.
[2355] KHIEU Samphân's Appeal Brief, para. 422.
[2356] KHIEU Samphân's Appeal Brief, para. 427.
[2357] Co-Prosecutors' Response, paras 381-383.

Nevertheless, based on the limited evidence that was before the Trial Chamber, the Supreme Court Chamber only confirmed the undisputed execution of four high-ranking officials and the killings recounted by one witness.[2358]

896. In relation to killings in Battambang, the Trial Chamber relied on one live testimony, two interview records and three other out-of-court accounts to enter a finding.[2359] HUN Chhunly testified before the Trial Chamber that he had seen high-ranking Khmer Republic officers and ordinary soldiers gathered in two different locations in Battambang.[2360] He had heard announcements that officers were to be received by NORODOM Sihanouk. He had later learned from one of the drivers involved in the operation that the officers had been taken to Thipakdei Mountain and killed, whereas the soldiers had been taken to Pailin and assigned to farming.

897. According to the interview record of PRUM Sarun, an ordinary soldier of the Khmer Republic, he told the Co-Investigating Judges that the Khmer Rouge had come to look for high-ranking soldiers to kill them.[2361] He had further witnessed the killing of a Khmer Republic soldier and his wife, and had seen the body of his former commander, whom, he had heard, the Khmer Rouge had beaten to death.[2362] According to the interview record of CHUCH Punlork, he recounted that Khmer Republic soldiers and officials had been put onto trucks to go attend a study session. He had later heard that these soldiers had been killed.[2363] He also said that another 300 to 400 soldiers had been taken to work elsewhere.[2364]

898. Three out-of-court accounts describe the killing of Khmer Republic military officers in Moung Russey District (Thipakdei Mountain) and Thmar Kôl in Battambang Province.[2365] They corroborate the other evidence relating to killings in

[2358] *See above*, para. 461 *et seq*.
[2359] Trial Judgement, fn. 2635.
[2360] T. 6 December 2012 (HUN Chhunly), E1/149.1, pp. 38-40.
[2361] PRUM Sarun Interview Record, E3/5187, dated 18 June 2008, p. 4, ERN (En) 00274179.
[2362] PRUM Sarun Interview Record, E3/5187, dated 18 June 2008, p. 4, ERN (En) 00274179.
[2363] CHUCH Punlork Interview Record, E3/5211, undated, p. 3, ERN (En) 00275399.
[2364] CHUCH Punlork Interview Record, E3/5211, undated, p. 3, ERN (En) 00275399.
[2365] Statement Notes by Henri LOCARD: *Research Notes on Democratic Kampuchea Prison Network*, E3/2071, dated 25 April 1991, pp. 2-3, 14, ERN (En) 00087304-00087305, 00087316; THACH Saly Civil Party Application, E3/4966, dated 15 October 2007, pp. 1-3, ERN (En) 00891027-00891029. *See also* T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 31-32 (referring to four witnesses who had told him about the killing of around 300 Khmer Republic officers in Thipakdei Mountain, one of whom had personally witnessed the killings and two of whom had seen the skulls or dead bodies); U.S.

Battambang in that they mention the same killing sites, similar numbers and identity of victims and similar circumstances, such as modalities to lure victims, means of transportation and methods of killing. Furthermore, they provide particulars that attest to their credibility. According to one of them, a number of low-ranking officers and ordinary soldiers were not killed, but were taken to perform hard labour near Pailin.[2366]

899. TOAT Thoeun's testimony before the Supreme Court Chamber on appeal also offers corroboration of the fact that Khmer Republic soldiers were killed in Battambang Province in the days following liberation. From the residence of Northwest Zone Secretary RUOS Nhim at Kampong Preah,[2367] TOAT Thoeun had witnessed soldiers being transported in trucks in the direction of Moung;[2368] he had also heard them chanting slogans celebrating NORODOM Sihanouk.[2369] TOAT Thoeun had deduced that they had heeded the radio announcements inviting them to attend a ceremony to welcome the Prince. Later he was told by one of RUOS Nhim's bodyguards that they had all been killed.[2370] There had been more than ten trucks, each of which carried approximately thirty to forty former Khmer Republic soldiers, and they had passed by RUOS Nhim's residence once during the day and another time in the evening.[2371] Although the witness did not know the location to which the soldiers had been taken, the Supreme Court Chamber, in light of the evidence as a whole, finds it reasonable to assume that they had been transported to Thipakdei Mountain.[2372] On the totality of this witness' testimony and other evidence related to

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State Department Telegram, Subject: Life Inside Cambodia, E3/3559, 31 March 1976, p. 5, ERN (En) 00443067 (discusses the situation in Phnom Srok district of Battambang Province, specifically how all military officers were killed by military Khmer communist leaders).

[2366] Statement Notes by Henri LOCARD: *Research Notes on Democratic Kampuchea Prison Network*, E3/2071, dated 25 April 1991, p. 3, ERN (En) 00087305.

[2367] The occasional reference to "Kampong Treas" appearing in the English transcript (T. 6 July 2015 (TOAT Thoeun), F1/3.1, pp. 105-106) is most likely a transliteration mistake (*see* pp. 64, 77-78, 118, referring instead to Kampong Preah).

[2368] T. 6 July 2015 (TOAT Thoeun), F1/3.1, p. 118.

[2369] T. 6 July 2015 (TOAT Thoeun), F1/3.1, p. 106.

[2370] T. 6 July 2015 (TOAT Thoeun), F1/3.1, pp. 59-60, 63, 104-105, 119.

[2371] T. 6 July 2015 (TOAT Thoeun), F1/3.1, p. 122.

[2372] *See* T. 6 July 2015 (TOAT Thoeun), F1/3.1, pp. 106, 119 (the reference to "Tuol Sdach" as a locality is an error in the English interpretation and transcription). Since TOAT Thoeun saw the trucks going towards Moung (which, from Kampong Preah, is the direction to take in order to go to Thipakdei), and considering that the circumstances of the incident (including date of event, modalities to lure in victims, means of transportation and number of victims) precisely tally with those characterising the killings that occurred at Thipakdei Mountain, the Chamber considers that his testimony is very likely to refer to a sequence of the killings that took place at Thipakdei Mountain.

RUOS Nhim,[2373] the Supreme Court Chamber concludes that RUOS Nhim had, at the very least, endorsed the execution.

900. Therefore, the Supreme Court Chamber concludes that it was not unreasonable for the Trial Chamber to find that Khmer Republic soldiers and officials were killed in connection with the evacuation of Battambang shortly after 17 April 1975.

901. As to killings in Kampong Thom, Pursat, Kampong Chhnang, Kandal and Takeo, the Trial Chamber cited to the live testimony of François PONCHAUD, which the Supreme Court Chamber has already addressed elsewhere,[2374] and TOENG Sokha, who provided hearsay evidence that people identified as Khmer Republic officials had been relocated and were nowhere to be found, stating that he had no idea as to whether they had been killed.[2375] The out-of-court statements upon which the Trial Chamber relied do not provide sufficient support to corroborate incidents mentioned in those two testimonies. As noted by NUON Chea,[2376] some of those statements actually indicate that Khmer Republic soldiers were not killed,[2377] while other soldiers were apparently killed before the cessation of hostilities.[2378] Of note is that a number of accounts suggest that a distinction was made between high- and low-ranking soldiers and officials, with most of the efforts directed to seek out the former.[2379]

902. In relation to Tuol Po Chrey, the Supreme Court Chamber recalls that it has found no unreasonableness in the Trial Chamber's finding that at least 250 former

[2373] *See* Trial Judgement, fn. 2454 ("[b]y 1963, [RUOS] Nhim was a member of the Standing Committee and attended all Party congresses. He was also secretary of the Northwest Zone, Vice-President of the State Presidium, and regularly attended meetings of the Centre in Phnom Penh or his Zone"), paras 663, 666, 686, 836 (as Secretary of the Northwest Zone, RUOS Nhim presided over the meeting at which the mass killing of former Khmer Republic soldiers and officials at Tuol Po Chrey and was ordered and, thus, partook in the organisation thereof). *See also* Trial Judgement, paras 240, 245.
[2374] *See above*, para. 484.
[2375] T. 4 December 2012 (TOENG Sokha), E1/147.1, p. 81.
[2376] NUON Chea's Appeal Brief, para. 585.
[2377] KUNG Sâmat *alias* At Interview Record, E3/5232, dated 22 December 2008, p. 3, ERN (En) 00279257; YUOS Phal *alias* Phĭn Interview Record, E3/4611, dated 12 December 2009, pp. 3-4, ERN (En) 00455376-0045537.
[2378] POV Sinuon Interview Record, E3/5545, dated 29 September 2009, ERN (En) 00387500.
[2379] YUOS Phal *alias* Phĭn Interview Record, E3/4611, dated 12 December 2009, p. 4, ERN (En) 00455377; French Embassy Letter, Subject: Testimony of Brigadier-General SOR Buon, E3/2666, dated 23 June 1975, pp. 5-6, ERN (En) 00517767-8; T. 10 April 2013 (François PONCHAUD), E1/179.1, p. 14.

Khmer Republic soldiers and officials were killed at that location approximately one week after 17 April 1975.[2380]

903. As concerns Siem Reap, PECHUY Chipse testified before the Trial Chamber about the execution of Khmer Republic soldiers and officials and their entire families at Kampong Kdei, in connection with the evacuation of Siem Reap.[2381] Contrary to NUON Chea's contention,[2382] his account, though of hearsay nature as to the actual acts of killing, was detailed, internally consistent and sufficiently specific as to the sources of this knowledge, which were amply scrutinised during examination.[2383] The Supreme Court Chamber is thus satisfied that the Trial Chamber reasonably found that Khmer Republic soldiers and officials were killed in connection with the evacuation of Siem Reap.

904. In sum, the evidence of killings of Khmer Republic soldiers and officials in late April and May 1975 was weak, except in relation to killings in Battambang, at Tuol Po Chrey and in Siem Reap, along with a certain number of killings in connection with the evacuation of Phnom Penh. The question of whether these incidents amount to a consistent pattern of execution of all soldiers and officials of the former Khmer Republic will be addressed below, on the basis of the totality of evidence.

(d) Alleged killings in late 1975, 1976 and thereafter

905. In reaching its finding as to the existence of a pattern, the Trial Chamber also relied on evidence of executions post-dating the events at Tuol Po Chrey. The Trial Chamber found that:

> In late 1975, 1976 and thereafter, the Khmer Rouge, through arrest, execution and/or disappearance, continued targeting former Khmer Republic officials and their families including in Battambang, Kandal,

[2380] *See above*, para. 487 *et seq*.
[2381] T. 12 November 2012 (PECHUY Chipse), E1/143.1, pp. 69, 72-73, 90-91.
[2382] NUON Chea's Appeal Brief, fn. 1538.
[2383] T. 12 November 2012 (PECHUY Chipse), E1/143.1, pp. 70 (he saw the children of the soldiers who were detained before being sent to be executed), 72-73 (he knew the treatment reserved to arrested soldiers and saw that Khmer Republic soldiers were being heavily guarded), 75-76, 92 (he learned of the executions from other Khmer Rouge, who had participated in the operation, and from three acquaintances, who had no reason to lie to him). NUON Chea had the opportunity to question the reliability of the witness' sources and the witness provided sufficient detail: T. 14 November 2012 (PECHUY Chipse), E1/144.1, pp. 16, 26-31.

> Takeo, Siem Reap/Oddar Meanchey, Kampong Thom, Kampong Cham, Pursat, Svay Rieng and Prey Veng.[2384]

906. NUON Chea maintains that most of the underlying evidence regarding the period after the fall of Phnom Penh "is dated 1976 or later", and thus it was unreasonable to use it to ascertain the policy existing at liberation.[2385] He further notes that, despite the vast geographical and temporal frame, the Trial Chamber identified only one live witness who described executions and otherwise relied on sources of inherently low probative value.[2386] KHIEU Samphân challenges the reliance on facts post-dating the events at Tuol Po Chrey, alleging that it violates the Trial Chamber's Second Severance Decision (E284), as well as his right to a fair trial.[2387]

907. The Co-Prosecutors respond that the Trial Chamber's findings were reasonably reached and the Accused's' arguments fail to call them into question.[2388]

908. As to KHIEU Samphân's argument concerning the reliance on facts post-dating the events at Tuol Po Chrey, the Supreme Court Chamber notes that the severance of Case 002 delimited the *charges* that are the object of Case 002/01, *i.e.*, the alleged crimes for which the Accused are allegedly criminally responsible. The severance, however, did not curtail the Trial Chamber's competence to consider events post-dating the charges that may be relevant to establish the factual allegations underlying the charges.[2389]

909. NUON Chea's argument that evidence post-dating the events at Tuol Po Chrey was *per se* irrelevant also falls to be rejected, since a reasonable trier of fact may validly rely on evidence post-dating a given event to make inferences on a policy existing at the relevant time. The real issue is whether the Trial Chamber properly assessed the evidence when making findings based on evidence post-dating the relevant events – an issue that the Supreme Court Chamber shall now address.

910. In support of the conclusion that arrests, disappearances and/or executions occurred in at least nine locations across the country after the events at Tuol Po

[2384] Trial Judgement, para. 833 (footnote(s) omitted).
[2385] NUON Chea's Appeal Brief, para. 586.
[2386] NUON Chea's Appeal Brief, para. 587.
[2387] KHIEU Samphân's Appeal Brief, paras 644-645.
[2388] Co-Prosecutors' Response, paras 384, 399.
[2389] *See above*, para. 227.

Chrey, the Trial Chamber relied upon three live testimonies, five interview records, eleven out-of-court accounts (seven of which were conveyed through Henri LOCARD's notes or François PONCHAUD's collections), three documents originating from foreign governments and one document produced by a non-governmental organisation.[2390]

911. Duch and François PONCHAUD gave testimonies that could reasonably relate to a country-wide pattern. Duch explained that many of the victims listed in certain documents originating from the S-21 Security Office had been former Khmer Republic soldiers.[2391] He also clarified that one document to which he referred to in his testimony was incorrectly dated March 1975, while it should have been dated March 1976, because, in March 1975, S-21 "had not been established yet, so how could we detain prisoners and brought (*sic*) them for execution".[2392] Duch's statement does not force an inference that, since a pattern of killings might have existed as of 1976, the policy of executions had already been in place on or around 17 April 1975.[2393] François PONCHAUD explained that the revolution in Cambodia proceeded in three stages, the first being the "national revolution", during which the Khmer Rouge "aimed to destroy all the people who worked for the Americans or the Lon Nol regime, who were regarded as traitors".[2394] However, he made this statement in relation to the incidents in Battambang, which have already been discussed above, and did not provide information about any other events. His sweeping statement, thus, is unsuitable to establish a broader pattern. The third witness, LAY Bony, testified that her husband, a former high-ranking officer of the Khmer Republic, was killed after the Khmer Rouge had discovered his previous position.[2395] She also gave evidence on disappearances.[2396] This testimony thus relates to a single incident and, as such, holds in itself quite limited value in supporting the Trial Chamber's finding under examination, concerning the existence of a widespread and generalised pattern.

[2390] Trial Judgement, fns 2643-2652.
[2391] T. 20 March 2012 (KAING Guek Eav *alias* Duch), E1/51.1, p. 66; T. 27 March 2012 (KAING Guek Eav *alias* Duch), E1/54.1, p. 15.
[2392] T. 27 March 2012 (KAING Guek Eav *alias* Duch), E1/54.1, p. 15.
[2393] *See also* *Duch* Trial Judgement (001-E188), para. 119, quoting Case 001 Amended Closing Order, para. 21 ("S-21 became fully operational in October 1975").
[2394] T. 10 April 2013 (François PONCHAUD), E1/179.1, p. 30; *see also* p. 36 ("Angkar did the same everywhere").
[2395] T. 24 October 2012 (LAY Bony), E1/138.1, pp. 13, 15.
[2396] T. 24 October 2012 (LAY Bony), E1/138.1, pp. 15-18. *See also* SUONG Sim Interview Record, E3/4657, dated 9 July 2009, pp. 7-8, ERN (En) 00353705-00353706.

912. Four of the interview records cited by the Trial Chamber contain, as noted by NUON Chea,[2397] no evidence of killings of Khmer Republic soldiers and officials, but refer to arrests and detentions, most of which occurred in late 1977 and 1978.[2398] The fifth interview record, which was recorded by the Co-Prosecutors and not the Co-Investigating Judges, attests to killings of those who were "connected to the old society", carried out in late 1977 through 1978 by Khmer Rouge arriving from the Southwest Zone.[2399]

913. Among the other out-of-court statements, of note is IENG Sary's interview with Elizabeth BECKER, according to which the Party leadership agreed to single out "people who supported Lon Nol" only in 1976.[2400] He stated that, prior to that decision, there was no order to divide people into categories, although SAO Phim and RUOS Nhim had been the first ones to do so, without approval by the leadership.[2401] Some of the remaining statements – which come in the form of civil party applications, victim complaints and notes provided by researchers – are unclear as to the source of information and likely amount to hearsay evidence,[2402] whereas others relate to disappearances, not killings.[2403] Several accounts appear to indicate that the Khmer Rouge distinguished between high- and low-ranking Khmer Republic soldiers and officials, or that not all arrested soldiers were ultimately killed.[2404] Finally, as noted by NUON Chea,[2405] most statements refer to events taking place in 1976 or

[2397] NUON Chea's Appeal Brief, para. 587.
[2398] CHÁK Thoeurng Interview Record, E3/5541, dated 31 August 2009, p. 3, ERN (En) 00374818 (arrested with forty-seven other people in 1978); HĒNG Chuy Interview Record, E3/5215, dated 9 September 2008, p. 3, ERN (En) 00275443 (saw arrests and people detained in 1978, as well as people being taken away); SĒNG Srun Interview Record, E3/1692, dated 11 August 2008, p. 3, ERN (En) 00242086 (arrested in 1976); CHĂN Sokeat Interview Record, E3/5169, dated 21 April 2008, pp. 5-6, ERN (En) 00250081-00250082 (saw arrests in 1977-1978).
[2399] SOENG Leum Interview by Stephen HEDER and Robert PETIT, E3/4649, dated 17 November 2006, p. 2, ERN (En) 00222963.
[2400] IENG Sary Interview by Elizabeth BECKER, E3/94, dated 22 July 1981, p. 5, ERN (En) 00342504.
[2401] IENG Sary Interview by Elizabeth BECKER, E3/94, dated 22 July 1981, p. 5, ERN (En) 00342504.
[2402] Statement Notes by Henri LOCARD: *Research Notes on Democratic Kampuchea Prison Network*, E3/2071, dated 25 April 1991, pp. 4, 17, ERN (En) 00087306, 00087319; UN Roeun Victim Complaint, E3/5395, dated 13 June 2008, p. 6, ERN (En) 00870341.
[2403] Statement Notes by Henri LOCARD: *Research Notes on Democratic Kampuchea Prison Network*, E3/2071, dated 25 April 1991, p. 23, ERN (En) 00087325.
[2404] Statement Notes by Henri LOCARD: *Research Notes on Democratic Kampuchea Prison Network*, E3/2071, dated 25 April 1991, p. 4, ERN (En) 00087306; Refugee Accounts collected by François PONCHAUD, E3/4590, undated, pp. 169-170, 217, ERN (En) 00820487-00820488, 00820535.
[2405] NUON Chea's Appeal Brief, para. 586.

later,[2406] while only three accounts presumably relate to events in 1975;[2407] in one account, the date of the event is not specified.[2408]

914. In sum, the evidence relating to killings of Khmer Republic soldiers and officials in late 1975 and thereafter is relatively weak. First, the accounts upon which the Trial Chamber relied often lack detail and primarily consist of out-of-court documents, the credibility and reliability of which was not specifically addressed. Most importantly, the Trial Chamber did not explain the reasons that led it to the conclusion that the evidence relating to incidents occurring long after April 1975 demonstrated that a pre-existing policy was continued, rather than marked the emergence of a new policy.

(3) Pattern as to the modalities for identification of Khmer Republic soldiers and officials and their subsequent fate

915. The Trial Chamber found that there was a "clear pattern" throughout the country in the way in which Khmer Republic soldiers and officials were identified.[2409] According to the Trial Chamber, they were first induced, through deception and lies, to reveal their identities and then "arrested, executed or disappeared".[2410]

916. NUON Chea argues that the evidence is insufficient to establish a consistent nationwide pattern.[2411]

917. The Co-Prosecutors contend that NUON Chea has failed to show that the Trial Chamber acted unreasonably and point to evidence cited elsewhere in the Trial Judgement.[2412]

[2406] IENG Sary Interview by Elizabeth BECKER, E3/94, dated 22 July 1981, p. 5, ERN (En) 00342504; Statement Notes by Henri LOCARD: *Research Notes on Democratic Kampuchea Prison Network*, E3/2071, dated 25 April 1991, pp. 15, 17, ERN (En) 00087317, 00087319; Refugee Accounts and Interviews Conducted in Paris or in Thailand collected by François PONCHAUD, E3/5776, undated, pp. 226-227, ERN (En) 00875259-00875260; Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 217, ERN (En) 00820535; SIM Hip Victim Complaint, E3/5355, dated 19 June 2008, pp. 6-7, ERN (En) 00869873-0086984; SAING Ry Civil Party Application, E3/4919, dated 5 January 2009, p. 1, ERN (En) 00890972.
[2407] Statement Notes by Henri LOCARD: *Research Notes on Democratic Kampuchea Prison Network*, E3/2071, dated 25 April 1991, pp. 4, 23, ERN (En) 00087306, 00087325; Refugee Accounts collected by François PONCHAUD, E3/4590, undated, pp. 169-170, ERN (En) 008204887-00820488.
[2408] UN Roeun Victim Complaint, E3/5395, dated 13 June 2008, p. 6, ERN (En) 00870341.
[2409] Trial Judgement, para. 834.
[2410] Trial Judgement, para. 834.
[2411] NUON Chea's Appeal Brief, paras 598-599.

918. The finding that Khmer Republic soldiers and officials were often lured into identifying themselves as such is supported, *inter alia*, by several of the accounts that the Supreme Court Chamber has reviewed above[2413] as well as the live testimonies of Philip SHORT, Stephen HEDER and François PONCHAUD.[2414] Hence, this finding was sufficiently supported by reliable evidence.

919. The Trial Chamber further held that the Khmer Republic soldiers and officials who were identified in that manner were destined to execution or disappearance and that the same method of identification was used throughout the country. In support of this finding, the Trial Chamber referred to the testimony of Civil Party CHUM Sokha, experts Philip SHORT and David CHANDLER and two out-of-court documents.[2415] Civil Party CHUM Sokha testified that those who had a connection with the Khmer Republic regime would be detained, but did not mention that they would be killed.[2416] CHUM Sokha was himself a Khmer Republic soldier and was for that reason relegated to farming.[2417] He testified that his father and two uncles, who had also been Khmer Republic soldiers, were arrested, detained and his uncles were forced into hard labour in a security centre; neither his father, nor his uncles, ever returned.[2418] Thus, the account is indicative of arrests, detention and disappearances, but inconclusive as to the circumstances leading to the death of CHUM Sokha's three relatives.

920. As for expert Philip SHORT, the Supreme Court Chamber recalls that he did not provide sufficiently specific support for his opinion that executions of Khmer Republic soldiers and officials occurred countrywide.[2419] Hence only some limited weight could have reasonably been attached to his testimony on the point. Turning to

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[2412] Co-Prosecutors' Response, para. 389.
[2413] *See, e.g.*, T. 6 July 2015 (TOAT Thoeun), F1/3.1, pp. 59-60, 104-105; T. 5 November 2012 (SUM Chea), E1/140.1, pp. 16-17 (citing SUM Chea Interview Record, E3/3961, dated 6 March 2008, p. 3, ERN (En) 00223346) 23, 31-33, 42, 59, 63, 113; T. 24 October 2012 (LAY Bony), E1/138.1, pp. 27-28; SÂM Sithy Interview Record, E3/5201, dated 7 August 2008, p. 3, ERN (En) 00275139;. Statement Notes by Henri LOCARD: *Research Notes on Democratic Kampuchea Prison Network*, E3/2071, dated 25 April 1991, pp. 2-3, ERN (En) 00087304-00087305; Refugee Accounts collected by François PONCHAUD, E3/4590, undated, pp. 169-170, ERN (En) 00820487-00820488.
[2414] Trial Judgement, para. 834, (referring to Philip SHORT and François PONCHAUD); *see also* para. 830, fn. 2619, (referring to Stephen HEDER).
[2415] Trial Judgement, para. 834, and accompanying footnotes.
[2416] Trial Judgement, fn. 2655, referring to T. 22 October 2012 (CHUM Sokha), E1/136.1, p.70.
[2417] T. 22 October 2012 (CHUM Sokha), E1/136.1, pp. 78-79, 90.
[2418] T. 22 October 2012 (CHUM Sokha), E1/136.1, pp. 68-70. *See also* CHUM Sokha Interview Record, E3/5788, dated 2 October 2009, pp. 4-5, ERN (En) 00380712-00380713.
[2419] *See above*, paras 881, 888.

expert David CHANDLER, he opined that, in the first stage of the Khmer Rouge regime, those who had a connection with the Khmer Republic became the target of "a kind of vendetta", involving, in many cases, executions.[2420] This, he continued, was "fully testified" by interviews he had conducted, refugee reports, and other documents.[2421] To the extent that he made factual conclusions based on sources which are part of the evidentiary record, David CHANDLER's opinions are not primarily relevant for the question of whether it has been established that Khmer Republic soldiers and officials were indeed killed. This is because it is for the court, rather than the expert, to draw legal conclusions on the basis of proffered evidence. In circumstances where David CHANDLER's conclusions are based on sources that do not form part of the evidentiary record, the Supreme Court Chamber considers that they amount to hearsay. This is because his knowledge apparently derives from conversations with other persons, rather than from his direct experience, and because he did not provide sufficient details concerning the incidents of executions he mentioned.

921. In support of its findings, the Trial Chamber also relied on a summary of refugee accounts and François PONCHAUD's interview record. The relevant passage of the summary reads "all the refugees gave the same answer: they 'disappeared' all the soldiers, [and] all the civil servants" of the Khmer Republic regime.[2422] The probative value of this anonymous hearsay evidence is low. François PONCHAUD, who compiled this summary, told the Co-Investigating Judges that a number of persons had recounted credible incidents of killings of both civil and military Khmer Republic personnel.[2423] As such, the Supreme Court Chamber sees no reason to fault the Trial Chamber for having relied on this evidence, considering that the Parties were afforded the opportunity to examine François PONCHAUD at length, including on issues relating to the methodology applied in his interviews.[2424] Nevertheless, only a

[2420] T. 20 July 2012 (David CHANDLER), E1/93.1, pp. 8-9. *See also* T. 18 July 2012 (David CHANDLER), E1/91.1, p. 22.
[2421] T. 20 July 2012 (David CHANDLER), E1/93.1, p. 8.
[2422] Refugee Accounts collected by François PONCHAUD, E3/4590, undated, p. 13, ERN (En) 00820331.
[2423] François PONCHAUD Interview Record, E3/370, dated 13 February 2009, p. 7, ERN (En) 00333955.
[2424] *See*, *e.g.*, T. 9 April 2013 (François PONCHAUD), E1/178.1, pp. 84-87, 104; T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 75, 114-116; T. 11 April 2013 (François PONCHAUD), E1/180.1, p. 60.

limited probative value could reasonably be assigned to this statement, since the identities of most of the individuals interviewed by François PONCHAUD are unknown and they did not appear before the Trial Chamber.

922. In sum, while there is relatively strong evidence as to how Khmer Republic soldiers and officials were identified, there is only weak evidence indicating that they were subsequently killed. In particular, the only fact witness mentioned by the Trial Chamber, CHUM Sokha, survived despite being a former Khmer Republic soldier. CHUM Sokha testified to the death of his relatives, who, however, perished under unknown circumstances. Further, the out-of-court documents largely consist of generalised hearsay and the expert testimonies were not supported by precise indications as to the specific and verifiable sources of knowledge underpinning the experts' opinions.

(4) CPK statements, declarations and orders

923. The Trial Chamber's finding – that a policy to "target for arrest, execution and/or disappearance all elements of the former Khmer Republic regime" [2425] continued throughout the time period relevant to Case 002/01 – was also based on evidence relating to the CPK position and instructions, especially concerning the identification and treatment of "enemies".[2426] The Accused raise several grounds of appeal in this regard, as well as in respect of the finding that such a policy existed before 1975 (to the extent that this finding was not based on the pattern of executions discussed in the preceding section).

(a) CPK ideology and discussion of "experience at Oudong"

924. The Trial Chamber based its conclusion that a targeting policy existed *inter alia* on its finding that, "[s]tarting before 1975, former soldiers and officials of the LON Nol regime were also identified as the key enemies".[2427] The Trial Chamber held that the Party leadership had considered the Khmer Republic officers to be the "primary enemy" at least until 1976, and sought to "eliminate all 'remnants' of the

[2425] Trial Judgement, para. 829.
[2426] Trial Judgement, paras 815-817. *See also* Trial Judgement, paras 819-829.
[2427] Trial Judgement, para. 118.

former feudalist, imperialist and capitalist regimes throughout the DK era".[2428] It also found that Party leaders had discussed the "experience at Oudong" at a meeting in June 1974, suggesting that the supposed executions of Khmer Republic officials was part of the "experience" that was discussed on that occasion.[2429]

925. NUON Chea submits that the Trial Chamber's findings concerning the "Party philosophy" and alleged instructions relating to Khmer Republic officials are "either erroneous or irrelevant to the charges at issue".[2430] NUON Chea avers that the Trial Chamber distorted and selectively used the evidence and that "broad platitudes" about abstract class theory do not necessarily amount to a policy to execute, but point to a policy which was primarily aimed at political re-education.[2431] Similarly, KHIEU Samphân challenges the relevance and probative value of the underlying evidence.[2432]

926. With reference to the use of the term "enemy" before the fall of Phnom Penh, NUON Chea and KHIEU Samphân submit that the Trial Chamber did not explain why this designation could not refer, as the context could reasonably suggest, to a legitimate military target.[2433]

927. The Co-Prosecutors respond that the Trial Chamber did not mischaracterise the evidence and that NUON Chea has failed to demonstrate that its findings were unreasonable, could invalidate the judgement; or occasion a miscarriage of justice.[2434]

928. The Supreme Court Chamber considers that the Trial Chamber did not sufficiently explain how it evaluated the evidence relating to the Party ideology and, in particular, why it did not engage with potentially exonerating aspects of it. Notably, the Trial Chamber did not articulate how it was able to infer from abstract principles of class theory, communist doctrine and the struggle against imperialists; that there was a concrete policy to target former Khmer Republic soldiers and officials for execution.

[2428] Trial Judgement, para. 815 (footnote(s) omitted).
[2429] Trial Judgement, para. 816.
[2430] NUON Chea's Appeal Brief, para. 551.
[2431] NUON Chea's Appeal Brief, paras 554-558.
[2432] KHIEU Samphân's Appeal Brief, paras 207-217, 424-426, 428; *see also* para. 159.
[2433] NUON Chea's Appeal Brief, para. 549; KHIEU Samphân's Appeal Brief, para. 166.
[2434] Co-Prosecutors' Response, paras 363-365.

929. A review of the evidence further shows that the Trial Chamber gave it too much weight. For example, the Trial Chamber found that Khmer Republic officials were considered the "primary enemy".[2435] However, as noted by NUON Chea,[2436] the focus of the underlying evidence is on general accusations directed against the "lackeys" of the capitalists, feudalists and imperialists and the need to guard against internal enemies.[2437] A witness who did single out the "remnants of the previous regimes" specified that the main target of the ideological training was the "networks", rather than the individuals, and the "feudalist mentality".[2438] It is therefore plausible that the objective of the Khmer Rouge was to remove the old system of power and indoctrinate the society, without necessarily engaging in an indiscriminate policy to kill all individuals associated with the previous regime. In his testimony, Duch confirmed that former Khmer Republic soldiers and officers were "the key enemies",[2439] but also clarified that they were classified into three categories and only those falling into the first one were "smashed secretly".[2440] Moreover, according to Duch, this occurred after 1975.

