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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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NUON CHEA'S APPEAL AGAINST THE JUDGMENT IN CASE 002/01

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Pursuant to Internal Rules 104(1), 105(3) and 106(5), the Co-Lawyers for Nuon Chea (the 'Defence') hereby submit Nuon Chea's appeal against the trial judgment ('Appeal') in Case 002/01:

1. On 7 August 2014, the Trial Chamber issued its judgment in Case 002/01 ('Judgment').[1] On 29 September 2014, the Defence filed a notice of appeal against the Judgment ('Notice of Appeal').[2] On 31 October 2014, the Supreme Court Chamber fixed a deadline of 29 December 2014 to file an appeal brief of up to 210 pages,[3] which it subsequently extended to 270 pages.[4] This page limit constituted a substantial limitation on the Defence's ability to fully articulate its arguments. Any errors alleged in the Notice of Appeal which this Chamber determines are not sufficiently substantiated in the instant Appeal should accordingly not be considered as having been waived.[5]

I. STANDARD OF APPELLATE REVIEW

A. Errors of law and fact

2. The standard of review against a Trial Chamber judgment was addressed by this Chamber in the Duch Appeal Judgment. This Chamber held that, pursuant to Rule 104(1), parties may appeal a judgment on the basis of 'an error on a question of law invalidating the judgment [...] or an error of fact which has occasioned a miscarriage of justice.'[6] The Chamber characterized this Rule as the 'implementation' of provisions in the ECCC Agreement and ECCC Law establishing the Supreme Court Chamber. It held that the ECCC Law deviates from ordinary Cambodian criminal procedure, which contemplates two levels of appellate review: an 'appellate chamber' with *de novo* jurisdiction over errors of fact, and a cassation court with a limited and comprehensively defined jurisdiction. Article 9 *new* of the ECCC Law compresses these procedures into a single appeal before a single Chamber, which 'shall serve as both appellate chamber and final instance'. The Chamber also held that, as the ECCC Law provides no further guidance as to how this '*sui generis*' appeals body should function, it could seek guidance in procedural rules established at the international level, as contemplated by Article 12(1) of the ECCC Agreement.[7] The Chamber then in effect adopted the standards of review applicable at the *ad hoc* tribunals for use at the ECCC.[8]

3. The Defence submits that this Chamber erred in its interpretation of Article 12(1) of the ECCC

[1] **E313**, 'Case 002/01 Judgment', 7 Aug 2014 ('Judgment').
[2] **E313/1/1**, 'Notice of Appeal Against the Judgment in Case 002/01', 29 Sep 2014 ('Notice').
[3] **F9**, 'Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses', 31 Oct 2014.
[4] **F13/2**, 'Decision on Defence Motions for Extensions of Pages to Appeal and Time to Respond', 11 Dec 2014.
[5] The Defence notes however that it does waive the following grounds: Nos 1, 23, 24, 25, 40.
[6] Case 001, **F28**, 'KAING Guek Eav Appeal Judgement', 001/18-07-2007/ECCC/SC, 3 Feb 2012 ('Duch Appeal Judgment'), para. 11. The Defence notes that Rule 104(1) does not expressly contemplate appeals against a judgment for abuse of discretion, which appears to be limited to immediate appeals. However, an abuse of discretion amounts to an error of law. This was this Chamber's approach to the appeals against the sentence imposed in Case 001. *See* Duch Appeal Judgment, paras. 353-358, 373.
[7] Duch Appeal Judgment, paras. 11-13.
[8] Duch Appeal Judgment, paras. 14-20.

Agreement and Article 9 *new* of the ECCC Law by failing to apply ordinary methods of statutory interpretation to the ECCC Law prior to, or alongside, its assessment of international procedure. Neither the ECCC Law, nor the legal context of proceedings before this Tribunal, warrant the wholesale adoption of appellate review standards applicable at the *ad hoc* tribunals.

4. Article 12(1) of the ECCC Agreement states that ECCC 'procedure shall be in accordance with Cambodian law'. Relying in part on this provision, two members of this Chamber emphasized that 'the ECCC was established by and within the domestic system'.[9] Article 12(1) further states that 'guidance may also be sought' beyond the confines of Cambodian law under specified and limited circumstances: 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.'

5. Pursuant to Article 31 of the Vienna Convention on the Law of Treaties, treaties shall be interpreted in accordance with their ordinary meaning in their context and in light of their object and purpose.[10] The ordinary meaning of Article 12(1) is that international rules constitute an interpretive tool secondary to Cambodian law, which remains the primary legal source subject to the usual rules of statutory interpretation. This follows first from the unambiguous link between ECCC procedure and Cambodian law. It follows further from the word 'guidance', which connotes that international rules merely inform the existing foundation of domestic procedure; the word 'may', which demonstrates that Chambers are free to resolve ambiguities without reference to international procedure; and the word 'also', which establishes that international procedures are supplementary to domestic ones. The practice of legal interpretation *always* entails ambiguity, and such ambiguities are resolved as a matter of course by reference to generally accepted modes of statutory interpretation. If the existence of uncertainty authorized Chambers to adopt international procedures wholesale without further reference to relevant Cambodian sources, the notion of Cambodian law as the primary source of rules would quickly become superfluous. This would run counter to both the ordinary meaning and object and purpose of Article 12(1).

6. Any uncertainty in the interpretation of Article 9 new of the ECCC Law must accordingly be approached first on the basis of *its* ordinary meaning and in light of the relevant procedural context. The phrase 'shall serve as both appellate chamber and final instance' means, on its face, just that: the Supreme Court Chamber should fulfill the functions normally served by both appellate and cassation

[9] Duch Appeal Judgment, Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe, paras. 9-10.
[10] Vienna Convention on the Law of Treaties, adopted 23 May 1969, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969) ('VCLT'), Art. 31. Although the VCLT applies only to treaties between states, and accordingly does not apply directly to the ECCC Agreement, its provisions reflect customary international law in this regard. *See* Botswana/Namibia Judgment, p. 1045, 1059.

courts in Cambodia. In practical terms, this means both that the Supreme Court Chamber has the authority to review factual findings *de novo* and that its findings are final and not subject to further review. The legal scheme adopted by this Chamber in the Duch Appeal Judgment has exactly the opposite effect: it transforms the Chamber into an entity which is *neither* an appeals court *nor* a cassation court, but instead, an ICTY Appeals Chamber.

7. This Chamber's characterization of the appellate system established by the ECCC Law as '*sui generis*' supports this interpretation. The Supreme Court Chamber was not established as a derivative of the *ad hoc* tribunals. It was established as a unique solution tailored to the procedural context of the Cambodian system within which this Tribunal was constituted.

8. Any reference to international procedure must therefore account for that domestic context and bear in mind differences between Cambodian and international procedure. The key difference was implicitly recognized by this Chamber in discussing the standard of review in the Duch Appeal Judgment. As to findings of fact, the Chamber held as follows, citing the ICTY Appeals Chamber:

> The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. *The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence.* Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points.[11]

At the ECCC, however, the overwhelming majority of testimonial evidence was given out of court. 92 witnesses, experts and civil parties appeared before the Chamber, while nearly 1200 witness statements, civil party applications and victim complaints were admitted into evidence.[12] As the Defence shows in greater detail in its analysis of the Trial Chamber's use of out of court evidence in the Judgment, this is a dramatic, unprecedented departure from the *ad hoc* tribunals' practice.[13] Nearly every significant finding in the Judgment was based overwhelmingly on documentary and out of court evidence.[14] On its own terms, the rationale for the ICTY rule does not apply.

9. This reality is reflected throughout this Appeal. Of the 223 errors alleged in the Notice, only 21 turn in any significant way on the credibility or reliability of testimony heard before the Trial Chamber. The vast majority of this Appeal concerns the Trial Chamber's erroneous interpretation of documentary evidence, the content and probative value of evidence given out of court, and the coherence of the inferences which the Chamber drew based on circumstantial evidence. Submissions which do concern live evidence are generally restricted to the Chamber's use of evidence for improper purposes (such as

[11] Duch Appeal Judgment, para. 17 (citing Kupreškić Appeal Judgment) (emphasis added).
[12] Judgment, para. 32; paras 155-159, *infra*.
[13] *See* paras. 155-159, *infra*.
[14] *See e.g.* paras. 229-236, 302-307, 312-318, 377-380, 559-599, *infra* (analyzing the evidence cited by the Trial Chamber as to killings and other deaths during both population movements, attitudes toward New People, CPK structure, and CPK policy as to Khmer Republic soldiers and officials).

expert testimony cited to resolve key factual disputes or victim impact testimony for substantive purposes) or its unambiguously erroneous misrepresentation of the record.[15] Not a single error turns on the Chamber's preference of one live witness over another.

10. The diminished importance of the Trial Chamber as a finder of fact within the civil law system and the existence of an intermediate level of *de novo* appellate review are intrinsically linked. While guidance *may* be sought in international procedure, guidance *should not* be sought where it is rendered irrelevant by fundamentally divergent legal systems. At the ICTY, as in other common law jurisdictions, a Trial Chamber is owed deference because it is the primary and better placed trier of fact. The Trial Chamber at the ECCC, as in other civil law jurisdictions, has no such role; the rationale for deferring to it accordingly does not apply.[16]

11. For these reasons, the Defence submits that this Chamber should apply the ordinary meaning of Article 9 *new* and hold that the standard of appellate review at the ICTY is of no relevance within the Cambodian system. Should the Chamber hold otherwise, however, the ICTY standard should be applied judiciously, and limited to findings in relation to which the Trial Chamber is truly better placed. This means, in particular, the Trial Chamber's assessment of the credibility and reliability of live testimony.

12. The Defence nevertheless emphasizes that, unless explicitly stated, every error of fact alleged in the instant Appeal satisfies the standard set out in the Duch Appeal Judgment.[17] The Defence notes in this regard that even the standard adopted in the Duch Appeal Judgment involves the detailed analysis of alleged errors of fact, including by thorough review of the evidence and the reasonability of the Trial Chamber's findings. One notable example of such a review is the first Appeals Judgment at the ICC, issued earlier this month in *Lubanga*.[18]

B. General importance to the jurisprudence of the tribunal

13. As stated above, the Duch Appeal Judgment recognizes this Chamber's jurisdiction over legal errors 'that would not lead to the invalidation of the Judgment but [are] nevertheless of significance to the ECCC's jurisprudence.'[19] This basis of appeal is well-established at the *ad hoc* tribunals and is of particular importance in this case due to the limits of this Chamber's interlocutory appellate jurisdiction

[15] *See e.g.* paras. 376, 532, *infra* (concerning Philip Short's testimony as to the execution of Khmer Republic soldiers in Oudong and Chhouk Rin's testimony concerning CPK policy as to citydwellers).
[16] *See* para. 8, *supra* ('The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is [that] Trial Chamber has the advantage of observing witnesses in person').
[17] The Defence notes in this regard that the standard applied at other international courts nevertheless involves the detailed analysis of errors of fact alleged by appellants including thorough review of the evidence and the reasonability of the Trial Chamber's findings. For one of many possible examples, *see, e.g.*, Lubanga Appeal Judgment, paras. 250-265, 345-433.
[18] Lubanga Appeal Judgment, paras. 250-265, 345-433.
[19] Duch Appeal Judgment, para. 15.

and the unique circumstances surrounding Case 002/02.[20] The Defence relies on this basis of appellate review in limited circumstances and only where it so states explicitly.