930. Other evidence pre-dates the fall of Phnom Penh on 17 April 1975.[2441] In relation to the use of the term "enemy" in this period, the Supreme Court Chamber notes that the Trial Chamber did not clarify why the word "enemy" in this context could not refer solely to a military target, as argued by NUON Chea and KHIEU Samphân.[2442] However, the statements confirm that, in the opinion of the Party leadership, "the masses […] firmly hated LON Nol" and were "alerted to the true nature of the aggressive and annexationist, cruel and treacherous American

[2435] Trial Judgement, para. 815.
[2436] NUON Chea's Appeal Brief, para. 557.
[2437] IENG Sary's Regime: The Diary of the Khmer Rouge Foreign Ministry, 1976-79, E3/925, undated, pp. 18, 86, ERN (En) 00003254, 00003322 (referring to records of internal meetings held in the DK Foreign Ministry in May and July 1976); KHIEU Samphân and NUON Chea Interviews by Meng-Try EA and Sopheak LOEUNG, E3/108, dated 11 June 2006, p. 6, ERN (En) 00000930 (referring to "killings of internal enemy", that is, "among the Khmer Rouge cadres").
[2438] T. 6 August 2012 (SUONG Sikoeun), E1/102.1, pp. 48-49.
[2439] T. 21 March 2012 (KAING Guek Eav *alias* Duch), E1/52.1, p. 26.
[2440] T. 18 May 2009 (KAING Guek Eav *alias* Duch) (Case 001), E3/345, p. 10 (referred to in NUON Chea's Appeal Brief, para. 274).
[2441] Trial Judgement, fn. 2568, referring to paras 121-123.
[2442] NUON Chea's Appeal Brief, para. 549; KHIEU Samphân's Appeal Brief, para. 166.

imperialists and of their lackeys and reactionaries", who were the enemies of the people.[2443]

931. NUON Chea argues that the Trial Chamber misrepresented a passage of the statement which he had made in court, upon which it then relied.[2444] NUON Chea is correct that his testimony had referred to "elimination" only for use in exceptional cases, after having unsuccessfully explored other options.[2445] However, while the Trial Chamber may well have oversimplified NUON Chea's testimony, it did not misrepresent its basic meaning, namely, that the ideology embraced by the CPK contemplated "the elimination of those who […] cannot be (re)educated".[2446]

932. Concerning the June 1974 meeting and its agenda, the Supreme Court Chamber recalls that it has found that it was unreasonable for the Trial Chamber to infer that executions at Oudong had been discussed at that meeting, given that the occurrence of such executions was not reasonably established.[2447]

933. In sum, the evidence of CPK ideology permitted a reasonable trier of fact to arrive at the conclusion that the Party line, as described, if disseminated through public statements and trainings, could potentially lay the ideological ground for a range of measures against perceived enemies, including physical elimination. Whether this ideological stance against "enemies" led to a policy contemplating the execution of Khmer Republic soldiers and officials is a question which will be addressed below, in light of the totality of evidence.

(b) CPK instructions

934. The Trial Chamber found "there is overwhelming evidence that the policy to target former Khmer Republic officials was expressly ordered and affirmed by the Party leadership".[2448]

[2443] Trial Judgement, fn. 2569, referring, *inter alia*, to KHIEU Samphân Interview Transcript, E3/3198, undated, p. 12, ERN (En) 00815887; IENG Sary Speech at U.N. General Assembly, 32nd Session, E3/1586, dated 11 October 1977, para. 47, ERN (En) 00079813.
[2444] NUON Chea's Appeal Brief, para. 554, referring to Trial Judgement, para. 815, citing T. 13 December 2011 (NUON Chea), E1/21.1, pp. 42, 45.
[2445] T. 13 December 2011 (NUON Chea), E1/21.1, pp. 42-45.
[2446] Trial Judgement, para. 815.
[2447] *See above*, para. 884.
[2448] Trial Judgement, para. 817.

935. NUON Chea claims that the Trial Chamber based its finding on only five pieces of mostly irrelevant evidence and ignored exculpatory evidence.[2449] KHIEU Samphân maintains that the evidence is inadequate to support the finding under examination, noting in particular that it is immaterial because of the date of the events described therein.[2450]

936. The Co-Prosecutors respond that the finding was reasonably reached and rested upon "ample evidence", cited in the same paragraph of the Trial Judgement.[2451]

937. As for the period before or shortly after the events at Tuol Po Chrey, the Trial Chamber relied on: (i) the interview records of KHOEM Sâmhuon and IENG Phan; (ii) IENG Sary's interview with Stephen HEDER; (iii) one DK document; and (iv) two documents, by the United States Government and the International Commission of Jurists, respectively.[2452]

938. Contrary to NUON Chea's submission,[2453] KHOEM Sâmhuon stated before the Co-Investigating Judges that, in May 1975, he had been aware of an order to arrest not only the high-ranking Khmer Republic officials who had refused to leave Phnom Penh, but also the Khmer Republic soldiers who had been treated at the Preah Ket Mealea Hospital.[2454] He testified that he later learned that a great number of those "officers and their servants [who] were arrested from Phnom Penh" had been killed.[2455] As for the provenance of the order, according to the Trial Chamber, it was SON Sen who gave the order,[2456]which is confirmed by the written record of KHOEM Sâmhuon's interview. However, as noted by NUON Chea, the audio record of the interview discloses that KHOEM Sâmhuon actually stated that the order had been issued by the division; he only speculated that the order must have come from the

[2449] NUON Chea's Appeal Brief, paras 559-573.
[2450] KHIEU Samphân's Appeal Brief, paras 217, 424-425.
[2451] Co-Prosecutors' Response, para. 367; *see also* paras 368-376.
[2452] Trial Judgement, fns 2574-2577. Since Stephen HEDER's testimony refers to 1976, it will be examined in the next section.
[2453] NUON Chea's Appeal Brief, para. 560.
[2454] KHOEM Sâmhuon Interview Record, E3/3962, dated 6 March 2009, p. 4, ERN (En) 00293365.
[2455] KHOEM Sâmhuon Interview Record, E3/3962, dated 6 March 2009, p. 4, ERN (En) 00293365.
[2456] Trial Judgement, fn. 2574 ("In May 1975, SON Sen gave an order to arrest high-ranking civil servants and soldiers of the LON Nol regime"), referring to KHOEM Sâmhuon Interview Record, E3/3962, dated 6 March 2009, p. 4, ERN (En) 00293365.

"upper echelon", identified as SON Sen.[2457] Nevertheless, the Trial Chamber acknowledged elsewhere that it was only "likely" that SON Sen had given the order.[2458] Thus, the Trial Chamber's characterisation of the evidence was not unreasonable in the circumstances. The Supreme Court Chamber considers, however, that the witness gave hearsay evidence as to the killings and that his account was not tested in court. A reasonable trier of fact could thus rely on it to a limited extent only. Moreover, of note is that the order targeted a specific group of soldiers and officials, rather than Khmer Republic soldiers and officials in general.

939. The Trial Chamber also relied upon on the transcript of IENG Phan's interview, which it summarised as follows: "[he] was instructed to look for LON Nol soldiers".[2459] On its face, this account does not support a finding relating to killing. Furthermore, as noted by NUON Chea,[2460] the question posed by the investigator was suggestive and the answer ambiguous. Of particular note is that the Trial Chamber did not clarify why it had chosen to rely on this interview record, prepared in the framework of the investigation, despite the fact that IENG Phan appeared before it as a witness. In fact, as argued by NUON Chea,[2461] IENG Phan's live testimony was exculpatory in that he repeatedly mentioned a long-standing order from the upper echelon that Khmer Republic soldiers captured in the battlefield were not to be mistreated but they should be "sent to the rear".[2462] IENG Phan testified that he never received any order to execute or mistreat them and stated on a number of occasions that they had been ordered by "the Upper Echelon" to follow the "universal rule" that prisoners of war must not be mistreated.[2463] Accordingly, the evidence provided by IENG Phan is not probative of a policy involving execution; rather it indicates that there were clear orders not to harm soldiers captured in combat.

940. NUON Chea and KHIEU Samphân contest the Trial Chamber's reliance on IENG Sary's interview with Stephen HEDER, which they claim is speculative,

[2457] KHOEM Sâmhuon Audio Record of Interview, D166/117R, at 48:00-50:00.
[2458] Trial Judgement, fn. 1530 ("the upper echelon was likely SON Sen who controlled all divisions").
[2459] Trial Judgement, fn. 2574 (referring to IENG Phan Interview by LIM Sokuntha, Partial Transcription, E3/419.1, dated 23 November 2009, p. 2, ERN (En) 00912383).
[2460] NUON Chea's Appeal Brief, para. 561.
[2461] NUON Chea's Appeal Brief, para. 561.
[2462] T. 20 May 2013 (IENG Phan), E1/193.1, pp. 8, 15-16, 36.
[2463] T. 20 May 2013 (IENG Phan), E1/193.1, pp. 8, 36, 65-70.

contradictory and lacks credibility.[2464] In this interview, IENG Sary stated that, on approximately 20 April 1975, a decision had been taken to kill Khmer Republic soldiers, in the context of a discovery of concealed weapons in the houses of military officers.[2465] While IENG Sary had not been present when the decision was taken,[2466] he explained that he had learned about it subsequently, and specified that the decision involved doing "whatever was required" to keep former elements of the Khmer Republic regime from staging a counter-revolution.[2467] It is unclear, however, whether the decision generally involved the killing of any Khmer Republic soldiers and officials, or only of those who were found to be engaged in rebellious activities. Furthermore, the Trial Chamber failed to discuss IENG Sary's statement to Stephen HEDER in relation to IENG Sary's earlier interview with Elizabeth BECKER, mentioned above, despite its potential contradiction.[2468]

941. The Trial Chamber also relied on a DK document, namely a "Decision" dated 4 June 1975, signed by "Comrade Pin", which ordered the execution of seventeen named Khmer Republic soldiers, following their having been "examined by the Party".[2469] The "Decision" directs that "[t]he comrades […] implement this policy of the Party".[2470] Enclosed with the "Decision" are two English translations thereof, one of which also includes a "translator's note" providing details as to Pin's position and background and a side annotation containing the further instruction that three other soldiers be "ke[pt] for further examination".[2471]

942. NUON Chea questions the authenticity and reliability of the document and requests that the Supreme Court Chamber obtain the original and verify the authenticity thereof.[2472] NUON Chea further submits that the document fails to establish the provenance of the execution order and notes that, in any event, the order

[2464] NUON Chea's Appeal Brief, para. 562; KHIEU Samphân's Appeal Brief, paras 424-425. *See also* NUON Chea's Appeal Brief, para. 607.
[2465] IENG Sary Interview by Stephen HEDER, E3/89, dated 17 December 1996, pp. 6-8, ERN (En) 00417604-6.
[2466] KHIEU Samphân's Appeal Brief, fn. 917, referring to IENG Sary Interview by Stephen HEDER, E3/89, dated 17 December 1996, p. 6, ERN (En) 00417604.
[2467] IENG Sary Interview by Stephen HEDER, E3/89, dated 17 December 1996, p. 8, ERN (En) 00417606.
[2468] *See above*, para. 913.
[2469] Execution Order, E3/832, 4 June 1975, p. 2, ERN (En) 00068915.
[2470] Execution Order, E3/832, 4 June 1975, p. 2, ERN (En) 00068915.
[2471] Execution Order, E3/832, 4 June 1975, p. 6, ERN (En) 00068919.
[2472] NUON Chea's Appeal Brief, para. 564.

concerns high-ranking officers, whose alleged execution was decided upon examination.

943. The Co-Prosecutors maintain that NUON Chea's arguments are repetitive and that his alternative interpretations of the document are insufficient to establish that the Trial Chamber abused its discretion.[2473]

944. The Supreme Court Chamber considers that NUON Chea has failed to raise real doubts as to the authenticity of the document in its Khmer original version, which is identical in all its renditions on the case file. Its two English translations appear to be generally accurate and, as far as they overlap, tally with each other. NUON Chea's request to obtain the original version of the document and verify its authenticity is accordingly rejected.

945. Moving on to the substance, the document, as noted by NUON Chea, refers to a "secret agent", and sixteen officers with the ranks from Second Lieutenant upwards. The execution of these seventeen individuals appears to have been ordered following a process involving an individual examination of their cases by the Party. Furthermore, the "policy of the Party" that the "Decision" requests implementation of appears to refer, despite the equivocal terminology, to the specific execution order contained therein, not to a general or indiscriminate policy.

946. The Trial Chamber finally cites to two documents, by the United States Government and the International Commission of Jurists, respectively.[2474] The United States' memorandum has already been analysed under the section on the pattern of executions of Khmer Republic officials.[2475] In addition to the aforementioned analysis, the Supreme Court Chamber notes that the Trial Judgement refers to evidence of "[r]eports that a Khmer Rouge order went out to kill all army officers and civilian officials of the LON Nol government".[2476] The alleged order to kill was

[2473] Co-Prosecutors' Response, para. 373.
[2474] U.S. National Security Council Memorandum, Subject: Assessment of Developments in Indochina Since the End of the War, E3/3472, dated 15 July 1976; U.N. Economic and Social Council: Further Submissions from the International Commission of Jurists under Commission on Human Rights decision 9 (XXXIV), E3/3327, dated 25 January 1979.
[2475] *See above*, para. 889.
[2476] Trial Judgement, fn. 2574, referring to U.S. National Security Council Memorandum, Subject: Assessment of Developments in Indochina Since the End of the War, E3/3472, dated 15 July 1976, p. 24, ERN (En) 00443170.

reported in the *Time* magazine but, as submitted by the Accused,[2477] the account constitutes anonymous hearsay contained in an out-of-court document. Thus, regardless of the Co-Prosecutors' argument that the Trial Chamber had the discretion to rely upon the evidence,[2478] only a low probative value could have reasonably been attached to it.

947. The document of the International Commission of Jurists conveys the account of a former Khmer Rouge official, who stated that the Central Committee had changed the policy against Khmer Republic soldiers "[i]n 1975", apparently after "the victory of the revolution".[2479] According to the document, the former Khmer Rouge official recounted, as a consequence, that it was "necessary to eliminate not only the officers but also the common soldiers as well as their wives and children".[2480] Contrary to NUON Chea's and KHIEU Samphân's arguments,[2481] it is clear that the policy shift was reported to have come from the Party Centre, and there is no reason to doubt the source's reliability. Nevertheless, since this account is contained in an out-of-court document and is of a hearsay nature, it must be assigned low probative value. Moreover, the account does not specify whether the change in policy occurred prior to the events at Tuol Po Chrey or at a later point in time.

948. NUON Chea points to allegedly exculpatory evidence, which the Trial Chamber, in his view, erroneously disregarded. PHY Phuon testified to explicit instructions not to harm Khmer Republic soldiers who had surrendered.[2482] While the Co-Prosecutors contend that the Trial Chamber "was seised" of this evidence and must thus be presumed to have considered it,[2483] the Trial Chamber did not address this portion of testimony. It cannot be assumed that the Trial Chamber tacitly discounted this evidence due to unreliability, since it extensively relied on PHY Phuon's testimony throughout the Trial Judgement, including to make key

[2477] NUON Chea's Appeal Brief, para. 575; KHIEU Samphân's Appeal Brief, para. 424.
[2478] Co-Prosecutors' Response, para. 378.
[2479] U.N. Economic and Social Council: Further Submissions from the International Commission of Jurists under Commission on Human Rights decision 9 (XXXIV), E3/3327, dated 25 January 1979, p. 2, ERN (En) 00075939.
[2480] U.N. Economic and Social Council: Further Submissions from the International Commission of Jurists under Commission on Human Rights decision 9 (XXXIV), E3/3327, dated 25 January 1979, p. 2, ERN (En) 00075939.
[2481] NUON Chea's Appeal Brief, para. 565; KHIEU Samphân's Appeal Brief, para. 424.
[2482] T. 30 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/98.1, p. 88.
[2483] Co-Prosecutors' Response, para. 375.

findings.[2484] Moreover, the Trial Chamber indicated which parts of his testimony it did not find reliable but did not refer to this specific passage.[2485] Considering the direct relevance of PHY Phuon's statement and the significant weight generally assigned to his testimony, the Trial Chamber erred in failing to consider this evidence in relation to the targeting policy. In order to remedy this error, the Supreme Court Chamber shall take this statement into account when making its final assessment on whether the Trial Chamber's finding was reasonably reached.

949. NUON Chea further refers to the interview record of SAO Van,[2486] which is not mentioned in the Trial Judgement either. According to NUON Chea, this document indicates that there had been instructions not to harm Khmer Republic soldiers below certain ranks, which is why he requested that the witness be summoned on appeal.[2487] The Supreme Court Chamber heard SAO Van on 2 July 2015.[2488] In his testimony, he confirmed that at a meeting he had attended, an order not to harm soldiers with ranks up to colonel had been given,[2489] but he was unable to recall the exact date of the meeting.[2490] On the basis of other evidence available on file,[2491] the Supreme Court Chamber considers it likely that the instruction was relayed, at the earliest, about one month after 17 April 1975. The witness confirmed that there had been no policy to execute Khmer Republic soldiers at the time of liberation,[2492] but

[2484] *See*, *e.g.*, Trial Judgement, paras 133-135, 139, 144, 146, fn. 2580.
[2485] Trial Judgement, para. 107.
[2486] NUON Chea's Appeal Brief, para. 567.
[2487] NUON Chea's Appeal Brief, para. 567.
[2488] Decision on Call for Witnesses on Appeal (F2/5), para. 26 (referring to SAO Van by the pseudonym of SCW-4).
[2489] *See*, *e.g.*, T. 2 July 2015 (SAO Van), F1/1.1, pp. 33, 43.
[2490] T. 2 July 2015 (SAO Van), F1/1.1, pp. 23-24, 51 (confirming that he was transferred to Sector 25 in 1976), 31 (order not to harm was divulged three months after liberation), 41-42 (by the time he attended the meeting at Takeo provincial town, he had been transferred to Sector 25), 48-50 (dating the instruction not to harm Khmer Republic soldiers to the immediate aftermath of liberation, but then giving the impression that he was actually referring to a KHIEU Samphân's radio announcement (*but see* p. 112, dating the radio announcement to a time prior to liberation)), 117 (meeting in Takeo was after 1975), 119 (meeting in Takeo was few days after liberation), 120 (meeting was in fact held at Treng mountains after liberation), 123-124 (meeting at Treng mountains held two months after liberation, meeting in Takeo held in 1976).
[2491] T. 24 April 2015 (PECH Chim) (Case 002/02), F2/6.1.2, p. 17 (the meeting in Takeo, at which Ta Mok and Ta Saom participated, was held after the 20-24 May 1975 conference in Phnom Penh); SAO Van DC-Cam Interview, F2/9.1, 20 April 2011, p. 16, ERN (En) 01098761 (the meeting at which Ta Mok made the announcement concerning the former Khmer Republic soldiers was held around a month after liberation).
[2492] T. 2 July 2015 (SAO Van), F1/1.1, pp. 33 (the political line around the time of liberation was that soldiers up to the rank of colonel were not to be harmed), 39 (confirming the content of the order), 122-123 (the order not to harm did not represent a change in policy, which was instead altered as of late

cautioned that his knowledge was limited to facts occurring within his commune.[2493] PECH Chim, two transcripts of whose testimony in Case 002/02 the Supreme Court Chamber has admitted into evidence,[2494] confirmed that, at the meeting that SAO Van had mentioned in his testimony and that PECH Chim also had attended, instructions had been issued not to harm former Khmer Republic soldiers with ranks up to colonel.[2495]

950. NUON Chea submits that evidence from Tram Kak district and Kraing Ta Chan prison, located in the area where SAO Van worked at the relevant time, corroborates SAO Van's statement that no policy to kill former Khmer Republic soldiers existed.[2496] Notably, NUON Chea avers that the records on file show that Khmer Rouge cadres were aware that former Khmer Republic soldiers resided in that area. The Khmer Rouge cadres persistently tried to re-educate them and arrested them only in connection with specific misconduct, not solely on the basis of their prior involvement with the Khmer Republic.[2497] The Co-Prosecutors respond that this evidence is inapt to raise doubts as to the Trial Chamber's findings.[2498]

1977). *See also* T. 2 July 2015 (SAO Van), F1/1.1, pp. 102-103 (screening and re-education applied irrespective of former association with the Khmer Republic regime), 110 (he never received orders or heard that Khmer Republic soldiers would be lured in through deceptive means and then arrested), 115-116 (former Khmer Republic soldiers not considered enemies on the sole basis of their prior allegiance). *See also* SAO Van DC-Cam Interview, F2/9.1, 20 April 2011, pp. 13, 16, 33 (confirming that, both before and after the end of the war against the Lon Nol regime, Ta Mok instructed cadres not to persecute former Khmer Republic soldiers).

[2493] T. 2 July 2015 (SAO Van), F1/1.1, pp. 70-71, 107-108, 111, 121.

[2494] Disposition on Pending Requests for Additional Evidence (F2/9), p. 6.

[2495] T. 24 April 2015 (PECH Chim) (Case 002/02), F2/6.1.2, p. 18, 22, 24. The Supreme Court Chamber notes that the Co-Prosecutors sought to discredit the credibility of PECH Chim's statement by referring to another passage of his testimony (Co-Prosecutors' Response to Fourth Request for Additional Evidence (F2/6/2), para. 7). However, the meeting at which District Chief Khom was said to have conveyed a plan from the upper echelon involving the purging of former soldiers and officials of the Khmer Republic was allegedly held "about three or four months after 17th April 1975" (T. 23 April 2015 (PECH Chim) (Case 002/02), F2/6.1.1, p. 36). Furthermore, when PECH Chim was confronted by the Co-Prosecutors with the apparent discrepancy between the instruction not to harm low-ranking Khmer Republic soldiers and that imparted at the meeting convened by Khom, he did not retract his previous statement on the former instruction, and instead suggested, albeit not unambiguously, that there had been two distinct phases in the treatment of former Khmer Republic soldiers and officials (T. 24 April 2015 (PECH Chim) (Case 002/02), F2/6.1.2, pp. 88-92.

[2496] NUON Chea's Appeal Brief, para. 568.

[2497] NUON Chea's Appeal Brief, para. 568.

[2498] Co-Prosecutors' Response, para. 375, fn. 1550. The Supreme Court Chamber takes note of the more specific submissions, made by the Co-Prosecutors regarding the relevance and weight of the evidence raised by NUON Chea, in Co-Prosecutors' Response to Fourth Request for Additional Evidence (F2/6/2), paras 8, 10, 12-16. However, to the extent that those submissions are based on Case 002/02 evidence not introduced into Case 002/01, they cannot be given consideration. Furthermore, the International Co-Prosecutor's conditional request for admission of rebuttal evidence finds no basis in

951. The Supreme Court Chamber observes that the above-mentioned evidence indicates that the majority of the detainees were former Khmer Republic soldiers, who had been accused of, for example, stealing, raping, running away, "playing tricks", inciting people to oppose the regime or, often, poor work performance. It remains unclear, however, whether these had been genuine or specious accusations and whether the prisoners ultimately survived. Most importantly, the records long post-date the instructions that SAO Van and PECH Chim mentioned in their testimonies and accordingly are inapt to offer corroboration thereto.

952. At NUON Chea's request, the Supreme Court Chamber also summoned TOAT Thoeun to testify.[2499] He stated that there had been a policy "to smash" all former imperialists and feudalists, which had been disseminated at a meeting, chaired by RUOS Nhim and attended by other Zone-level cadres, which he had overheard from another room.[2500] The policy was presented as having been ordered "by the upper echelon", that is, by "those who were in the Centre".[2501] The meeting took place around one month after liberation, after the killings at Battambang referred to above.[2502] Since, according to TOAT Thoeun, the meeting had been convened at the Zone level – the highest level locally – and since RUOS Nhim had characterised the policy as one emanating from the Party Centre, the Supreme Court Chamber finds it plausible that the meeting was aimed at conveying Party instructions that had been recently received, rather than confirming a pre-existing Party policy.

953. Lastly, NUON Chea recalls that HENG Samrin was not summoned as witness before the Trial Chamber and submits that he would have given exculpatory evidence.[2503] The Supreme Court Chamber has already addressed this argument and concluded that it is unlikely HENG Samrin's testimony would have produced significant additional exonerating information in relation to the meeting on 20 May 1975, but that the Supreme Court Chamber shall, where appropriate, draw inferences

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the applicable legal framework and, as such, falls to be summarily rejected, considering that he did not demonstrate how the proffered evidence satisfies the requirements under Internal Rules 104(1) and 108(7).

[2499] Decision on Call for Witnesses on Appeal (F2/5), para. 26 (referring to TOAT Thoeun by the pseudonym of SCW-5).

[2500] T. 6 July 2015 (TOAT Thoeun), F1/3.1, pp. 123-125.

[2501] T. 6 July 2015 (TOAT Thoeun), F1/3.1, pp. 124-125.

[2502] T. 6 July 2015 (TOAT Thoeun), F1/3.1, pp. 124. *See above*, para. 900.

[2503] NUON Chea's Appeal Brief, paras 569-570.

in favour of the Accused based on the interview notes of HENG Samrin.[2504] Accordingly, the Supreme Court Chamber considers that these interview notes indicate that, on 20 May 1975, the Party leadership, including NUON Chea, stated that the leaders of the Khmer Republic were to be removed from the framework and did not say that they were to be killed.[2505]

954. As for the evidence originating from THET Sambath and Robert LEMKIN's interviews, to which NUON Chea refers,[2506] the Supreme Court Chamber has already determined that its content is irrelevant to the issue of whether a policy against Khmer Republic soldiers and officials existed at the time of the events at Tuol Po Chrey.[2507]

955. The Supreme Court Chamber notes that the Trial Chamber relied upon several issues of the *Revolutionary Flag* and the testimony of PECH Chim.[2508] It did so, not to establish the existence of the policy or its content, but rather to establish how the policies regarding the CPK's "enemies" had been disseminated, namely through publications and study sessions. The Supreme Court Chamber notes further that only one of the *Revolutionary Flag* issues is dated 1975, and that its language and context clearly refer to killings in combat.[2509]

956. The Trial Chamber also relied on reports, telegrams and other CPK material, dated 1976 (two documents), 1977 (five documents) and 1978 (two documents).[2510] NUON Chea argues that any evidence of CPK instructions post-dating 1975 is irrelevant to proving his criminal responsibility for the events at Tuol Po Chrey, as what is required is proof that a specific decision to execute Khmer Republic soldiers and officials was made around the time of liberation.[2511] The Supreme Court Chamber considers that, as noted above, it has to be determined whether a policy contemplating killing existed at the time of the events at Tuol Po Chrey. However, it does not follow that the Trial Chamber was not entitled to rely on evidence post-dating the events to

[2504] *See above*, para. 155.
[2505] KIERNAN Retyped Interview Notes, E3/1568, dated 30 December 1991, ERN (En) 00651884.
[2506] NUON Chea's Appeal Brief, para. 572.
[2507] *See above*, para. 39 *et seq*.
[2508] Trial Judgement, para. 818.
[2509] Trial Judgement, fn. 2582, referring to CPK Magazine: *Revolutionary Flag*, Issue 8, E3/5, dated 8 August 1975, p. 22, ERN (En) 00401497; *see also* CPK Magazine: *Revolutionary Flag*, Issue 8, E3/5, dated 8 August 1975, p. 7, ERN (En) 00401482.
[2510] Trial Judgement, fns 2578-2579.
[2511] NUON Chea's Appeal Brief, para. 552.

draw inferences on a pre-existing policy, as long as it provided adequate reasons as to why such evidence demonstrated a continuing policy, as opposed to a newly instituted or amended policy. Accordingly, NUON Chea's general argument as to the irrelevance of evidence post-dating April 1975 is rejected.

957. As to the substance of the evidence, as noted by NUON Chea,[2512] a number of these documents do not actually establish the occurrence of executions, but rather of arrests. Most importantly, it remains unclear how they may support the existence of a policy in April 1975. For example, the Trial Chamber relied on the minutes of a September 1976 meeting of Division 164 to find that there was an order to "continue" collecting biographies and arrest former soldiers.[2513] Nevertheless, a closer reading of the evidence reveals that Khmer Rouge cadres had discovered a "desertion plan" involving forty persons, who had not all necessarily been Khmer Republic soldiers.[2514] It was then decided that the deserters had to be arrested "to do production in one place", not killed.[2515] There were, indeed, indications that former soldiers were subject to stricter control.[2516] However, according to the meeting minutes, they had not been targeted due to their potential allegiance to the Khmer Republic, but due to their insubordination. The document further refers to the treatment of other previous deserters, indicating that, while some had been "distributed among the units" and that "most of them have improved", others "were never seen to return".[2517] In conclusion, the document does not show that there was a policy to kill, or that such a policy specifically concerned former Khmer Republic soldiers and officials; rather, it appears that measures were taken in response to purported insubordination – including by "Base People"[2518] – and that these measures led, at least for most offenders, to arrest and relocation. Similarly, whereas the DK telegram of 2 April 1976 reported on measures taken against former soldiers and "agents" responsible for

[2512] NUON Chea's Appeal Brief, paras 577-580.
[2513] Trial Judgement, para. 817.
[2514] Comrades 164 Meeting Minutes, E3/813, 9 September 1976, p. 2, ERN (En) 00143486.
[2515] Comrades 164 Meeting Minutes, E3/813, 9 September 1976, p. 3, ERN (En) 00143487.
[2516] Comrades 164 Meeting Minutes, E3/813, 9 September 1976, p. 2, ERN (En) 00143486 ("[t]he majority among [base people who have been engaging in various strange activities] are good, but the soldiers engage in no-good movements"), p. 3, ERN (En) 00143487 ("soldiers elements must be rounded up").
[2517] Comrades 164 Meeting Minutes, E3/813, 9 September 1976, p. 2, ERN (En) 00143486.
[2518] Comrades 164 Meeting Minutes, E3/813, 9 September 1976, p. 2, ERN (En) 00143486.

specific rebellious activities, it cannot establish a link to a policy existing in April 1975 and cannot be regarded as proof of an indiscriminate policy.[2519]

958. With regards to the other telegrams and documents cited by the Trial Chamber,[2520] they do indicate that instructions to identify and "sweep cleanly away" enemies, including "remnants" of the former regime, had been imparted and implemented.[2521] All of them, however, date to 1977 and 1978, with no element suggesting that a policy involving execution existed at the time of the killings at Tuol Po Chrey.

959. As to Stephen HEDER's testimony that, beginning in the latter half of 1976, the security services received signals from the Party leadership that they had to "*augment* their efforts to identify former Khmer Republic officials who had escaped",[2522] it is unclear upon which sources he based this statement. Moreover, the statement indicates neither when the instructions were given, nor what should happen to the Khmer Republic officials who were ultimately identified.

960. In sum, the evidence of CPK instructions to kill Khmer Republic soldiers and officials dating to the period before or shortly after the events at Tuol Po Chrey is relatively weak. Evidence relating to the subsequent period appears to be much stronger, but lacks a clear connection to April 1975.

(5) Reasonableness of the overall conclusion

961. The Supreme Court has considered the arguments relating to the evidence upon which the Trial Chamber relied, as well as those relating to the Trial Chamber's more specific findings. It shall now determine whether, based on this evidence and these findings as a whole, it was reasonable for the Trial Chamber to conclude that the existence of a policy contemplating execution of Khmer Republic soldiers and officials at the time of the events at Tuol Po Chrey was established beyond reasonable

[2519] DK Telegram, E3/511, dated 2 April 1976, p. 1, ERN (En) 00182658.
[2520] Trial Judgement, fn. 2579.
[2521] *See*, *e.g.*, Trial Judgement, fn. 2579, citing, *inter alia*, DK Telegram, E3/511, 2 April 1976, p. 1, ERN (En) 00182658; Report to Tram Kak District, E3/4141, dated 30 April 1977, p. 1, ERN (En) 00711361; DK Telegram, E3/995, dated 19 March 1978, p. 1, ERN (En) 00185583; DK Telegram, E3/996, dated 19 March 1978, pp. 1-2, ERN (En) 00436995-00436996.
[2522] Trial Judgement, fn. 2574, citing T. 11 July 2013 (Stephen HEDER), E1/222.1, p. 61 (emphasis added).

doubt. It is recalled that, in reaching this finding, the Trial Chamber relied both on the evidence of a pattern of executions and CPK statements, declarations and orders.

962. As regards evidence of a pattern, the Supreme Court Chamber notes that, in respect of the period prior to 1975, which is of particular importance to establishing the existence of a policy at the time of the events at Tuol Po Chrey, the evidence gives some indication that a number of killings of Khmer Republic soldiers occurred. However, the evidence in question is ambivalent, uncorroborated, inconsistent and of hearsay value. No fact witness testified, not even indirectly, to incidents within this time frame. The evidence largely originates from documents that were produced for purposes other than use in a criminal trial, such as reports, unsworn refugee accounts, and newspaper articles, which have low probative value. Moreover, in several cases, where the circumstances surrounding the killings were ambiguous as to whether the killings occurred in a non-combat situation or as a result of isolated acts of violence, the Trial Chamber did not explain why it considered them to be indications of a centrally-devised policy against soldiers who were not engaged in hostilities. Equally untenable is the Trial Chamber's conclusion that there is "consistent evidence of a radicalisation" of such supposed policy.[2523] Importantly, the Trial Chamber's finding in relation to the killings in Oudong, which was pivotal to the Trial Chamber's conclusion of the existence of a policy before 1975, was not reasonably reached.

963. As to the period immediately preceding and immediately following the events at Tuol Po Chrey, only few instances of killing can be regarded as having been reasonably established. These are, namely, the killing of four high-ranking officials (two of whom had been previously "earmarked" for certain death) and other soldiers in Phnom Penh, the killing of high-ranking soldiers in Battambang, the killings in Pursat (*i.e.* at Tuol Po Chrey) and the killing of soldiers and officials in Siem Reap. These incidents all took place on 17 April 1975 and/or the following days, in connection with the evacuation of these four cities. The execution of the four high-ranking officials in Phnom Penh, given the modalities of its announcement and execution, stands out as unique among all other events under consideration. The events leading to the killings in Battambang, including their time frame and modalities of execution, resemble those leading to the executions at Tuol Po Chrey.

[2523] Trial Judgement, para. 121.

The Supreme Court Chamber has already satisfied itself that the incident in Battambang must have been, as a minimum, endorsed by Zone Secretary RUOS Nhim, who was also found to have ordered the execution at Tuol Po Chrey. While the strong similarities between the events in Battambang and at Tuol Po Chrey suggest that they were part of a common design, it remains unclear whether RUOS Nhim was acting on his own independent volition, or in accordance with a policy emanating from the Party Centre. The Supreme Court Chamber considers that, in order to reasonably infer from the occurrence of killings that a centrally-devised policy existed, several incidents of execution occurring in different Zones would have had to be established. In the present case, however, the incidents that have been reasonably established by the Trial Chamber were few and limited to a small part of the area under Khmer Rouge control. Indeed, aside from two incidents which may be attributed to RUOS Nhim and those incidents regarding of the high-ranking officials in Phnom Penh that had unique features, there remain only the execution in Siem Reap and the killing of soldiers in Phnom Penh. These incidents, even when considered as a whole, do not lend strong support to the existence of a centrally-devised policy contemplating execution.

964. To the extent that the Trial Chamber relied on evidence of arrests – occurring either before or after the events at Tuol Po Chrey – the Supreme Court Chamber notes that, in a considerable number of instances, and as accepted elsewhere by the Trial Chamber,[2524] arrests resulted in relocation, detention, hard labour and/or eventual release.[2525] Therefore, this evidence does not lend strong support to the existence of a pattern of *execution*. Furthermore, the evidence tended to show that there were efforts to identify and single out persons who held positions of a certain rank – especially in the military.[2526]

965. As to evidence of executions after the events at Tuol Po Chrey, the Supreme Court Chamber recalls that the Trial Chamber relied primarily on out-of-court documents, the credibility and reliability of which was not specifically assessed,

[2524] Trial Judgement, para. 555, fns 1657-1658, referring to paras 513-514.
[2525] *See*, *e.g.*, *above*, fns 2323, 2360 and 2366, 2364, 2377, 2398, 2404; *see also* Report by Stephen HEDER and Masato MATSUSHITA: Interviews with Kampuchean Refugees at Thai-Cambodia Border, E3/1714, dated 25 March 1980, pp. 25, 41, 50-51, ERN (En) 00170716, 00170732, 00170741-00170742.
[2526] *See*, *e.g.*, *above*, paras 466, 896-898, 945, 949 and fns 2343, 2379, 2395, 2404.

which thus constitute a weak evidentiary basis. The only account provided by a witness who testified in court concerned a sporadic incident, which is not indicative of a broad and generalised policy. Most importantly, the Trial Chamber did not explain the reasons that led it to conclude that the evidence relating to incidents occurring long after April 1975 demonstrated that they were the result of a policy that had already existed at the time of the events at Tuol Po Chrey, rather than of a new or altered policy. The instances to which it referred – mostly dating to 1976 and the following years – do not have a clear connection with the period of the events at Tuol Po Chrey.[2527] On the contrary, there are indications in the evidence that a broad policy against Khmer Republic soldiers and officials was adopted only after April 1975. The Trial Chamber failed to engage with this issue. For example, the Trial Chamber cited to a passage of the testimony of Duch, in which he stated that the document he was shown referred to the detention and killing of Khmer Republic officials in 1976 and not 1975. Similarly, there are indications in IENG Sary's interview that a policy against Khmer Republic officials was adopted only in 1976.[2528]

966. In sum, there was only relatively weak evidence of a pattern of executions in the period preceding or, upon the date of, the events at Tuol Po Chrey.

967. As to the evidence concerning the general position of the CPK on communist ideology *vis-à-vis* enemies, the Supreme Court Chamber has found it plausible that the cited Party statements could be regarded as paving the way for a policy contemplating the execution of enemies. Nevertheless, the Trial Chamber did not explain how abstract and general statements about communism and class struggle allowed it to reasonably infer that there was a policy to kill all Khmer Republic soldiers and officials.

968. Turning to the CPK instructions to kill Khmer Republic soldiers and officials, the Supreme Court Chamber recalls that the evidence consists of the interview record of KHOEM Sâmhuon, IENG Sary's interview with Stephen HEDER, the DK "Decision", a number of contemporaneous DK documents and the submission of the

[2527] *See above*, paras 914, 955-956, 958.
[2528] IENG Sary Interview by Elizabeth BECKER, E3/94, dated 22 July 1981, p. 5, ERN (En) 00342504 (stating that RUOS Nhim and SAO Phim had been the first to divide people into categories and that later on, "this division was accepted by the leadership" only in 1976, when they decided to categorise, including a group of "people who supported Lon Nol").

International Commission of Jurists. Each piece of evidence, however, is marked by weaknesses that significantly diminish its probative value. Firstly, no account was provided by a live witness. Secondly, IENG Sary's statement, the submission of the International Commission of Jurists and, as regards executions, KHOEM Sâmhuon's statement all amount to hearsay evidence. Thirdly, no account is indicative of a generalised policy. Instead, they refer to specific incidents, with the DK "Decision", in particular, militating against the existence of any generalised policy as of 4 June 1975. Fourthly, the DK documents post-date the events at Tuol Po Chrey; the two that are closest in time to Tuol Po Chrey, dating to 1976, actually relate to instances where the Khmer Rouge apparently had responded to insubordination and other disruptive activities, irrespective of the class to which the alleged offenders belonged. The Supreme Court Chamber notes that post-1975 evidence of Party instructions appears to be significantly stronger, but does not find a clear connection to the time relevant to the charges. Accordingly, the evidentiary basis upon which the Trial Chamber relied to establish the existence of a policy to kill former Khmer Republic soldiers and officials is all but solid and consistent. Moreover, in places, the evidence points to a policy that was not generalised, but was rather seeking to address specific incidents of disturbance, with the offenders' social provenance being of minor or no relevance.

969. As for the evidence that NUON Chea submits to be exculpatory, PHY Phuon, a witness the Trial Chamber considered to be generally credible, attested to orders having been given, that Khmer Republic soldiers who had been captured in battle were not to be harmed; IENG Phan also confirmed the existence of such orders. The Trial Chamber failed to assess this testimony, which, while dealing with the treatment of soldiers captured in combat, could also be seen as an indication that generally there was no policy against Khmer Republic soldiers and officials. The existence of a policy to execute at the time of the events at Tuol Po Chrey is further called into question by the testimonies of CHUM Sokha, SAO Van and PECH Chim, as well as by HENG Samrin's interview. Although SAO Van seems to have dated the order not to harm former Khmer Republic soldiers to May or June 1975, his testimony does not suggest that the order replaced a previous order to kill. HENG Samrin's account is similarly indicative that, as of 20 May 1975, there was no order to kill emanating from the Party leadership.

970. In conclusion, the evidence relied upon by the Trial Chamber is weak, ambivalent, of low probative value and called into question by other evidence. The Supreme Court Chamber notes that there are several accounts on the record describing the killing of former Khmer Republic soldiers and officials. However, they overwhelmingly come from out-of-court statements, rather than live testimonies, and hence inherently have a lower probative value, in addition to being generally undetailed and vague as to the particulars of the described incidents. Another factor that weighed significantly in the Supreme Court Chamber's analysis is the Trial Chamber's marked inadequacies in the evaluation of the evidence. The Trial Chamber consistently failed to engage with fundamental issues affecting the strength of the evidence, such as the plausibility of alternative explanations concerning the usage of the term "enemy" in the course of an armed conflict, the killing of Khmer Republic soldiers in combat and, generally, evidence lending itself to equivocal interpretation, which the Trial Chamber regularly found to be inculpatory without providing sufficient explanation. The Trial Chamber further omitted to give proper consideration to the possibility that some executions, including those at Tuol Po Chrey, may have been independently ordered at the Zone level, which would have meant that they could not have been taken into consideration to establish a nationwide pattern, in particular in the absence of strong evidence of additional incidents in other parts of the territory under Khmer Rouge control. The Supreme Court Chamber observes that the evidence post-dating the events at Tuol Po Chrey appears to be generally stronger than that pre-dating them, but the Trial Chamber did not substantiate why such evidence allowed it to infer that a policy had existed at the time of the events at Tuol Po Chrey.

971. 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 policy against Khmer Republic officials, 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.

972. For the foregoing reasons, the Supreme Court Chamber finds that it was not reasonable to find established beyond reasonable doubt that a policy contemplating the execution of Khmer Republic soldiers and officials existed at the time of the events at Tuol Po Chrey. Accordingly, the common criminal purpose in respect of the events at Tuol Po Chrey has not been established and the Accused cannot be held criminally liable, based on JCE, for the crimes against humanity which the Trial Chamber found had been committed at Tuol Po Chrey.

e) Overall political context and finding that CPK adopted policy of armed struggle

973. KHIEU Samphân argues that the Trial Chamber too often neglected the political context prevailing at the time of the facts, notably the Cold War, and as a result misinterpreted the terminology that had been used at the time. KHIEU Samphân submits that this neglect to consider context resulted in the Trial Chamber interpreting aims which, in the context, "were considered both honourable and legitimate" as "evidence of intent to commit crimes", leading to the distortion of evidence.[2529] He also argues that the Trial Chamber erred when it found that the CPK had adopted a policy to resort to armed struggle as early as 1960, which was the basis for its incorrect assumption that the common purpose had been criminal.[2530] Similarly, he submits that the Trial Chamber failed to explain why it did not take into account the prevailing armed conflict, including the American bombing of Cambodia, and the *coup d'état* of LON Nol, which allowed the Trial Chamber to conclude that the Khmer Rouge movement was "intrinsically violent", which in turn was the basis for finding that the common purpose had been criminal.[2531]

974. The Co-Prosecutors submit that KHIEU Samphân's argument regarding the CPK policy to resort to armed struggle does not have the potential to invalidate the conviction or occasion a miscarriage of justice.[2532] Additionally, they aver that the

[2529] KHIEU Samphân's Appeal Brief, paras 150-151.
[2530] KHIEU Samphân's Appeal Brief, paras 153-155.
[2531] KHIEU Samphân's Appeal Brief, paras 156-158.
[2532] Co-Prosecutors' Response, para. 334.

Trial Chamber did take into account that the Khmer Rouge had been involved in an armed conflict against the Khmer Republic.[2533]

975. The Supreme Court Chamber notes that KHIEU Samphân has neither pointed to any error in the Trial Judgement, nor has he explained the impact of the purported errors on his conviction. The Supreme Court Chamber notes, in this regard, that the Trial Chamber did not suggest that the common purpose was criminal because it amounted to the implementation of a socialist revolution or sought to oust LON Nol. Rather, as addressed above,[2534] the implementation of the common purpose was criminal because it involved the commission of crimes against humanity falling under the jurisdiction of this Court. Furthermore, as pointed out by the Co-Prosecutors, the Trial Chamber addressed the historical context of the crimes at various parts of the Trial Judgement.[2535] To the extent that KHIEU Samphân's argument could be understood as suggesting that the prevailing armed conflict justified the commission of crimes, this would be without any foundation in the law.

f) Legal standard in respect of the contribution to the common purpose

976. As will be seen in more detail below, the Trial Chamber, in finding that NUON Chea and KHIEU Samphân each made a significant contribution to the implementation of the common purpose, relied, *inter alia*, on activities that were not directly connected to the commission of crimes through the population movement or targeting policies, but more generally to the implementation of a socialist revolution in Cambodia.

[2533] Co-Prosecutors' Response, para. 400.
[2534] *See above*, paras 814-817.
[2535] Trial Judgement, paras 57 (referring to the bombing campaign implemented against Cambodia by the U.S. between 1969 and 1973 and living conditions pre-17 April 1975 within Cambodia); 94 (which describes the geopolitical context with reference to the conflict between Vietnam and the U.S., and the effect of this upon Cambodia); 96 (referring to the stagnating economy in Cambodia and the further pressures with reference to the Vietnamese conflict); 121 (one effect of the American bombing was that "it had made people very angry and suspicious of outsiders"), 153-156 (which details the U.S. military's bombing campaign in Cambodia, between 1969 and 1973, which involved "several hundred thousand tonnes of bombs" being dropped, in addition to some U.S. ground troops being deployed from April until June 1970. The bombing caused the deaths of "tens of thousands" of Cambodians and caused those from rural areas to seek refuge in Phnom Penh.); 157-160 (the refugees swelled Phnom Penh's population by between 1.5-2 million people in the space of five years. Refugee interviews cite both the U.S. bombing and the rise of the Khmer Rouge as the reasons for their seeking refuge. Sanitation in refugee camps, and throughout Phnom Penh, was very poor; and food was insufficient. Once the Khmer Rouge started targeting the routes which the U.S. were using to provide food aid to the areas held by LON Nol's government, the food situation worsened considerably. At one point, there was "only a three day supply" of rice, and widespread starvation was predicted).

977. While not explicitly articulating a legal error in this regard,[2536] NUON Chea argues that the findings of the Trial Chamber in respect of his contribution "are findings that [he] substantially contributed to a socialist revolution, not that he contributed to the commission of criminal acts".[2537]

978. KHIEU Samphân submits that the Trial Chamber failed to specify how he was linked to criminal activities or to a criminal aspect of the common purpose, which the Trial Chamber recognised was not (entirely) criminal in itself.[2538] He argues that approving a Party line that is not criminal in itself cannot give rise to criminal liability, that the Trial Chamber failed to establish his requisite criminal intent, and criminal liability because KHIEU Samphân contributed to a common purpose that merely involved the commission of crimes that amounted to liability under JCE III.[2539] KHIEU Samphân argues that the Trial Chamber erred in concluding that his contribution met the required threshold to find him criminally responsible under JCE.[2540] Specifically, KHIEU Samphân submits that the Trial Chamber erred by relying on his presence at meetings and training sessions,[2541] his delivery of speeches,[2542] his role as a liaison with NORODOM Sihanouk and his diplomatic activities,[2543] other positions that he occupied throughout the DK period,[2544] and his reputation[2545] in concluding that he made a significant contribution to the JCE. KHIEU Samphân further argues that the Trial Chamber erred by relying on events that were contemporaneous to, or which post-dated, the facts at issue in Population Movement Phase One in finding that his contribution to the common purpose was significant.[2546] KHIEU Samphân also contends that the Trial Chamber erred when it

[2536] Note, in particular, that NUON Chea does not allege that, as a matter of law, the contributions identified by the Trial Chamber were insufficient to establish liability under the notion of joint criminal enterprise, but rather that this notion did not exist in 1975 under customary international law (*see* NUON Chea's Appeal Brief, para. 617). The Supreme Court Chamber has addressed (and dismissed) this argument above (*see above*, paras 770 *et seq*., 807, 810, 845).
[2537] NUON Chea's Appeal Brief, para. 616.
[2538] KHIEU Samphân's Appeal Brief, para. 231.
[2539] KHIEU Samphân's Appeal Brief, para. 231.
[2540] KHIEU Samphân's Appeal Brief, paras 292-295, 316, 599-601, 624.
[2541] KHIEU Samphân's Appeal Brief, paras 298-301, 604-607.
[2542] KHIEU Samphân's Appeal Brief, paras 306-307, 612-613.
[2543] KHIEU Samphân's Appeal Brief, paras 308-311, 618-621.
[2544] KHIEU Samphân's Appeal Brief, paras 608-609 (in respect of Population Movement Phase Two only).
[2545] KHIEU Samphân's Appeal Brief, paras 312-313, 616-617.
[2546] KHIEU Samphân's Appeal Brief, paras 402-412. *See also* KHIEU Samphân's Appeal Brief, para. 444.

concluded that his contribution before and during the events at Tuol Po Chrey was sufficient to reach the requisite threshold for joint criminal enterprise liability.[2547] Thus, NUON Chea and KHIEU Samphân both suggest that contributions directed at the implementation of a socialist revolution as opposed to the specific crimes that were committed in the course of Phases One and Two of the Population Movement and at Tuol Po Chrey cannot be the basis for a finding that they made significant contributions to a joint criminal enterprise.[2548]

979. The Co-Prosecutors respond that KHIEU Samphân confuses the correct legal standard for JCE liability by conflating the terms "significant" and "substantial" and that he fails to recognise that the Trial Chamber considered the totality of his contribution as significant, rather than the individual ways in which he contributed to the JCE.[2549]

980. The Supreme Court Chamber considers that the Trial Chamber, based on the case law of, in particular, the *ad hoc* tribunals, generally articulated the correct legal standard applicable to the participation of an accused in the implementation of the common purpose of a JCE, namely that his or her contribution must be "significant, but not necessarily indispensable".[2550] In making this assessment, the Trial Chamber considered the *totality* of NUON Chea's and KHIEU Samphân's respective activities.[2551] The Supreme Court Chamber finds that this was the correct approach, as evidenced by relevant jurisprudence, which indicates that particular contributions should not be assessed in isolation,[2552] as KHIEU Samphân appears to advocate throughout his appeal brief.[2553] The Trial Chamber also correctly considered that "[t]he significance of a contribution to the JCE is to be determined on a case-by-case basis, taking into account a variety of factors including the position of the Accused,

[2547] KHIEU Samphân's Appeal Brief, paras 441-444.
[2548] KHIEU Samphân's Appeal Brief, paras 292-316; NUON Chea's Appeal Brief, para. 616.
[2549] Co-Prosecutors' Response, para. 585.
[2550] Trial Judgement, para. 692, referring to *Duch* Trial Judgement (001-E188), para. 508; *Brđanin* Appeal Judgement (ICTY), para. 430.
[2551] Trial Judgement, paras 861-82 (NUON Chea), 961-963 (KHIEU Samphân).
[2552] *See*, *e.g.*, *Kvočka* Appeal Judgement (ICTY), para. 95; *Šainović* Appeal Judgement (ICTY), paras 920, 970-972; *Krajišnik* Appeal Judgement (ICTY), para. 217.
[2553] *See*, *e.g.*, KHIEU Samphân's Appeal Brief, paras 298-299; 300-301; 306-307; 308-309; 310-311; 312-313; 405-406; 407-408; 409-410; 604-605; 606-607; 608-609; 612-613; 616-617; 618-619; 620-621.

the level and efficiency of the participation, and any efforts to prevent crimes".[2554] The ICTY Appeals Chamber has held that such a contribution need not be *sine qua non*, "necessary or substantial" but that it must "at least be a significant contribution to the crimes for which the accused is found responsible".[2555] Further, the ICTY Appeals Chamber has found that "the law [applicable to JCE] does not foresee specific types of conduct which *per se* could not be considered a contribution to the common purpose".[2556]

981. An ICTY Trial Chamber found in the Case of *Blagojević and Jokić* that:

> There are various ways in which a person may participate in a joint criminal enterprise: (i) by personally committing the agreed crime as a principal offender; (ii) by assisting the principal offender in the commission of the agreed crime as a co-perpetrator, *i.e.* facilitating the commission of the crime with the intent to carry out the enterprise; or (iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function and with knowledge of the nature of that system and intent to further that system.[2557]

982. From a factual perspective, the ICTY Appeals Chamber has confirmed that a contribution to a JCE can take a number of forms. In the *Krajišnik* Appeal Judgement (ICTY), the Appeals Chamber confirmed[2558] that the following conduct constituted contributions to the JCE at issue:

> (a) Formulating, initiating, promoting, participating in, and/or encouraging the development and implementation of […] governmental policies intended to advance the objective of the joint criminal enterprise;
>
> (b) Participating in the establishment, support or maintenance of […] government bodies at the [national], regional, municipal, and local levels […] through which [he] could implement the objective of the joint criminal enterprise;
>
> (c) Supporting, encouraging, facilitating or participating in the dissemination of information to […] win support for and participation in achieving the objective of the joint criminal enterprise;

[2554] Trial Judgement, para. 693, referring to *Kvočka* Trial Judgement (ICTY), para. 311.
[2555] *Krajišnik* Appeal Judgement (ICTY), para. 215. *See also* *Kvočka* Appeal Judgement (ICTY), paras 97-98; *Tadić* Appeal Judgement (ICTY), para. 199.
[2556] *Krajišnik* Appeal Judgement (ICTY), para. 696.
[2557] *Blagojević and Jokić* Trial Judgement (ICTY), para. 702.
[2558] *Krajišnik* Appeal Judgement (ICTY), para. 217.

> (d) Directing, instigating, encouraging and authorizing […] [f]orces to carry out acts in order to further the objective of the joint criminal enterprise;
>
> […]
>
> (f) Engaging in, supporting or facilitating efforts directed at representatives of the international community, non-governmental organizations and the public denying or providing misleading information about crimes.[2559]

983. Thus, the contribution may take many forms. At the same time, the jurisprudence of the *ad hoc* tribunals clearly indicates that the contribution must be made to the commission of *crimes*. For instance, in the *Krajišnik* Appeal Judgement (ICTY), the Appeals Chamber found that "[w]hat matters in terms of law is that the accused lends a significant contribution to the commission of the *crimes* involved in the JCE".[2560]

984. The Supreme Court Chamber recalls that in the case at hand, the "common purpose" of the joint criminal enterprise was the implementation of a rapid socialist revolution in Cambodia, which was intrinsically linked to the criminal policies concerning population movement and targeting of Khmer Republic officials.[2561] The Supreme Court Chamber considers that, given this common purpose, 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. This is because even such activities may nevertheless further and support the commission of crimes, if only indirectly. Naturally, the further removed an activity is from the actual commission of crimes, the less weight it is likely to have in the consideration as to whether a significant contribution has indeed been made. That said, as noted above, such a determination should always be based on an assessment of activities of the accused.

985. For the above reasons, the Supreme Court Chamber considers that the Trial Chamber did not err by taking into account activities of the Accused that were, on

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[2559] *Krajišnik* Appeal Judgement (ICTY), para. 216, referring to *Krajišnik* Trial Judgement (ICTY), para. 1121.
[2560] *Krajišnik* Appeal Judgement (ICTY), para. 696 (emphasis added). *See also Brđanin* Appeal Judgement (ICTY), para. 430.
[2561] Trial Judgement, paras 804, 835; *see also above*, para. 815.

their face, not directed at the commission of specific crimes when determining that they made a significant contribution to the implementation of the common criminal purpose of the joint criminal enterprise.

g) Finding that contribution to JCE may be by way of culpable omission

986. The Trial Chamber found, with reference notably to the *Kvočka* Appeal Judgement (ICTY), that participation in a JCE may be by way of positive act or culpable omission.[2562] On appeal, KHIEU Samphân argues that the Trial Chamber thereby erred in law, as the post-World War II jurisprudence does not provide for liability by culpable omission.[2563] KHIEU Samphân's argument also covers other modes of liability in relation to which the Trial Chamber found that culpable omission could give rise to liability, notably through aiding and abetting.[2564] He submits that in light of the Trial Chamber's error, he should be acquitted in respect of all findings that are based on his purported omissions.[2565] In a footnote, he identifies certain paragraphs of the Trial Judgement as *a priori* containing such findings, noting further that the purported lack of reasoning makes it impossible to know whether and for which culpable omissions he was convicted.[2566] However, most of the paragraphs referred to do not concern KHIEU Samphân's conduct, but the evacuation of Phnom Penh and transfer of the population; only paragraph 1045 speaks of "KHIEU Samphân's acts and omissions" which substantially contributed to the crimes committed at Tuol Po Chrey. Nevertheless, it appears that the phrase "acts and omissions" is used in this paragraph in a generic sense, as there is no indication that the Trial Chamber actually relied on any omission.

987. The Supreme Court Chamber recalls that an appellant must demonstrate not only that the Trial Chamber made a legal error, but also how that error invalidated the judgement.[2567] Given that KHIEU Samphân has failed to substantiate how the

[2562] Trial Judgement, para. 693, referring to *Kvočka* Appeal Judgement (ICTY), paras 187, 421, 556. The Trial Chamber also referred to other cases before the ICTY and ICTR (*Blaškić* Appeal Judgement (ICTY), para. 663; *Galić* Appeal Judgement (ICTY), paras 168, 175; *Ntagerura* Appeal Judgement (ICTY), para. 334).
[2563] KHIEU Samphân's Appeal Brief, paras 93-98.
[2564] *See* Trial Judgement, paras 700 and 706, respectively.
[2565] KHIEU Samphân's Appeal Brief, para. 98.
[2566] KHIEU Samphân's Appeal Brief, fn. 212, referring to Trial Judgement, paras 952, 788, 794, 805, 999, 1025-1026, 1014, 1031, 1045, 1034, and 1048.
[2567] *See above*, para. 84.

purported error invalidates the judgement, the Supreme Court Chamber will not consider his arguments any further and dismisses them *in limine.*

h) Contribution of NUON Chea to the implementation of the common purpose

988. Regarding NUON Chea's contribution to the implementation of the common purpose, the Trial Chamber found that he "was not only involved in the initial development of DK policies but also actively involved throughout the period relevant to Case 002/01 in their continuing implementation".[2568] The Trial Chamber distinguished two types of contribution by NUON Chea, notably: (i) his involvement in the planning of the common purpose;[2569] and (ii) his role in disseminating and implementing the common purpose through propaganda, education and public training.[2570]

989. In respect of the former, the Trial Chamber noted that, since the beginning of the 1960s, NUON Chea had been involved in formulating CPK policy regarding revolutionary violence and armed struggle as well as the decision to launch an armed revolution.[2571] The Trial Chamber recalled that he had participated in two meetings during which the decision to evacuate Phnom Penh had been taken and that he had travelled to Vietnam to inform the Vietnamese leadership of the decision to attack Phnom Penh and to ask for weapons.[2572] The Trial Chamber also recalled that NUON Chea participated in a meeting in May 1975, at which the plan to implement collectivisation had been discussed, which "effectively precluded any possibility that, with few exceptions, those removed from Phnom Penh would return to their homes. NUON Chea did not oppose the plan".[2573]

990. The Trial Chamber further found that, in August 1975, following a visit to the Northwest Zone, the Standing Committee had decided that 400,000 to 500,000 people should be transferred to that Zone.[2574] The Trial Chamber considered a report on the Standing Committee's visit to the Northwest Zone, which, in the view of the Trial

[2568] Trial Judgement, para. 861.
[2569] *See* Trial Judgement, paras 863-869.
[2570] *See* Trial Judgement, paras 870-874.
[2571] Trial Judgement, paras 863-864.
[2572] Trial Judgement, para. 865.
[2573] Trial Judgement, para. 866.
[2574] Trial Judgement, para. 867.

Chamber, illustrates the Standing Committee's views on the matter; the Trial Chamber was satisfied that NUON Chea had shared these views, even though he might not have had participated in the visit to the Northwest Zone.[2575] The Trial Chamber also noted a policy document of September 1975, which outlined the plan to move a large number of people to other Zones, while also touching on policies that fell into NUON Chea's portfolio within the Standing Committee.[2576] The Trial Chamber found that the plan to move people subsequently had been approved at the First Nationwide Economics Congress and mentioned in the October/November 1975 issue of the *Revolutionary Flag* and that "NUON Chea was aware of and supported the planned population movements affecting more than half a million people".[2577]

991. Based on the foregoing, the Trial Chamber was satisfied that "[t]hrough his contributions at Party Congresses and other meetings with other senior CPK leaders, […] NUON Chea not only shared support for the common plan, but played a key role in formulating its content".[2578]

992. In respect of NUON Chea's role in disseminating and implementing the common purpose through propaganda, education and public training, the Trial Chamber recalled that "both in the years preceding the evacuation of Phnom Penh and during the subsequent DK regime, NUON Chea focussed actively on propaganda and training Khmer Rouge cadres in the countryside, advocating the Party's revolutionary and economic policies, the formation of cooperatives and vigilance against enemies" and that he had promoted the Party line at various meetings and training and study sessions.[2579] Having recalled his involvement in training sessions over a period of five days in May 1975,[2580] in the publication of the *Revolutionary Flag* (of which, according to the Trial Chamber, he had been one of the principal authors),[2581] and further developments regarding the policy of "class struggle" within the CPK,[2582] the Trial Chamber found that "through his role in the propaganda campaign (including his instrumental role in issuing the *Revolutionary Flag*) and training of cadres both before

[2575] Trial Judgement, para. 867.
[2576] Trial Judgement, para. 868.
[2577] Trial Judgement, para. 868.
[2578] Trial Judgement, para. 869.
[2579] Trial Judgement, para. 870.
[2580] Trial Judgement, para. 871.
[2581] Trial Judgement, para. 264.
[2582] Trial Judgement, paras 871-873.

and after April 1975, NUON Chea contributed substantially to the dissemination and implementation of the common purpose".[2583]

993. NUON Chea argues that the Trial Chamber erred in attributing roles within the CPK to him that were not within the remit of his ordinary functions.[2584] In particular, NUON Chea argues that, by ascribing him a role in military policy and its implementation, the Trial Chamber erred, mischaracterising his testimony and reaching a finding inconsistent with other findings in the Trial Judgement.[2585] NUON Chea also submits that the Trial Chamber erred in fact by finding that he had been responsible for "the discipline of cadres and other internal security matters",[2586] arguing that the Trial Chamber mischaracterised the evidence of two witnesses on which it relied,[2587] and in relying on the testimony of Duch in reaching this conclusion.[2588] In addition, NUON Chea argues that the Trial Chamber erred in finding that he had had oversight of all CPK activities and that he had "exercised the ultimate decision-making power of the Party" upon which it relied to conclude that "NUON Chea held and exercised the power to make and implement CPK policies and decisions".[2589] In this regard, NUON Chea submits that the Trial Chamber mischaracterised the expert testimony upon which it relied in support of this finding.[2590] NUON Chea further submits that the Trial Chamber erred when it found that NUON Chea was known as "Brother Number Two" and that he had been Acting Prime Minister of Democratic Kampuchea.[2591] Furthermore, NUON Chea argues that Trial Chamber relied on facts that were outside the scope of Closing Order (D427), notably on two meetings in June 1974 and early April 1975, to establish his responsibility for executions at Tuol Po Chrey.[2592] NUON Chea argues that, because these two meetings had not been mentioned in the Closing Order in the context of the

[2583] Trial Judgement, para. 874.
[2584] NUON Chea's Appeal Brief, para. 250.
[2585] NUON Chea's Appeal Brief, paras 251-253.
[2586] NUON Chea's Appeal Brief, para. 254, referring to Trial Judgement, para. 329.
[2587] NUON Chea's Appeal Brief, paras 255-258.
[2588] NUON Chea's Appeal Brief, para. 259.
[2589] NUON Chea's Appeal Brief, para. 260, referring to Trial Judgement, para. 348. *See also* NUON Chea's Appeal Brief, para. 261.
[2590] NUON Chea's Appeal Brief, paras 262-265.
[2591] NUON Chea's Appeal Brief, paras 266-267.
[2592] NUON Chea's Appeal Brief, para. 630.

events at Tuol Po Chrey, his right to be informed in detail of the charges against him was violated, which invalidates any findings based on those meetings.[2593]

994. The Co-Prosecutors respond that NUON Chea's arguments concerning his role in military policy and its implementation fail to meet the standard of appellate review for errors of fact.[2594] The Co-Prosecutors submit that the Trial Chamber's finding in this regard is supported by ample, mutually reinforcing evidence, which the Trial Chamber fairly characterised in the Trial Judgement.[2595] Regarding the function ascribed to NUON Chea by the Trial Chamber in respect of disciplinary and other internal security matters, which NUON Chea contests, the Co-Prosecutors respond that the Trial Chamber was reasonably relying on extensive witness testimony and documentary evidence.[2596] Additionally, the Co-Prosecutors submit that the Trial Chamber reasonably characterised NUON Chea as the ultimate decision-maker, together with Pol Pot, arguing that NUON Chea mischaracterises the evidence cited in support of his argument to the contrary.[2597] Finally in this regard, the Co-Prosecutors submit that NUON Chea does not give any compelling reason why the Supreme Court Chamber should review the Trial Chamber's findings that a number of witnesses confirmed that NUON Chea was also known by the *alias* "Brother Number Two" and that he had been Acting Prime Minister of Democratic Kampuchea in Pol Pot's absence.[2598] The Co-Prosecutors submit that the evidence in support of these findings is plentiful.[2599] As to the argument regarding the Trial Chamber's reliance on NUON Chea's participation in two meetings that had not been mentioned in the Closing Order (D427) in the context of the events at Tuol Po Chrey, the Co-Prosecutors argue that NUON Chea's argument should be summarily dismissed as it lacks substantiation and that, in addition, while the material facts of the charge have to be set out, the evidence does not.[2600]

995. The Supreme Court Chamber rejects NUON Chea's argument that the Trial Chamber erred in fact in finding that he was commonly known as "Brother Number

[2593] NUON Chea's Appeal Brief, paras 636-638.
[2594] Co-Prosecutors' Response, para. 402.
[2595] Co-Prosecutors' Response, paras 403-410.
[2596] Co-Prosecutors' Response, paras 411-417.
[2597] Co-Prosecutors' Response, paras 418-421.
[2598] Co-Prosecutors' Response, para. 422.
[2599] Co-Prosecutors' Response, para. 422.
[2600] Co-Prosecutors' Response, para. 116.