14. The Defence notes that several grounds in the instant Appeal concern trial procedures which are in continuing use before the Trial Chamber.[21] Considering that the trial in Case 002/02 is likely to be at an advanced stage by the time the appeal judgment in Case 002/01 is issued, expedited rulings on these issues are essential to the proper conduct of proceedings in Case 002/02. Accordingly, to the extent this Chamber decides to rule on such issues, the Defence hereby requests that the Supreme Court Chamber issue preliminary rulings prior to and separate from the appeal judgment.

II. CONSTITUTIONALITY OF THE INTERNAL RULES

15. Shortly after the Trial Chamber was seized of the case file, the Defence filed preliminary objections arguing, *inter alia*, that the adoption of the Internal Rules was 'unconstitutional and *ultra vires*' the ECCC plenary.[22] The Defence argued that: (i) the adoption of the Internal Rules constituted an exercise of law-making authority inconsistent with Article 90 of the Cambodian Constitution[23]; (ii) neither the appointment of a plenary nor the adoption of Internal Rules is contemplated by the ECCC Law[24]; and (iii) the adoption of the Internal Rules is inconsistent with Article 12(1) of the ECCC Agreement, providing that procedures shall be in accordance with Cambodian law, subject to defined exceptions.[25] On 8 August 2011, the Trial Chamber dismissed this objection in a decision comprising a mere two substantive paragraphs.[26]

16. The Trial Chamber committed numerous errors of law in these two paragraphs.[27] First, the Chamber applied an erroneous legal standard in holding that the adoption of the Internal Rules was 'not prohibited' by the ECCC Agreement and that 'other international courts trying cases similar to those before the ECCC have also adopted Rules of Procedure and Evidence'.[28] The *ad hoc* tribunals are not bound by the limits of a domestic constitution, and their constitutive documents – their respective Statutes – explicitly instruct judges 'to adopt rules of procedure and evidence'.[29] Practice at these Tribunals is accordingly irrelevant to the constitutional legitimacy of the ECCC Plenary and its permissibility under the ECCC Law. Second, the Chamber applied an erroneous legal standard in holding that the Internal Rules 'consolidate applicable Cambodian procedure, supplemented by

[20] Galić Appeal Judgment, para. 6.
[21] *See* paras 88-106, 135-147, *infra*.
[22] **E51/3**, 'Consolidated Preliminary Objections', 25 Feb 2011, paras. 66-71.
[23] **E51/3**, Consolidated Preliminary Objections, paras. 66-67.
[24] **E51/3**, Consolidated Preliminary Objections, paras. 68-69.
[25] **E51/3**, Consolidated Preliminary Objections, paras. 70-71.
[26] **E51/14**, 'Decision on NUON Chea's Preliminary Objection alleging the Unconstitutional Character of the ECCC Internal Rules', 8 Aug 2011 ('Internal Rules Preliminary Objection Decision'), paras. 6-7.
[27] *See* Notice, Ground 2.
[28] **E51/14**, Internal Rules Preliminary Objection Decision, paras. 6-7.
[29] ICTY Statute, Art. 15; ICTR Statute, Art. 14.

international procedure where necessary and appropriate'.[30] Even assuming the authority of a Plenary composed of judges to adopt a code of procedural rules, no legal authority at the ECCC permits resort to international procedures 'where necessary and appropriate'. Rather, the relevant legal standard as to reference to international procedure is – as argued before – found in Article 12(1) of the ECCC Agreement. Third, the Chamber erred in finding that the Internal Rules are consonant with the ECCC's obligation to 'conduct proceedings in accordance with international standards of justice and fairness as expressed in Articles 14 and 15 of the ICCPR.'[31] This was an especially disingenuous and malign holding, as it was Nuon Chea and his co-accused themselves repeatedly seeking to apply Cambodian law in place of the Internal Rules. The Chamber made no effort to demonstrate that all deviations from Cambodian procedure in the Internal Rules are intended to safeguard the fair trial rights of the Accused under the ICCPR, undoubtedly because any such effort would obviously fail. Indeed, as the Defence shows throughout this Appeal, the Chamber has frequently abused its discretion under Article 12(1) to curtail, rather than enhance, the rights of the Accused.[32]

17. As the entire Case 002/01 trial proceeded pursuant to the Internal Rules, the effects of these errors are pervasive. The Internal Rules limited Nuon Chea's ability, *inter alia*, to adduce evidence[33] and appeal Trial Chamber decisions on an interlocutory basis (causing further prejudice).[34] The Judgment is accordingly invalid in full.

III. THE JUDICIAL INVESTIGATION

18. While the Co-Investigating Judges ('CIJs') and Pre-Trial Chamber's decisions are not before this Chamber for review, events during the investigation are fundamental to the Defence's claims as to the right to an independent and impartial tribunal; the reliability, probative value and comprehensiveness of evidence on the case file; and the Trial Chamber's assessment of evidence in the Judgment. Accordingly, the Defence begins with an overview of two key issues plaguing the investigation: pervasive political interference and the CIJs' biased, flawed investigative approach.

A. Political interference

19. The objectives of the Royal Government of Cambodia ('RGC') in regard to the ECCC have long been clear: to produce a narrative of Democratic Kampuchea ('DK') which allocates blame entirely to a tiny group of leaders while protecting at all costs the senior military officers who implemented the CPK's policies and today remain the highest ranking members of the government. These interests long predate even the advent of the Tribunal. They have manifested continuously, from the establishment

[30] **E51/14**, Internal Rules Preliminary Objection Decision, para. 7.
[31] **E51/14**, Internal Rules Preliminary Objection Decision, para. 7.
[32] *See* paras. 88-104, 135-147, 155-159, *infra*.
[33] *See* paras. 88-104, *infra*.
[34] *See* Rule 104(4).

negotiations through the judicial investigation, to today.

20. The RGC made no secret of its desire to maintain control over the ECCC during the lengthy and acrimonious negotiations which led to its establishment. Where the UN Group of Experts expressed great skepticism that a fair trial was possible within Cambodian courts – because 'only an international tribunal would guarantee international standards of justice, fairness and due process of law'[35] – the RGC was unwilling to cede control over the hearings to an international body.[36] Especially contentious was the question of who would be on trial.[37] UN Legal Counsel Hans Correll believed that the Accused should be selected by an independent prosecutor. Prime Minister Hun Sen, however, insisted that the ECCC would try only 'four or five of the people responsible.'[38] In February 2002, these disputes led the UN to withdraw from negotiations. Correll explained:

> [T]he UN should not be part of a court that would fail to provide victims of the Khmer Rouge with the credible justice they deserve…UN affiliation to such a court could set a precedent for lowering international standards…[and] the UN's name would [be] attached to a judicial process over which it had little or no control.[39]

According to Correll, the UN was nevertheless 'forced back to the negotiating table'.[40] In the end, it agreed to create 'the tribunal that Hun Sen and his allies, including other former Khmer Rouge throughout the regime, wanted.'[41] Among other things, 'a group of potential accused [was] handed over to the Court on a platter.'[42] These latter two assessments – from former international Co-Prosecutor Robert Petit and former Trial Chamber Judge Silvia Cartwright, respectively – constitute rare honest admissions from those offices about these well-known, and obvious, circumstances.

21. Preliminary indications that the Group of Experts' skepticism was justified surfaced in January 2007, when reports surfaced that a kickback scheme implicating Sean Visoth, the Director of the Office of Administration, existed among national staff.[43] The Defence sent letters to the Office of Administration and UN Secretary General, and filed a criminal complaint with the Phnom Penh Municipal Court and a Request for Investigative Action ('RIA') with the CIJs.[44] While the effect of the kickback scheme on the fairness of trial proceedings remains unclear, the incident acutely demonstrates the Tribunal's inability to function transparently and according to the rule of law. Six years after being forced to take 'sick leave' as a consequence of the scandal, Sean Visoth remains the titular Director of

[35] David Scheffer, 'The Extraordinary Chambers in the Courts of Cambodia', 2008 ('*The ECCC*'), p. 5.
[36] Scheffer, *The ECCC*; John D. Ciorciari and Anne Heindel, 'Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia', 2014 ('*Hybrid Justice*'), pp. 28-33.
[37] Ciorciari and Heindel, *Hybrid Justice*, p. 29.
[38] Ciorciari and Heindel, *Hybrid Justice*, pp. 29-30.
[39] Ciorciari and Heindel, *Hybrid Justice*, p. 32.
[40] Ciorciari and Heindel, *Hybrid Justice*, p. 34.
[41] See statement of Robert Petit, cited in Ciorciari and Heindel, *Hybrid Justice*, p. 39.
[42] See statement of Judge Cartwright, cited in **F2/1**, Second Request to Consider Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01', 2 Sep 2014 ('Second Appeal Evidence Request'), para. 4.
[43] **D158**, 'NUON Chea's lawyers 11th request for investigative action', 27 Mar 2009 ('Eleventh RIA'), para. 4.
[44] **D158**, Eleventh RIA, para. 12.

Administration, yet since 2011 has held a different full-time job.[45]

22. More overt and blatant forms of interference would follow, designed to shield key RGC officials (all former CPK members) from scrutiny. From late 2008, the Defence filed RIAs seeking the appearance of King Father Norodom Sihanouk, Prime Minister Hun Sen, National Assembly President Heng Samrin and Senate President Chea Sim before the CIJs.[46] The Defence showed that Sihanouk was 'singularly capable of providing information relevant to the OCP's allegations'[47] and that the other three held CPK positions of considerable importance in relation to numerous crimes alleged in the Co-Prosecutors' Introductory Submissions. The Defence sought the appearance of the three RGC officials in connection with CPK policies, command and communication structures, interactions with Nuon Chea including as to his character, and a range of other issues.[48]

23. For months, no action was taken on these requests. In May 2009, the Open Society Justice Initiative ('OSJI') issued a report noting that indications existed of government officials 'attempting to block the investigating judges from interviewing certain "insider" or high-level witnesses.'[49] In September 2009, Prime Minister Hun Sen publicly described the efforts of the Tribunal to obtain the appearance of certain unnamed witnesses and explained that 'I said no and don't be so annoyance (*sic*).'[50] Later that month, the international CIJ ('ICIJ') Marcel Lemonde, acting alone, finally issued summonses for the appearance of six high-ranking members of the government, all former members of the CPK ('Insider Witnesses'). These included Heng Samrin and Chea Sim. In January 2010, the ICIJ issued a note to the case file explaining that the Insider Witnesses refused to testify and that the national CIJ, You Bunleng, determined that their appearance was not necessary. Concerned that coercive measures to ensure their compliance would be 'fraught with difficulty', the ICIJ decided to 'defer to the Trial Chamber' to decide whether to compel the witnesses to testify.[51]

24. The Defence filed numerous submissions concerning these issues, including its November 2009 RIA reiterating these facts and seeking an investigation into 'all interference by the RGC in the activities of the OCIJ', or at least specific investigative acts.[52] After the CIJs' ruling on the Insider Witnesses' appearance in January 2010, the Defence appealed to the Pre-Trial Chamber.[53] In a split decision, the international judges concluded that 'no reasonable trier of fact could have failed to

[45] Julia Wallace, *Khmer Rouge Tribunal Chief Marks 6 Years on "Sick Leave"*, Cambodia Daily, 13 Dec 2014.
[46] **D122**, 'NUON Chea's lawyers 7th request for investigative action', 1 Dec 2008 ('Seventh RIA'); **D136**, 'Tenth Request for Investigative Action', 24 Feb 2009 ('Tenth RIA').
[47] **D122**, Seventh RIA, para. 6.
[48] **D136**, Tenth RIA, para. 21.
[49] **D254**, 'NUON Chea's lawyer's 1st request for investigation', 30 Nov 2009 ('First RIA'), para. 4.
[50] **D254**, First RIA, para. 6.
[51] **D301**, 'CIJ's Note regarding summons and interviews of witnesses', 11 Jan 2010, p. 3. The CIJs' official ruling on the witness requests was issued two days later, on 13 Jan 2010, in which they noted their disagreement. *See* **D314**, 'Order on Nuon Chea & Ieng Sary's Request to Summon Witnesses', 13 Jan 2010.
[52] **D254**, First RIA, para. 20.
[53] **D314/2/4**, 'Appeal Against OCIJ Order on NUON Chea & IENG Sary's Request to Summon Witnesses', 16 Mar 2010.

consider' that one or more members of the RGC 'knowingly and willfully interfered with witnesses who may give evidence', causing prejudice to Nuon Chea's ability to obtain 'possible advantage[s]' from their testimony.[54] Lacking a supermajority, no further action was taken.