Two" and had been Acting Prime Minister of DK in the absence of Pol Pot.[2601] NUON Chea concedes in his appeal brief that the former alleged error did not cause a miscarriage of justice and that neither error had an effect on his individual criminal responsibility.[2602] Accordingly, even if they were to be established, the alleged errors could not justify appellate intervention and they are therefore not discussed any further.[2603]

996. In addition, the Supreme Court Chamber is unconvinced by NUON Chea's argument that the Trial Chamber erred in its finding that he "had considerable influence on DK military policy and its implementation".[2604] Contrary to what NUON Chea argues,[2605] the Trial Chamber explicitly took into consideration its earlier finding[2606] that it was not established beyond reasonable doubt that NUON Chea had been a member of the Military Committee.[2607] As NUON Chea concedes,[2608] the Trial Chamber relied on evidence that he had attended and actively participated in a series of Standing Committee meetings in 1976 during which military matters had been discussed.[2609] The remainder of the arguments that NUON Chea raises in this regard merely suggest alternative interpretations of the evidence upon which the Trial Chamber relied. The Supreme Court Chamber considers that NUON Chea has failed to demonstrate that no reasonable trier of fact could have found that he "had considerable influence on DK military policy and its implementation", based on the available evidence. The Supreme Court Chamber therefore dismisses this argument.

997. Turning to the argument that the Trial Chamber erred in fact in finding that NUON Chea's formal responsibility extended to discipline and other internal security matters,[2610] the Supreme Court Chamber accepts NUON Chea's argument that the testimony of SALOTH Ban does not support the entire finding reached by the Trial

[2601] NUON Chea's Appeal Brief, paras 266-267.
[2602] NUON Chea's Appeal Brief, paras 266-267.
[2603] *See above*, para. 84.
[2604] NUON Chea's Appeal Brief, para. 251, referring to Trial Judgement, para. 341.
[2605] NUON Chea's Appeal Brief, para. 253.
[2606] Trial Judgement, para. 333.
[2607] Trial Judgement, para. 341 ("[a]ctual membership of the Military Committee was of little significance due to NUON Chea's very senior positions within the Party").
[2608] NUON Chea's Appeal Brief, para. 252.
[2609] Trial Judgement, fns 1020-1021, 1024-1025.
[2610] Trial Judgement, para. 329.

Chamber in this respect.[2611] Rather, as contended by NUON Chea, SALOTH Ban confirmed that NUON Chea had been responsible for certain "appointments", but did not specify over which appointments he had control; nor did the witness testify that NUON Chea was responsible for the discipline of cadres.[2612] Turning to NORNG Sophang's testimony, upon which the Trial Chamber also relied, it is correct that NORNG Sophang testified that, at the time, he had not known why telegrams concerning violations of moral codes and the internal security situation had been sent to NUON Chea, but that his interpretation had been that this was because NUON Chea "was in charge of social affairs and culture".[2613] This statement is consistent with his earlier testimony that NUON Chea was the person in charge of cultural affairs, which included "moral issues among people in society".[2614] Finally in this regard, the Supreme Court Chamber recalls that it has found above that Duch's testimony should be treated with caution.[2615] As such, the evidence before the Trial Chamber appears to be insufficient to support a finding that NUON Chea had formal responsibility for the discipline of Party members. Nevertheless, it is clear from the evidence before the Trial Chamber, that NUON Chea did have a role to play in that regard, although the precise contours of his involvement are not known.

998. As to the argument that the Trial Chamber erred in finding that NUON Chea had overseen all Party activities and exercised the ultimate decision-making authority of the Party, including in the administration of DK and military affairs,[2616] the Supreme Court Chamber notes, first, that the paragraph that contains this finding is part of the conclusion on NUON Chea's role. Accordingly, it is not only based on the evidence cited specifically in that paragraph, but on all the evidence relied upon in this section. Accordingly, it is factually incorrect to state, as NUON Chea does, that the "the only evidence comprises four excerpts from the testimony of experts David

[2611] NUON Chea's Appeal Brief, para. 255, referring to Trial Judgement, para. 328 ("SALOTH Ban […] testified that NUON Chea was in charge of the appointment and discipline of Party members".
[2612] T. 23 April 2012 (SALOTH Ban), E1/66.1, p. 69-70 ("Mr. Nuon Chea was responsible for the appointments, but I did not know what kind of appointments that was"); T. 30 April 2012 (SALOTH Ban), E1/70.1, p. 74 ("I don't think I understand their exact roles, whether it is politics or organizational roles, but I just learned from Pang that Pol Pot was tasked with managing the politics, when Nuon Chea was responsible for, rather, appointment").
[2613] NUON Chea's Appeal Brief, para. 256, referring to T. 3 September 2012 (NORNG Sophang), E1/120.1, p. 28. *See also* NUON Chea's Appeal Brief, paras 257-258.
[2614] T. 29 August 2012 (NORNG Sophang), E1/117.1, p. 50.
[2615] *See above*, para. 349.
[2616] NUON Chea's Appeal Brief, para. 260, referring to Trial Judgement, para. 348.

Chandler and Philip Short".[2617] As the remaining arguments put forward by NUON Chea in this regard merely offer alternative interpretations of the evidence, the Supreme Court Chamber dismisses these arguments.

999. As to NUON Chea's arguments regarding the Trial Chamber's reliance on the June 1974 and the early April 1975 meetings to establish his responsibility for the events at Tuol Po Chrey,[2618] the Supreme Court Chamber recalls that it has found that the existence of a targeting policy at the time of the events at Tuol Po Chrey has not been reasonably established. Accordingly, these crimes cannot be imputed on NUON Chea and the question whether the Trial Chamber erred by relying on the two meetings is therefore moot.

1000. In sum, while the Supreme Court Chamber has found that the evidence was insufficient to establish that NUON Chea had had formal responsibility for party discipline, it still supports the conclusion that NUON Chea had a role in this regard. Accordingly, this does not affect the Trial Chamber's later conclusion that NUON Chea "participated in the common purpose of the joint criminal enterprise, making a significant contribution".[2619] The Trial Chamber identified a number of contributions made to the common purpose by NUON Chea,[2620] the totality of which the Trial Chamber found to be "significant". NUON Chea has not demonstrated that the Trial Chamber erred in this regard. These grounds of appeal raised by NUON Chea are therefore dismissed.

i) Contribution of KHIEU Samphân to the implementation of the common purpose

1001. The Trial Chamber found that KHIEU Samphân had made a significant contribution to the implementation of the common purpose by: (i) attending meetings of the Standing and Central Committees and of Party Congresses, "where the common purpose and policies were planned and developed"; (ii) attending meetings and sessions, where lower cadres of the Khmer Rouge were informed about the common purpose and policies; (iii) participating in economic matters within the DK

[2617] NUON Chea's Appeal Brief, para. 262.
[2618] NUON Chea's Appeal Brief, paras 630, 636-638.
[2619] Trial Judgement, para. 862.
[2620] Trial Judgement, paras 863-874.

regime, notably in the fields of trade, export/import and commerce; (iv) making public statements in support of the common purpose and policies and encouraging Khmer Rouge cadres and the population at large to adhere to the Party line; and (v) liaising with NORODOM Sihanouk and acting as a diplomat, with a view to garnering external support for DK.[2621]

1002. KHIEU Samphân alleges a series of factual errors in the Trial Chamber's findings, which he contends underpin the Trial Chamber's conclusion.[2622] In particular, he challenges the Trial Chamber's findings regarding his contact with senior CPK leaders before he joined the Party;[2623] its failure to consider his desire to reform gradually[2624] and his defiance of NORODOM Sihanouk;[2625] its characterisation of his role as liaison and as diplomat between 1970 and 1975;[2626] its reliance on speeches made and propaganda sessions carried out before 17 April 1975;[2627] and its conclusion that he had collaborated with, and had enjoyed the trust of, the CPK leaders.[2628] In addition, KHIEU Samphân challenges the Trial Chamber's conclusions regarding his attendance and involvement in a Central Committee meeting held in June 1974[2629] and at a meeting held at the B-5 command post in early April 1975.[2630] KHIEU Samphân also contests the findings of the Trial Chamber in respect of his functions and activities after 17 April 1975, particularly his diplomatic activities,[2631] his delivery of political training sessions,[2632] and his speeches and public statements.[2633] KHIEU Samphân further argues that the Trial Chamber erred in its findings as regards his involvement in CPK decision-making processes, the trust and influence he had, and the information to which he had access,[2634] his role in Office 870 and responsibility for economic affairs,[2635] his participation in developing the

[2621] Trial Judgement, paras 960-992.
[2622] KHIEU Samphân's Appeal Brief, paras 237-285, 522-587.
[2623] KHIEU Samphân's Appeal Brief, paras 237-245.
[2624] KHIEU Samphân's Appeal Brief, paras 246-248.
[2625] KHIEU Samphân's Appeal Brief, paras 249-252.
[2626] KHIEU Samphân's Appeal Brief, paras 253-256.
[2627] KHIEU Samphân's Appeal Brief, paras 257-263.
[2628] KHIEU Samphân's Appeal Brief, paras 264-269.
[2629] KHIEU Samphân's Appeal Brief, paras 270-278.
[2630] KHIEU Samphân's Appeal Brief, paras 279-285.
[2631] KHIEU Samphân's Appeal Brief, paras 522-528.
[2632] KHIEU Samphân's Appeal Brief, paras 532-535.
[2633] KHIEU Samphân's Appeal Brief, paras 536-539.
[2634] KHIEU Samphân's Appeal Brief, paras 540-550.
[2635] KHIEU Samphân's Appeal Brief, paras 551-559.

CPK's plans for 1976 and 1977,[2636] the timing of his appointment as a full-rights member of the Central Committee[2637] and his functions as President of the State Presidium.[2638]

1003. The Co-Prosecutors respond that KHIEU Samphân fails to demonstrate how the alleged errors meet the required standard for appellate review, instead providing alternative interpretations of isolated pieces of evidence, merely disagreeing with the conclusions of the Trial Chamber, or repeating arguments already put forward at trial.[2639] The Co-Prosecutors submit that KHIEU Samphân fails to show that the Trial Chamber erred in its assessment of his functions from 1970 to 1975,[2640] his involvement in the decision-making of the Central Committee,[2641] and his role at the time of the facts during Population Movement Phases One and Two and at Tuol Po Chrey.[2642] Additionally, the Co-Prosecutors respond that the Trial Chamber was correct in finding that participation by KHIEU Samphân at meetings,[2643] indoctrination sessions, speeches and propaganda constituted a significant contribution to the implementation of the common purpose.[2644] Finally, the Co-Prosecutors contest KHIEU Samphân's arguments concerning his reputation and official titles, role as a liaison with NORODOM Sihanouk, diplomatic functions and official roles.[2645]

(1) KHIEU Samphân's participation in policy meetings to plan the common purpose

1004. The Trial Chamber determined that, throughout the revolutionary and DK eras, KHIEU Samphân had attended and, in some cases, actively participated in several meetings of the Central and Standing Committees, as well as Party congresses, at which the common purpose to implement rapid socialist revolution, and the policies deemed necessary to achieve it, had been planned and decided upon.[2646] It was

[2636] KHIEU Samphân's Appeal Brief, paras 560-570.
[2637] KHIEU Samphân's Appeal Brief, paras 571-572.
[2638] KHIEU Samphân's Appeal Brief, paras 573-587.
[2639] Co-Prosecutors' Response, para. 423.
[2640] Co-Prosecutors' Response, paras 424-441.
[2641] Co-Prosecutors' Response, paras 442-458.
[2642] Co-Prosecutors' Response, paras 459-481.
[2643] Co-Prosecutors' Response, paras 590-592.
[2644] Co-Prosecutors' Response, paras 602-604.
[2645] Co-Prosecutors' Response, paras 610-612.
[2646] Trial Judgement, paras 964-971.

satisfied that, "by 1969 when he joined the CPK, KHIEU Samphân was well aware of the common purpose […], as well as its development […], and that he assented to it".[2647] It further found that, in June 1974, KHIEU Samphân had participated in a meeting of CPK leaders at which the decision to evacuate Phnom Penh had been made, and that he had attended a meeting in early April 1975 at which the decision to evacuate Phnom Penh had been affirmed.[2648] In addition, the Trial Chamber found that documents from 1975 and 1976 show that KHIEU Samphân had participated in the development of economic plans for 1976 and 1977 to, among other things, increase agricultural production, strategically allocate labour resources, and divide people into categories.[2649] The Trial Chamber thus concluded that KHIEU Samphân "not only shared the common purpose which resulted in and/or involved policies to evacuate urban areas, move people between rural areas and target Khmer Republic officials, but that he also played a key role in formulating the content of the common purpose and policies".[2650]

1005. Turning first to KHIEU Samphân's challenges[2651] to the factual findings underpinning the Trial Chamber's conclusion that KHIEU Samphân was aware of the common purpose by 1969,[2652] the Supreme Court Chamber recalls that the common purpose of implementing a rapid socialist revolution (as relevant to Case 002/01) was criminal because it was intrinsically linked to the policy of population movement.[2653] The Trial Chamber noted that population movements had been carried out from 1970 onwards.[2654] It follows that any activities of KHIEU Samphân relating to the period *before* 1970 are evidently irrelevant to determining whether he made a "significant contribution" to the implementation of the common purpose giving rise to criminal liability under the notion of joint criminal enterprise. Indeed, while the Trial Chamber referred to the pre-1970 period in the section of the Trial Judgement discussing his

[2647] Trial Judgement, para. 965 (footnote(s) omitted).
[2648] Trial Judgement, para. 966, referring to paras 133-138 of the Trial Judgement regarding the June 1974 meeting and to paras 144-149 regarding the meeting in April 1975.
[2649] Trial Judgement, para. 968, 971.
[2650] Trial Judgement, para. 972.
[2651] KHIEU Samphân's Appeal Brief, paras 237-248.
[2652] Trial Judgement, para. 965.
[2653] *See above*, para. 815. The Supreme Court Chamber recalls in this regard that it has found that the Trial Chamber's finding that there existed a targeting policy was unreasonable; accordingly, the targeting policy does not have to be considered any further also in the context of the present grounds of appeal.
[2654] Trial Judgement, para. 105.

contribution, the Supreme Court Chamber understands these references to be intended to contextualise his involvement, rather than to provide a basis for the finding that he had made a significant contribution to the implementation of the common purpose that amounted to or involved the commission of the crimes that form the subject of Case 002/01. Accordingly, the Supreme Court Chamber sees no reason to consider KHIEU Samphân's arguments in that regard any further.

1006. KHIEU Samphân further contends that the Trial Chamber made several errors in finding that he had participated in the development of the 1976 and 1977 economic plans, including by relying on the September 1975 policy document and by concluding that he had known of and attended meetings in 1974 and 1975 at which the plans had been developed and discussed.[2655] The Supreme Court Chamber recalls that KHIEU Samphân elaborates these arguments elsewhere in his appeal brief, where he challenges the Trial Chamber's findings regarding the existence of a policy of population movement between rural areas.[2656] The Supreme Court Chamber has rejected these arguments for the reasons explained fully above.[2657]

1007. The Supreme Court Chamber will now turn to KHIEU Samphân's argument that the Trial Chamber erred in finding that, starting in 1973, the CPK Central Committee collectively, over a series of meetings, in which he contends he had not actively participated,[2658] had decided to forcibly evacuate the inhabitants of Phnom Penh.[2659] The Supreme Court Chamber observes that many of KHIEU Samphân's submissions in this respect allude to the Trial Chamber's purported failure to provide reasoning.[2660] The Supreme Court Chamber recalls that the Trial Chamber was obliged to give a reasoned opinion in relation to the Trial Judgement in its entirety, rather than in respect of each submission made at trial.[2661] The Supreme Court Chamber considers it reasonable to assume that the Trial Chamber took each submission into consideration when evaluating the totality of the evidence and

[2655] KHIEU Samphân's Appeal Brief, paras 560-570.
[2656] KHIEU Samphân's Appeal Brief, paras 451-469.
[2657] *See above*, para. 830 *et seq*.
[2658] KHIEU Samphân's Appeal Brief, paras 270-285. *See also* KHIEU Samphân's Appeal Brief, para. 565.
[2659] Trial Judgement, para. 132.
[2660] KHIEU Samphân's Appeal Brief, paras 271, 274, 279, 284-285.
[2661] *See* *Renzaho* Appeal Judgement (ICTR), para. 405; *Ntabakuze* Appeal Judgement (ICTR), para. 161; *Kvočka* Appeal Judgement (ICTY), para. 23; *Limaj* Appeal Judgement (ICTY), para. 81; *Gatete* Appeal Judgement (ICTR), para. 65.

arguments before it.[2662] Accordingly, KHIEU Samphân's arguments regarding the purported failure to provide reasons is rejected. The Supreme Court Chamber will now address his arguments in relation to the substance of the Trial Chamber's findings as to his participation in two meetings.

(a) CPK Meeting in June 1974

1008. In challenging the Trial Chamber's finding that the decision to evacuate Phnom Penh had been made at a meeting in June 1974, KHIEU Samphân refers to evidence by David CHANDLER and Pol Pot that the decision to evacuate Phnom Penh was made in February 1975 and argues that the Trial Chamber was wrong to not explain why the decision could not have been made at that time, alleging that the Trial Chamber instead "prefer[red] the theory that implicates the Appellant".[2663] The Supreme Court Chamber considers that KHIEU Samphân's argument is based on a distortion of the Trial Chamber's findings. The Trial Chamber reviewed the evidence concerning a February 1975 meeting, stating that "[t]here was evidence to suggest that the evacuation of Phnom Penh was again discussed within the CPK in February 1975", also noting in this context NUON Chea's testimony that "the decision to evacuate was discussed at more than one meeting".[2664] The Chamber did not make a specific finding on the exact date of the evacuation decision. Rather, it found that the Central Committee had decided collectively to forcibly evacuate the city "over a series of meetings starting in 1973", though it noted that "the Chamber was only presented with detailed evidence of meetings starting in June 1974".[2665] Accordingly, the Supreme Court Chamber considers that the evidence of a February 1975 discussion of the decision to evacuate Phnom Penh is not at odds with the Trial Chamber's overall finding that the decision was made "over a series of meetings starting in 1973".[2666]

1009. Turning to KHIEU Samphân's submission that the Trial Chamber committed an error of fact when it found that he had attended a Central Committee meeting in

[2662] *See* *Brđanin* Appeal Judgement (ICTY), para. 11; *Uwinkindi* Appeal Decision on Referral (ICTR), para. 32.
[2663] KHIEU Samphân's Appeal Brief, para. 271.
[2664] Trial Judgement, para. 143.
[2665] Trial Judgement, fn. 376.
[2666] Trial Judgement, para. 132.

June 1974, at which the attendees had endorsed the plan to evacuate of Phnom Penh,[2667] the Supreme Court Chamber notes that the Trial Chamber explicitly acknowledged the conflicting accounts of NUON Chea and witness PHY Phuon, who had been a guard of the meeting, as to KHIEU Samphân's attendance.[2668] The Trial Chamber turned to documentary sources and the live testimony of SUONG Sikoeun to piece together KHIEU Samphân's travel itinerary from Laos to Cambodia after the first week of June 1974.[2669] The Trial Chamber stated that it "consider[ed] it very likely that the June 1974 meeting was scheduled to enable KHIEU Samphan and IENG Sary to attend and report to the members of the CPK Central Committee on the highly successful meetings with senior Chinese, Vietnamese and Laotian leaders".[2670] However, the Trial Chamber did not explain why it rejected the detailed, live testimony of NUON Chea, who testified that KHIEU Samphân and IENG Sary (who, according to the Trial Chamber, had been travelling with KHIEU Samphân)[2671] had not attended this meeting,[2672] while PHY Phuon only briefly stated that Pol Pot, NUON Chea and KHIEU Samphân had been at the June 1974 meeting.[2673] In this context, it must also be noted that the Trial Chamber partly misrepresented PHY Phuon's testimony when stating that "[a]ccording to PHY Phuon, KHIEU Samphan was at the June 1974 meeting in Meak and agreed with the plan to evacuate the city"[2674] – as far as KHIEU Samphân's approval of the decision to evacuate is concerned, PHY Phuon was, in fact, referring to his approval at the April 1975 meeting.[2675] In sum, the Supreme Court Chamber considers that it was unreasonable for the Trial Chamber to conclude that KHIEU Samphân had attended the June 1974 meeting: the evidence that supported its finding – namely the testimony of PHY

[2667] KHIEU Samphân's Appeal Brief, paras 272-278. *See also* KHIEU Samphân's Appeal Brief, para. 565.
[2668] Trial Judgement, para. 135 ("There were conflicting accounts as to whether KHIEU Samphan attended the meeting at which the decision to evacuate Phnom Penh was made. KHIEU Samphan asserts that he did not participate and that he was not in Cambodia at the time of the meeting. NUON Chea supports this rendition of events, stating that KHIEU Samphan was not present at the meeting and therefore he did not know of the decisions taken. According to PHY Phuon, however, KHIEU Samphan was at the June 1974 meeting in Meak and agreed with the plan to evacuate the city") (footnote(s) omitted).
[2669] Trial Judgement, paras 136-137.
[2670] Trial Judgement, para. 138.
[2671] Trial Judgement, paras 136-137.
[2672] T. 14 December 2011 (NUON Chea), E1/22.1, pp. 2-8.
[2673] T. 26 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/97.1, p. 44.
[2674] Trial Judgement, para. 135.
[2675] T. 26 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/97.1, p. 16.

Phuon – was partly misrepresented and less detailed than that of NUON Chea, who had directly participated in the meeting and unequivocally stated that KHIEU Samphân had not attended it, while the Trial Chamber's consideration that it was likely that the meeting had been scheduled to allow KHIEU Samphân and IENG Sary to attend finds no basis in the evidence.

(b) CPK Meeting of April 1975

1010. The Trial Chamber found that, in early April 1975, "senior leaders of the CPK gathered at B-5, the command centre for the attack on Phnom Penh […], to discuss the forcible transfer of the inhabitants of Phnom Penh".[2676] The Trial Chamber found that, *inter alia*, KHIEU Samphân had attended this meeting and noted that "[a]ccording to PHY Phuon, both NUON Chea and KHIEU Samphan supported the plan".[2677] KHIEU Samphân argues that the Trial Chamber's findings were erroneous as PHY Phuon was the only person who mentioned this meeting and that the Trial Chamber failed to address KHIEU Samphân's arguments as to the contradictions and unreliability of his testimony.[2678]

1011. The Trial Chamber's finding on the meeting in early April 1975 on the forcible transfer of the population of Phnom Penh rested almost exclusively on testimony by PHY Phuon,[2679] although IENG Sary in an interview with Stephen HEDER also mentioned a meeting "in late March or early April 1975" at which the evacuation of Phnom Penh had been decided; IENG Sary, however, had not attended this meeting.[2680] KHIEU Samphân reiterates on appeal his arguments from his closing brief concerning PHY Phuon's evidence.[2681] The Supreme Court Chamber notes that, contrary to what KHIEU Samphân alleges in his appeal brief, the Trial Chamber specifically addressed several of these arguments and explained why it nevertheless found the witness to be credible.[2682] However, the Trial Chamber did not specifically address the argument by KHIEU Samphân that PHY Phuon's testimony in this regard

[2676] Trial Judgement, para. 144.
[2677] Trial Judgement, paras 145-146.
[2678] KHIEU Samphân's Appeal Brief, para. 279.
[2679] *See* Trial Judgement, para. 146, fns 421-425.
[2680] Trial Judgement, para. 145, fn. 420, referring to IENG Sary Interview by Stephen HEDER, E3/89, dated 17 December 1996, ERN (En) 00417603.
[2681] KHIEU Samphân's Appeal Brief, para. 279.
[2682] Conclusions finales de KHIEU Samphân (E295/6/4), paras 29-31 (not available in English); Trial Judgement, para. 145, fn. 425.

– namely that he had been able to overhear what had been said at the meeting in early April – was contradicted by the testimony of two other witnesses who had testified that body guards had been instructed to stay at a distance from the place where meetings were held.[2683] Given the detailed testimony of PHY Phuon, the Supreme Court Chamber considers that this in itself does not establish that the Trial Chamber's conclusion was unreasonable. Accordingly, KHIEU Samphân's argument is rejected.

(2) KHIEU Samphân's participation in instructional meetings to disseminate the common purpose

1012. The Trial Chamber found that KHIEU Samphân had attended and participated in instructional meetings and indoctrination sessions at which the common purpose and policies were disseminated.[2684] It determined that, during the revolution, KHIEU Samphân helped prepare FUNK propaganda materials and conducted political training sessions in the liberated Zones.[2685] It further found that his attendance and participation in such meetings and sessions had continued after 17 April 1975,[2686] and that these meetings and sessions had addressed, *inter alia*, the identification and elimination of enemies, and the justification of urban evacuations.[2687] The Trial Chamber concluded that his attendance at, and participation in, these meetings and sessions demonstrated that "he played a key role in disseminating the content of the common purpose and policies", that "his mere presence at meetings facilitated the effectiveness of the instructions delivered, by indicating to those in attendance that he had endorsed the common purpose and policies", and that "[t]his was even further emphasised when he delivered the instructions himself".[2688]

1013. KHIEU Samphân submits that the Trial Chamber erred in holding that he had conducted political training sessions before 17 April 1975, apparently claiming that he only ever participated in one session before that date.[2689] The Supreme Court Chamber notes that PHY Phuon, one of the two witnesses on whose testimony of the

[2683] Conclusions finales de KHIEU Samphân (E295/6/4), paras 30 and 31 (not available in English), referring to T. 2 May 2012 (SALOTH Ban), E1/71.1, p. 12, and T. 13 June 2012 (OEUN Tan), E1/86.1, p. 17.
[2684] Trial Judgement, paras 973-976.
[2685] Trial Judgement, para. 973, referring to Trial Judgement, para. 367.
[2686] Trial Judgement, para. 973.
[2687] Trial Judgement, paras 974-975.
[2688] Trial Judgement, para. 976.
[2689] KHIEU Samphân's Appeal Brief, para. 263.

Trial Chamber relied, spoke of several training sessions, stating that "Om Khieu Samphân was also seen teaching in the sessions".[2690] Thus, KHIEU Samphân's argument is baseless and stands to be rejected.

1014. KHIEU Samphân also contests the Trial Chamber's finding that he had disseminated the Party's policy regarding "enemies",[2691] arguing that the testimonies of the witnesses relied upon did not show that a policy to smash enemies had existed, or that he had anything to do with such a policy if one did exist.[2692] The Supreme Court Chamber has already concluded that the Trial Chamber's finding that a targeting policy existed was not reasonably established.[2693] Accordingly, KHIEU Samphân's arguments require no further discussion.

1015. Finally, KHIEU Samphân avers that the Trial Chamber's "isolated claim" that he justified the urban evacuations during indoctrination sessions is based on hearsay evidence.[2694] The Supreme Court Chamber notes that, of the four items of evidence upon which the Trial Chamber relied in support of this finding, one – a book authored by Ben KIERNAN – referred specifically to the evacuation of cities as a subject of indoctrination sessions, while the other sources relate more generally to KHIEU Samphân's involvement in such sessions.[2695] Ben KIERNAN cites as a source an interview that he conducted in 1980 with a Cambodian physicist who had returned to Cambodia from France in late 1975.[2696] However, as noted above, given that Ben KIERNAN had not testified before the Trial Chamber, the Trial Chamber should not

[2690] T. 25 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/96.1, p. 76. The Trial Chamber, at Trial Judgement, para. 367, fn. 1106, did not refer to this specific passage of PHY Phuon's testimony, but to another passage, which also does not indicate that KHIEU Samphân would have participated only in one training session before 17 April 1975.
[2691] KHIEU Samphân's Appeal Brief, para. 532, referring to Trial Judgement, para. 818, fn. 1155.
[2692] KHIEU Samphân's Appeal Brief, paras 532-534.
[2693] *See above*, para.972.
[2694] KHIEU Samphân's Appeal Brief, para. 535, referring to Trial Judgement, para. 757. *See also* Trial Judgement, para. 379, where the same finding is made.
[2695] *See* Trial Judgement, para. 757, fn. 2385.
[2696] *See* Book by B. KIERNAN: *The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975-79,* E3/1593, 1996, p. 149, fn. 238, ERN (En) 01150071. The other sources cited by the Trial Chamber are T. 7 August 2012 (ONG Thong Hoeung), E1/103.1, p. 99 (ONG Thong Hoeung stated that his wife recalled that KHIEU Samphân had said that "Cambodia is being developed and it needs the resources, and also that we had to build ourselves. And besides that, I cannot recall any other point"); ONG Thong Hoeung Interview Record, E3/97, dated 22 November 2008, p. 10, ERN (En) 00287106 (ONG Thong Hoeung stated that his wife had attended a meeting with KHIEU Samphân who had come to "talk about how […] to re-educate oneself and how to behave like a peasant"); T, 7 May 2013 (Philip SHORT), E1/190.1, pp. 17-19 (Philip SHORT discusses the concept of "mental private property" and the principle of secrecy in the context of indoctrination sessions).

have given much weight to his book, in particular when making a finding that related to KHIEU Samphân's conduct and that was directly relevant to his individual criminal liability.[2697] Nevertheless, it must be noted that that, elsewhere in the Trial Judgement, the Trial Chamber found that KHIEU Samphân had attended a ten-day meeting in May 1975 at the Silver Pagoda during which Party leaders had justified the evacuation of the cities.[2698] Thus, there was evidence before the Trial Chamber that indoctrination sessions covered the justification of the evacuation of cities, that KHIEU Samphân led some indoctrination sessions. Considered in light of the totality of the evidence on this point, including the limited weight it could attach to Ben KIERNAN's account, the Trial Chamber's finding that KHIEU Samphân had justified the evacuation at least one of the indoctrination sessions[2699] was not unreasonable.

(3) KHIEU Samphân's role as an economist in implementing the common purpose

1016. Regarding KHIEU Samphân's role in economic policies, the Trial Chamber found that he had played an important role in the DK economy and in particular in his capacity as a member of Office 870, as part of which he, *inter alia*, had distributed goods to the Zones, visited warehouses to inspect products destined for export (such as rice), received communications of international trade and had assumed responsibility for the use of credit.[2700] Recalling that the "objective of the common purpose was establishment of [a] self-reliant, modern agricultural state within ten to fifteen years, and thereafter an industrial economy", the Trial Chamber concluded that KHIEU Samphân "not only shared the common purpose, but also […] played a key role in implementing certain aspects of it".[2701]

1017. KHIEU Samphân submits that the Trial Chamber could not reasonably infer from the evidence that he had joined Office 870 in or around October 1975.[2702] The Supreme Court Chamber notes that in support of this finding, the Trial Chamber relied, *inter alia*, on the minutes of the meeting of the Standing Committee of 9 October 1975, according to which "Comrade Hêm" (KHIEU Samphân's *alias*) had

[2697] *See above*, para. 325 *et seq*.
[2698] Trial Judgement, paras 743, 974.
[2699] *Cf.* Trial Judgement, para. 757, which speaks of his justification of the evacuation at indoctrination sessions, with para. 379, which speaks of "at least one" of such session.
[2700] Trial Judgement, paras 977-978, referring to Trial Judgement, paras 390, 406-407.
[2701] Trial Judgement, para. 979.
[2702] KHIEU Samphân's Appeal Brief, paras 551-553, referring to Trial Judgement, para. 390.

been assigned responsibility for "the Front and the Royal Government and Commerce for accounting and pricing", while "Comrade Doeun" was made "Chairman, Political Office of 870",[2703] as well as KHIEU Samphân's interview record, according to which he admitted having been one of the two members of Office 870 (the other one having been "Doeun") and that his responsibility had included "preparing the price list for the cooperatives and the distribution of goods to the zones under direction from the standing committee and [he] also had to maintain relations with King Norodom Sihanouk".[2704] The Trial Chamber also cited a book authored by KHIEU Samphân, according to which he had joined Office 870 "[a]round October 1975" and described his responsibilities in a similar way.[2705] While KHIEU Samphân now claims that his statements were erroneous, as purportedly evidenced by minutes of other meetings of the Standing Committee, the Supreme Court Chamber does not see why the Trial Chamber's conclusion that he had joined Office 870 around October 1975 was been unreasonable, given the above mentioned evidence, which mutually corroborates this fact. His argument is therefore dismissed.