25. Government interference in the proceedings was even more apparent in Cases 003 and 004, precisely since those investigations directly target lower-level officials. National CIJ You Bunleng first signed rogatory letters to initiate these investigations before taking the extraordinary step of 'unsigning' those letters and returning them to ICIJ Lemonde. The key intervening event was not hard to identify: a government spokesman publicly announced in the interim that 'only the five top leaders [are] to be tried […]. Just five.'[55] Accordingly, the Defence filed an application to disqualify CIJ Bunleng and a second RIA into interference with the administration of justice.[56] However, the Pre-Trial Chamber dismissed those requests, in part as inadmissible and in part as unsubstantiated.[57]

26. The interference of senior government officials in Cases 003 and 004 was, however, clear to leading Tribunal monitors. Throughout 2010, both OSJI and the UN Special Rapporteur on the situation of human rights in Cambodia highlighted government efforts to scuttle the investigations.[58] According to the Special Rapporteur, this interference was 'undermining the faith that Cambodians had in their judicial institutions.'[59] According to OSJI, the Tribunal's ability to try additional suspects would be test its ability 'to operate free of political interference.'[60]

27. Any doubt in this regard was put to rest following the resignation of former reserve ICIJ Laurent Kasper-Ansermet. Just prior to resigning, Judge Kasper-Ansermet filed a fourteen-page 'Note' describing the overt interference of representatives of the RGC in ECCC investigations and the refusal of national CIJ You Bunleng and national staff to fulfil their legal duties. ICIJ Kasper-Ansermet alleged that 'there exist within the ECCC such serious irregularities, dysfunctions and violations of proper

[54] **D314/2/10**, 'Second Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses', 9 Sep 2010, Opinion of Judges Catherine Marchi-Uhel and Rowan Downing, paras. 6, 12. In response to the Defence appeal, the Pre-Trial Chamber first issued a unanimous ruling that the CIJs had applied the wrong legal test, directing them to reconsider their decision: *see* **D314/2/7**, 'Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses', 8 Jun 2010. In response, the CIJs affirmed their prior ruling: *see* **D314/3**, 'Decision on the Defence Request for Extension of Time to File an Appeal Against Order on NUON Chea & IENG Sary's Request to Summon Witnesses', 2 Mar 2010. The Defence filed more submissions to the Pre-Trial Chamber: *see* **D314/2/9**, 'Further Written Submissions in the Appeal Against the OCIJ Order on NUON Chea and IENG Sary's Request to Summon Witnesses', 22 Jun 2010. The Pre-Trial Chamber then filed the 9 Sep 2010 split decision.

[55] **E51/3**, Consolidated Preliminary Objections, para. 11.

[56] Case File 002/17-06-2010-ECCC-PTC(09), Document No. 1, 'Application for Disqualification of Judge You Bunleng', 17 Jun 2010; **D384**, 'NUON Chea's lawyers 2nd Request for Investigation', 07 Jul 2010.

[57] **D384/5/2**, 'Decision on Appeal Against the Order on Nuon Chea's Second Request for Investigation (Rule 35)', 2 Nov 2010.

[58] OSJI Report, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia', Mar 2010 Update; Mark Worley and Neou Vannarin, 'Un Envoy Says Judiciary "Compromised"', *Cambodia Daily*, 18 Jun 2010.

[59] Mark Worley and Neou Vannarin, 'Un Envoy Says Judiciary "Compromised"', *Cambodia Daily*, 18 Jun 2010.

[60] Ciorciari and Heindel, *Hybrid Justice*, p. 168.

procedure that endanger and impede due process of law'.[61]

28. The Defence filed a renewed RIA into political interference in the work of the Tribunal and a stay of proceedings pending such investigation.[62] None of these requests led to any remedial action.[63] As the Defence describes in further detail *infra*, ICIJ Kasper-Ansermet's Note was later followed by another extraordinary public statement from Marcel Lemonde, the ICIJ in Case 002, leveling almost exactly the same allegations in a book published in January 2013.[64]

29. The motivation, intent and *modus operandi* of the RGC in relation to the Tribunal is clear, consistent and uncontroverted. The bitter disputes over personal jurisdiction, the RGC's entrenched opposition to international control, the successful effort to shield senior CPK officials from scrutiny in Case 002, and the ongoing effort to protect such officials from prosecution in Cases 003 and 004, together present irrefutable pattern of conduct designed to diminish responsibility of former CPK officials such as Heng Samrin and Hun Sen at Nuon Chea's expense. As detailed further in sections III, IV, VI, VIII *infra*, the notion that these realities have had no substantive effect on Case 002 is absurd.

B. Substantive shortcomings of the investigation

30. The substance of the investigation was also deeply flawed. The CIJs erred to Nuon Chea's prejudice in extremely limiting defence participation in the process, failing to carry out essential investigations, and conducting investigations they did undertake in a biased and ineffective manner.

i – Limitations on the role of the Accused

31. On 20 December 2007, at the outset of the investigation, the Defence wrote to the CIJs to (i) seek notice of and permission to attend interviews conducted by the CIJs, and (ii) give notice of its intention to conduct its own investigation.[65] On 10 January 2008, the CIJs responded. On the first point, the CIJs informed the Defence that Accused persons would not be permitted to attend any interviews conducted by the CIJs.[66] While the CIJs recognized that Accused have a right to confront evidence against them pursuant to ICCPR Article 14 (incorporated in Article 35 *new* of the ECCC Law), they held that such right may be vindicated 'at the trial stage, [by examining] *any witness* against him with whom he was

[61] Cases 003/07-09-2009-ECCC-OCIJ and 004/07-09-2009-ECCC-OCIJ, **D38**, 'Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC impeding the Proper Conduct of Investigations in Cases 003 and 004', 21 Mar 2012, p. 13.
[62] **E189**, 'Application for Immediate Action Pursuant to Rule 35', 25 Apr 2012 ('RIA Following Kasper-Ansermet Allegations').
[63] *See* **E116**, 'Decision on Nuon CHEA Motion Regarding Fairness of Judicial Investigation (E51/3, E82, E88, E92)', 9 Sep 2011; **E189/3**, 'Decision on Application for Immediate Action Pursuant to Rule 35', 22 Nov 2012 ('First Kasper-Ansermet Allegations RIA Decision'). While this Chamber rejected appeals against these rulings, as discussed, *infra*, those rulings deferred to the discretion of the Trial Chamber but did not directly address the underlying issues. *See* para. 55, *infra*.
[64] *See* para. 56, *infra*.
[65] **A110**, 'NUON Chea's lawyers letter: Conduct of the Judicial Investigation', 20 Dec 2007.
[66] **A110/I**, 'Memorandum from the Office of the Co-Investigating Judges entitled 'Response to your letter dated 20 Dec 2007 concerning the conduct of the judicial investigation', 10 Jan 2008 ('CIJ Letter on Investigation Modalities'), p. 1.

not confronted during the judicial investigation.'[67] With regard to investigations conducted by the Accused, the CIJs held that 'it appears necessary to distinguish this legal system from that of other international and common law systems', holding that such investigations are prohibited. The CIJs drew counsel's attention to Rules 35 and 38, which concern interference with the administration of justice, attorney misconduct and even criminal offences.[68] As described further herein, this ruling was confirmed by the Trial Chamber and remains in effect.[69]

32. The CIJs failed to justify either aspect of their analysis by reference to any applicable legal sources, including Cambodian law, Article 12(1) of the ECCC Agreement, or rules established at the international level. Cambodian law, as a civil law system, permits an Accused to conduct his own investigations. If reference to procedural rules established at the international law had been appropriate, the first source should have been the French system upon which Cambodian law is based, which permits the Accused to attend interviews conducted by the CIJs.[70] Had reference to other international courts been appropriate, the CIJs would have concluded that investigations conducted by an Accused are not only allowed but seen as fundamental to his fair trial rights.[71] The scheme adopted by the CIJs – which prohibited *any* form of independent participation in the investigation – is unknown in any legal system and a flagrant error of law. This was the first blatant example of the arbitrary use of rules from divergent legal systems to Nuon Chea's overall detriment.

ii – CIJs' approach to witness interviews

33. After improperly excluding defence counsel from their interviews, the CIJs conducted those interviews in a manner which consistently failed to satisfy even the basic requirements of an impartial and effective investigation. In a series of seven RIAs filed before the CIJs, the Defence identified four systematic flaws in the CIJs' interviews: failing to investigate witnesses' sources of knowledge (in particular given the time gap since the events took place and the overt government efforts for more than 30 years to shape the history of DK in the public's mind[72]); failing to test the veracity of the evidence given during interviews (for instance, by repeating questions to test the consistency of the answers obtained, posing 'control questions' to which answers are known, and interviewing additional witneses for corroboration); failing to provide transparency concerning the circumstances of the interviews (including 'location, participants, presence of others, translation, promises, conditions, prior knowledge, and exchanged documents'); and failing to ensure the accuracy of the interviews in the form in which

[67] **A110/I**, CIJ Letter on Investigation Modalities, p. 2 (emphasis added).
[68] **A110/I**, CIJ Letter on Investigation Modalities, p. 2.
[69] *See* para. 133, *infra*.
[70] *See* French Code de procédure pénale, Arts 120, 82.1.
[71] *See e.g.*, Katanga Trial Judgment, Dissenting Opinion of Judge Van den Wyngaert, paras. 86-108.
[72] These efforts are described with specificity herein. *See* paras. 125-129, *infra*.

they were placed on the case file (by failing to produce verbatim transcripts).[73] The Defence notes that, from the limited disclosures of material from Cases 003 and 004 which it has very recently received in Case 002, the current ICIJ appears to have acted to remedy many of these problems. However, the CIJs in 2008 and 2009 responded merely by noting again that, according to 'the case law of the European Court of Human Rights […] a trial will be fair if, after the judicial investigation, there is a public hearing at which the Defence has *every* opportunity to contest the evidence.'[74] Notably, two witnesses identified by the Defence in these seven RIAs – Chhouk Rin and Lim Sat – subsequently appeared for cross-examination at trial and showed their WRIs to be seriously flawed in numerous critical respects.[75] Both of these WRIs were conducted by the same investigator whose interviews manifest a fraudulent pattern, as the Defence argues later in this Appeal in connection with a third such WRI.[76]

iii – The scope of the investigation

34. Nowhere is the CIJs' bias and incompetence more directly apparent than in the final product of the investigation, the Closing Order. The CIJs' blinkered approach to the investigation and the weaknesses in the evidence supporting their findings are both apparent on the face of the document notwithstanding the conditions of secrecy under which the investigation was conducted.

35. Most serious by far is the CIJs' failure to question the Co-Prosecutors' one-dimensional and simplistic account of the CPK as a unified, strictly hierarchical Party. Although the Closing Order concludes on a balance of probabilities that Nuon Chea intended and is criminally responsible for a vast array of crimes allegedly committed by cadres in every zone and province across the entire DK period, it says not one word about the conflict within the CPK which caused loyalties throughout the Party to splinter (discussed in futher detail in section VIII, *infra*). The Closing Order says nothing about the large body of available evidence that the Party was divided into competing, equally strong factions; the uncontroverted fact that Vietnam sponsored one of these factions in a war against Pol Pot, Nuon Chea and others; or the conflict between the USSR and China which sparked a proxy war in Indochina and was a substantial underlying cause of Vietnam's effort to undermine Pol Pot and Nuon Chea. The Closing Order does allege that Nuon Chea was responsible for 'purges' in the East, Central and North

[73] **D318**, 'Nineteenth Request for Investigative Action', 13 Jan 2010, paras. 9-14; **D319**, 'Twentieth Request for Investigative Action', 13 Jan 2010, paras. 10-15; **D320**, 'Twenty-First Request for Investigative Action', 15 Jan 2010, paras. 9-14; **D336**, 'Twenty-Second Request for Investigative Action', 26 Jan 2010, paras. 10-15; **D338**, 'Twenty-Third Request for Investigative Action', 27 Jan 2010 paras. 9-14; **D339**, 'Twenty-Fourth Request for Investigative Action', 2 Feb 2010, paras. 10-15; **D340**, 'Twenty-Fifth Request for Investigative Action', 3 Feb 2010, paras. 9-14.

[74] **D375**, 'Order on NUON Chea's Requests for Interview of Witness (D318, D319, D320, D336, D338, D339 & D 340)', 9 Apr 2010, para. 7 (emphasis added).

[75] *See* paras. 451, 595, *infra*.

[76] *See* para. 595, *infra*. The Defence raised this issue at trial with regard to apparent errors in the interviews of Chhouk Rin and Lim Sat, seeking verbatim transcripts of all significant witness interviews and an investigation into the possibility that any investigators knowingly and willfully tampered with evidence. *See* **E142**, 'Request for Rule 35 Investigation regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews', 17 Nov 2011.The Trial Chamber declined to act. *See* **E142/3**, 'Decision on NUON Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews', 13 Mar 2012.

Zones, but only to find yet another basis to enter charges against Nuon Chea. The fact that these 'purges' were really the result of an armed conflict within the Party pitting Pol Pot and Nuon Chea against the very cadres who supposedly implemented their policies is omitted. Pol Pot and Nuon Chea are depicted as paranoid, conducting a war against imagined enemies instead of real ones. The CIJs bought Hun Sen's story hook, line and sinker.

36. These critically important omissions in the Closing Order are the direct result of the CIJs' persistent refusal to allow Nuon Chea to participate in witness interviews or meaningfully investigate any of the substantive areas of inquiry relevant to his defence. The Defence filed nineteen RIAs with the CIJs seeking such investigations, nearly all of which were summarily dismissed.[77] While the substance of all these requests is of continuing relevance to Nuon Chea's defence, of particular importance to Case 002/01 and questions of CPK structure is the CIJs' failure to seek to obtain material in the possession of a variety of foreign states, in particular, China, Vietnam and Russia. The CIJs rejected the Defence's request to seek material from the Russian government, finding simply that it was unlikely to possess 'documents relevant to the scope of the judicial investigation'[78] and failing to recognize the role of the former USSR as Vietnam's primary patron in its conflict with DK.[79] The CIJs failed to *meaningfully* seek to obtain evidence possessed by the Chinese and Vietnamese governments, even though both are certain to possess evidence of critical importance. In both cases, the CIJs satisfied themselves with a single letter to the respective governments' embassy in Phnom Penh before quickly declaring that any further action would unduly delay the investigation.[80] The CIJs made no effort to access publicly available Chinese or Vietnamese sources and failed to even follow up on this single request.[81] This attitude can only reflect the CIJs' total disbelief of any of the Accused's defences and their disinterest in looking beyond the prepared narrative made available to them by the RGC and a handful of Anglo-French academic experts and journalists.

37. The Defence adds that irrespective of whether the CIJs did their utmost to obtain the material in question, the fact remains that it is absent from the case file. If the reason it is absent is because it was practically impossible to obtain, this bodes no better for the reliability of the judicial investigation than if

[77] The Defence filed 26 RIAs over the course of the investigation: the seven which concerned the CIJs' approach to interviews referred to above, and nineteen requests for investigation of a variety of substantive areas. For the sake of brevity, the Defence does not reiterate all of the filings here. A list and brief summary can be found in the following filing before the Trial Chamber: **E88**, 'First Consolidated Request for Additional Investigations', 18 May 2011 ('Consolidated Investigation Request'), paras. 3(a)-(t).
[78] **D315**, 'Order on NUON Chea's Requests for Investigative Action Relating to Foreign States (D101, D102, D105, D126 & D128)', 13 Jan 2010, para. 26.
[79] *See* para. 125, *infra* (concerning the Vietnam-Cambodia conflict as a proxy war between the Soviets and the Chinese).
[80] **D292**, 'International Rogatory Letter to the Socialist Republic of Vietnam', 19 Jun 2008; **D292/3**, 'Rogatory Letter of Completion Report', 30 Dec 2008, p. 2 ; D293.
[81] As one example, the CIJs failed to obtain a 1979 report by the Chinese Minister of Defence, Geng Biao, explicitly describing the factional divisions within the CPK which underlie much of Nuon Chea's defence. This document is discussed further at para. 241, *infra*.

the CIJs had simply been biased. This raises another ugly reality about the investigation, which is that the CIJs simply did not have access to a considerable body of relevant material. Instead, the vast majority of the photocopied, contemporaneous documents the CIJs collected originated in DC-Cam.[82] Director Youk Chhang testified that he obtained a substantial proportion of these documents from government sources, including the Ministry of the Interior, National Archives, Ministry of Information and Ministry of Education sometime after 1995.[83] As Youk Chhang testified, in 1979 the Ministry of Information was managed by Keo Chanda, who was simultaneously the presiding judge at the 1979 trial of Pol Pot and Ieng Sary, one of the PRK's earliest efforts (discussed in greater detail, *infra*)[84] to influence the history and narrative of DK.[85] Youk Chhang gave only scant detail as to the whereabouts of these documents in the 16 intervening years between the end of the DK and DC-Cam's establishment.[86] Accordingly, describing this case file as the outcome of an 'investigation', much less an 'impartial' one, transforms this Tribunal into the setting of a George Orwell novel. The case file's documentary material does not reflect an investigation, but rather the 'evidence' handed to the CIJs, via DC-Cam, from the RGC, undoubtedly after removing any material inculpatory as to those presently in power. Whether the CIJs were unwilling to procure evidence from other key sources or unable to do so is of little consequence.

38. Where the Closing Order does make findings, they are routinely based on the flimsiest possible pretensions. The CIJs repeatedly made findings on the basis of a single witness who could not have known the facts which the CIJs concluded they knew.[87] The CIJs' findings concerning Tuol Po Chrey were based on such patently unreliable evidence that it was eviscerated by a mere two hours of simple cross-examination – proving that the CIJs themselves failed to engage in even a modicum of fact-checking.[88] In another example, the CIJs concluded that at least 15,000 people were killed at Kraing Ta Chan security center based solely on a page in a notebook of unknown provenance with a handwritten note stating 'up until today we have smashed 15,000 enemies.'[89] This note was found interspersed in the middle of a notebook of an apparent interrogator from Kraing Ta Chan, completely out of context

[82] While precise numbers are difficult to specify, metadata in Zylab states that of the 5,800 documents entered into evidence in Case 002/01 and assigned 'E3' numbers, approximately 2,000 have DC-Cam numbers, suggesting that is where they originated. The 5,800 documents in evidence include roughly 1,200 interviews, civil party applications and victim complaints, and the remaining documents include substantial secondary sources and other non-contemporaneous material. Whatever the precise figures, it is apparent that DC-Cam's influence was extraordinary.
[83] T. 1 Feb 2012 (Youk Chhang, **E1/37.1**), p. 40.
[84] *See* paras. 125-129, *infra*.
[85] T. 1 Feb 2012 (Youk Chhang, **E1/37.1**), p. 61.
[86] *See e.g.*, T. 1 Feb 2012 (Youk Chhang, **E1/37.1**), pp. 43-46 (describing efforts to ascertain history of documents obtained from the Ministry of the Interior, and stating that unnamed individuals he never met found collected documents which 'were scattered everywhere at that time' and deposited them at the Ministry).
[87] **E295/6/3**, Closing Brief, paras. 34-36.
[88] **E291**, 'Urgent Request to Summons Key Witnesses in Respect of TUOL PO CHREY', 17 Jun 2003, paras. 9-14; **E295/6/3**, Closing Brief, para. 33; T. 30 Apr 2013 (Ung Chhat, **E1/186.1**), pp. 41-87; T. 2 May 2013 (Lim Sat, **E1/187.1**), pp. 86-90; T. 3 May 2013 (Lim Sat, **E1/188.1**), pp. 1-40.
[89] **E3/2107**, Kraing Ta Chan notebook, ERN 00290205.

and in different handwriting.[90] This *alone* convinced the CIJs to charge Nuon Chea with 15,000 murders at that crime site.

C. Relevant filings before the Trial Chamber

39. The Defence persisted in highlighting these issues before the Trial Chamber. Immediately after the Trial Chamber was seized of the case file in January 2011, the Defence filed a wide-ranging preliminary objection summarizing and reiterating all of these facts and the failure of both the CIJs and the Pre-Trial Chamber to address them in any meaningful way.[91] The Defence detailed the prejudice caused by these errors to Nuon Chea's ability to obtain critical and potentially exculpatory evidence[92] and to confront the evidence against him,[93] and described the overall bias toward inculpatory evidence in the case file produced by the investigation. In that regard, the Defence noted that members of Judge Lemonde's own investigating team had accused him of instructing staff to search only for inculpatory evidence.[94] The Defence argued that 'rehabilitating *this Case File* to an acceptable standard of "fairness" would [at this stage] prove impossible [...] Tainted by political interference, bias, and a litany of methodological shortcomings, the harm suffered is simply irreparable in any practical sense.'[95] Accordingly, the Defence sought an order for 'termination of the prosecution or, in the alternative, a stay in the proceedings against Nuon Chea.'[96] In April 2011, the Defence filed a request pursuant to Rule 35 detailing many of the same indicia of government interference in the proceedings and seeking specific investigative acts, including interviews with particular witnesses.[97] In June 2011, the Defence filed a second request for action pursuant to Rule 35 based on clear signs of interference with the administration of justice manifested in evidence given to the CIJs by a witness who described his fear of becoming involved with the Tribunal because 'the government will be unhappy'.[98] These requests were all rejected.[99]

IV. INDEPENDENCE AND IMPARTIALITY OF THE TRIAL CHAMBER

40. The lack of independence and impartiality permeating the investigation (and structural flaws in evidence gathering, to be discussed *infra*)[100] were equally apparent before the Trial Chamber.