1018. KHIEU Samphân also contests the Trial Chamber's finding that he had supervised the Commerce Committee, claiming that his role in the DK economy had been limited, and that the Trial Chamber thus erred in finding that he had significantly contributed to the implementation of the common purpose of the JCE.[2706] He argues, in particular, that the documents upon which the Trial Chamber relied to find that he had had oversight of the Commerce Committee actually attested to only a limited function of KHIEU Samphân.[2707] In this regard, the Supreme Court Chamber notes that the Trial Chamber's conclusion that KHIEU Samphân had supervised the Commerce Committee did not rest exclusively upon these contested pieces of evidence. Rather, their conclusion rested upon all of the findings in relation to his role regarding the Commerce Committee.[2708] KHIEU Samphân merely proposes an alternative interpretation of the evidence, without demonstrating that the Trial Chamber's interpretation was unreasonable. To the extent that KHIEU Samphân

[2703] Standing Committee Meeting Minutes, E3/182, dated 9 October 1975, p. 1, ERN (En) 00183393.
[2704] KHIEU Samphân Interview Record, E3/37, dated 14 December 2007, p. 3 ERN, (En) 00156754.
[2705] Book by KHIEU Samphân: *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, E3/18, dated 7 July 2004, pp. 65-66, ERN (En) 00103755-00103756.
[2706] KHIEU Samphân's Appeal Brief, paras 554-559, referring to Trial Judgement, para. 409.
[2707] KHIEU Samphân's Appeal Brief, para. 555.
[2708] *See* Trial Judgement, para. 409.

argues that the Trial Chamber erred by relying on SAKIM Lhmuth's testimony in support of the finding that the Commerce Committee had frequently sought instructions from KHIEU Samphân, given the way the witness had been interviewed in the course of the investigation,[2709] the Supreme Court Chamber notes that the Trial Chamber cited this witness's testimony as an additional source ("*See also*") and primarily relied on six Commerce Committee reports and letters, none of which KHIEU Samphân challenges. His arguments are therefore rejected.

(4) KHIEU Samphân's public statements endorsing the common purpose

1019. The Trial Chamber found that, "[a]s the highest official in the internal resistance and thereafter in his capacity as a DK leader in particular as President of the State Presidium",[2710] KHIEU Samphân made statements in support of Khmer Rouge policies,[2711] including justifying the evacuation of Phnom Penh, which won internal and external support for the revolution.[2712] The Trial Chamber concluded that "[t]hese public statements, which whole-heartedly supported the revolution without a hint of criticism, demonstrate that KHIEU Samphan shared the common purpose and policies to evacuate urban areas, move people between rural areas and target Khmer Republic officials for arrest, execution and disappearance" and that he had used his titles and position to present himself "as a key leader and [to encourage] the Cambodian people and the Khmer Rouge cadres to continue implementing the socialist revolution".[2713]

1020. KHIEU Samphân contests the Trial Chamber's findings relating to speeches given before 17 April 1975 offering deceitful guarantees to Khmer Republic soldiers that they would be spared if they would join the resistance, arguing that there is no reason to believe such guarantees were not genuine.[2714] He further submits that the Trial Chamber distorted the evidence to conclude that, between 17 April 1975 and his appointment as President of the State Presidium, his speeches demonstrated that he had participated in the crimes charged.[2715] He contends that the only speech relevant

[2709] KHIEU Samphân's Appeal Brief, paras 556-557.
[2710] Trial Judgement, para. 980.
[2711] Trial Judgement, paras 981-986.
[2712] Trial Judgement, para. 980.
[2713] Trial Judgement, para. 987.
[2714] KHIEU Samphân's Appeal Brief, paras 257-262.
[2715] KHIEU Samphân's Appeal Brief, para. 538.

to the present case is the one he gave on 21 April 1975, congratulating Khmer Rouge units and the Cambodian people for liberating the country, and that this speech had nothing to do with the evacuation of Phnom Penh or Population Movement Phase Two.[2716] Finally in this regard, KHIEU Samphân challenges the Trial Chamber's reliance on speeches that he had given on 17 April 1976, 16-19 August 1976, 15 April 1977 and 30 December 1977 in concluding that he had contributed to the implementation of the common purpose of the JCE by endorsing the commission of crimes.[2717]

1021. In relation to KHIEU Samphân's allegations of error concerning speeches before 17 April 1975, the Supreme Court Chamber notes that he does not contest that he had delivered those speeches or their content, but he compares them to those of NORODOM Sihanouk, arguing that the Trial Chamber treated them differently, or argues that they could not have had an impact on Khmer Republic officials.[2718] These arguments are plainly inapt to demonstrate an error in the Trial Chamber's findings and are therefore rejected.

1022. As to the 21 April 1975 speech, contrary to KHIEU Samphân's suggestion,[2719] the Trial Chamber did not purport that the content thereof invoked the evacuation of Phnom Penh or Population Movement Phase Two, but rather that, in this speech, KHIEU Samphân had "praised the army for 'liberating' the country, declared that all their enemies had died in agony; and noted the sacrifice of the people in the liberated Zones, and their efforts in building dikes, canals and reservoirs",[2720] much in line with his own description of the speech's content. Moreover, the Trial Chamber relied on the 21 April 1975 speech among many others before reaching its finding on his contribution to the common purpose through his public statements;[2721] KHIEU Samphân does not substantiate his assertion that all other speeches upon which the Trial Chamber had relied were irrelevant. For the same reason, the Supreme Court Chamber dismisses the arguments raised by KHIEU Samphân in respect of the

[2716] KHIEU Samphân's Appeal Brief, paras 536-538.
[2717] KHIEU Samphân's Appeal Brief, paras 582-587.
[2718] KHIEU Samphân's Appeal Brief, paras 258-262.
[2719] KHIEU Samphân's Appeal Brief, paras 388-391.
[2720] Trial Judgement, para. 982.
[2721] Trial Judgement, paras 981-987 (recalling speeches he made between June 1973 and 30 December 1977).

speeches that he gave on 15 April 1976, 6-19 August 1976, 15 April 1977 and 30 December 1977:[2722] KHIEU Samphân does not dispute that he gave these speeches, but seeks to give them an interpretation that differs from that of the Trial Chamber, which is insufficient to establish a factual error.

1023. In contrast, in relation to the inaugural speech of 11 April 1976, KHIEU Samphân is correct when he avers[2723] that the Trial Chamber erred when it attributed this speech to him.[2724] While the Trial Chamber apparently relied on the English translation of the DK People's Representative Assembly Meeting Minutes, which identify the speaker as the "Chairman of the Presidium",[2725] the Khmer and French versions of the document refer to the "President of the Delegates" as the speaker; a reference to KHIEU Samphân is made only in regard to the nomination of the President of the State Presidium.[2726] There is no indication in the meeting minutes that KHIEU Samphân had also assumed the role of "President of the Delegates" and delivered the inaugural speech.

1024. As to KHIEU Samphân's argument that the Trial Chamber erred by relying on his speech of 15 April 1977, from which it concluded that he "acknowledged that tens of thousands [of people] had been collected at various work-sites",[2727] the Supreme Court Chamber concedes that this speech did not specifically address the issue of population movement.[2728] Nevertheless, it addresses the high number of workers at construction sites for reservoirs, canals and dams, and it may be reasonably inferred that the workers had been previously transferred to these construction sites. Thus, the Trial Chamber's reliance on this speech and the use it made thereof squarely fell in the scope of Case 002/01.[2729] KHIEU Samphân's remaining arguments in this regard[2730] merely offer alternative interpretations of the evidence on which the Trial

[2722] KHIEU Samphân's Appeal Brief, paras 582-583, 584-587.
[2723] KHIEU Samphân's Appeal Brief, para. 580.
[2724] Trial Judgement, para. 985.
[2725] The People's Representative Assembly of Kampuchea Meeting Minutes, E3/165, dated 13 April 1976, pp. 5-9, ERN (En) 00184052-00184056.
[2726] The People's Representative Assembly of Kampuchea Meeting Minutes, E3/165, dated 13 April 1976, pp. 5-9, ERN (Kh) 00053607-00053611, ERN (Fr) 00301338-00301342.
[2727] KHIEU Samphân's Appeal Brief, para. 584, referring to Trial Judgement, para. 956.
[2728] *See* KHIEU Samphân's Speech at Anniversary Meeting, E3/201, dated 19 April 1977, ERN (En) 00419514("we can see that our countryside is undergoing tremendous changes. Each construction site of a reservoir, canal or dam is manned by as many as 10,000, 20,000 or even 30,000 workers").
[2729] *See above*, paras 221, 236.
[2730] KHIEU Samphân's Appeal Brief, paras 584-585, 587.

Chamber relied and are therefore insufficient to establish that the Trial Chamber's findings were unreasonable.

(5) KHIEU Samphân's role as a diplomat in defending the common purpose

1025. The Trial Chamber noted that, within the CPK, it had fallen on KHIEU Samphân, drawing on his good reputation, to establish relations with NORODOM Sihanouk and his supporters, a role which KHIEU Samphân identified as "important, if not indispensable".[2731] It found that KHIEU Samphân had accompanied NORODOM Sihanouk on visits to the liberated Zones in 1973 and to the countryside in early 1976, including to worksites where he had praised the construction of dams and canals, and agricultural production.[2732] In addition, the Trial Chamber recalled KHIEU Samphân's role in diplomatic relations, in which position, *inter alia*, he had travelled to China and North Korea in August 1975 to negotiate the return of NORODOM Sihanouk[2733] and had justified the urban evacuations.[2734] The Trial Chamber concluded that KHIEU Samphân had thereby endorsed and continued to contribute to the common purpose and underlying policies, which had won the Khmer Rouge international support "in his efforts to justify and praise the Party's policies and actions, and to deflect attention and feared interference".[2735]

1026. KHIEU Samphân submits that the Trial Chamber inflated his role as a liaison with NORODOM Sihanouk and the importance of his diplomatic activities, ignoring evidence that he had defied NORODOM Sihanouk and that IENG Sary had been a more prominent diplomat in the international sphere and had liaised more with NORODOM Sihanouk than he had done.[2736] He contends that the Trial Chamber should therefore have concluded that his contribution to rallying support for the Khmer Rouge was relatively minimal.[2737]

[2731] Trial Judgement, para. 988.
[2732] Trial Judgement, paras 989-990.
[2733] Trial Judgement, para. 989, fn. 2980, referring to Trial Judgement, paras 374, 757-758.
[2734] Trial Judgement, para. 991.
[2735] Trial Judgement, para. 992.
[2736] KHIEU Samphân's Appeal Brief, paras 249-256.
[2737] KHIEU Samphân's Appeal Brief, paras 252, 256.

1027. To the extent that KHIEU Samphân argues that the Trial Chamber erred by failing to take into account his purported defiance of NORODOM Sihanouk,[2738] the Supreme Court Chamber dismisses the arguments *in limine* as KHIEU Samphân fails to indicate how this issue could have an impact on his criminal responsibility. With his remaining arguments, KHIEU Samphân merely offers alternative interpretations of the evidence, which do not establish that the Trial Chamber's findings were unreasonable. In addition, contrary to what KHIEU Samphân argues,[2739] the Trial Chamber made no finding regarding his criminal responsibility based on information gathered from his diplomatic activities; rather, the Trial Chamber concluded, *inter alia*, that as a diplomat he had won domestic and overseas support for the Khmer Rouge, thereby deflecting attention and possible external interference.[2740] The fact that IENG Sary might also have engaged in similar diplomatic efforts does not detract from or minimise KHIEU Samphân's own efforts. Similarly, KHIEU Samphân's suggestion that NORODOM Sihanouk had had his own political incentives for supporting the Khmer Rouge and that he had been unaware of KHIEU Samphân's task of acting as a liaison with the CPK in no way contradicts the Trial Chamber's finding that KHIEU Samphân did in fact act as a liaison and had contributed to the implementation of the common purpose by helping to secure NORODOM Sihanouk's support.[2741]

1028. As to his trips abroad, KHIEU Samphân concedes that he (and others) travelled to China and North Korea in August 1975, but submits that nothing in the evidence shows that the purpose of the trip was to negotiate the return of NORODOM Sihanouk.[2742] A review of the evidence relied upon by the Trial Chamber shows that the allegation of lack of evidence on this matter is plainly incorrect.[2743] As to the

[2738] KHIEU Samphân's Appeal Brief, paras 249-252.
[2739] KHIEU Samphân's Appeal Brief, para. 256.
[2740] *See* Trial Judgement, paras 962, 992.
[2741] KHIEU Samphân's Appeal Brief, para. 254.
[2742] KHIEU Samphân's Appeal Brief, para. 523, referring to Trial Judgement, paras 374, 758. KHIEU Samphân also submits that there is no evidence that information was exchanged regarding the commission of crimes. *See* KHIEU Samphân's Appeal Brief, para. 523. A review of the relevant portions of the Trial Judgement do not reveal any such finding in relation to his liaison with NORODOM Sihanouk, his trips abroad in this respect, or his contribution to the JCE. This argument is accordingly dismissed.
[2743] *See*, *e.g.*, Trial Judgement, para. 374, referring to U.S. State Department Telegram, Subject: KHIEU Samphân Leaves for North Korea, E3/3350, dated 19 August 1975, p. 1, ERN (En) 00413736 ("[i]n Pyongyang, KHIEU Samphan is expected to work out the terms of Sihanouk's return to Cambodia. Confidential") and para. 758, referring to French Ministry of Foreign Affairs Telegram, Subject: Visit

evidence adduced that KHIEU Samphân had accompanied NORODOM Sihanouk on visits to worksites following the latter's return to Cambodia, he submits that such evidence falls outside the scope of Case 002/01, and, in any event, is not inculpatory, nor is the fact that he praised the construction and agricultural work being done there.[2744] The Supreme Court Chamber notes that the evidence is relevant insofar as some of those who were transferred as part of Population Movement Phase Two indeed had been transferred to worksites.[2745] In sum, KHIEU Samphân's arguments stand to be rejected.

(6) KHIEU Samphân's overall contribution through authority and influence

1029. The Supreme Court Chamber also dismisses KHIEU Samphân's submissions concerning the Trial Chamber's findings as to the trust he had enjoyed from the CPK leadership, as well as his involvement in CPK decision-making processes or to the authority and influence he had.[2746] By merely suggesting that there were other possible conclusions or alternative interpretations of the evidence upon which the Trial Chamber relied,[2747] the arguments raised by KHIEU Samphân are insufficient to establish that the Trial Chamber's findings were unreasonable. The Supreme Court Chamber recalls in this regard that what has to be established is that no reasonable trier of fact could have reached the impugned factual finding, and it is therefore insufficient merely to propose alternative conclusions that the Trial Chamber might have reached.[2748] Moreover, KHIEU Samphân's assertion that his positions were merely symbolic or a pretence and therefore devoid of any authority[2749] is unpersuasive, given that the Trial Chamber specified that an accused need not hold a position of authority in order to make a significant contribution to a JCE,[2750] and also found that "his titles and positions were part of a façade", but that this served the

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to China by KHIEU Samphân and IENG Sary, E3/2721, dated 18 August 1975, p. 3, ERN (En) 00651628 ("[t]here are suggestions here that following its visit to Peking, the delegation will travel to Pyongyang to travel back with Prince Sihanouk"); U.S. State Department Telegram, Subject: KHIEU Samphân Visit to PRC, E3/619, dated 16 August 1975, p. 3, ERN (En) 00413734 ("[i]t may be, as the Peking rumor mill has it, that PENN Nouth is here to negotiate Sihanouk's relations with Samphân and the terms for a return to Cambodia before Sihanouk himself will appear").

[2744] KHIEU Samphân's Appeal Brief, paras 524-525.
[2745] *See*, *e.g.*, Trial Judgement, para. 601.
[2746] KHIEU Samphân's Appeal Brief, paras 264-269, 540-550, 573-575.
[2747] KHIEU Samphân's Appeal Brief, paras 264, 269, 541-545, 549-550.
[2748] *See above*, para. 88.
[2749] KHIEU Samphân's Appeal Brief, paras 548, 573-575.
[2750] Trial Judgement, para. 960.

important practical purpose of endorsing CPK policies and deceiving people,[2751] an issue which KHIEU Samphân does not address.

(7) Conclusion

1030. While the Supreme Court Chamber has found that the findings that KHIEU Samphân had attended the June 1974 meeting and endorsed at that meeting the plan to evacuate Phnom Penh and that he had given the inaugural speech of the DK People's Representative Assembly were insufficiently supported by evidence, the Trial Chamber's overall conclusion that KHIEU Samphân made a "significant" contribution to the common purpose of the JCE was not erroneous. The Trial Chamber found in this regard that the totality of KHIEU Samphân's conduct, which it divided into five categories ("Policy Meetings";[2752] "Instructional Meetings";[2753] "Economist";[2754] "Public Statements";[2755] "Diplomat"[2756]), amounted to a significant contribution to the common purpose. In light of the legal standard outlined above,[2757] the Supreme Court Chamber is not persuaded by KHIEU Samphân's argument that the Trial Chamber erred in finding that his contribution reached the necessary threshold to find him criminally responsible under JCE.[2758]

1031. In particular, the Supreme Court Chamber recalls that the common purpose of the JCE, as clarified above[2759] and as relevant to Case 002/01, was intrinsically linked to criminal policies. Therefore, KHIEU Samphân's arguments that his acts did not contribute to the criminal aspects of the common purpose are not persuasive.[2760] The Trial Chamber was reasonable in finding that his participation furthered the execution of the common objective or purpose – namely implementing a socialist revolution – which involved the commission of crimes pursuant to the population movement policies.[2761] The Supreme Court Chamber consequently dismisses these arguments.

[2751] Trial Judgement, para. 987.
[2752] Trial Judgement, paras 964-972.
[2753] Trial Judgement, paras 973-976.
[2754] Trial Judgement, paras 977-979.
[2755] Trial Judgement, paras 980-987.
[2756] Trial Judgement, paras 988-992.
[2757] *See above*, para. 980 *et seq*.
[2758] KHIEU Samphân's Appeal Brief, para. 292.
[2759] *See above*, para. 811-817.
[2760] KHIEU Samphân's Appeal Brief, paras 299, 307, 311, 406, 410, 605, 619.
[2761] *See above*, para. 768 *et seq*.

1032. As KHIEU Samphân has failed to demonstrate that the Trial Chamber committed an error in concluding that his acts amounted to a significant contribution to the implementation of the common purpose of the joint criminal enterprise, the Supreme Court Chamber dismisses the grounds of appeal raised in this regard.

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

1033. NUON Chea submits that the Trial Chamber erred by portraying the CPK as a "cohesive, highly structured Party in which lower level cadres loyally and consistently implemented the instructions of the 'Party leadership'".[2762] NUON Chea submits that the Trial Chamber "completely failed to substantiate its findings concerning the structure of the CPK", which amount to "little more than an elaborate organizational chart".[2763] He argues that the Party centre rarely issued instructions, that execution orders were issued at a much lower level and the conditions were not the same across the country; he submits that there was "substantial evidence that the Party was divided between equally powerful factions fighting each other in an internal armed conflict which escalated throughout the course of the DK and culminated in the Vietnamese invasion of DK".[2764]

1034. More specifically, NUON Chea argues that the Trial Chamber mischaracterised the role that Zone leaders had played, who had been members of the Central Committee or even the Standing Committee, but whom the Trial Chamber nevertheless "consistently portrayed as subordinate to the ill-defined 'Party leadership'".[2765] According to NUON Chea, this allowed the Trial Chamber to find that they had simply implemented or conveyed orders, when in reality they had helped formulate the "CPK's non-criminal common purpose pursuant to the principle of democratic centralism".[2766] In that regard, NUON Chea challenges the Trial Chamber's finding regarding the communication between the Party centre and other parts of the organisation.[2767] He also alleges that the Trial Chamber ignored evidence of the "considerable autonomy" of the Zone leaders, who had "formed alliances

[2762] NUON Chea's Appeal Brief, para. 225.
[2763] NUON Chea's Appeal Brief, para. 227.
[2764] NUON Chea's Appeal Brief, para. 228.
[2765] NUON Chea's Appeal Brief, para. 230.
[2766] NUON Chea's Appeal Brief, para. 231.
[2767] NUON Chea's Appeal Brief, paras 232-236.

against Pol Pot and Nuon Chea and exploited their positions of authority to act contrary to and sabotage the intentions of the Standing Committee".[2768] In that regard, he refers to a statement by IENG Sary in an interview with Stephen HEDER, according to which each Zone was independent, which the Trial Chamber failed to address,[2769] which supports other evidence of conflict among the Zones.[2770] He submits that there were plots against Pol Pot "from probably as early as May 1975" and arrests for treason from 1976, contrary to HENG Samrin's assertion that planning within the East Zone to overthrow Pol Pot had commenced only in May 1978.[2771] He asserts further that opposition not only came from CPK members who were pro-Vietnam, but also from loyalists of NORODOM Sihanouk, which was apparent from a Chinese report dated 16 January 1979, which the judicial investigation failed to uncover despite it being in the public domain.[2772]

1035. NUON Chea recalls that the Trial Chamber refused to call HENG Samrin to testify, who was, according to NUON Chea, the most important witness to shed light on the interaction between the "Party leadership" and other powerful Khmer Rouge officials, recalling his position "at the intersection of the "Party leadership" and the direct perpetrators of the crimes charged in Case 002/01".[2773] He also recalls that the Trial Chamber failed to call other witnesses who could have testified to the divisions within the CPK,[2774] which he puts in the context of "Vietnam's longstanding efforts to capture Cambodian territory" and intention to "exert full control over Indochinese Communism".[2775] He avers that, apart from the CPK Statute, there was no evidence before the Trial Chamber that would support its view that the Zone leaders had no other role than to faithfully implement decisions of the Party Centre.[2776] In his view, the CPK Statute was inapt to demonstrate the actual power relations within the CPK.[2777] He submits more generally that the Trial Chamber did not acknowledge evidence that demonstrated that Khmer Rouge cadres had enjoyed substantial

[2768] NUON Chea's Appeal Brief, para. 237.
[2769] NUON Chea's Appeal Brief, para. 238.
[2770] NUON Chea's Appeal Brief, para. 239.
[2771] NUON Chea's Appeal Brief, para. 240.
[2772] NUON Chea's Appeal Brief, para. 241.
[2773] NUON Chea's Appeal Brief, para. 242.
[2774] NUON Chea's Appeal Brief, para. 242.
[2775] NUON Chea's Appeal Brief, para. 243.
[2776] NUON Chea's Appeal Brief, para. 244.
[2777] NUON Chea's Appeal Brief, paras 244-245.

autonomy in respect of the crimes relevant to Case 002/01 and that the conditions had varied considerably among the Zones.[2778]

1036. NUON Chea avers that the alleged error was relevant to the Trial Chamber's finding as to his criminal responsibility in several ways, citing parts of the Trial Judgement that discussed his liability for planning and ordering as well as superior responsibility.[2779] Furthermore, in the Sixth Request for Additional Evidence (F2/8), NUON Chea submits that "no reasonable trier of fact could have concluded that Pol Pot and Nuon Chea shared a common purpose and apparently collude in a JCE *with the very leaders who sought to foment rebellion and/or treason against them*, nor that Nuon Chea exercised effective control over those leaders' civilian and military forces".[2780] He also submits that the Trial Chamber's view of the structure of the CPK led to its rejection of his account of the role of the Zone leaders.[2781]

1037. KHIEU Samphân submits that the Trial Chamber made several factual errors in relation to the armed forces involved in the evacuation of Phnom Penh, amounting to a miscarriage of justice.[2782] He argues, first, that the Chamber used imprecise language and terminology when describing how the orders to evacuate the city had been passed down the chain of command, despite the Trial Chamber's acknowledgment that the armed forces had not been under the command of the Party Centre, but of the Zones, also complaining of insufficient reasoning in this regard.[2783] He avers further that the Trial Chamber erred when it found that the forces involved in the takeover of Phnom Penh had belonged to the Revolutionary Army of Kampuchea, because this army had only been established several months later, arguing that this amounted to a "charade".[2784] Finally, he submits that the Trial Chamber's findings as to the preparation, ordering and execution of the evacuation of Phnom Penh were based primarily on the evidence of witnesses from the armed forces of the Southwest and North Zones, while only a small proportion of the evidence

[2778] NUON Chea's Appeal Brief, paras 246-249.
[2779] NUON Chea's Appeal Brief, para. 226. NUON Chea also argues that the findings were relevant to the Trial Chamber's conclusions regarding his liability for instigating and aiding and abetting crimes; however, he fails to point to any part of the Trial Judgement where these findings were relied upon in respect of those modes of liability, nor are any apparent.
[2780] NUON Chea's Sixth Request for Additional Evidence (F2/8), para. 13.
[2781] NUON Chea's Appeal Brief, para. 226.
[2782] KHIEU Samphân's Appeal Brief, para. 343.
[2783] KHIEU Samphân's Appeal Brief, para. 345.
[2784] KHIEU Samphân's Appeal Brief, para. 346.

came from the East and Special Zones, which, however, had also been involved in the evacuation of the city.[2785] He argues that this allowed the Trial Chamber to portray the armed forces as homogenous, which, in turn, allowed it to establish the link between the perpetrators of crimes in the course of Population Movement Phase One and the members of the JCE.[2786]

1038. The Co-Prosecutors dispute NUON Chea's arguments and submit that the Trial Chamber's findings were adequately substantiated.[2787] They submit that the Trial Chamber's findings regarding the role of the Zone leaders were reasonable and, in particular, that it cannot be asserted that the Zone leader had acted autonomously.[2788] They also argue that the Trial Chamber's findings as to instructions by the Party Centre were reasonably made and aver that NUON Chea distorts the evidence.[2789] They challenge NUON Chea's argument that there was "outright warfare" between factions of the CPK, noting that there was no evidence to sustain such a conclusion, and submit that it would not be incompatible with the Trial Chamber's findings if lower levels had some degrees of decision-making power.[2790] The Co-Prosecutors also dispute KHIEU Samphân's arguments. They submit that he has failed to demonstrate that the use of purportedly imprecise language and terminology amounted to an error and highlight that a comprehensive reading of the Trial Judgement shows that the Trial Chamber fully understood the military structure of the armed forces, despite its reference to the Revolutionary Army of Kampuchea.[2791] They also argue the Trial Chamber's findings regarding the consistency of the evacuation of Phnom Penh was not based on the evidence of soldiers, but on a wealth of evidence, mostly from victims.[2792] They also submit that KHIEU Samphân has failed to show any prejudice arising from the purported errors.[2793]

[2785] KHIEU Samphân's Appeal Brief, paras 347-348.
[2786] KHIEU Samphân's Appeal Brief, para. 350.
[2787] Co-Prosecutors' Response, paras 292-300.
[2788] Co-Prosecutors' Response, paras 293-295.
[2789] Co-Prosecutors' Response, paras 296-299.
[2790] Co-Prosecutors' Response, paras 300-301.
[2791] Co-Prosecutors' Response, para. 311.
[2792] Co-Prosecutors' Response, para. 311.
[2793] Co-Prosecutors' Response, para. 311.

1039. The Supreme Court Chamber notes that the impugned findings of the Trial Chamber regarding the hierarchical structure of the CPK are relevant primarily to NUON Chea's conviction based on the modes of liability of planning, ordering and superior responsibility.[2794] As regards superior responsibility, the Trial Chamber did not enter a conviction on that basis, given that it found NUON Chea "directly responsible" for the crimes at issue.[2795] Accordingly, any potential error of the Trial Chamber could not have resulted in a miscarriage of justice in respect of that mode of liability. As far as liability for ordering and planning of the crimes is concerned, as set out elsewhere in this judgement, given its findings in respect of the Accused's liability for crimes committed in relation to Population Movement Phases One and Two based on the notion of JCE, their conviction would stand irrespective of the correctness of the Trial Chamber's legal and factual findings in relation to the modes of liability of ordering and planning.[2796] For that reason, there is no need to consider his arguments of an alleged error in that regard either.

1040. NUON Chea also submits that the Trial Chamber's purported errors led it to reject his account of the Zone leaders' authority, an argument which the Supreme Court Chamber understands to relate to his liability under JCE. In this regard, the Supreme Court Chamber recalls, first, that in situations where the crime in question was not carried out by one of the members of the JCE, but by other individuals, all members of the JCE incur criminal responsibility for the crime if it can be imputed on at least one of the members of the JCE, who was acting in accordance with the common purpose, such that the crime in question formed part of the common purpose[2797] NUON Chea does not explain how the purported error in relation to the Zone leaders' authority would affect his liability under JCE for the crimes committed in the course of Population Movement Phases One and Two, nor is such impact apparent. The Supreme Court Chamber recalls in this regard that the Trial Chamber concluded that there was a plurality of persons, which agreed on a common purpose – namely the implementation of a rapid socialist revolution – which amounted to or

[2794] *See* NUON Chea's Appeal Brief, para. 226, fns 615, 616, 617, 619, which refer to the Trial Chamber's findings at Trial Judgement, paras 885, 924 (regarding liability for ordering), 904 and 924 (regarding liability for planning), 892 and 893 (regarding superior responsibility).
[2795] Trial Judgement, para. 941.
[2796] *See below*, para. 1099.
[2797] *See above*, para. 768 *et seq.*

involved the commission of crimes.[2798] The members of this JCE included, according to the Trial Chamber, NUON Chea and KHIEU Samphân, as well other individuals, notably the Zone leaders such as RUOS Nhim and SAO Phim.[2799] Regarding the actual crimes committed in the course of Population Movement Phase One, the Trial Chamber found that troops under the command of the various Zones were involved in the capture and subsequent evacuation of Phnom Penh.[2800] As noted above, the crimes committed during the evacuation squarely fell into the common purpose.[2801] The same goes for the crimes committed in the course of Population Movement Part Two, as established by the Trial Chamber.[2802] As regards the crimes at Tuol Po Chrey, the Supreme Court Chamber has found that the targeting policy has not been reasonably established by the Trial Chamber. Accordingly, the question of whether the crimes at Tuol Po Chrey were committed in accordance with the common purpose is moot.

1041. Even if one assumed that some of the Zone leaders, who were members of the JCE, were opposed to Pol Pot and NUON Chea or were secretly involved in plotting to overthrow them, this would not mean without more that the crimes committed during evacuation of Phnom Penh or during Population Movement Phase Two for which these Zone leaders were responsible could not be imputed on the other members of the JCE. The finding that, *inter alia*, Zone leaders shared a common purpose with NUON Chea in respect of these crimes was not based on the assumption that they fully agreed with and supported the CPK's leadership, including NUON Chea. Rather, the Trial Chamber's conclusions as to who participated in the JCE are based on its assessment of who was involved in the development and decision-making within the CPK throughout the various phases of the revolution.[2803] For instance, the Trial Chamber found that RUOS Nhim and SAO Phim (two Zone leaders who, in NUON Chea's submission, had been opposed to Pol Pot and NUON Chea[2804]) had participated in a meeting in June 1974, where the evacuation of Phnom Penh had been

[2798] NUON Chea's grounds of appeal in relation to these issues are addressed. *See above*, para. 811 *et seq*.
[2799] Trial Judgement, para. 777.
[2800] Trial Judgement, paras 240, 460.
[2801] *See above*, para. 845 *et seq*.
[2802] *See above*, para. 863 *et seq*.
[2803] *See* Trial Judgement, paras 724-776.
[2804] *See*, for instance, NUON Chea's Sixth Request for Additional Evidence (F2/8), para. 11.

decided.[2805] Similarly, the evidence the Trial Chamber relied upon in relation to a meeting in early April 1975, where the decision to evacuate Phnom Penh had been confirmed, indicates that SAO Phim had attended that meeting (though the Trial Chamber did not specifically mention this).[2806] Regarding Population Movement Phase Two, the Trial Chamber found that, "[o]ver the course of the DK era, Zone secretaries and officials reported to Pol Pot, NUON Chea, VORN Vet, SON Sen, Doeum and/or Office 870 on population movements, sometimes requesting further instructions", referring, *inter alia*, to reports sent by SAO Phim.[2807]

1042. It also bears noting that conflicts among leaders in a large organisation are not unusual; as such, they do not impact on the question of criminal responsibility under JCE, as long as all elements for this mode of liability have been established. Similarly, NUON Chea fails to explain how the purportedly substantial autonomy of the Zone leaders impacts on his criminal liability under JCE. As noted above, the Zone leaders were, according to the Trial Chamber's findings, members of the JCE. It is inherent in the very notion of JCE that its members make various contributions to the implementation of the common purpose; the fact that some members have a degree of autonomy as to the implementation of aspects of the common purpose does not extinguish the responsibility of the other members of the JCE.