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[90] **E3/2107**, Kraing Ta Chan notebook, ERN 00290205.
[91] **E51/3**, Consolidated Preliminary Objections, paras. 5-19.
[92] **E51/3**, Consolidated Preliminary Objections, paras. 57-58.
[93] **E51/3**, Consolidated Preliminary Objections, paras. 59-60.
[94] **E51/3**, Consolidated Preliminary Objections, para. 19.
[95] **E51/3**, Consolidated Preliminary Objections, para. 62.
[96] **E51/3**, Consolidated Preliminary Objections, para. 73.
[97] **E82**, 'Request for Investigation Pursuant to Rule 35', 28 Apr 2011.
[98] **E92**, 'Second Request for Investigation Pursuant to Rule 35', 3 Jun 2011, para. 2.
[99] **E116**, 'Decision on Nuon CHEA Motion Regarding Fairness of Judicial Investigation (E51/3, E82, E88, E92)', 9 Sep 2011 ('Fairness of Judicial Investigation Decision').
[100] *See* paras. 118-129, *infra*.

A. Grounds 3 & 4: The Trial Chamber is deeply biased against the Accused and incapable of impartially assessing the evidence

41. Article 35 *new* provides that the 'accused shall be presumed innocent as long as the court has not given its definitive judgment'. This right is replicated in Articles 31 and 38 of the Constitution of the Kingdom of Cambodia, Article 14(2) of the ICCPR, Article 20(1) of the ASEAN Human Rights Declaration, Article 6(2) of the European Convention on Human Rights ('ECHR'), Article 8(2) of the American Convention on Human Rights ('ACHR'), Article 7(1)(b) of the African Charter on Human and Peoples' Rights ('AfCHPR'), and across national jurisdictions.[101] The presumption of innocence entails the right to be tried by an impartial tribunal, which is given independent effect under Cambodian law and applicable international instruments.[102] The essence of this right is that the trier of fact must 'bring an impartial mind' to its assessment of the evidence.[103] This process was not, however, the one which produced the Judgment. The Judgment was a *post facto* rationalization of a long-held belief that the Accused are morally repugnant and deserving of the harshest punishment.

42. This is not a claim the Defence makes lightly. It is, rather, a claim which follows a careful and detailed analysis of the Judgment. This analysis reveals that a substantial portion of the findings are, or would be reasonably perceived to be 'attributable to a pre-disposition against the [accused], and not genuinely related to the application of law, […] or to the assessment of the relevant facts'.[104] The sense that the Judgment is striving for guilt is palpable, as the Chamber actively searches for pathways to every possible conviction on the basis of every possible mode of liability. Neither the evidence nor facts seem to be significant to this process. While a full appreciation of the Chamber's bias requires review of the Appeal as a whole, its three clearest manifestations can be summarized as follows.

43. First, the Chamber blatantly misrepresented the substance of evidence on which it relied. While legitimate disagreements and honest interpretive errors are obviously possible, in some instances the Chamber's characterization of the evidence was so manifestly misleading that it could only have been a product of its predisposition against the Accused. In some cases, the evidence concerned was the

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[101] *See* David S. Law and Mila Versteeg, The Evolution and Ideology of Global Constitutionalism , 99 Cal. L. Rev. 1163 ('Law and Versteeg'), 1201 (2011) (canvassing potections of various fair trial rights in domestic constitutions and noting protections for presumption of innocence in 74% of constitutions as of 2006).

[102] Constitution of the Kingdom of Cambodia, Art. 31; ICCPR, Art. 14(1); ECHR, Art. 6(1); ACHR, Art. 8(1); AfCHPR, Art. 7(1)(d); *see also*, Law and Versteeg, p.1201 (right of 'access to court', which includes impartiality, protected in 86% of constitutions).

[103] **E55/4**, 'Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony' ('First Trial Chamber Disqualification Decision'), 23 Mar 2011, para. 17; *Prosecutor v. Brđanin & Talić*, 'Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge', IT-99-36-PT, 18 May 2000, paras. 18-19; Nahimana Appeal Judgment, para. 78 (judges required to 'rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case') ; Akayesu Appeal Judgment, para. 269 (same).

[104] **E55/4**, First Trial Chamber Disqualification Decision, para. 13; *Prosecutor v. Karemera et al.*, 'Decision on Motion by Karemera for Disqualification of Trial Judges', ICTR-98-44-T, 17 May 2004, para. 13; *Prosecutor v. Sesay et al.*, 'Decision on Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case', SCSL-04-15-T, 6 Dec 2007, paras. 61-63.

subject of extensive argument before the Chamber.[105] In other cases, a consistent pattern of similar errors regarding similar documents emerges.[106]

44. Second, the Trial Chamber made findings of fact that were either glaringly inconsistent with its other findings – even in the same paragraph or immediately preceding sentence[107] – or otherwise illogical.[108] While it is not as clear here that the Chamber was aware that its analysis was fundamentally incoherent, at a minimum these errors demonstrate a total indifference to a genuine understanding of the facts. These are not findings that a Chamber occupied with 'ascertaining truth' could or would have made. These are findings which are the product of a conscious and sometimes desperate effort to convict and to concede as little as possible to the Defence lest it jeopardise that goal.

45. Third, the Chamber adopted legal standards inconsistent not only with uniform, established jurisprudence, but with its own analysis of the applicable law. In one case, the Chamber adopted a legal standard which diverged from the analysis in the immediately preceding paragraph.[109] More troubling, it is clear in these cases that the standards applied were tailor-made to the facts of Case 002/01 for the purpose of entering a conviction. This, too, could not have been impartial.

46. The errors outlined in the preceding paragraphs constitute but a small cross-section of errors in the Judgment. They are not merely the most serious or even unreasonable errors. Indeed, the Defence

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[105] For instance, in finding that executions of Khmer Republic soldiers and officials were carried out in Oudong and that those executions were discussed at a meeting of the Central Committee in June 1974, the Trial Chamber distorted and misrepresented the evidence given by both key witnesses, Philip Short and Stephen Heder, failed to acknowledge the existence of critical exculpatory evidence, and, with regard to the June 1974 meeting, made findings which were directly contradicted by the very evidence on which the Chamber relied. *See* Judgment, paras. 124-127, 816; paras 530-540, *infra*. The Chamber ignored extensive Defence submissions on all of these issues, then relied on these findings as the centrepiece of its finding that Nuon Chea was criminally responsible for the alleged executions at Tuol Po Chrey.

[106] For instance, in finding that the CPK targeted 'New People' as a political group, the Chamber distorted and misrepresnted a series of similar CPK publications, failing to acknowledge extensive Defence's submissions on precisely this issue. The Chamber instead pretended that the evidence was clear and unconstested. *See* Judgment, paras 569, 613-616, 621 ; *see* paras. 372-383, *infra*. The Chamber similarly relied on the evidence of a witness named Chhouk Rin for this same purpose. Although both parties again made extensive submissions at trial, the Chamber essentially copied the Co-Prosecutors' brief, citing to the ostensibly inculpatory portion while ignoring the existence of the umbiguously exculpatory testimony relied on by the Defence. *See* Judgment, fn 2498 ; paras 376-377.

[107] For instance, the Chamber held that FUNK broadcasts in the early months of 1975 lulled Khmer Republic soldiers into a false sense of security which led to their death by assuring them that only the seven supertraitors would be targeted,, yet simultaneously held that these same broadcasts contained an implicit threat that these same soldiers would be executed upon defeat.*See* Judgment, para. 120 ; paras 541-542. The Chamber failed to acnkowledge any inconsistency in these holdings, and relied on both simultaneously as a significant component of its finding that the CPK targeted Khmer Republic soldiers and officials.

[108] For instance, faced with the logical impossibility of finding that the evacuation of Phnom Penh was a persecutory act even while the Judgment held that it targeted a population of 2.5 million people indiscriminately, the Trial Chamber made the incoherent claim that 'city people' were 'identified' at checkpoints in the outskirts of the city even while it simultaneously held that the CPK viewed *every* person in Phnom Penh as an urban dweller and hence an enemy. *See* Judgment, para. 572 ; paras 385-387, *infra*.

[109] For instance, in stating the definition of extermination, the Trial Chamber relied on a single ICTY Trial Judgment which the Chamber admitted was inconsistent with subsequent appellate jurisprudence. The Chamber then asserted in a conclusory statement that there was 'no reasoned basis' for the narrower definition adopted by the ICTY Appeals Chamber, failing to review a single sentence from a single judgment, or to make reference to *any* existing jurisprudence as of 1975. The Chamber *then* blatantly misrepresented the one ICTY trial judgment on which it did rely. The test ultimately adopted by the Trial Chamber appears to have been designed to ensure that convictions would be possible for extermination due to deaths allegedly caused by conditions during population movements notwithstanding clear evidence that none of the Accused had any intent in that regard. *See* Judgment, paras 414-424; paras 329-345, *infra*.

submits that *all* of the errors of fact alleged in this Appeal are unreasonable. Nor are these errors which are merely *very* unreasonable or *highly* unreasonable. These are errors which are *so* unreasonable that they could not have been the product of impartial fact-finding or analysis.

47. The Defence acknowledges that not every finding in the Judgment reaches this threshold. Many do not. However, this fact does not cleanse the Judgment of the taint of bias. In part, this is because the findings enumerated here are not anomalies. Many other outrageous findings are strewn throughout the Judgment. More importantly, a Chamber cannot be biased in one paragraph and impartial in the next. There is enough in this Judgment to establish the Trial Chamber's predetermination of the issues,[110] including the ultimate issue of criminal liability.

48. The Chamber's erroneous approach to the evidence in the Judgment is explained at least in part by the political and institutional context of Case 002. As the Defence argued in closing submissions, the sheer scale of the crimes alleged, the time lapse since the events took place, and the presumption of guilt pervasive among the public and court staff produced a thirst for retribution, creating serious obstacles to an objective treatment of the evidence.[111] The Defence argued that the manner in which the Case 002/01 trial had been conducted reflected these pressures through its consistent failure to attempt any critical scrutiny of the evidence.[112]

49. As if on cue, Judge Cartwright gave an interview in the United States just days after the Defence made these submissions, confirming the presumption of guilt and bias against the Accused.[113] As noted *supra*, she described how the 'Hun Sen government' ensured that 'a group of potential accused [were] handed over to the Court on a platter'. Judge Cartwright opined that 'the Khmer Rouge wiped out the intelligentsia', that anyone suspected of being a Khmer Republic soldier was killed 'because they didn't care whether the people were guilty or innocent [since] [t]hat wasn't relevant', and that 'thousands of people died' for the construction of a 'useless' dam. She asserted that the purpose of trials such as those at the ECCC is to ensure that 'tyrant[s] will be put on trial and humiliated', no longer able to 'show off to the people for the terrible philosophy, the bad thinking that goes into the decisions that they make, the lack of care for their people.' Judge Cartwright described the attitude of her national counterparts to exculpatory testimony – in court, during the hearing of the evidence – which included 'growling in antagonism' and making 'very rude comments'.[114]

50. All of these comments reflect the Trial Chamber's deep bias. Judge Cartwright's opinions prove

[110] Palestinian Wall, Diss. Op. of Judge Buergenthal on 'Order of 30 Jan 2004', 2004 ICJ Rep. 7, 30 Jan 2004 ("Buergenthal Opinion"), paras. 11, 13; *see also*, **E314/6**, 'Nuon Chea Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara', 29 Sep 2014 ('Second Trial Chamber Disqualification Application'), para. 31.
[111] **E295/6/3**, Closing Brief, paras. 16-17.
[112] **E295/6/3**, Closing Brief, paras. 16-17.
[113] On 2 Sep 2014, the Defence filed a motion to this Chamber seeking admission of a video of the interview into evidence. *See* **F2/1**, Second Appeal Evidence Request.
[114] **F2/1**, Second Appeal Evidence Request.

that she formed opinions on matters never adjudicated at the ECCC. No evidence exists that the 'intelligentsia' was indiscriminately murdered, much less that such killings constituted CPK policy or that the CPK systematically arrested or killed anybody who might be a Khmer Republic soldier regardless of whether 'they were guilty or innocent'. These issues were directly at issue in Case 002/01. No evidence has yet been heard about conditions at dams and other CPK worksites. No 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.