1043. In the absence of substantiation as to how the purported factual error could have resulted in a miscarriage of justice, there is no need to address the substance of NUON Chea's arguments. The grounds of appeal are therefore dismissed.

1044. Similarly, the Supreme Court Chamber considers that KHIEU Samphân's arguments are inapt to establish an appealable error. The Supreme Court Chamber has already explained above that the fact that the troops involved in the evacuation of Phnom Penh were under the command of the Zones and not the Party Centre does not as such affect the Accused's criminal responsibility under JCE as the Trial Chamber had found that the Zone leaders were part of the JCE and that the crimes were carried

[2805] *See* Trial Judgement, para. 133.
[2806] *See*, for instance, T. 26 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/97.1 (ENG), p. 13 ("as early as April 1975, uncles met to discuss about the evacuation of the population. Om Pol Pot raised this concern. Om Nuon Chea, Om Khieu Samphan, Ta Mok, Son Sen, Koy Thuon, Vorn Vet, Cheng An, So Phim, all were there in the meeting"). The Trial Chamber relied heavily on this witness's testimony. *see* Trial Judgement, fns 416-425.
[2807] Trial Judgement, para. 798 and fn. 2542.

out in accordance with the common purpose. For that reason, it is also irrelevant whether the Trial Chamber heard evidence primarily relating to the forces of some of the Zones. As to the use of terminology, while it is true that the Trial Chamber occasionally referred to the Revolutionary Army of Kampuchea in the context of the evacuation of Phnom Penh, even though, according to the Trial Chamber's own finding, this entity was only established after the evacuation of Phnom Penh, in July 1975,[2808] this mistake does not have any impact on the validity of the Trial Chamber's findings. As KHIEU Samphân concedes,[2809] the Trial Chamber specifically acknowledged that the forces involved in the evacuation of Phnom Penh were under the direct command of the Zones and not the Party Centre.[2810] This also goes to show that KHIEU Samphân's argument that the Trial Chamber portrayed the forces as uniform and pyramid-like[2811] is based on a distortion of the Trial Chamber's findings, which are more nuanced than KHIEU Samphân suggests. His arguments are therefore dismissed.

k) Role of Central Committee

1045. KHIEU Samphân submits that the Trial Chamber erred when it concluded that the Central Committee had decision-making power and the function, "in part […] to analyse the implementation of the Party's policies, to correct abuses and to issue directives".[2812] He argues that this finding is contradicted by the Trial Chamber's finding that it was the Standing Committee that exercised ultimate decision-making power.[2813] Furthermore, he avers that the Trial Chamber's finding as to the decision-making power of the Central Committee is based on a distorted interpretation of the evidence, notably his own statement made in a book,[2814] and that it was on the basis of this incorrect reading of the evidence that the Trial Chamber could conclude that various decisions, notably those regarding the evacuation of Phnom Penh, had been taken by the Central Committee.[2815] He argues that it was this distorted view of the

[2808] *See* Trial Judgement, paras 148-149, 240.
[2809] KHIEU Samphân's Appeal Brief, para. 345.
[2810] Trial Judgement, para. 240.
[2811] KHIEU Samphân's Appeal Brief, para. 350.
[2812] KHIEU Samphân's Appeal Brief, para. 120, referring to Trial Judgement, para. 847 (note that para. 120, fn. 248, refers to 34 paragraphs of the Judgement; only para. 847 contains the cited passage).
[2813] KHIEU Samphân's Appeal Brief, para. 121, referring to Trial Judgement, paras 203, 223.
[2814] *See* Book by KHIEU Samphân: *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, E3/18, dated 7 July 2004, pp. 58-59, ERN (En) 00103752 .
[2815] KHIEU Samphân's Appeal Brief, paras 123-125.

role of the Central Committee that allowed the Trial Chamber to impute criminal liability on KHIEU Samphân, as he had never been a member of the Standing Committee.[2816] KHIEU Samphân also submits that the Trial Chamber erred when it found that a document dated 30 March 1976, listing certain decisions that had been taken, emanated from the Central Committee, and that the Trial Chamber had failed to address the Defence's arguments as to the limited probative value and questions as to the chain of custody of that document.[2817]

1046. The Co-Prosecutors refute KHIEU Samphân's arguments. They submit that the Trial Chamber's findings are not contradictory and that the evidence establishes that the Central Committee issued decisions and instructions on several matters.[2818] They argue that the Trial Chamber's analysis, including KHIEU Samphân's own statement, was correct, and that the other evidence KHIEU Samphân seeks to rely on does, in fact, demonstrate that the Central Committee did have decision-making power.[2819] They also submit that his criminal liability "does not hinge exclusively on his relationship to the Central Committee", which also undermines his argument regarding the document dated 30 March 1976.[2820] In their submission, KHIEU Samphân's arguments are belated and compound the question of admissibility of evidence and the standard of "beyond reasonable doubt".[2821]

1047. The Supreme Court Chamber is not persuaded by KHIEU Samphân's arguments. First, it appears that he misrepresents the relevant findings of the Trial Chamber as to the role and powers of the Central Committee: contrary to what he suggests, the Trial Chamber's findings were not contradictory, but portrayed a nuanced picture of the Central Committee's functions, expressly acknowledging that the ultimate decision-making power lay elsewhere. This, however, does not exclude that some decisions were indeed taken at the level of the Central Committee and KHIEU Samphân has not established that the Trial Chamber's findings in this regard were unreasonable. Notably, the Trial Chamber relied upon excerpts of KHIEU Samphân's book, according to which the Central Committee gave certain "directives"

[2816] KHIEU Samphân's Appeal Brief, para. 125.
[2817] KHIEU Samphân's Appeal Brief, paras 497-501.
[2818] Co-Prosecutors' Response, para. 302.
[2819] Co-Prosecutors' Response, paras 303-304.
[2820] Co-Prosecutors' Response, para. 305.
[2821] Co-Prosecutors' Response, para. 305.

on a variety of issues.[2822] Although a footnote to one of these excerpts indicates that the Central Committee was not an "executive organization", but it only "discussed implementation of policies created by the Permanent Bureau" (presumably referring to the Standing Committee), this is not incompatible with the Trial Chamber's finding, which, as noted above, specifically accepted that the Standing Committee was the ultimate decision-maker. As to the document dated 30 March 1976, KHIEU Samphân has failed to substantiate that any error the Trial Chamber may have made in relying on that document could have resulted in an error of fact that led to a miscarriage of justice. His arguments are therefore dismissed.

l) Principle of democratic centralism

1048. KHIEU Samphân contends that the Trial Chamber erred in its findings regarding "democratic centralism" as a principle underlying the decision-making process of the CPK. He argues that democratic centralism consists, in theory, of two parts: first, a democratic discussion of issues commencing at the lower ranks of the hierarchy and eventually reaching the highest level; and, second, a decision at the highest level of the issue in question, which is then passed down to the lower levels of the organisation.[2823] In his submission, the evidence before the Trial Chamber established only the second part of the decision-making process.[2824] He challenges the evidence upon which the Trial Chamber relied to establish the first part of the decision-making process, notably statements of NUON Chea regarding the use of democratic centralism and that Pol Pot did not hold absolute power; a transcript of an interview with KHIEU Samphân regarding the decision-making to evacuate Phnom Penh; the testimony before the Trial Chamber of David CHANDLER; and the minutes of the meeting of the Standing Committee on 11 March 1976, and submits that the Chamber inappropriately rejected or disregarded evidence that showed that the "democratic" aspect was missing in the decision-making process within the CPK.[2825] He argues that there was another reasonable inference that the Trial Chamber should have drawn, namely that the CPK's organisation had been rigid and strictly hierarchical, and that it was therefore wrong for the Chamber to conclude that

[2822] Book by KHIEU Samphân: *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, E3/18, dated 7 July 2004, p. 58 ERN (En) 00103752 .
[2823] KHIEU Samphân's Appeal Brief, para. 128.
[2824] KHIEU Samphân's Appeal Brief, para. 129.
[2825] KHIEU Samphân's Appeal Brief, paras 130-136.

the decision-making had been collective and based on broad consensus.[2826] He avers that the Trial Chamber's erroneous finding was the basis for its conclusion that he had participated in, and endorsed, the decision to evacuate Phnom Penh that had been made at meetings in June 1974 and April 1975 that it had been open to him to oppose the decision to evacuate Phnom Penh at the June 1974 meeting and that he had held a certain position of authority when participating in meetings of the Standing Committee.[2827]

1049. The Co-Prosecutors argue that KHIEU Samphân's arguments are premised on an incorrect understanding of democratic centralism: rather than requiring election of members of a given committee by the level immediately below, democratic centralism meant, according to the Trial Chamber, that decisions were made collectively and not individually.[2828] They submit further that the minutes of the Standing Committee meeting of 11 March 1976 confirm rather than undermine, the Trial Chamber's findings because they suggest that the Standing Committee had agreed on the decisions outlined by Pol Pot.

1050. While the Supreme Court Chamber does not agree with the Co-Prosecutors' contention that KHIEU Samphân misunderstood the meaning of democratic centralism, as it is clear that he challenges primarily the Trial Chamber's finding that it involved collective decision-making, the Supreme Court Chamber recalls that the Trial Chamber's findings are based mainly on two statements by NUON Chea regarding the collective decision-making process, as well as statements by KHIEU Samphân and IENG Sary, all of who had participated in meetings of the Standing Committee.[2829] In these circumstances, it was not unreasonable to give lesser weight to Philip SHORT's testimony, according to which Pol Pot was the actual decision-maker, as his testimony was not a first-hand account. As to the minutes of the meeting of the Standing Committee of 11 March 1976,[2830] the Supreme Court Chamber does not consider that the fact that the Trial Chamber apparently did not analyse this document in respect of the principle of democratic centralism amounted to an error: as

[2826] KHIEU Samphân's Appeal Brief, para. 137.
[2827] KHIEU Samphân's Appeal Brief, para. 138, referring to Trial Judgement, paras 142, 735, 997, 1006.
[2828] Co-Prosecutors' Response, para. 306, referring to Trial Judgement, para. 223.
[2829] Trial Judgement, para. 228.
[2830] Standing Committee Meeting Minutes, E3/197, dated 11 March 1976.

noted by the Co-Prosecutors, the document actually suggests that the Standing Committee was involved in the decision-making and it does not call into question the Trial Chamber's analysis of the other evidence. This ground of appeal is therefore rejected.

m) Law in respect of the requisite intent

1051. With reference to the Trial Chamber JCE Decision (100/6) and the *Kvočka* Appeal Judgement (ICTY), the Trial Chamber found with respect to the *mens rea* element for liability under the notion of JCE that "an accused must intend to participate in the common purpose and this intent must be shared with the other JCE participants".[2831] It also found that "[p]articipants [of the] JCE must be shown to share the required intent of the direct perpetrators, including the specific intent for the crime where required, as with persecution".[2832] In the section of the Trial Judgement dealing with KHIEU Samphân's *mens rea*, the Trial Chamber found that he had the requisite intent for liability under JCE, *inter alia*, because he had known of the substantial likelihood that the implementation of the policies would result in the crimes, and that, in fact, they did result in the crimes committed during the population movements and at Tuol Po Chrey.[2833]

1052. KHIEU Samphân argues that the Trial Chamber erred as to the requisite *mens rea* by finding that the Accused had the intention to participate in the common purpose, which must be shared by the other members of the JCE. With reference to the *Kvočka* Appeal Judgement,[2834] he argues that it must be established that the Accused and the other members of the JCE must have had the intent to effect the common purpose.[2835] He also avers that the Trial Chamber erroneously lowered the standard for the requisite *mens rea* by assessing whether he had been aware of the substantial likelihood of the commission of crimes.[2836]

[2831] Trial Judgement, para. 694.
[2832] Trial Judgement, para. 694.
[2833] Trial Judgement, para. 994.
[2834] *See* *Kvočka* Appeal Judgement (ICTY), para. 82.
[2835] KHIEU Samphân's Appeal Brief, para. 70.
[2836] KHIEU Samphân's Appeal Brief, para. 71, referring to Trial Judgement, para. 944. *See also* KHIEU Samphân's Appeal Brief, para. 287.

1053. In the view of the Supreme Court Chamber, for an accused to be guilty of a crime based on liability under the notion of JCE, his or her *mens rea* must cover, both the ingredients of the crime and those of the mode of liability. As such, the Trial Chamber's finding that the intent must cover both the common purpose and the crimes it encompassed is correct. To the extent that KHIEU Samphân argues that the Trial Chamber incorrectly stated that the accused must have the intention to participate in the common purpose, as opposed to effect the common purpose and perpetrate crimes,[2837] the Supreme Court Chamber considers that this statement does not disclose an error of law. While the Trial Chamber's formulation differs from the one used in the *Kvočka* Appeal Judgement (ICTY) (which is nevertheless cited in a footnote), the Trial Chamber noted in the same paragraph that participants in a JCE must share the intent of the direct perpetrator, that is the intent to commit a specific crime.[2838] Indeed, when analysing NUON Chea's and KHIEU Samphân's *mens rea*, the Trial Chamber specifically addressed whether the Accused had acted with the intent to commit the crimes against humanity of murder, extermination, inhumane acts and persecution.[2839]

1054. As to KHIEU Samphân's argument that the Trial Chamber erroneously lowered the requisite standard of *mens rea* by referring to the substantial likelihood of the occurrence of crimes,[2840] the Supreme Court Chamber considers that substantial likelihood that crimes would be committed is as such not the correct *mens rea* standard. As noted above, what is required is that the accused and the other members of a JCE share the "intent to effect the common purpose".[2841] This, however, is a general statement that requires further elaboration, bearing in mind both the crimes at issue and the circumstances of the case. For instance, as has been explained above,[2842] 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 has to be established that the accused had the objective to bring about the death of the victim through the implementation of the common purpose or was aware

[2837] KHIEU Samphân's Appeal Brief, para. 70.
[2838] Trial Judgement, para. 694.
[2839] Trial Judgement, paras 876 (NUON Chea), 995 (KHIEU Samphân).
[2840] Trial Judgement, para. 994.
[2841] *Kvočka* Appeal Judgement (ICTY), para. 82.
[2842] *See above*, para. 409-410.

that the death would be the certain result thereof (direct intent), or 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 (*dolus eventualis*). In contrast, in respect of the crime against humanity of persecution, it has to be established that the accused intended that the implementation of the common purpose would lead to the acts that discriminated against the victims as a discernible group, and that he or she acted with the specific discriminatory intent. Turning to factual aspects, for example, when the case involves accused at the leadership level, it may be that the decision on a common purpose substantially precedes its implementation and there cannot be absolute certainty that a crime will be committed in the future.[2843]

1055. Thus, depending on the crimes at issue and the factual scenario, it may be appropriate to consider whether the accused knew of the substantial likelihood that crimes would be committed. Accordingly, the Trial Chamber's reference to this was not *per se* erroneous. Nevertheless, this is not as such sufficient to establish the mental element for liability for crimes based on JCE liability. Accordingly, the Supreme Court Chamber shall proceed to analyse the Trial Chamber's findings as to the Accused's intent and the related grounds of appeal based on the above understanding of the applicable standard.

n) NUON Chea's intent

1056. Regarding NUON Chea's intent as relevant to liability for the crimes based on JCE, the Trial Chamber recalled his role in formulating the policies of the CPK, his membership in the committees that decided on the population movements, that he "was also a strong proponent of waging 'class struggle'", and his role in trainings and propaganda activities; on that basis, the Trial Chamber concluded that "he intended to further the implementation of the common purpose".[2844] The Trial Chamber also found that he had shared the requisite intent with the other participants in the JCE to

[2843] *See* *Lubanga* Appeal Judgement (ICC), para. 447.
[2844] Trial Judgement, para. 875.

commit the crimes against humanity of inhumane acts, murder, extermination and persecution.[2845]

1057. NUON Chea submits that the Trial Chamber made only cursory findings as to his intent relevant to liability under the notion of JCE.[2846] He argues that the Trial Chamber cannot have given proper thought to this question, which, in his submission, is reflected in the fact that the Trial Chamber found that he had had intent for murder in relation to Population Movement Phase Two, even though he was neither charged with, nor convicted for, murder in that regard.[2847] He submits further that in the absence of substantiated findings regarding his intent, "the Defence is able only to demonstrate *de novo* that Nuon Chea did not have the requisite intent with regard to any of the crimes charged".[2848]

1058. In relation to intent to commit murder in respect of Population Movement Phase One, NUON Chea argues that there was only sporadic evidence of killings of civilians during the evacuation of Phnom Penh and that the Trial Chamber failed to call HENG Samrin, who, according to NUON Chea, could have testified to the orders that were given.[2849] He further avers that there is no evidence that he intended to cause the death of, or infliction of serious bodily harm to, civilians, and that even if he could or should have foreseen that the conditions under which the evacuation of Phnom Penh had taken place could result in death (which he disputes), this would be insufficient to establish the requisite intent.[2850] He also submits that, as the Trial Chamber acknowledged, his objective had been to increase the population, which is incompatible with a finding that he intended to cause civilians serious bodily harm.[2851] NUON Chea recalls that the Trial Chamber also made findings as to his knowledge of the crimes as they were committed and contends that, while it is unclear whether the Trial Chamber relied on these findings to the establish his intent, the Trial Chamber's findings were erroneous because it relied on a statement that he had seen dead bodies in houses in Phnom Penh, which was, in his submission, "obviously

[2845] Trial Judgement, para. 876.
[2846] NUON Chea's Appeal Brief, para. 618.
[2847] NUON Chea's Appeal Brief, para. 619.
[2848] NUON Chea's Appeal Brief, para. 620.
[2849] NUON Chea's Appeal Brief, para. 621.
[2850] NUON Chea's Appeal Brief, para. 622.
[2851] NUON Chea's Appeal Brief, para. 622.

irrelevant", and misrepresented another item of evidence, a transcript of an interview with a Japanese journalist.[2852]

1059. The Co-Prosecutors respond that "throughout the Judgement" the Trial Chamber made "innumerable findings […] with respect to his intent"[2853] and that its findings in respect of his intent for murder and persecution were reasonable.[2854]

1060. The Supreme Court Chamber notes that NUON Chea's arguments regarding the purported lack of intent to commit murder seem to be based on the assumption that the *mens rea* of murder necessarily requires a showing that it was the perpetrator's objective that the crime in question be committed. NUON Chea argues in this vein that "[e]ven if it could be said that Nuon Chea did […] foreseen [*sic*] these deaths […], this is not the standard".[2855] In this regard, the Supreme Court Chamber recalls, first, that NUON Chea specifically admitted that he had the intent to kill the seven "super-traitors" and his argument is bound to fail as far as these killings are concerned.[2856] It has been established that he acted with direct intent to kill in this regard.

1061. As regards other killings that occurred in the course of the evacuation of Phnom Penh, as explained above, "intention" for the crime against humanity of murder also exists in situations where the perpetrator acted with *dolus eventualis*.[2857] The Trial Chamber made extensive findings as to NUON Chea's knowledge of the crimes, including the substantial likelihood of the commission of crimes.[2858] For instance, the Trial Chamber found that the plan to evacuate Phnom Penh had been taken without "any provision for the well-being or the health of those being moved, in particular the vulnerable",[2859] which in the circumstances in which the evacuation of Phnom Penh had taken place (extremely short time frame, hottest period of the year) clearly demonstrates knowledge on the part of NUON Chea of the substantial likelihood of deaths resulting from the conditions of the evacuation. Despite this

[2852] NUON Chea's Appeal Brief, para. 623.
[2853] Co-Prosecutors' Response, para. 484.
[2854] Co-Prosecutors' Response, paras 488-494.
[2855] NUON Chea's Appeal Brief, para. 622.
[2856] *See above*, paras 358, 859.
[2857] *See above*, para. 410.
[2858] *See* Trial Judgement, paras 839-860; *see also* paras 904-909.
[2859] Trial Judgement, para. 788.

knowledge, NUON Chea had contributed to the implementation of the common criminal purpose, thus demonstrating that he had accepted the deaths of people as a consequence of the evacuation. Accordingly, regarding the crime of murder by way of deaths by conditions during Population Movement Phase One, based on the Trial Chamber's findings, it has been established that NUON Chea acted with *dolus eventualis*.

1062. In respect of the murder of civilians and Khmer Republic soldiers and officials during Population Movement Phase One, the Supreme Court Chamber recalls its above findings regarding the crimes encompassed by the common criminal purpose,[2860] where it found that in the specific circumstances of this case, the common purpose implicitly encompassed the anticipation that deadly force could be used by the troops tasked with evacuating the city. As NUON Chea was directly involved in the decision to evacuate Phnom Penh, he was aware of these circumstances. Given that he decided to contribute to the implementation of the common purpose regardless, he accepted that such killings could occur and therefore acted with the requisite *dolus eventualis.* In light of this finding, there is no need to consider the argument that the Trial Chamber erred because it referred, when discussing NUON Chea's intent, to his having seen dead bodies in Phnom Penh.

1063. In respect of Population Movement Phase Two, the Supreme Court Chamber recalls that it has confirmed the Trial Chamber's findings as to deaths resulting from the conditions of the transfers and as to one killing.[2861] However, while the Trial Chamber found that this amounted to the crime against humanity of extermination, the Supreme Court Chamber has decided to re-characterise the facts as a crime against humanity of murder.[2862] Accordingly, as far as NUON Chea's intent is concerned, it has to be determined whether, based on the Trial Chamber's findings, it is established whether he had either the direct intent to kill through the implementation of the common purpose or acted with *dolus eventualis* in that regard.

1064. In the view of the Supreme Court Chamber, none of the findings of the Trial Chamber indicate that he had the objective to bring about the death of the transferees

[2860] *See above*, para. 854 *et seq*.
[2861] *See above*, para. 550
[2862] *See above*, paras 560-562.

through the implementation of Population Movement Phase Two or was aware that the death would be the certain result thereof. Accordingly, it cannot be said that he acted with direct intent to kill. Nevertheless, also in light of the fact that he had been aware of the deadly consequences of Population Movement Phase One[2863] and nevertheless proceeded to be directly involved in the decision and planning to move large numbers of people as part of Population Movement Phase Two, he was aware that deaths would be the likely result of the implementation of Population Movement Phase Two, a fact with which he had accepted. Thus, he acted with *dolus eventualis* in respect of murder in relation to Population Movement Phase Two.

1065. In relation to the events at Tuol Po Chrey, NUON Chea submits that his arguments as to inexistence of a policy against Khmer Republic officials and soldiers apply equally to the Trial Chamber's findings as to his intent in this regard.[2864] The Supreme Court Chamber has already addressed these arguments above and concluded that the targeting policy has not been reasonably established.[2865] Accordingly, the arguments regarding intent in respect of the crimes at Tuol Po Chrey need not be considered any further.

1066. Regarding the Trial Chamber's findings as to his intent regarding the crimes of persecution and other inhumane acts, NUON Chea does not raise any new arguments, but merely refers to arguments made elsewhere in his appeal brief, which the Supreme Court Chamber has already addressed and dismissed.[2866]

o) KHIEU Samphân's intent

1067. As to KHIEU Samphân's intent to incur criminal responsibility under JCE, the Trial Chamber held that "his deliberate and continuous participation in the JCE, knowing of the crimes being committed, indicates his criminal intent".[2867] The Trial Chamber considered that KHIEU Samphân had participated in gatherings at which the common purpose had been established and the policies through which it was implemented had been agreed upon, and that he had been aware of the substantial

[2863] *See above*, para. 1061.
[2864] NUON Chea's Appeal Brief, para. 626.
[2865] *See above*, para. 972.
[2866] *See* NUON Chea's Appeal Brief, paras 624-625.
[2867] Trial Judgement, para. 993.

likelihood that crimes would result from their implementation.[2868] The Trial Chamber found that KHIEU Samphân had known that these policies resulted in and/or involved the commission of crimes during Population Movement Phases One and Two and at Tuol Po Chrey and that he had been privy to further notice of the crimes after their commission.[2869] The Trial Chamber further found that, despite this knowledge, "he continued to contribute to and approve the progress of the democratic and socialist revolutions" by planning, disseminating, implementing, endorsing and defending the common purpose, which resulted in and involved the population movement and targeting policies, pursuant to which the crimes were committed during Population Movement Phases One and Two and at Tuol Po Chrey.[2870] The Trial Chamber found that KHIEU Samphân shared, with the other members of the JCE, the intent to carry out the common purpose through the foregoing policies, which resulted in and/or involved the commission of the crimes committed in the course of Population Movement Phases One and Two and at Tuol Po Chrey, including other inhumane acts, murder and extermination.[2871] Moreover, the Trial Chamber found that KHIEU Samphân had shared with the other members of the JCE the requisite discriminatory intent to incur criminal responsibility for the crime of persecution on political grounds.[2872]

1068. KHIEU Samphân argues that the Trial Chamber erred because it did not sufficiently take into account the principle of secrecy within the CPK, suggesting that this principle should have led the Trial Chamber to conclude that there was doubt as to his criminal responsibility.[2873] KHIEU Samphân avers that the Trial Chamber erred by considering that the terms "Party Centre" and "Angkar" allowed the identification of persons and organs with precision.[2874] He submits that, while the Trial Chamber accepted that the term "Party Centre" was nebulous,[2875] it contradicted its finding by defining the term as referring "collectively to the senior executive organs of the CPK

[2868] Trial Judgement, para. 994.
[2869] Trial Judgement, para. 994.
[2870] Trial Judgement, para. 994.
[2871] Trial Judgement, para. 995.
[2872] Trial Judgement, para. 995.
[2873] KHIEU Samphân's Appeal Brief, para. 149.
[2874] KHIEU Samphân's Appeal Brief, para. 139.
[2875] *See* Trial Judgement, para. 205.

based in Phnom Penh".[2876] He argues that this amounts to a serious error, on the basis of which the Trial Chamber diluted the analysis of KHIEU Samphân's criminal responsibility and artificially linked him to all decisions taken by the organs of DK.[2877] As regards the term "Angkar", he raises similar arguments, submitting that the Trial Chamber erred because it used the term imprecisely, thereby implicitly including KHIEU Samphân.[2878] He submits that, as a result, the Chamber erred by establishing a link between events for which the "Party Centre" or "Angkar" was responsible and KHIEU Samphân's knowledge of these events as a prerequisite of his criminal liability.[2879] KHIEU Samphân submits that the Trial Chamber erred in finding that he had possessed prior knowledge of the plan to evacuate Phnom Penh and that he had participated in the decision-making process resulting in this decision.[2880] Additionally, KHIEU Samphân argues that the Trial Chamber erred when it found that he had had knowledge of crimes or criminal policies implemented prior to 17 April 1975 and that he had known of the substantial likelihood that crimes would be committed through the implementation of such policies.[2881] KHIEU Samphân argues that the Trial Chamber erred in its findings regarding the distribution of the publications *Revolutionary Youth* and *Revolutionary Flag* in the period before 17 April 1975.[2882] Further, KHIEU Samphân submits that the Trial Chamber erred in inferring criminal intent solely from his alleged participation in the execution of the common purpose, which it held not to have been entirely criminal, and by failing to find that his actions had contributed to the criminal aspects of the common purpose.[2883] KHIEU Samphân further contests the finding that he had had access to information concerning the commission of crimes during Population Movement Phase One because he had met with senior leaders of the CPK at B-5 and at Phnom Penh railway station.[2884] Also in relation to Population Movement Phase One, KHIEU Samphân challenges the Trial Chamber's finding that he had known about the crimes at the time of their commission through foreign news reports and through his

[2876] Trial Judgement, para. 206.
[2877] KHIEU Samphân's Appeal Brief, para. 141.
[2878] KHIEU Samphân's Appeal Brief, para. 143.
[2879] KHIEU Samphân's Appeal Brief, para. 144.
[2880] KHIEU Samphân's Appeal Brief, paras 280-285.
[2881] KHIEU Samphân's Appeal Brief, paras 286, 288-291.
[2882] KHIEU Samphân's Appeal Brief, paras 171-176.
[2883] KHIEU Samphân's Appeal Brief, paras 318-319, 414-415, 446-447, 626-627. *See also* KHIEU Samphân's Appeal Brief, para. 395.
[2884] KHIEU Samphân's Appeal Brief, paras 374-382.

diplomatic relations.[2885] Additionally, KHIEU Samphân alleges errors as regards the Trial Chamber's findings concerning meetings that he had attended in May 1975, his participation in these meetings, as well as their content.[2886] KHIEU Samphân contests more generally the Trial Chamber's conclusion as regards his knowledge of the CPK policies at issue and his access to information concerning the crimes.[2887] KHIEU Samphân argues that the Trial Chamber erred in finding that he had had concurrent and *post-facto* knowledge of the crimes committed during Population Movement Phase One.[2888] Further, KHIEU Samphân submits that the Trial Chamber committed errors in concluding that he had known of the substantial likelihood, prior to Population Movement Phase Two, that crimes would be committed, and in finding that he had had contemporaneous and *post-facto* knowledge of these crimes.[2889] Finally, KHIEU Samphân argues that the Trial Chamber incorrectly relied on facts after the commission of the crimes in question in relation to Population Movement Phases One and Two and the events at Tuol Po Chrey, thereby erroneously establishing a *dolus subsequens*.[2890]

1069. The Co-Prosecutors respond that the Trial Chamber "amply substantiated that, despite the secrecy of the CPK, Khieu Samphân had knowledge of the crimes he was found guilty committing", and that he had participated in upholding the principle of secrecy.[2891] Regarding the Trial Chamber's use of the terms "Party Centre" and "Angkar", the Co-Prosecutors submit that it was supported by the evidence and that the Trial Chamber was aware of the ambiguities of these terms.[2892] They submit further that KHIEU Samphân "fails to demonstrate any error or harm from the Chamber's usage of these terms", noting that KHIEU Samphân's arguments are not referenced and appear to be contradictory.[2893] The Co-Prosecutors submit further that the Trial Chamber was correct in finding, based on the ample evidence it cited, that KHIEU Samphân had participated in a meeting in April 1975 at B-5 at which he had

[2885] KHIEU Samphân's Appeal Brief, paras 383-387.
[2886] KHIEU Samphân's Appeal Brief, paras 393-394.
[2887] KHIEU Samphân's Appeal Brief, para. 395.
[2888] KHIEU Samphân's Appeal Brief, paras 397-401. *See also* KHIEU Samphân's Appeal Brief, para. 395.
[2889] KHIEU Samphân's Appeal Brief, paras 588-598.
[2890] KHIEU Samphân's Appeal Brief, paras 437-440, 636-641.
[2891] Co-Prosecutors' Response, para. 309 (footnote(s) omitted).
[2892] Co-Prosecutors' Response, para. 307.
[2893] Co-Prosecutors' Response, para. 308.

supported the decision to evacuate Phnom Penh,[2894] a decision which, according to the Co-Prosecutors, he could have opposed.[2895] In respect of the errors alleged by KHIEU Samphân regarding his knowledge of the crimes committed during Population Movement Phase One and at Tuol Po Chrey, the Co-Prosecutors respond that KHIEU Samphân fails to demonstrate how these alleged errors occasion a miscarriage of justice.[2896] The Co-Prosecutors further respond in this regard that the Trial Chamber correctly found that KHIEU Samphân had had access to information concerning the crimes when meeting with senior CPK leaders at B-5 as well as through diplomatic reports and news agencies.[2897] The Co-Prosecutors submit that KHIEU Samphân mischaracterises the Trial Chamber's finding that he had known, before 17 April 1975, of the "substantial likelihood" that crimes would be committed and that he had had contemporaneous knowledge thereof.[2898] The Co-Prosecutors further aver that he fails to identify the alleged errors of fact by the Trial Chamber relevant to his knowledge of the crimes, thereby failing to identify any appealable error.[2899] In relation to KHIEU Samphân's submission that the Trial Chamber erred by inferring intent merely from his participation in the implementation of the common purpose, which it considered to have been "not entirely criminal", the Co-Prosecutors argue that its findings were based on his awareness of the crimes and five-fold contribution to the common purpose, which resulted in and involved the population movement and targeting policies.[2900] Finally, the Co-Prosecutors submit that KHIEU Samphân's arguments as to the Trial Chamber's findings regarding his awareness of the crimes committed at Tuol Po Chrey are either unsubstantiated or based on a misunderstanding of the applicable law and that, in any event, the Trial Chamber's findings were accurate based on the demonstrated pattern of crimes upon which it relied.[2901]

1070. The Supreme Court Chamber will address KHIEU Samphân's submissions to the extent that they pertain to the Trial Chamber's conclusions as to whether he had

[2894] Co-Prosecutors' Response, paras 456-457.
[2895] Co-Prosecutors' Response, para. 458.
[2896] Co-Prosecutors' Response, para. 459.
[2897] Co-Prosecutors' Response, paras 459-465.
[2898] Co-Prosecutors' Response, paras 616, 618.
[2899] Co-Prosecutors' Response, paras 617, 619.
[2900] Co-Prosecutors' Response, paras 622-623.
[2901] Co-Prosecutors' Response, paras 625-627.

the requisite intent to incur criminal responsibility. The Supreme Court Chamber will not, however, address KHIEU Samphân's arguments insofar as they relate to the crimes committed at Tuol Po Chrey.[2902] The Supreme Court Chamber has found above that the existence of a policy to target Khmer Republic soldiers and officials has not been reasonably established based on the evidence in Case 002/01;[2903] KHIEU Samphân therefore cannot incur criminal responsibility for these crimes and the question of his intent in this regard is moot.

1071. Concerning KHIEU Samphân's arguments regarding the principle of secrecy within the CPK,[2904] the Supreme Court Chamber understands KHIEU Samphân to challenge the Trial Chamber's finding that he had knowledge of the crimes for which he was convicted. These findings are contained in a separate section of the Trial Judgement, spanning over several pages, in which the Trial Chamber describes in detail how it reached its conclusions regarding KHIEU Samphân's knowledge of the crimes.[2905] KHIEU Samphân merely argues that, based on the principle of secrecy, the Trial Chamber should have reached a different conclusion. This is clearly unsuitable to establish an error on the part of the Trial Chamber and KHIEU Samphân's arguments are therefore rejected.

1072. As to KHIEU Samphân's arguments in respect of the distribution of the *Revolutionary Flag* and the *Revolutionary Youth* magazines, he submits, first, that the Trial Chamber erred when finding that the Party Centre had been able to communicate easily with the Zones.[2906] This argument is dismissed because, as noted by the Co-Prosecutors,[2907] in the paragraphs of the Trial Judgement referenced by KHIEU Samphân, the Chamber made no such finding.[2908] Second, he argues that the Trial Chamber erroneously relied on the distribution of these publications to establish KHIEU Samphân's knowledge of the substantial likelihood of the commission of crimes as a result of the population movement policy since it has not been established

[2902] KHIEU Samphân's Appeal Brief, paras 437-440.
[2903] *See above*, para. 972.
[2904] KHIEU Samphân's Appeal Brief, paras 145-149.
[2905] *See* Trial Judgement, paras 944-959.
[2906] KHIEU Samphân's Appeal Brief, para. 172.
[2907] Co-Prosecutors' Response, para. 310.
[2908] *See* Trial Judgement, paras 274-275.

that he had had access to them or even read them.[2909] This argument is rejected because in the paragraphs of the Trial Judgement which he references, the Trial Chamber did not find that his knowledge was based solely or even primarily on the *Revolutionary Flag* or *Revolutionary Youth* magazines; rather, the Trial Chamber relied, *inter alia*, on his involvement in the planning of the population movements, his contact with other senior leaders, as well as with foreign diplomats.[2910] Similarly, the Supreme Court Chamber rejects KHIEU Samphân's arguments regarding the Trial Chamber's use of the terms "Party Centre" and "Angkar"[2911] because he has failed to substantiate both the purported errors and the potential impact on the verdict.[2912] To the extent that he argues that the purported errors have an impact on the Trial Chamber's findings as to his knowledge of the crimes, the Supreme Court Chamber notes that he does not develop this argument in any way, but merely refers to another section of his submissions, where, however, the issue is not taken up again.[2913]

1073. The Supreme Court Chamber recalls that it has dismissed KHIEU Samphân's argument regarding the Trial Chamber's interpretation of the principle of democratic centralism;[2914] his argument that the Trial Chamber erred in this regard also in relation to its finding on his intent is therefore unpersuasive.[2915] Nevertheless, as noted above,[2916] as it was unreasonable to conclude, based on the evidence before the Trial Chamber, that KHIEU Samphân had attended the June 1974 meeting of CPK leaders, his knowledge or intent cannot be inferred from his purported attendance. In these circumstances, there is no reason to address KHIEU Samphân's additional arguments in this respect.[2917]

1074. As to KHIEU Samphân's submission that the Trial Chamber erred in finding that, before 17 April 1975, he had had knowledge of the substantial likelihood that crimes would be committed during Population Movement Phases One and Two and at

[2909] KHIEU Samphân's Appeal Brief, para. 173.
[2910] *See* Trial Judgement, paras 947-952.
[2911] KHIEU Samphân's Appeal Brief, paras 139-144.
[2912] *See above*, paras 101-102.
[2913] *See* KHIEU Samphân's Appeal Brief, para. 144, fn. 295, referring to KHIEU Samphân's Appeal Brief, paras 286-329.
[2914] *See above*, para. 1072.
[2915] KHIEU Samphân's Appeal Brief, paras 282-283.
[2916] *See above*, para. 1028.
[2917] KHIEU Samphân's Appeal Brief, para. 285.

Tuol Po Chrey,[2918] the Supreme Court Chamber notes that, to substantiate this argument, he refers to other submissions contesting the Trial Chamber's findings as to his contribution to the implementation of the common purpose.[2919] KHIEU Samphân follows a similar approach with regard to his argument that the Trial Chamber erred in finding that he had known of the substantial likelihood of the commission of crimes before, during and after Population Movement Phase Two in a subsequent section of his appeal brief.[2920] The Supreme Court Chamber has addressed these alleged factual errors above and concluded that the Trial Chamber's reference to the period before 1970 was to contextualise its findings,[2921] while erred when it found that he had attended a Central Committee meeting in June 1974 at which he had approved of the plan to evacuate Phnom Penh[2922] and that he had delivered the inaugural speech of the DK People's Representative Assembly on 11 April 1976.[2923] However, the Supreme Court Chamber has found that the Trial Chamber's remaining findings were reasonable. They provide a sufficient basis for concluding that KHIEU Samphân possessed knowledge of the substantial likelihood that crimes would be committed during Population Movement Phases One and Two and at Tuol Po Chrey, whether prior to 17 April 1975, or before, during and after Population Movement Phase Two.

1075. KHIEU Samphân argues that the Trial Chamber erred in purportedly inferring criminal intent solely from his alleged contribution to the implementation of the common purpose of the JCE, which it found to not have been entirely criminal.[2924] The Supreme Court Chamber recalls that the common purpose, as clarified above,[2925] was criminal as it was intrinsically linked to policies the implementation of which amounted to the commission of crimes. Consequently, contrary to KHIEU Samphân's submissions, the Trial Chamber did not infer criminal intent from his mere endorsement of a common purpose that was not entirely criminal. Rather, the Trial Chamber found that KHIEU Samphân had the same intent to effect the common purpose – namely implementing a socialist revolution, necessarily involving the

[2918] KHIEU Samphân's Appeal Brief, paras 286, 289-291.
[2919] KHIEU Samphân's Appeal Brief, para. 289.
[2920] KHIEU Samphân's Appeal Brief, paras 588-598.
[2921] *See above*, para. 1005.
[2922] *See above*, para. 1009.
[2923] *See above*, para. 1023.
[2924] KHIEU Samphân's Appeal Brief, paras 318-319, 414-415, 446-447, 626-627. *See also* KHIEU Samphân's Appeal Brief, para. 395.
[2925] *See above*, paras 816-817.

commission of crimes pursuant to the population movement and targeting policies – as all of the other participants in the JCE through a five-fold contribution, despite his prior, concurrent and *post-facto* knowledge of the commission of crimes.[2926] Therefore, the Supreme Court Chamber rejects KHIEU Samphân's argument.

1076. Turning to KHIEU Samphân's submission that the Trial Chamber erred in finding that he had had access to information concerning the commission of crimes as he met with CPK officials at B-5 and at Phnom Penh railway station,[2927] the Supreme Court Chamber recalls that it has found that the Trial Chamber's finding that he attended a meeting at B-5 in April 1975 was reasonable.[2928] PHY Phuon testified in significant detail before the Trial Chamber that KHIEU Samphân had not only attended the meeting held at B-5 in early April 1975, but that he had also approved of the decision to evacuate Phnom Penh that had been confirmed at that meeting.[2929] A reasonable trier of fact could conclude on this basis that he had prior knowledge of the details of the evacuation of Phnom Penh. Furthermore, the Supreme Court Chamber dismisses KHIEU Samphân's argument that the Trial Chamber failed to sufficiently reason its decision because it failed to respond to his arguments concerning his lack of decision-making power.[2930] As noted above, the Trial Chamber was required to deliver a reasoned opinion in relation to the Trial Judgement as a whole rather than in respect of each submission made at trial.[2931] There is no indication that the Trial Chamber did not take KHIEU Samphân's submissions into consideration.[2932] In addition, the Supreme Court Chamber fails to see how KHIEU Samphân's decision-making power or absence thereof actually relates to the question of his criminal intent. Nor is the Supreme Court Chamber persuaded by KHIEU Samphân's argument that the Trial Chamber erred in evaluating the other evidence it cited in support of this finding. Rather, the Trial Chamber reasonably relied on KHIEU Samphân's book to

[2926] Trial Judgement, para. 994 ("[d]espite this knowledge, he […] planned, disseminated, implemented, endorsed and defended the common purpose which resulted in and involved the policies to evacuate urban areas, move people between rural areas and target Khmer Republic officials for arrest, execution and disappearance").
[2927] KHIEU Samphân's Appeal Brief, paras 374-383; *see also* paras 280-284.
[2928] *See above*, paras 1010-1011.
[2929] Trial Judgement, para. 146, referring to T. 26 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/97.1, pp. 14, 16, 23-24; T. 31 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/99.1, pp. 44-45.
[2930] KHIEU Samphân's Appeal Brief, para. 284.
[2931] *See above*, para. 1007.
[2932] *See above*, para. 1007.

corroborate his location at the time of the meeting at B-5.[2933] KHIEU Samphân's argument that the Trial Chamber erred because it misquoted his trial testimony[2934] is incorrect: he testified that he had been called to "participate" and "listen".[2935]

1077. As to KHIEU Samphân's argument that the Trial Chamber committed an error in finding that he had had access to information from "Zone leaders commanding the forces on the ground" in the course of Population Movement Phase One,[2936] KHIEU Samphân mischaracterises the Trial Chamber's findings. As noted above, KHIEU Samphân testified that Pol Pot had asked him "to participate and to listen to" reports from military cadres.[2937] The Trial Chamber relied on this testimony to reach its finding.[2938] The Supreme Court Chamber does not consider the Trial Chamber to have been unreasonable in taking this testimony into account when concluding that KHIEU Samphân had known about the commission of crimes during Population Movement Phase One. The Supreme Court Chamber notes in this respect that, in reaching this overall conclusion, the Trial Chamber considered the evidence in its entirety, of which KHIEU Samphân's testimony concerning this meeting with Pol Pot was one element. Nor does the Supreme Court Chamber consider this finding to be irreconcilable with the Trial Chamber's later conclusion that KHIEU Samphân "never had direct military responsibilities".[2939]

1078. As to KHIEU Samphân's submission that the Trial Chamber erred when it found that he had known of the crimes because he had met with CPK leaders at Phnom Penh railway station because PHY Phuon's testimony and interview record – upon which the Trial Chamber relied – did not indicate that KHIEU Samphân had been "personally involved in the development of the plans and policies for the country",[2940] the Supreme Court Chamber notes that the Trial Chamber, when

[2933] Trial Judgement, para. 735, fn. 2302, referring to Book by KHIEU Samphân: *Cambodia's Recent History and the Reasons Behind the Decisions I Made*, E3/18, dated 7 July 2004, p. 54, ERN (En) 00103750.
[2934] KHIEU Samphân's Appeal Brief, para. 376.
[2935] *See* T. 13 December 2011 (KHIEU Samphân), E1/21.1, p. 94 ("Pol Pot […] called upon me to go [to the party headquarters] in order to participate and to listen to what he did with the military cadre from various battles – various battlefields […] so that I could understand the situation of the revolution").
[2936] KHIEU Samphân's Appeal Brief, paras 378-381.
[2937] T. 13 December 2011 (KHIEU Samphân), E1/21.1, p. 94.
[2938] Trial Judgement, para. 739.
[2939] KHIEU Samphân's Appeal Brief, para. 381, referring to Trial Judgement, para. 378.
[2940] KHIEU Samphân's Appeal Brief, para. 382, referring to Trial Judgement, paras 739, 740, 946, 953,

discussing KHIEU Samphân's knowledge, noted that he had met at the railway station with senior leaders. [2941] Elsewhere in the Trial Judgement, the Trial Chamber stated that several senior leaders, including KHIEU Samphân, had met to "discuss policies".[2942] As KHIEU Samphân correctly notes, according to his interview record, PHY Phuon did not know what had been discussed during one of the meetings that took place at the railway station as he had not been "on guard there".[2943] Nevertheless, the Supreme Court Chamber does not consider that any error that the Trial Chamber may have made in respect of the meetings at the railway station would impact on KHIEU Samphân's conviction: the finding is contained in a section discussing KHIEU Samphân's knowledge of the crimes at Tuol Po Chrey. Not having confirmed the existence of a targeting policy,[2944] the question of whether KHIEU Samphân had knowledge of these crimes is moot because, in any event, the crimes are not imputable to KHIEU Samphân.

1079. Regarding KHIEU Samphân's challenges to the Trial Chamber's findings concerning his access to information through foreign news reports and diplomatic reports and contacts,[2945] the Trial Chamber found that KHIEU Samphân had had knowledge of the crimes concurrent with their commission in Population Movement Phase One because of his regular contact with Norodom SIHANOUK, PENN Nouth as well as external GRUNK officials, including officials of the internal resistance travelling abroad at the time of the facts or who were based overseas, "such as IENG Sary and IENG Thirith".[2946] While the evidence upon which the Trial Chamber's finding is based does not demonstrate direct access, it shows contact with people in possession of relevant information. The Trial Chamber's inference that KHIEU Samphân actually gained access through these regular contacts was not unreasonable. As to his submissions in respect of the Trial Chamber's alleged failure to provide sufficient reasons, the Supreme Court Chamber recalls that the Trial Chamber was

954.
[2941] Trial Judgement, para. 954.
[2942] Trial Judgement, para. 740.
[2943] ROCHOEM Ton *alias* PHY Phuon Interview Record, E3/24, dated 5 December 2007, p. 5, ERN (En) 00223582.
[2944] *See above*, para. 972.
[2945] KHIEU Samphân's Appeal Brief, paras 383-387.
[2946] Trial Judgement, para. 953.

required to give a reasoned opinion in respect of the Trial Judgement as a whole, not as to each submission made at trial.[2947]

1080. Regarding KHIEU Samphân's argument that the Trial Chamber erred when it found that KHIEU Samphân had chaired a Special National Congress and therefore should not have relied on this finding when concluding that he had supported the commission of crimes during Population Movement Phase One,[2948] the Supreme Court Chamber agrees that this finding was unreasonable. Having observed that it was not satisfied that the congress had actually taken place,[2949] the Trial Chamber could not reasonably infer knowledge on the basis of a resolution purportedly produced at the congress.

1081. As to KHIEU Samphân's argument that the Trial Chamber erred in finding that he could have received information concerning the commission of crimes at a series of meetings held at the Silver Pagoda in May 1975,[2950] the Supreme Court Chamber observes that both PHY Phuon and Philip SHORT – upon whose testimony the Trial Chamber relied – testified that the meetings at the Silver Pagoda involved discussions about a change in CPK policy.[2951] KHIEU Samphân does not show how the Trial Chamber erred in finding that he could have received such information by attending these meetings shortly after the evacuation of Phnom Penh, in the course of which crimes had been committed. The Supreme Court Chamber therefore dismisses this argument.

1082. As to KHIEU Samphân's argument that the Trial Chamber erroneously relied on facts post-dating the commission of the crimes, even though such *dolus subsequens* is insufficient and irrelevant to the finding of intent,[2952] the Supreme Court Chamber notes that the Trial Chamber relied, *inter alia*, on his subsequent knowledge of crimes to conclude that KHIEU Samphân had the requisite intent for

[2947] *See above*, para. 1007.
[2948] KHIEU Samphân's Appeal Brief, para. 392.
[2949] Trial Judgement, para. 377. *See also* Trial Judgement, para. 742, fn. 2338.
[2950] KHIEU Samphân's Appeal Brief, paras 393-394.
[2951] Trial Judgement, para. 740, fn. 2335, referring to ROCHOEM Ton *alias* PHY Phuon Interview Record, E3/24, dated 5 December 2007, p. 5, ERN (En) 00223582; T. 7 May 2013 (Philip SHORT), E1/190.1, pp. 4-7; T. 26 July 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/97.1, pp. 67-68, 70-71.
[2952] KHIEU Samphân's Appeal Brief, paras 636-640.

liability based on JCE.[2953] While the Supreme Court Chamber considers that intent arising after the fact would indeed be insufficient to establish requisite intent, there is no indication that this is what the Trial Chamber did. Rather, the Trial Chamber took into account knowledge after the fact as one of the elements when determining whether KHIEU Samphân had the requisite intent at the time of their commission. Indeed, the Trial Chamber also noted that he "knew of the substantial likelihood that crimes would result from the implementation of the [population movement and targeting policies]" and that "these policies did in fact result in and/or involve the crimes committed in the course of phases one and two of the population movements and at Tuol Po Chrey" and based its finding as to his intent on all these facts,[2954] KHIEU Samphân's argument therefore falls to be rejected.

1083. The Supreme Court Chamber concludes that the Trial Chamber erred to the extent that it inferred knowledge or intent on the part of KHIEU Samphân from its finding – shown to have been unreasonable – that he attended a meeting of the CPK leadership in June 1974.[2955] The Trial Chamber also erred insofar as it inferred any intent or knowledge on the part of KHIEU Samphân from his attendance at a Special National Congress allegedly held in April 1975.[2956] Nevertheless, given that the remaining findings of the Trial Chamber remain intact, the Supreme Court Chamber does not consider that the errors that have been identified affect the Trial Chamber's overall conclusion that KHIEU Samphân had prior, contemporaneous and *post-facto* knowledge of the commission of the crimes during Population Movement Phases One and Two.

1084. As to whether the Trial Chamber erred by considering, in the context of KHIEU Samphân's intent, that he had been aware of the substantial likelihood of the crimes,[2957] the Supreme Court Chamber recalls that it has already addressed this argument above and concluded that, depending on the circumstances and the crime at issue, the substantial likelihood of the commission of crimes may be a relevant

[2953] Trial Judgement, para. 994. The Supreme Court Chamber notes that the Trial Chamber's reference, at fn. 2989, to paras 758-759 is probably meant to point instead to paras 958-959 regarding "Knowledge Arising after the Commission of the Crimes".
[2954] Trial Judgement, paras 994-995.
[2955] *See above*, paras 1008-1009.
[2956] *See above*, para. 1080.
[2957] KHIEU Samphân's Appeal Brief, para. 396.

consideration for determining whether an accused had the intent for the commission of a crime based on JCE liability; though it is not, of itself, sufficient to establish intent.[2958] Accordingly, based on the Trial Chamber's findings, it has to be determined whether KHIEU Samphân had the requisite intent for the crimes for which he was convicted, based on JCE liability.

1085. As far as the killing of high-ranking Khmer Republic officials in the context of the evacuation of Phnom Penh is concerned, there can be no doubt that KHIEU Samphân acted with the intent to kill them through the implementation of the common purpose, given that he had publicly called for the execution of the so-called "seven super-traitors".[2959]

1086. With regards to other killings that occurred in the course of the evacuation of Phnom Penh, the Trial Chamber's findings as to KHIEU Samphân's knowledge of the crimes, including the substantial likelihood of the commission of crimes, have been largely confirmed on appeal. Notably, the Supreme Court Chamber has confirmed the finding that KHIEU Samphân participated in a meeting at B-5 in April 1975, at which the plan to evacuate Phnom Penh was discussed and that KHIEU Samphân supported this plan.[2960] Given the circumstances in which the evacuation of Phnom Penh was to take place (extremely short time frame, hottest period of the year), it is clear that KHIEU Samphân had knowledge of the substantial likelihood of deaths resulting from the conditions of the evacuation. Indeed, the Trial Chamber noted that he had admitted that he had expected that people would die during the evacuation of Phnom Penh.[2961] Despite this knowledge, he contributed to the implementation of the common criminal purpose instead of opposing it, thus demonstrating that he had accepted the death of people as a consequence of the evacuation. Further, given the specific circumstances of this case, the common purpose implicitly encompassed the anticipation that deadly force could be used by the troops tasked with evacuating the city, and there is no indication that KHIEU Samphân was not aware of this, given his involvement in the planning of the evacuation of Phnom Penh. Because he

[2958] *See above*, paras 1054-1055.
[2959] *See* Trial Judgement, para. 120.
[2960] Trial Judgement, para. 145.
[2961] Trial Judgement, paras 946, 785, referring to KHIEU Samphân Interview Transcript, E3/4040, undated.

contributed to the implementation the common purpose regardless, it is clear that he had accepted that such killings could occur. In sum, it is established that KHIEU Samphân had the requisite intent, in the form of *dolus eventualis*, in respect of deaths by conditions as well as killings of civilians and Khmer Republic soldiers and officials in the context of the evacuation of Phnom Penh.

1087. It is also established that KHIEU Samphân had the direct intent to commit the crime against humanity of other inhumane acts in this regard, given that, in the circumstances, the evacuation of Phnom Penh fulfilled all elements of this crime. Further, KHIEU Samphân has not successfully challenged on appeal the Trial Chamber's finding that he had acted with discriminatory intent in respect of Population Movement Phase One, thus establishing the requisite intent for the crime against humanity of persecution on political grounds [2962]

1088. Concerning the crimes committed in the course of Population Movement Phase Two, the Supreme Court Chamber recalls that it has confirmed the Trial Chamber's findings as to deaths resulting from the conditions of the transfers and as to one killing.[2963] However, while the Trial Chamber found that this amounted to the crime against humanity of extermination, the Supreme Court Chamber has decided to re-characterise the facts as the crime against humanity of murder.[2964] Accordingly, it has to be determined whether, based on the Trial Chamber's findings, it has been established that KHIEU Samphân had either the direct intent to kill through the implementation of the common purpose or *dolus eventualis* in that regard.

1089. As was the case in respect of NUON Chea,[2965] none of the findings of the Trial Chamber indicate that KHIEU Samphân had the objective to bring about the death of the victim through the implementation of Population Movement Phase Two or was aware that the death would be the certain result thereof. Accordingly, it cannot be said that he acted with direct intent to kill. Nevertheless, having been aware of the consequences of Population Movement Phase One and having nevertheless been involved in the decision and planning to move large numbers of people as part of

[2962] Trial Judgement, para. 995.
[2963] *See above*, para. 550.
[2964] *See above*, paras 560-562.
[2965] *See above*, para. 1064 *et seq*.

Population Movement Phase Two, the Supreme Court Chamber finds that KHIEU Samphân was aware that deaths would be the likely result of the implementation of Population Movement Phase Two, a result which he had accepted. Thus, he acted with *dolus eventualis* in respect of murder in relation to Population Movement Phase Two.

1090. The Supreme Court Chamber also considers that, based on the Trial Chamber's findings, it has been established that KHIEU Samphân had acted with direct intent to commit the crime against humanity of other inhumane acts through the implementation of the common purpose in relation to Population Movement Phase Two, given that the transfer of the population, which stood at the centre of the common purpose, amounted in the circumstances to this crime.[2966]

1091. In respect of the crime of persecution, the Supreme Court Chamber recalls that it has found that the elements of this crime were not established in respect of Population Movement Phase Two. Accordingly, the question of KHIEU Samphân's intent does not arise. The same is true regarding the killings at Tuol Po Chrey, given that the Supreme Court Chamber considers that, based on the evidence that was before the Trial Chamber, the targeting policy cannot be considered to have been reasonably established.

1092. In sum, the Supreme Court Chamber rejects KHIEU Samphân's arguments that the requisite intent was not established.

2. Principle of legality regarding modes of liability

1093. Regarding the arguments concerning the foreseeability and accessibility of the modes of liability pursuant to which KHIEU Samphân was convicted,[2967] the Supreme Court Chamber has already found above that the Trial Chamber did not err in finding that, at the time relevant to charges, an individual could incur criminal liability under customary international law by making a significant contribution to the implementation of a common criminal purpose. This finding was based, in particular, on a review of the post-World War II jurisprudence.[2968] The Supreme Court Chamber

[2966] *See above*, para. 863 *et seq.*
[2967] KHIEU Samphân's Appeal Brief, paras 105-107.
[2968] *See above*, para. 768.

does not consider that this form of liability – which holds responsible those who enter into a common criminal purpose and contribute to its implementation for the crimes that this common purpose amounted to or involved – was inaccessible or unforeseeable to the Accused, notably because the crimes at issue were very grave. KHIEU Samphân cannot persuasively argue that he could not expect that he might be held criminally liable for engaging in activities that involved the commission of such crimes.

1094. As to the arguments concerning foreseeability and accessibility of culpable omission as the basis for incurring criminal responsibility under JCE,[2969] the Supreme Court Chamber has concluded that the Trial Chamber employed the phrase "acts and omissions" only in the generic sense and that there is no suggestion in the Trial Judgement that it relied on omissions by KHIEU Samphân in this regard.[2970] This argument is therefore dismissed

1095. As a result, the Supreme Court Chamber considers that it was sufficiently foreseeable to KHIEU Samphân that he could incur criminal responsibility pursuant to JCE, as affirmed above.

3. Other modes of liability

1096. The Trial Chamber found NUON Chea and KHIEU Samphân responsible for the crimes against humanity of extermination, murder, persecution on political grounds and other inhumane acts in relation to Population Movement Phase One, based on liability for planning, ordering (NUON Chea only), instigating, aiding and abetting and superior responsibility (NUON Chea only).[2971] However, it entered convictions on this basis only in respect of the crime of extermination, given that in relation to the other crimes it had found that liability also arose under the notion of JCE.[2972] In relation to the crime of murder, it found that this crime was subsumed by the crime of extermination.[2973]

[2969] KHIEU Samphân's Appeal Brief, paras 106.
[2970] *See above*, para. 986.
[2971] *See* Trial Judgement, paras 883, 886, 888, 891, 898 (NUON Chea) and 1003, 1005, 1007, 1013, 1015, 1022 (KHIEU Samphân).
[2972] Trial Judgement, paras 940, 942 (NUON Chea) and 1053-1054 (KHIEU Samphân).
[2973] Trial Judgement, para. 1057.

1097. In relation to Population Movement Phase Two, the Trial Chamber found the Accused responsible for the crimes against humanity of extermination, political persecution, and other inhumane acts based on planning, ordering (NUON Chea only), instigating, aiding and abetting and superior responsibility (NUON Chea only). However, it entered a conviction on this basis only for the crime of extermination, as in respect of the other crimes, NUON Chea and KHIEU Samphân were found to be liable based on the notion of JCE.[2974]

1098. NUON Chea and KHIEU Samphân raise numerous grounds of appeal in regard of these alternative modes of liability.

1099. The Supreme Court Chamber recalls that it has confirmed the Accused's liability, based on the notion of JCE, in respect of murder,[2975] other inhumane acts and persecution in relation to Population Movement Phase One as well as other inhumane acts and murder in relation to Population Movement Phase Two. The Supreme Court Chamber does not consider that it is appropriate to consider the grounds of appeal relating to the other modes of liability, given that these grounds of appeal cannot invalidate the judgement under review or occasion a miscarriage of justice.[2976] This is because, irrespective of the correctness of the Trial Chamber's legal and factual findings in relation to those modes of liability, the Accused's conviction for the crimes in question based on JCE would still stand.

1100. In contrast, in relation to the crimes committed at Tuol Po Chrey, the Supreme Court Chamber has found that liability does not arise under JCE because the existence of the targeting policy (and therefore of a common criminal purpose) has not been reasonably established. Accordingly, liability could theoretically arise under other

[2974] Trial Judgement, paras 904, 907, 909, 912, 917, 940-942 (NUON Chea) and 1029-1030, 1032, 1036, 1038, 1053-1054 (KHIEU Samphân). The Trial Chamber distinguished in this regard between other inhumane acts of "forced transfer" and "attacks against human dignity", which it found to be covered by JCE I, and other inhumane acts of "enforced disappearance", which it did not find to be covered. In respect of the latter, the Trial Chamber therefore found NUON Chea and KHIEU Samphân to be liable because of planning, etc. As the Supreme Court Chamber has found the Trial Chamber's approach to the crime of other inhumane acts to have been erroneous (*see above*, para. 572 *et seq.*), the Supreme Court Chamber considers this distinction in treatment to have been uncalled for. Rather, liability for the crime of other inhumane acts should have been based only based on JCE I liability.
[2975] As the Supreme Court Chamber has found that the crime of extermination has not been established in respect of Population Movement Phase One (*see above*, para. 541), the crime of murder is no longer subsumed by the crime of extermination and liability arises based on the notion of JCE I.
[2976] *See* Internal Rule 104(1).

modes of liability. However, the Supreme Court Chamber notes that, in reaching its finding regarding the liability of NUON Chea and KHIEU Samphân for planning, instigating, ordering (NUON Chea only), and aiding and abetting as well as superior responsibility (NUON Chea only), the Trial Chamber relied to a decisive extent on factual findings that were the basis for its findings in relation to the targeting policy, which, however, were overturned on appeal. Notably, the Trial Chamber relied to a decisive degree on the targeting policy that the CPK leaders had purportedly planned.[2977]

1101. Accordingly, irrespective of the grounds of appeal raised by NUON Chea and KHIEU Samphân in this regard, liability in relation to the crimes committed at Tuol Po Chrey cannot arise based on planning, instigating, ordering, aiding and abetting or superior responsibility. The Trial Chamber's findings in that regard are therefore overturned as well.

F. GROUNDS OF APPEAL RELEVANT TO THE ACCUSED'S SENTENCING AND IMPACT OF ERRORS ON SENTENCE

1102. As noted previously, the Trial Chamber convicted NUON Chea and KHIEU Samphân for the crimes against humanity of extermination (encompassing murder), persecution on political grounds and other inhumane acts (comprising forced transfer, attacks against human dignity and enforced disappearances) and sentenced each of the Accused to life imprisonment.[2978] In determining the sentences, the Trial Chamber took into account various factors, including the gravity of the offences, in view of the vast number of victims, as well as the "broad geographic and temporal scope of victimisation",[2979] and certain aggravating circumstances, including NUON Chea's and KHIEU Samphân's respective positions of authority, which they abused in contributing to the crimes and participating in the JCE ,[2980] and their status as "well-educated" individuals.[2981] The Trial Chamber declined to consider as mitigating

[2977] Trial Judgement, paras 918-931, 936-938 (NUON Chea) and 1039-1051 (KHIEU Samphân).
[2978] Trial Judgement, paras 1074, 1105-1107.
[2979] Trial Judgement, para. 1075.
[2980] Trial Judgement, paras 1084, 1087.
[2981] Trial Judgement, paras 1086, 1089.

circumstances other factors, such as NUON Chea's remorse,[2982] the Accused's advanced age and ill-health,[2983] and KHIEU Samphân's good character.[2984]

1103. KHIEU Samphân raises several arguments against the sentence of life imprisonment that the Trial Chamber imposed, arguing that the Trial Chamber's exercise of discretion was tainted by discernible errors of fact and law. The Co-Prosecutors submit that KHIEU Samphân has failed to demonstrate an error in the Trial Chamber's exercise of discretion as regards the sentence and that the Trial Chamber was entitled to take into account the factors it did.[2985]

1104. The Supreme Court Chamber recalls that it has found that the Accused were erroneously convicted for the crime against humanity of extermination during Population Movement Phases One and Two, the crime against humanity of persecution on political grounds in relation to Population Movement Phase Two and the crimes against humanity of murder, extermination and persecution on political grounds in respect of the events at Tuol Po Chrey. The Supreme Court Chamber has also identified some errors in the findings of the Trial Chamber in relation to specific crimes committed in the course of Population Movement Phases One and Two.

1105. The Supreme Court Chamber will first assess KHIEU Samphân's alleged errors in relation to the sentence imposed by the Trial Chamber and will then determine whether, in view of the above-mentioned erroneous findings, it is necessary to adjust the sentence that the Trial Chamber imposed.[2986] At the outset, however, it will discuss the applicable standard of review.