51. Much worse is that Judge Cartwright's characterization of the CPK indulges the most tired stereotypes about the DK. This not the nuanced view of a distinguished Judge who heard nearly three years of evidence about the CPK over two landmark trials, but the vague impression of a first-time visitor to Tuol Sleng who skimmed through Ben Kiernan's *The Pol Pot Regime*. Judge Cartwright's speech is important because it demonstrates that the Case 002/01 trial was unable to perform its essential function: to subjugate popular stereotypes and public disgust to hard evidence and dispassionate analysis. In the Judge's mind, the CPK could never have been a political movement with legitimate objectives engaged in an armed struggle against a ruthless dictatorship – which, according to Prince Sihanouk, was 'composed of traitors and outlaws […] guilty of unspeakable crimes'[115] – and which adopted policies which may or may not have involved the commission of crimes. Instead, it remains the parody of itself which exists in the public imagination, a bogeyman which ominously stalked the Cambodian countryside indiscriminately, killing innocent victims for no discernible purpose. This is the state of mind which Judge Cartwright, speaking in early November 2013, brought to the process of drafting the Case 002/01 Judgment.

52. Judge Cartwright's comments are equally damning of her national colleagues. Judge Cartwright asserted that one of the National Judges was forced to marry and work at a dam site and that another was a member of a 'children's brigade' about which evidence was given during the Case 002/01 trial. She stated that she often heard the National Judges 'growl in antagonism' and make 'very rude comments' in response to exculpatory evidence. In one case, she asked one of the National Judges whether a witness's exculpatory evidence was consistent with the judge's personal experience in relation to similar events. His response was to 'just g[i]ve me a look that was, you know, very sad.'[116] These revelations strike at the heart of the test for judicial impartiality: whether a judge can 'bring an impartial mind' to the evidence.[117] Judge Cartwright's comments constitute a concrete, first-hand account of the National Judges' failure to do so. Detailed arguments in this regard have previously been

[115] Stephen Heder, 'Victors' Genocide in Cambodia', *Phnom Penh Post*, 5 Mar 1999.
[116] **F2/1**, Second Appeal Evidence Request , para. 4.
[117] *See* para. 41 , *supra*.

put forward by the Defence in its motion for disqualification of the judges of the Trial Chamber in Case 002/02, which the Defence incorporates herein.[118]

53. Seen in light of the manner in which the Case 002/01 trial was conducted and the reflexive blanket condemnation of the CPK which constitutes the Case 002/01 Judgment, Judge Cartwright's comments paint a coherent picture of predetermination and deeply rooted bias inconsistent with the judicial role. Pursuant to the ECCC Law, Judges are required to act with 'high moral character [and] a spirit of impartiality and integrity'.[119] This notion of moral character does not connote *personal* morality but a dedication to the law and legal process. Such was the view of Justice Radhabinod Pal at the Tokyo Tribunal, who described the essential task of the judge as one requiring 'moral integrity'. According to Justice Pal, moral integrity in this context entails:

> a measure of freedom from prepossessions, a readiness to face the consequences of views which may not be shared, a devotion to judicial processes, and a willingness to make the sacrifices which the performance of judicial duties may involve.[120]

This is precisely what the Judgement lacks entirely. The Defence does not doubt the fervency of the Trial Chamber's belief in having done substantive justice. But this is not the standard. Whatever the Trial Chamber judges 'may believe in their *intime conviction*', their findings 'cannot stand up against the required standard of proof and the dispassionate rigour it demands.'[121] Nuon Chea's right to a fair trial adjudicated by an independent and impartial tribunal was accordingly flagrantly violated.

B. Ground 5 & 6: The Trial Chamber failed to respect Nuon Chea's right to trial by an independent tribunal and erred in law by failing to summons Heng Samrin

54. As described *supra* in connection with the judicial investigation,[122] and in detail in the Defence motion for disqualification of the Trial Chamber,[123] the evidence is overwhelming that the Cambodian judiciary is not structurally independent from the RGC and that National Judges at the Tribunal are incapable of acting contrary to the instructions and wishes of the government. The Defence has presented voluminous evidence in that regard during Case 002, including reports from respected monitoring agencies, human rights NGOs and news outlets, and first-hand statements from the highest levels of the government illustrating the expectation and reality that National Judges will not

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[118] **E314/6**, Second Trial Chamber Disqualification Application, paras. 53-60.
[119] ECCC Law, Art. 10 *new*.
[120] Tokyo Judgment, p. 10. In more recent years, a UN and TI-commissioned group of experts produced the *Bangalore Principles of Judicial Conduct*, which identify integrity as one of six fundamental principles which should guide judicial conduct: *see*, *Bangalore Principles of Judicial Conduct*, 2002, available online at: http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf. In addition, the UN General Assembly in 1985 endorsed the *Basic Principles on the Independence of the Judiciary*, which not only cite integrity as a necessary quality of judges (Principle 10) but also state at Principle 2 that "[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or influences, direct or indirect, from any quarter or for any reason": *see*, *e.g.* UN General Assembly, 'Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders', UN A/RES/40/32, 29 Nov 1985.
[121] Katanga Trial Judgment, Dissenting Opinion of Judge Van den Wyngaert, para. 172.
[122] *See* paras. 19-29, *supra*.
[123] **E314/6**, Second Trial Chamber Disqualification Application

compromise government interests.[124] Within this institutional context, during the trial, Prime Minister Hun Sen signaled directly to the public and thus also the National Judges what outcome was expected from Case 002, publicly describing Nuon Chea as a 'killer' and perpetrator of 'genocide'.[125] Despite detailed argument on this issue in closing submissions,[126] the Judgment fails to make reference to it.[127]

55. Although this Chamber has addressed the issue of political interference at this Tribunal in connection with multiple immediate appeals,[128] it has never directly pronounced on the substance of the Defence's allegations. Instead, this Chamber has held that the allegations largely concerned events during the investigation, which had been extensively litigated before the CIJs and the Pre-Trial Chamber.[129] This Chamber furthermore deferred to the Trial Chamber's assessment that the Defence failed to demonstrate a 'tangible impact' of allegations which largely concern Cases 003 and 004 on the fairness of Case 002.[130] While the Defence maintains that judicial independence is an absolute right which impacts the right to a fair trial as such, considerable evidence has also come to light since this Chamber last ruled on these matters demonstrating that the tangible impact on Case 002 is substantial. Some of this evidence concerns events which arose during the judicial investigation, to which the Defence briefly returns for this purpose.[131]

56. First, in January 2013 former international co-investigating Judge Marcel Lemonde published a book detailing the absence of judicial independence in Cambodia and its many deleterious effects on the Case 001 and 002 investigations ('Lemonde Book').[132] Confirming what the Defence had been saying all along, Judge Lemonde asserted, among other things, that in his experience *all* Cambodian judges are ultimately beholden to the government whether because of fear of or proximity to power, and that the RGC 'pulls strings' behind every Cambodian judge. Judge Lemonde described in explicit

[124] *See e.g.*, **E51/3**, Consolidated Preliminary Objections, paras. 13-14; **E189**, RIA Following Kasper-Ansermet Allegations, para. 12.
[125] *See* **E176**, 'Application for Summary Action Against HUN Sen Pursuant to RULE 35', 22 Feb 2011, para. 2. The Defence filed a request pursuant to Rule 35 seeking an acknowledgement that the PM's public statements constitute a violation of the presumption of innocence in light of the greater political context and influence of the Prime Minister over the the judiciary, and a 'public rebuke' of the Prime Minister. *See* **E176**, 'Application for Summary Action Against HUN Sen Pursuant to RULE 35', 22 Feb 2011, para. 2..
[126] **E295/6/3**, Closing Brief, paras. 80-86.
[127] The Trial Chamber briefly raised the issue of impartiality but not independence: *see* Judgment, para. 43. This discussion did touch on issues that relate to judicial independence but made no findings of any consequence.
[128] **E116/1/7, '**Decision on Immediate Appeal by NUON Chea against the Trial Chamber's Decision on Fairness of the Investigation (SCC)', 27 Apr 2012 ('Fairness of Investigation Appeal Decision'); **E189/3/1/8**, 'Decision on NUON Chea's "Immediate Appeal against Trial Chamber Decision on Application for Immediate Action pursuant to Rule 35" (SCC)' ('Appeal Decision on Kasper-Ansermet Allegations RIA'), 25 Mar 2013.
[129] **E116/1/7,** Fairness of Investigation Appeal Decision, para. 32.
[130] **E116/1/7,** Fairness of Investigation Appeal Decision, paras. 33-34; **E189/3/1/7**, 'Request to Consider Additional Evidence', 15 Mar 2013 ('Lemonde Book Request'), paras. 22-24.
[131] *See* paras. 22-29, *supra* (discussing the interference of government officials in the investigation).
[132] The Defence notes that this book was available at the time of this Chamber's most recent decision in relation to judicial independence, but that the Chamber declined to consider it for reasons of timeliness. *See* **E189/3/1/8**, 'Decision on NUON Chea's "Immediate Appeal against Trial Chamber Decision on Application for Immediate Action pursuant to Rule 35" (SCC)', 25 Mar 2013, paras. 10-11. The Defence has since sought its admission into evidence pursuant to Rule 108(7). *See* **F2/1**, Second Appeal Evidence Request, paras. 5-6, 12, 16-17, 19. Accordingly, its contents are new for the purposes of the resolution of allegations of judicial independence before this Chamber.

detail the manner in which leading officials of the government, all of whom are former CPK cadres who opposed Pol Pot and Nuon Chea, evaded his summonses and refused to give evidence. The Lemonde Book is significant in part because it constituted yet another first-hand insider account – again by an international judge – of the political interference rampant at the Tribunal. However, it was significant also because Judge Lemonde's work at the ECCC concerned largely Cases 001 and 002: the Case 003 Introductory Submission was filed only one year prior to the end of his nearly four and a half year tenure. The Lemonde Book accordingly proves that Judge Kasper's accusations were not mere manifestations of Cases 003 and 004 but extended to the inception of the Tribunal and across its caseload.[133] Incredibly, when confronted with a request from Khieu Samphan to admit excerpts of the Lemonde Book into evidence, the Trial Chamber ruled that various extracts were either irrelevant, repetitious or not conducive to ascertaining the truth.[134] The request was rejected in full. As discussed further herein,[135] this scandalous decision is part of a clear pattern of Trial Chamber rulings designed to obscure and avoid rather than confront issues surrounding the independence of the Tribunal.

57. Second was Thet Sambath's interview just after the Judgment was issued describing his personal possession of exculpatory evidence concerning a range of topics including the structure of the CPK and Nuon Chea's criminal responsibility for crimes charged in Case 002. According to Thet Sambath, numerous witnesses have described to him how Pol Pot and Nuon Chea were 'opposed' and 'betrayed' by their supposed subordinates in the CPK, many of whom acted independently to commit crimes charged in Case 002, such as at Tuol Po Chrey.[136] Thet Sambath states that he asked these witnesses why they had not spoken to the CIJs at the ECCC and that in response, '[t]hey asked me if I knew the ones who led this government and they said they would be killed if they spoke about it'.[137] Thet Sambath's interview accordingly demonstrates that exculpatory evidence has been excluded from the record because powerful RGC officials are responsible for crimes with which Nuon Chea is wrongly charged. The interview thus makes it abundantly clear why Heng Samrin and other leading RGC officials refused to subject themselves to questioning. The Defence has already requested that this Chamber summons Thet Sambath and his *Enemies of the People* co-director Rob Lemkin in order to ascertain the nature of the evidence in their possession.[138] Until it does so, the fairness of Nuon Chea's trial must be presumed to have been compromised.

58. The third new indication of the effect of the absence of judicial independence on the fairness of

[133] *See* **E189/3/1/7**, Lemonde Book Request, para. 27.
[134] **E280/2/1**, 'Decision on KHIEU Samphan Second Request Pursuant to Rule 87(4) to Admit Extracts of Former Co-Investigating Judge Lemonde's Book (E280/2)', 13 Aug 2013.
[135] *See* para. 58-73, *infra*.
[136] **F2**, 'Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 1 Sep 2014 ('First Appeal Evidence Request'), para. 5.
[137] **F2**, First Appeal Evidence Request, para. 5.
[138] **F2**, First Appeal Evidence Request, para. 18 (b).

Nuon Chea's trial – and undoubtedly the most obvious – concerns the National Judges' reasoning in support of their decision not to summons Heng Samrin for testimony. The Chamber's decision in that regard is of dual relevance to the instant Appeal: it constitutes evidence of the National Judges' lack of judicial independence and is also an independent violation of Nuon Chea's right to present a defence. As a violation of Nuon Chea's right to present a defence, it requires dismissal of all charges concerning the crimes allegedly committed at Tuol Po Chrey and extermination and persecution during the evacuation of Phnom Penh.

59. The Defence sought Heng Samrin's appearance before the Trial Chamber repeatedly over the course of the trial, including in six separate written submissions.[139] The Defence argued that Heng Samrin was without a doubt the most important witness in connection with both the evacuation of Phnom Penh and the crimes allegedly committed at Tuol Po Chrey. With regard to the evacuation, the Defence argued that Heng Samrin is the senior-most military officer still living to have actively participated in the evacuation of Phnom Penh. The Defence emphasized that Heng Samrin was only two rungs below East Zone secretary Sao Phim in the hierarchy at that time and was certain to have first-hand knowledge of the orders issued from the very top of the zone military. The Defence further argued that, according to Ben Kiernan's notes of an interview with Heng Samrin in 1991, Heng Samrin was actively involved in turf battles with CPNLAF forces from other zones starting as early as 1973 and continuing in Phnom Penh itself shortly after liberation, when the city was strictly divided in four separate geographic regions, each controlled by competing forces reporting to zone leaders.[140] With regard to Tuol Po Chrey, the Defence argued that the only direct evidence of Nuon Chea's intent as to Khmer Republic officials anywhere on the case file is in the same notes of Kiernan's interview with Heng Samrin. According to those notes, Heng Samrin attended a meeting on 20 May 1975 at which Nuon Chea stated that the leaders of the Khmer Republic should not be killed but 'removed from the framework'. Heng Samrin specifically stated that Nuon Chea 'didn't say kill' and that the words he used 'do not mean "smash"'.[141] The Judgment makes no reference to the notes of Kiernan's interview with Heng Samrin and cites no direct evidence of Nuon Chea's intent. The Defence also sought Heng Samrin's appearance as his only character witness in Case 002/01.[142] The Defence elaborates further on Heng Samrin's importance in these respects in the coming paragraphs.

60. The Trial Chamber dismissed these requests to summons Heng Samrin in a split decision issued

[139] *See* **E236/5/1/1**, 'Sixth and Final Request to Summons TCW-223' ('Final Request for Heng Samrin'), 22 Jul 2013, paras. 3-7 (describing the relevant requests).
[140] **E3/1568**, 'Retyped from a Handwritten Interview of CHEA Sim, Phnom Penh 3 Dec 1991, and HENG Samrin, 2 Dec 1991' ('Chea Sim-Heng Samrin Interview'), ERN 00651879, 00651882. *See also*, **E3/9**, 'Book by P. SHORT: *Pol Pot: The History of a Nightmare*', 2004 ('Short, *Pol Pot*'), ERN 00396483-85.
[141] **E3/1568,** Chea Sim-Heng Samrin Interview, ERN 00651884.
[142] **E236/5/1**, 'Request to Summons TCW-223 as a Character Witness on Behalf of Nuon Chea', 22 February 2013.

as part of the Final Witness Decision. The National Judges held that while Heng Samrin's evidence 'could conceivably be relevant to limited aspects of Case 002/01, we are not persuaded that it is necessary or appropriate to compel his testimony.'[143] The International Judges agreed that Heng Samrin would be 'likely to offer unique and relevant testimony regarding the DK-era policies, the course of the forced evacuation of Phnom Penh and command structures.'[144] The International Judges nevertheless chose not to pronounce on the Defence's claim that in light of the failure to summons Heng Samrin, a conviction for the crimes allegedly committed at Tuol Po Chrey and for the crimes of extermination and persecution during the evacuation of Phnom Penh was not possible.[145]

61. The evidence is overwhelming that the National Judges' decision was driven by improper considerations, in particular the interests of a handful of very senior officials within the military and the government. The Lemonde Book explicitly describes the government's considerable efforts to ensure Heng Samrin never appears before the ECCC and the collusion of his national counterpart, You Bunleng, in that regard.[146] The international Co-Prosecutor, along with international judges at the OCIJ, Pre-Trial Chamber and now Trial Chamber, all agree that Heng Samrin must be heard.[147] As shown in the Defence's recent motion for disqualification of the judges of the Trial Chamber, structural features of the Cambodian judiciary are inconsistent with international standards concerning judicial independence.[148] The opinion of the National Judges in regard to the appearance of Heng Samrin is *prima facie* unreliable.[149]

62. While these facts are well-known (and, the Defence is confident, uncontroversial), it bears emphasis why Heng Samrin does not want to appear before this Tribunal. Heng Samrin does not want to appear before this Tribunal because no living person is more directly, personally responsible for the

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[143] **E312**, Final Decision on Witnesses, Experts and Civil Parties to be Hear in Case 002/01', 7 Aug 2014 ('Final Witness Decision'), para. 96.
[144] **E312**, Final Witness Decision, para. 108.
[145] **E312**, Final Witness Decision, para. 111.
[146] **E189/3/1/7**, Lemonde Book Request, paras. 15-20. Judge Lemonde describes his efforts to obtain the appearance of these witnesses as follows: 'There is no response from the other side. I tell the greffier to get to work over the phone and to note down all of his conversations. For several weeks, he is passed from department to department, from "no one to take your call" to "wrong number". When he eventually does get through to someone, he is usually told that the matter will be taken up at a higher level and that they will call him back, which they never do. Only the chief of staff of one of the people summoned ventures to state the real issue, namely that such a high ranking official cannot be summoned because it could damage his political career! You Bunleng discreetly asks whether it is truly necessary to include this comment in the report…To do him a favour, the unfortunate expression is deleted. As usual, it is necessary to smooth some ruffled feathers if we are not going to jeopardize the future.' Judge Lemonde describes Judge Bunleng's awkward position in the matter as follows: 'Je lui disais que j'étais bien conscient de la difficulté de sa position : la question que je le soulevais était à l'évidence plus délicate pour lui que pour moi. Nous échangions sans aucune animosité personnelle. Simplement, lorsque je lui expliquais qu'entre le gouvernement et le juge d'instruction il faudrait bien qu'il finisse par choisir, il était manifestement embarrassé.'
[147] **D136/3/1**, 'Witness Summons: Heng Samrin', 25 Sep 2009; **D314/1/12**, 'Opinion of Judges Catherine Marchi-Uhel and Rowan Downing' in 'Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses', 9 Sep 2010.
[148] **E314/6**, Second Trial Chamber Disqualification Application, paras. 43-49.
[149] To preempt any possible criticism in this regard, the Defence emphasizes: this is not about the abilities of 'Cambodians', but the pressures to which the Cambodian judges are subject within the institutional context of the ECCC. *See* **E189/3/1/1**, 'Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to rule 35', 24 Dec 2012, paras. 52-59. The Defence is confident that this is sufficiently clear to the Chamber.

evacuation of Phnom Penh, the centerpiece of Case 002/01 and the overwhelming focus of the evidence heard at trial. Heng Samrin is to the evacuation of Phnom Penh what Duch is to S-21: the person tasked with guiding the implementation of policies which the Co-Prosecutors say were adopted by the CPK at one of the most important crime sites alleged in the Closing Order. If Duch is among those 'most responsible', Heng Samrin is no less deserving of the attention of this Tribunal.

63. The National Judges' contrived reasoning confirms that that their decision was driven by improper considerations and not the genuine application of the law to the facts. The National Judges first seek to diminish Heng Samrin's role in the CPNLAF, wrongly stating that during the evacuation of Phnom Penh, he was merely a commander of one of three regiments within the 1st Division of the East Zone army.[150] While Heng Samrin did hold this position, he was *also* the deputy commander of the entire 1st Division, reporting directly to Division Commander Chan Chakrei.[151] Chakrei reported to Sao Phim, whom the Chamber found entered into a JCE with Nuon Chea to commit crimes during the course of the evacuation of Phnom Penh and then passed instructions in that regard to his subordinates.[152] Yet no evidence exists at all that Nuon Chea agreed with Sao Phim to subject evacuees to murder, persecution or attacks against human dignity. Nor is there any evidence of any orders emanating from zone secretaries or division commanders. The reason is that no witness as senior as Heng Samrin testified. The National Judges do not contest these facts. They ignore them.

64. The National Judges furthermore state that other witnesses testified as to military structure during the evacuation of Phnom Penh.[153] But the Defence did not seek Heng Samrin's testimony for a purpose as banal as 'military structure'. The first reason the Defence sought Heng Samrin's testimony was to describe the orders given by Sao Phim and Chan Chakrei as to how the evacuation of the city should be ensured and specifically what to do with people who refused to leave the city. The second is that Heng Samrin was personally involved in the inter-zonal conflict among the forces which liberated Phnom Penh. No witness who appeared before the Chamber to describe 'military structure' was able to speak to these facts, because none were as senior as Heng Samrin.[154] Yet the Judgment held that the forces which liberated Phnom Penh acted pursuant to a 'strict, hierarchical' command reporting to Pol Pot and Nuon Chea.[155] Nuon Chea's criminal liability turns directly on this finding.[156] The National Judges failed to contest or even mention these facts.