1. Standard of review

1106. Internal Rule 98, Article 39 of the ECCC Law and Article 10 of the ECCC Agreement set out the law applicable to sentencing.[2987] In addition, Internal Rule 104 is applicable to appeals against the sentence.[2988]

[2982] Trial Judgement, paras 1092, 1093, 1096.
[2983] Trial Judgement, paras 1095, 1098.
[2984] Trial Judgement, paras 1099-1103.
[2985] Co-Prosecutors' Response, paras 628-630.
[2986] *See generally* *Seromba* Appeal Judgement (ICTR), para. 226 (as an example of where errors in relation to the sentence imposed have been found on appeal, resulting in the sentence being modified).
[2987] *See* *Duch* Appeal Judgement (001-F28), para. 348 (for the application of the ECCC Law as *lex*

1107. As regards the standard of review for appeals against the sentence, the Supreme Court Chamber in the *Duch* Appeal Judgement (001-F28) cited with approval[2989] and applied the standard of review set out by the ICTY Appeals Chamber in *D. Milošević.* The relevant passage of the judgement in that case reads as follows:

> Due to their obligation to individualise the penalties to fit the circumstance of an accused and the gravity of the crime, Trial Chambers are vested with broad discretion in determining the appropriate sentence, including the determination of the weight given to mitigating or aggravating circumstances. As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law. It is for the appellant to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[2990]

1108. The Supreme Court Chamber shall apply this standard in the case at hand in considering KHIEU Samphân's grounds of appeal relating to the sentence imposed by the Trial Chamber.

1109. In addition, in accordance with its own jurisprudence as well as that of the *ad hoc* tribunals, when the Supreme Court Chamber overturns one or more convictions on which the Trial Chamber has based a single sentence, the Supreme Court Chamber is competent to impose a single sentence – or concurrent sentences – for the remaining convictions. In doing so, the Supreme Court Chamber may revise the sentence imposed by the Trial Chamber.[2991]

2. Determination of KHIEU Samphân's grounds of appeal

1110. In a section devoted to "[r]elevant sentencing principles and factors", the Trial Chamber noted that it sought to "reassure the surviving victims, their families, the

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specialis instead of the Cambodian Criminal Code with regard to the rules on sentencing applicable).
[2988] *Duch* Appeal Judgement(001-F28), para. 353.
[2989] *Duch* Appeal Judgement (001-F28), para. 354.
[2990] *D. Milošević* Appeal Judgement (ICTY), para. 297 (footnote(s) omitted). *See also Mrkšić and Šljivančanin* Appeal Judgement (ICTY), para. 353; *Martić* Appeal Judgement (ICTY), para. 326; *Strugar* Appeal Judgement (ICTY), paras 336-337.
[2991] *See*, *e.g.*, *Blaškić* Appeal Judgement (ICTY), para. 680 (footnote(s) omitted).

witnesses and the general public that the law is effectively implemented and enforced, and applies to all regardless of status and rank".[2992] The Trial Chamber also referred to punishment (as opposed to revenge) and deterrence as purposes of imposing a sentence.[2993] KHIEU Samphân argues that the Trial Chamber, in setting out these principles, erroneously downplayed the importance of retribution and individual deterrence.[2994] The Supreme Court Chamber considers that this assertion is obscure and falls to be rejected as such. There is also no indication that the Trial Chamber's statement is an expression of bias against him.[2995]

1111. KHIEU Samphân argues that the Trial Chamber, in considering his role in the commission of the crimes,[2996] failed to take into account its earlier findings as to his purportedly limited role and lack of power to issue orders, which, in his submission, "should have attracted a significantly less severe sentence".[2997] He further avers that a review of the sentencing practices of the ICTY and the IMT shows that the most serious punishments should be reserved to those most responsible for the crimes committed.[2998]

1112. The Supreme Court Chamber considers that KHIEU Samphân has failed to establish any error or contradiction in the Trial Chamber's approach. The paragraphs of the Trial Judgement to which he refers (without further explanation)[2999] are not indicative of a failure to take the extent of KHIEU Samphân's role into account when imposing a sentence. As to the purported principle that the harshest punishment must be reserved for those bearing the highest responsibility for the crimes, the Supreme Court Chamber considers that the appropriate sentence will always have to be determined based on the facts of the specific case and the level of culpability of the individual accused. A comparison of sentences imposed by other tribunals in other cases is, as such, inapt to show an error on the part of the Trial Chamber in its exercise of discretion in imposing an appropriate sentence.

[2992] Trial Judgement, para. 1067.
[2993] Trial Judgement, para. 1067.
[2994] KHIEU Samphân's Appeal Brief, para. 647.
[2995] *See* KHIEU Samphân's Appeal Brief, para. 648.
[2996] Trial Judgement, para. 1080.
[2997] KHIEU Samphân's Appeal Brief, para. 650.
[2998] KHIEU Samphân's Appeal Brief, para. 651.
[2999] *See* KHIEU Samphân's Appeal Brief, fn. 1348, referring to Trial Judgement, para. 1080, in comparison to Trial Judgement, paras 203, 230, 378, 381.

1113. KHIEU Samphân also contests the Trial Chamber's finding that his abuse of his position of authority constituted an aggravating circumstance, arguing that a position of authority is not automatically aggravating and that his role was merely symbolic.[3000] The Supreme Court Chamber is not persuaded by this argument. According to the jurisprudence of the ICTY, a senior political or military rank or position of authority in the leadership does not *per se* constitute an aggravating circumstance.[3001] Nevertheless, a trial chamber has "the discretion to take into account, as an aggravating circumstance, the seniority, position of authority, or high position of leadership held by a person".[3002] In particular, the fact that a person *uses* such a position to contribute to a criminal purpose, or abuses the position, does constitute an aggravating circumstance. Thus, what matters is the manner in which the authority was exercised. In the case at hand, the Trial Chamber based its finding as to KHIEU Samphân's abuse of authority on his "contribution to the crimes, including through his participation in the JCE, [which] was undertaken in his official capacities, including as a member of the Central Committee, a member of Office 870, President of the State Presidium, and highest official in GRUNK".[3003] The Supreme Court finds that the Trial Chamber was not unreasonable in finding that such a contribution amounted to an abuse of his position of authority and influence.

1114. KHIEU Samphân also posits that the Trial Chamber "offended the principle of legality in considering [his] level of education as an aggravating factor" as this "has never been contemplated in international law or Cambodian law".[3004] The Supreme Court Chamber rejects this argument, as it fails to show an error in the exercise of discretion: it is not unreasonable to assume that KHIEU Samphân's high level of education enabled him to realise and predict the dreadful consequences of his contribution and the seriousness of the crimes. His argument is also factually incorrect, as other courts and tribunals have previously taken the level of an accused's education into account as an aggravating factor.[3005] The Supreme Court Chamber

[3000] KHIEU Samphân's Appeal Brief, para. 653, referring to Trial Judgement, para. 1087.
[3001] *See*, *e.g.*, *Deronjić* Appeal Judgement (ICTY), para. 67; *Babić* Judgement on Sentencing Appeal (ICTY), para. 80.
[3002] *Babić* Judgement on Sentencing Appeal (ICTY), para. 80.
[3003] Trial Judgement, para. 1087.
[3004] KHIEU Samphân's Appeal Brief, para. 654.
[3005] *Hadžihasanović and Kubura* Appeal Judgement (ICTY), para. 328 (footnote(s) omitted). *See also* Stakić Trial Judgement (ICTY), para. 915; *Brđanin* Trial Judgement (ICTY), para. 1114; *Lubanga*

therefore concludes that the Trial Chamber did not err in considering KHIEU Samphân's educational background as an aggravating circumstance.

1115. KHIEU Samphân maintains that the Trial Chamber erred because, contrary to its indication that it would consider all mitigating factors, it failed to take into account his good character.[3006] The Supreme Court Chamber considers this argument to be baseless, as the Trial Chamber considered the testimony of witnesses as to his character[3007] and stated that KHIEU Samphân "may have treated his wife well and been kind to people in specific instances. However, these factors cannot play any significant part *in mitigating* crimes of the severity of those for which KHIEU Samphân has been found guilty, and will not be given undue weight".[3008] While this passage is not contained in the section of the Trial Judgement entitled "Mitigating factors", but the section immediately thereafter, entitled "Character witnesses", it is evident that the Trial Chamber did give consideration to his character as a potentially mitigating factor. To the extent that KHIEU Samphân argues[3009] that the Trial Chamber contradicted itself because it spoke of his "purported good character" while elsewhere finding that his character was "trusted and respected",[3010] the Supreme Court Chamber cannot see any contradiction; clearly, a person may be trusted and respected and still not be of good character.

1116. Consequently, KHIEU Samphân grounds of appeal relating to sentencing are dismissed.

3. Impact of the Supreme Court Chamber's findings on the sentence

1117. The Trial Chamber sentenced each of the Accused to life imprisonment in respect of all convictions for crimes against humanity, without specifying the sentences for individual crimes. The Supreme Court Chamber recalls that it has found that the crime of extermination was not established beyond reasonable doubt in respect of Population Movement Phases One and Two.[3011] Regarding the latter, the

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Decision on Sentence (ICC), para. 56.
[3006] KHIEU Samphân's Appeal Brief, paras 655-657.
[3007] Trial Judgement, paras 1099-1102.
[3008] Trial Judgement, para. 1103.
[3009] KHIEU Samphân's Appeal Brief, para. 657.
[3010] Trial Judgement, paras 1080 and 1103.
[3011] *See above*, paras 541, 560.

underlying acts nevertheless constituted the crime against humanity of murder.[3012] Further, the Supreme Court Chamber found that the Trial Chamber erred when it found that the crime of persecution on political grounds had been committed during Population Movement Phase Two. In addition, the Supreme Court Chamber reversed the Trial Chamber's findings with regard to the criminal responsibility of the Accused for the crimes committed at Tuol Po Chrey because the existence of a targeting policy had not been reasonably established.[3013] The Supreme Court Chamber has also found errors in respect of specific findings of crimes in the course of Population Movement Phases One and Two. The question arises as to whether these errors have an impact on the appropriateness of the sentence imposed by the Trial Chamber.

1118. The Supreme Court Chamber recalls that a sentence should reflect the inherent gravity of the criminal conduct.[3014] The Supreme Court Chamber recalls that "[i]n determining the appropriate sentence, the gravity of the crime committed is the 'litmus test' for the appropriate sentence".[3015] As described above, a number of factors are relevant for the assessment of the gravity of the offence, including the number and vulnerability of victims, the impact of the crimes upon them and their relatives, the discriminatory intent of the convicted person when this is not already an element of the crime; the scale and brutality of the offences, and the role played by the convicted persons.[3016]

1119. In the case at hand, the Supreme Court Chamber recalls that the Trial Chamber found that between 2,330,000 to 2,430,000 persons were victims of the crimes committed during Populations Movement Phases One and Two.[3017] The Supreme Court Chamber further recalls that the Trial Chamber found that:

> The number of victims is among the highest of any decided case concerning international crimes. The crimes were committed across the whole of Cambodia during an almost two-year period. The Trial Chamber considers that the gravity of the crimes is illustrated by the vast

[3012] *See above*, paras 560-562, 868.
[3013] *See above*, para. 972.
[3014] *Jelisić* Appeal Judgement (ICTY), para. 94.
[3015] Trial Judgement, para. 1068; *Čelebići* Trial Judgement (ICTY), para. 1225, endorsed in *Aleksovski* Appeal Judgement (ICTY), para. 182.
[3016] *Duch* Appeal Judgement (001-F28), para. 375; *see also* fn. 798.
[3017] Trial Judgement, para. 1075.

> number of victims, as well as the broad geographic and temporal scope of victimisation.[3018]

1120. The Supreme Court Chamber notes that these findings are, as such, not affected by the errors that it has identified in the Trial Judgement in respect of specific crimes. In particular, the Supreme Court Chamber' s finding that the Accused cannot be held responsible for the crimes at Tuol Po Chrey has only a limited effect on the overall number of victims for which the Accused are responsible. The Supreme Court Chamber endorses the Trial Chamber's conclusion with regard to the lasting impact of the crimes on the victims.[3019] In addition, the Supreme Court Chamber notes that it has upheld the conviction for the crime against humanity of murder. With regard to the role of the Accused in the crimes, the Supreme Court Chamber has generally confirmed the Trial Chamber's findings in this regard. The Supreme Court Chamber also considers the Accused's complete lack of consideration for the ultimate fate of the Cambodian people, 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.

1121. For the foregoing reasons, the Supreme Court Chamber considers that the imposition of a life sentence for each of the Accused is appropriate and therefore confirms the sentences imposed by the Trial Chamber.

[3018] Trial Judgement, para. 1075.
[3019] Trial Judgement, para. 1073.

V. THE APPEAL OF THE CO-PROSECUTORS

1122. In the Trial Judgement, the Trial Chamber recalled its own decision as well as that of the Pre-Trial Chamber,[3020] according to which the mode of liability referred to as the "third" or "extended" form of joint criminal enterprise ("JCE III") was not applicable in proceedings before the ECCC as JCE III did not form part of customary international law at the time of the crimes under the jurisdiction of the ECCC were alleged to have been committed. On that basis, the Trial Chamber decided not to consider liability based on JCE III any further.[3021]

1123. With their appeal, the Co-Prosecutors seek a finding by the Supreme Court Chamber that JCE III is applicable in proceedings before the ECCC.[3022] They do not seek a change to the dispositive part of the Trial Judgement,[3023] as they do not allege any error that would invalidate it, given that NUON Chea and KHIEU Samphân were found guilty based on other modes of liability. In these circumstances, the Supreme Court Chamber shall first consider the admissibility of the appeal.

A. SUBMISSIONS ON THE ADMISSIBILITY OF THE APPEAL

1124. The Co-Prosecutors submit that the Supreme Court Chamber has the power, recognised in the *Duch* Appeal Judgement (001-F28), to admit legal errors of "general significance to the jurisprudence", even if those errors do not have any impact on the decision under review.[3024] They aver that this is a "self-standing basis for admissibility of appeals, well-established in international procedural rules, and operates independently from ordinary review of errors of law under Internal Rule 104".[3025] The Co-Prosecutors note that Internal Rule 105(3) refers to an alleged error invalidating the *decision*, but not the *judgement*.[3026] The Co-Prosecutors refer to the ICTR Appeals Chamber's judgement in *Akayesu*, which held that it had the discretionary power to pronounce on grounds of appeal that do not have the potential

[3020] *See* Pre-Trial Chamber's Decision on JCE (D97/15/9); Trial Chamber Decision on JCE (E100/6).
[3021] Trial Judgement, para. 691.
[3022] *See* Co-Prosecutors' Notice of Appeal (E313/3/1) ; Co-Prosecutors' Appeal Brief, para. 59.
[3023] Co-Prosecutors' Notice of Appeal (E313/3/1), para. 2.
[3024] Co-Prosecutors' Appeal Brief, para. 6, referring to *Duch* Appeal Judgement (001-F28), para. 15; *See also* Co-Prosecutors' Appeal Brief, para. 8 ("[t]he *Brđanin* Appeals Chamber also acceded to the Prosecutor's request to 'clarify the law' […] despite the agreement of all parties that the Appeals Chamber would enter no new convictions as a result") (footnote(s) omitted).
[3025] Co-Prosecutors' Appeal Brief, para. 6 (footnote(s) omitted).
[3026] Co-Prosecutors' Appeal Brief, para. 6.

to invalidate the judgement under review, even in circumstances where the appellant only raises such grounds of appeal.[3027] The Co-Prosecutors aver that the Supreme Court Chamber is the "apex judicial body of the ECCC" and should have the opportunity to address "compelling issues of law even if they would not affect the ultimate judgment", noting that the ECCC Agreement and the ECCC Law do not provide for interlocutory appeals, unlike under Cambodian law.[3028] Thus, they submit that the Supreme Court Chamber should use its inherent discretion to apply Cambodian procedure.[3029] The Co-Prosecutors submit that if their appeal were to be declared inadmissible, the Chamber would be "powerless" to address the issues raised therein; and that it is likely that the Trial Chamber will repeat the same purported error of law in future proceedings before the ECCC.[3030] Finally, they invoke "[c]ompelling considerations of international public policy" in support of a review by the Supreme Court Chamber.[3031] They claim that JCE III is an important mechanism through which accountable leaders can be held responsible for crimes and submit that the Supreme Court Chamber should have an opportunity to "harmonise the ECCC's legal position with decisions and final judgments of the ICTY, ICTR, SCSL and STL",[3032] all of which accept JCE III as an applicable mode of liability.

1125. In their responses to the Co-Prosecutors' Appeal Brief, KHIEU Samphân and NUON Chea contest the admissibility of the appeal. With reference to Internal Rule 105(3), KHIEU Samphân submits that it is impossible to appeal a decision without challenging its effect upon the outcome.[3033] He argues that the issue raised by the Co-Prosecutors was neither addressed in the Trial Judgement, nor did it have any impact thereon.[3034] He recalls a decision of the Supreme Court Chamber,[3035] which stated that appeals from decisions taken in the course of the trial, which are brought as part of an appeal against the judgement on the merits, "must demonstrate a lasting *gravamen* on the part of the appellant; as such, they must relate to one or more of permissible

[3027] Co-Prosecutors' Appeal Brief, para. 7, referring to *Akayesu* Appeal Judgement (ICTR), para. 21 *et seq*.
[3028] Co-Prosecutors' Appeal Brief, para. 9.
[3029] Co-Prosecutors' Appeal Brief, para. 9.
[3030] Co-Prosecutors' Appeal Brief, para. 10.
[3031] Co-Prosecutors' Appeal Brief, para. 11.
[3032] Co-Prosecutors' Appeal Brief, para. 11.
[3033] KHIEU Samphân's Response, para. 13.
[3034] KHIEU Samphân's Response, para. 14.
[3035] KHIEU Samphân's Response, para. 15.

grounds of appeal from the Trial Judgement".[3036] KHIEU Samphân submits that the Co-Prosecutors were not prejudiced by the Trial Judgement, thus have no legitimate interest; hence their appeal is inadmissible.[3037]

1126. In addition, KHIEU Samphân submits that the Co-Prosecutors renounced their right to appeal this issue because they failed to appeal the Closing Order (D427) and did not raise the matter as a preliminary objection before the Trial Chamber.[3038] Furthermore, KHIEU Samphân avers that the Co-Prosecutors' Appeal is outside the Supreme Court Chamber's jurisdiction as it relates, in reality, not to Case 002/01, but to Case 002/02.[3039] He also argues that, since JCE III was not included in the Closing Order (D427) in respect of Case 002/02, it is definitively excluded from that case, and therefore JCE III also has no importance for that case;[3040] and the mere fact that the Co-Prosecutors have indicated that they wish to plead based on JCE III in Case 002/02 does not change that fact.[3041]

1127. KHIEU Samphân submits that the conditions for a declaratory decision by the Supreme Court Chamber regarding the applicability of JCE III are not fulfilled.[3042] With reference to the jurisprudence of the Supreme Court Chamber and that of the ICTY and ICTR, he submits that there are three conditions for such a declaratory decision, but that none of the conditions are actually met in the case at hand.[3043]

1128. KHIEU Samphân argues further that not every legal question must be resolved by the Supreme Court Chamber;[3044] that there is no need to harmonise the ECCC's jurisprudence with that of other international or internationalised courts and tribunals (which recognise JCE III);[3045] that there is no need for the Supreme Court Chamber to

[3036] Decision on Appeal Brief and Responses Extension Requests (F9), para. 16.
[3037] KHIEU Samphân's Response, para. 16.
[3038] KHIEU Samphân's Response, paras 17-19.
[3039] KHIEU Samphân's Response, paras 22-28.
[3040] KHIEU Samphân's Response, para. 26.
[3041] KHIEU Samphân's Response, para. 40.
[3042] KHIEU Samphân's Response, para. 30.
[3043] KHIEU Samphân's Response, paras 34-37.
[3044] KHIEU Samphân's Response, para. 39.
[3045] KHIEU Samphân's Response, para. 41.

give legal guidance;[3046] and that that the holdings of the Pre-Trial Chamber are *res judicata* and the trial was conducted on that basis.[3047]

1129. NUON Chea submits that the Co-Prosecutors' appeal fails to comply with the requirements of the Internal Rules, namely that the alleged error must have the potential to invalidate the judgement.[3048] He recognises that the Supreme Court Chamber previously found that it has jurisdiction over legal errors which would not invalidate the judgement but are of significance to the ECCC's jurisprudence. However, he claims that, in the Co-Prosecutors' Notice of Appeal (E 313/3/1), the Co-Prosecutors merely stated that they were raising the appeal in the interests of the law, without indicating that the appeal was raising a matter of significance to the ECCC's jurisprudence.[3049] He submits that, in any event, the issue of whether JCE III is applicable before the ECCC is not of general importance, given that it has been litigated at length in the context of Case 002/01, asserting that "[e]ven if it was at one time a matter of 'significance to the ECCC's jurisprudence' which may have warranted consideration by the Supreme Court Chamber, any such significance in Case 002 has long been eroded".[3050] He requests that the Supreme Court Chamber dismiss the Co-Prosecutors' Appeal as inadmissible.[3051]

B. DETERMINATION BY THE SUPREME COURT CHAMBER

1130. Pursuant to Internal Rule 111(2), the Supreme Court Chamber may declare an appeal inadmissible if it finds that it "was filed late, or was otherwise procedurally defective". An appeal is procedurally defective if it fails to comply with mandatory procedural requirements, as stipulated in the Internal Rules or elsewhere in the applicable law.

1131. Internal Rule 105 sets out several procedural requirements for the admissibility of appeals. Notably, Rule 105(3) provides, in relevant part, as follows:

[3046] KHIEU Samphân's Response, para. 42.
[3047] KHIEU Samphân's Response, para. 44.
[3048] NUON Chea's Response, para. 3, referring to Internal Rules 104(1)(a), 105(2)(a), 105(3).
[3049] NUON Chea's Response, para. 4, referring to Co-Prosecutors' Notice of Appeal (E131/3/1), para. 2.
[3050] NUON Chea's Response, para. 4.
[3051] NUON Chea's Response, para. 58.

> A party wishing to appeal a judgment shall file a notice of appeal setting forth the grounds. The notice shall, in respect of each ground of appeal, specify the alleged errors of law invalidating the decision and alleged errors of fact which occasioned a miscarriage of justice.

1132. The Co-Prosecutors do not argue that the legal error that they allege invalidates the Trial Judgement. Thus, they fail to comply with a mandatory requirement for their appeal, namely to specify an error "invalidating the decision". The Co-Prosecutors argue that Internal Rule 105(3) refers only to a "decision", as opposed to "judgement", seemingly implying that this means that it is unnecessary to establish that the judgement as a whole was invalidated. To this extent, the Supreme Court Chamber finds that such an interpretation of the aforementioned rule is unpersuasive. The provision has to be understood in context, particularly including Internal Rule 104(1), which states that:

> The Supreme Court Chamber shall decide an appeal against a judgment or a decision of the Trial Chamber on the following grounds: a) an error on a question of law invalidating the judgment or decision.

1133. This indicates that the word "decision" in Internal Rule 105(3) must be understood as referring to the verdict of the Trial Chamber at the end of the case, *i.e.* the judgement. This is because the primary objective of appeal proceedings following a trial is to determine whether judgement issued by the Trial Chamber was legally and factually correct. This is confirmed by the equally authoritative French version of Internal Rule 105(3), which uses the formulation "*le verdict prononcé*" - which translates to "the pronounced verdict" - for the English term "decision".[3052]

1134. The Supreme Court Chamber's recent decision regarding the Parties' motions for extensions of time and page limits[3053] confirms this understanding and highlights that there is no difference when the error is alleged to have been made not in the judgement itself, but in a decision taken earlier on within the proceedings. As noted by KHIEU Samphân, the Supreme Court Chamber underlined in that decision that, if an interlocutory decision is challenged in an appeal against the judgement, a "lasting *gravamen* on the part of the appellant [must be demonstrated]; as such, they must relate to one or more of permissible grounds of the appeal from the Trial

[3052] Internal Rule 105(3) (Fr).
[3053] Decision on Appeal Brief and Responses Extension Requests (F9).

[Judgement]".[3054] Thus, the Supreme Court Chamber established a clear link between the interlocutory decision which is being challenged and the Trial Judgement, which remains the ultimate object of the appeal.

1135. In their notice of Appeal, the Co-Prosecutors state that they bring their appeal "*dans l'intérêt de la loi*" ("in the interest of the law"), seeking declaratory relief only.[3055] They submit that:

> Procedural rules established at the international level confirm that declaratory relief is available through the appellate courts on legal issues of "general significance" or "considerable significance" to the jurisprudence. This Chamber expressly adopted the same legal standard in the Case 001 Appeal Judgment. This position is also well-established in French law through the extraordinary recourse of *pourvoi en cassation dans l'intérêt de la loi*.[3056]

1136. The Co-Prosecutors do not claim that the remedy of *pourvoi en cassation dans l'intérêt de la loi* (literally, cassation in the interests of the law) is available under Cambodian criminal procedure, nor does the Code of Criminal Procedure of Cambodia expressly contain a provision in that regard. As to French law, while the Code of Criminal of Procedure of France does contain such a provision, it appears to be inapposite to the issue at hand. The relevant provision reads as follows:

> Where an appeal or assize court, a correctional court or a police court has made a final judgment that is liable to cassation, and despite this, none of the parties has filed a cassation application within the given time limit against it, the prosecutor general attached to the Court of Cassation may file an application against the judgment on his own motion and notwithstanding the expiry of the time limit, but solely in the interest of the law. The Court rules on the admissibility and the merits of this application. Where the application is granted, cassation is pronounced, but the parties may not avail themselves of the cassation, nor oppose the enforcement of the decision thereby quashed.[3057]

1137. Thus, cassation in the interest of the law is available only against judgements which are liable to cassation under the ordinary course of proceedings, but in respect of which none of the parties has made an application for cassation. In other words, a cassation in the interest of the law is not a vehicle through which decisions that the

[3054] Decision on Appeal Brief and Responses Extension Requests (F9), para. 16.
[3055] Co-Prosecutors' Notice of Appeal (E313/3/1), paras 2, 5.
[3056] Co-Prosecutors' Notice of Appeal (E313/3/1), para. 5 (footnote(s) omitted).
[3057] Code of Criminal Procedure of France, Art. 621.

Court of Cassation otherwise could not review may be made reviewable, it is merely a mechanism for the highest prosecutorial authority to seize the Court of Cassation when the parties have decided not to do so. Accordingly, the analogy proposed by the Co-Prosecutors is misguided and must be rejected.

1138. The Co-Prosecutors submit that, in the *Duch* Appeal Judgement (001-F28), the Supreme Court Chamber recognised that it may address issues of "general significance to the […] jurisprudence", even if they do not invalidate the judgement under review, which, in the Co-Prosecutors' submission, provides a self-standing basis for the admissibility of an appeal.[3058] In the *Duch* Appeal Judgement (001-F28), the Supreme Court Chamber made the following statement:

> In exceptional circumstances, the Supreme Court Chamber may raise questions *ex proprio motu* or hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but is nevertheless of general significance to the ECCC's jurisprudence.[3059]

1139. The Supreme Court Chamber relied on two judgements of the ICTY Appeals Chamber. Indeed, since the *Tadić* Appeal Judgement (ICTY), the ICTY and ICTR Appeals Chamber have stated that they have the power to pronounce themselves on legal issues that do not have the potential to invalidate a decision which is under review. In *Tadić*, the ICTY Appeals Chamber noted in relation to two grounds of appeal that, although they did not appear to fall within Article 25(1) of the ICTY Statute (governing appeals from judgement), they raised matters of general significance to the ICTY's jurisprudence; and it was therefore appropriate for the Chamber to address them.[3060] The ICTY Appeals Chamber did not provide any further explanation or justification for this approach. In the *Akayesu* Appeal Judgement (ICTR) (relied upon by the Co-Prosecutors) followed the same approach in circumstances where the prosecution had *only* raised such grounds of appeal. It must be noted, however, that the Appeals Chambers of the *ad hoc* tribunals have couched this as a right of the Chamber, as opposed to a right of the appellant. They have underlined the discretionary character of their decision to address a ground of

[3058] Co-Prosecutors' Appeal Brief, para. 6, referring to *Duch* Appeal Judgement (001-F28), para. 15.
[3059] *Duch* Appeal Judgement (001-F28), para. 15 (footnote(s) omitted).
[3060] *Tadić* Appeal Judgement (ICTY), paras 241, 247, 281.

appeal that does not have the potential to invalidate the judgement on appeal.[3061] Accordingly, this jurisprudence cannot provide a basis for the *right* of the Co-Prosecutors to appeal. Rather, it is of significance for the discussion of whether the Supreme Court Chamber may consider the merits of the appeal even if it were to find it inadmissible.

1140. In this context, the Supreme Court Chamber recalls that the Internal Rules provide that, if an appeal is found to be procedurally defective, the Supreme Court Chamber *may* declare it inadmissible.[3062] The use of the word "may" suggests that the rejection of a procedurally defective appeal as inadmissible is not mandatory and that the Supreme Court Chamber may also decide to consider its merits regardless of the procedural defect, in keeping with the ICTR approach in *Akayesu*.[3063]

1141. Thus, the question for the Supreme Court Chamber to resolve is whether, in the circumstances of the present case, it is appropriate to exercise its discretion and consider the issues raised by the Co-Prosecutors' appeal. Contrary to the arguments of KHIEU Samphân,[3064] this decision is not confined by definitive and rigid criteria.

1142. The Supreme Court Chamber considers that whether JCE III is applicable in proceedings before the ECCC is of relevance, both to current and future proceedings

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[3061] *Akayesu* Appeal Judgement (ICTR), para. 23 (in which they state that they may choose to exercise this discretion where "resolution [of the issue] is likely to contribute substantially to the development of the Tribunal's jurisprudence"). *See also* the additional references to the jurisprudence of the ICTY, to which the Co-Prosecutors refer at Co-Prosecutors' Appeal Brief, fn. 16: *Galić* Appeal Judgement (ICTY), para. 6 ("[i]n exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but is nevertheless of general significance to the International Tribunal's jurisprudence"). Additionally, a similar formulation of this principle appears in both the *Stakić* Appeal Judgement (ICTY), para. 7; and the *Duch* Appeal Judgement (001-F28), para. 15. *See also Kupreškić* Appeal Judgement (ICTY), para. 22 ("[o]n appeal, parties must limit their arguments to matters that fall within the scope of Article 25 of the Statute. The general rule is that the Appeals Chamber will not entertain arguments that do not allege legal errors invalidating the judgement, or factual errors occasioning a miscarriage of justice, apart from the exceptional situation where a party has raised a legal issue that is of general significance to the Tribunal's jurisprudence. Only in such a rare case may the Appeals Chamber consider it appropriate to make an exception to the general rule") (footnote(s) omitted).

[3062] Internal Rule 111(2) (emphasis added).

[3063] In this regard, the Supreme Court Chamber notes that, according to Article 404 of the Code of Criminal Procedure of Cambodia, "[i]f the Court of Appeal finds that the appeal is filed after the expiration of the [time] period or it was not filed under improper conditions, the Court of Appeal *shall* decide that the appeal is not admissible" (emphasis added). Thus, Internal Rule 111(2) differs from ordinary Cambodian criminal procedure. In the view of the Supreme Court Chamber, this is justified by specific circumstances of the ECCC: the number of cases heard before this jurisdiction is limited; accordingly, opportunities to clarify the law through jurisprudence are correspondingly limited.

[3064] KHIEU Samphân's Response, paras 31, 34, 42.

before this Court. The notion of JCE III has been frequently employed in cases before the *ad hoc* tribunals and it is conceivable that it could also play a role in other proceedings before the ECCC. That said, the Supreme Court Chamber notes that the appeals brought by NUON Chea and KHIEU Samphân 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' appeal. This will provide sufficient guidance for future proceedings; accordingly there is no need to consider the Co-Prosecutors' appeal on an exceptional basis.

1143. For the aforementioned reasons, the Supreme Court Chamber rejects the Co-Prosecutors' appeal as procedurally defective.

VI. 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.

Done in Khmer and English.
Dated this 23rd day of November 2016
At Phnom Penh,
Cambodia

Greffiers

Volker NERLICH SEA Mao Paolo LOBBA PHAN Theoun

Judge KONG Srim
President

Judge Chandra Nihal JAYASINGHE

Judge SOM Sereyvuth

Judge Agnieszka KLONOWIECKA-MILART

Judge MONG Monichariya

Judge Florence Ndepele MWACHANDE-MUMBA

Judge YA Narin