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[150] **E312**, Final Witness Decision, para. 93.
[151] **E3/1568**, Chea Sim-Heng Samrin Interview, ERN 00651878 (Heng Samrin was 'chief of the 126th Regiment of the Zone', and 'deputy president of the Front [Committee of R25]', which was re-designated as the East Zone 1st division following liberation).
[152] Judgment, para. 807.
[153] **E312**, Final Witness Decision, para. 93.
[154] **E295/6/3**, Closing Brief, para. 43.
[155] Judgment, paras. 913, 893-5.
[156] **E236/5/1/1**, Final Request for Heng Samrin, para. 10.

65. The National Judges' mischaracterization of Heng Samrin's potential evidence as to the treatment of Khmer Republic soldiers and officials is even worse. The National Judges assert:

> The NUON Chea Defence contrasts "komchat" with "komtec", the latter of which it concedes would be interpreted as smash, meaning to kill. It is argued that the use of the term "scatter" (rather than kill) reveals NUON Chea's intent towards former soldiers and officials of the Khmer Republic.[157]

In fact, the Defence never sought to 'contrast' *komtec* and *komchat* nor did it 'concede' that *komtec* means kill. The Defence made no submissions about the meaning of *komchat* or *komtec* at all. The Defence submits that according to Ben Kiernan, Heng Samrin gave *his* account about what Nuon Chea said and what *he understood* those words to mean. The Defence submits that, as a leading military officer, CPK veteran and close personal acquaintance of Nuon Chea,[158] the probative value of that observation is unparalleled. The National Judges do not address or contest these submissions either.[159]

66. Other aspects of the National Judges' reasoning are equally erroneous. The National Judges 'note that the NUON Chea Defence did not challenge Stephen HEDER's testimony that it would be incorrect to interpret "*komchat*" as "scatter"'.[160] This assertion is first of all incorrect: as the Defence has previously argued, expert witness David Chandler testified that Heng Samrin's statement 'certainly' contradicts the view that Nuon Chea told cadres to kill Khmer Republic officials.[161] The National Judges do not explain why they prefer the evidence of fact witness Stephen Heder to the evidence of expert witness David Chandler; indeed, they fail to acknowledge Chandler's testimony. More fundamentally, the Defence does not dwell on what David Chandler believes Nuon Chea meant or what Stephen Heder believes Nuon Chea meant because the evidence is clear as to what Heng Samrin believed Nuon Chea meant. Heng Samrin believed that what Nuon Chea said 'does not mean kill'. Stephen Heder's opinion is irrelevant. So too is the view of the National Judges.

67. The National Judges also ignored entirely the other reasons why Heng Samrin's account of the 20 May 1975 meeting was critical. Like Chea Sim, who also described the 20 May 1975 meeting to Ben Kiernan, Heng Samrin told Kiernan that the policy described by Nuon Chea only concerned the 'leaders' of the Khmer Republic government.[162] Yet the alleged victims at Tuol Po Chrey apparently

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[157] **E312**, Final Witness Decision, para. 94.
[158] **E236/5/1**, 'Request to Summons TCW-223 as a Character Witnesses on Behalf of Nuon CHEA', 22 Feb 2013, paras. 3-5.
[159] The National Judges were similarly incorrect to say that the Defence 'relied on' Kiernan's characterization of the word *komchat* as meaning 'to scatter'. *See* **E312**, Final Witness Decision, para. 94. The Defence cited from Kiernan's description of the interview in his book, which includes Kiernan's characterization of the word *komchat* as meaning 'scatter'. However, the Defence relies on this excerpt not because of Kiernan's definition of a word, but for Heng Samrin's description of what Nuon Chea said. In that description, Heng Samrin, and not Kiernan, states, 'They didn't say kill' and 'it doesn't mean "smash"'. *See* **E3/1568**, Chea Sim-Heng Samrin Interview, ERN 00651884.
[160] **E312**, Final Witness Decision, para. 95.
[161] T. 23 Jul 2012 (David Chandler, **E1/94.1**), pp. 57-58.
[162] **E3/1568**, Chea Sim-Heng Samrin Interview, ERN 00651867 (quoting Chea Sim), 00651884 (quoting Heng Samrin). It is striking that, according to Kiernan, both men used this same word.

were ordinary soldiers and officials,[163] and the Trial Chamber erroneously found that the CPK policy targeted 'all former elements' of the Khmer Republic for 'arrest, execution and/or disappearance'.[164] Heng Samrin's statement is accordingly unambiguously exculpatory with regard to CPK policy as to officials other than the 'leaders' of the Khmer Republic – including those allegedly killed at Tuol Po Chrey. The Defence also questioned at trial why Heng Samrin – who actively led the implementation of the evacuation of Phnom Penh – had to be told one month *after* the evacuation how to deal with Khmer Republic officials.[165] This directly contradicts the Chamber's erroneous finding that a 'deliberate, organized, large-scale' operation to kill Khmer Republic soldiers was in place during the evacuation.[166] The National Judges' response to all of this was deafening silence.

68. The National Judges also seek to diminish Heng Samrin's account of the 20 May 1975 meeting by stating that he was one of only 'thousands' of attendees and that the Chamber has heard other evidence of what occurred. Yet the National Judges conspicuously fail to cite this evidence. The reason is given by both David Chandler and Ben Kiernan: according to Kiernan, 'no documents and very few members of its audience appear to have survived'.[167] Chandler adds that Kiernan's source in regard to this meeting was 'certainly not a document from the Khmer Rouge period that has survived.'[168] Indeed, the sources for this meeting are so limited that, without referring to Kiernan's book or interview notes, Chandler was able to determine that Kiernan's source 'might have been Heng Samrin himself.'[169] Chandler added: 'the material [Kiernan] obtained is invaluable because it was so close to the – it's just factual.'[170]

69. The National Judges' final argument is that because Heng Samrin's statement is already in evidence, it is not necessary to hear his testimony merely for the purpose of confirming that the statement is accurate.[171] In that regard, the National Judges held that they accept that Heng Samrin 'uttered the words and opinions upon which the NUON Chea Defence seeks to rely', but that seen in the totality of the evidence, this 'does not demonstrate that a policy to eliminate LON Nol officials did not exist.'[172] This argument is difficult to reconcile with the National Judges' finding three paragraphs earlier that Heng Samrin's account of the 20 May 1975 meeting was actually inculpatory.[173] If the National Judges indeed accept that Heng Samrin expressed the 'opinion' that what Nuon Chea said

[163] *See* para. 611, *infra*.
[164] Judgment, paras. 829, 854.
[165] **E295/6/3**, Closing Brief, paras. 419-420.
[166] Judgment, para. 561.
[167] **E3/1593**, 'The Pol Pot Regime: Race, Power and Genocide in Cambodia, 1975-79', 1996 ('Kiernan, *The Pol Pot Regime*'), ERN 00678522.
[168] T. 23 Jul 2012 (David Chandler, **E1/94.1**), p. 52.
[169] T. 23 Jul 2012 (David Chandler, **E1/94.1**), p. 53.
[170] T. 23 Jul 2012 (David Chandler, **E1/94.1**), p. 54.
[171] **E312**, Final Witness Decision, para. 98.
[172] **E312**, Final Witness Decision, para. 98.
[173] **E312**, Final Witness Decision, para.95.

'does not mean kill', they were obligated to establish with specificity how they could enter a conviction beyond a reasonable doubt after acknowledging that the only direct evidence of Nuon Chea's intent exonerates him.[174] For patently obvious reasons, they did not attempt this analysis.

70. The International Judges similarly erred in law in their puzzling decision not to issue any ruling on the Defence's fair trial claim in relation to the failure to summons Heng Samrin.[175] As this Chamber has held, a Trial Chamber has a duty to respond to 'well-referenced and detailed trial submissions' made by a party.[176] The International Judges cited no authority for their view that it was within their discretion not to address an Accused's claim that his right to a fair trial has been violated. The authority they did cite, a decision of the ICTR Appeals Chamber in Bagosora, held that where a trial chamber erroneously fails to summons a witness, an appeals chamber has the authority to assess whether the rights of the accused have been violated and to remedy that violation if necessary by hearing the witness on appeal.[177] This tautology has no bearing on the Trial Chamber's duty to determine the underlying issue: whether the rights of the Accused have been violated to begin with.

71. In the context of this case, the International Judges' decision was not only erroneous but disingenuous. The Bagosora decision was premised on the ability of the appeals chamber to secure the appearance of the witness for testimony.[178] Yet the International Judges are well aware that the difficulty in obtaining Heng Samrin's testimony is the source of the fair trial complaint to begin with. This fact is all but explicit in the National Judges' opinion.[179] It is accordingly very likely that the exact same question which was before the Trial Chamber will ultimately come before this Chamber: is a conviction for crimes allegedly committed during the evacuation of Phnom Penh and at Tuol Po Chrey possible without Heng Samrin's evidence? The International Judges' opinion was accordingly little more than a decision to pass the buck: to leave a potentially divisive issue to another Chamber in spite of their sworn duty to resolve it.

72. This error was aggravated by the seemingly deliberate decision to address the issue in a subsidiary witness decision without reference to it in the Judgment, thus obscuring from the broader public scrutiny to which the Judgment would be subjected the fact that there had been a pronounced split between the National and International Judges. Indeed, as discussed herein, the Trial Chamber failed to even make reference to Heng Samrin's statement, or his failure to appear, at any point in its

[174] *See* paras. 569-570, *infra*.
[175] **E312**, Final Witness Decision, para. 111.
[176] Duch Appeal Judgment, para. 367.
[177] **E312**, Final Witness Decision, fn. 193.
[178] **E312**, Final Witness Decision, fn. 193; Bagosora Appeal Judgment, paras. 544.
[179] **E312**, Final Witness Decision, paras. 90 (it 'is clear that' Heng Samrin has 'declined to testify before the ECCC'), 96-97 (weighing the 'potential value' of Heng Samrin's testimony against 'the practical reality that he has already refused to comply with a summons issued by an International Co-Investigating Judge'; 'it would be unrealistic to ignore [Heng Samrin's] refusal to testify before the Co-Investigating Judges'; 'There is a significant risk that it would be impossible to obtain [Heng Samrin's] testimony within a reasonable time').

analysis of the CPK's supposed policy of targeting Khmer Republic soldiers and officials or crimes allegedly committed in the course of the evacuation of Phnom Penh.

73. The International Judges' error in not ruling on the Defence's fair trial claims in relation to the failure to summons Heng Samrin must also be placed in context. It comes after years of well-substantiated Defence requests for investigative action into political interference at the Tribunal, including but not limited to the failure of Heng Samrin and other high-ranking members of the CPP to appear for questioning before the ICIJ, were rejected by the Trial Chamber. Although (as argued above) the interference with the administration of justice was already apparent by the time Case 002 came to trial, the Trial Chamber refused to take action on the grounds that the issues had been litigated at the investigative stage and that any prejudice caused to Nuon Chea could be remedied by hearing evidence at trial.[180] Yet, nothing had ever been resolved at the investigative stage: the international judges of the Pre-Trial Chamber recognized that the witnesses' failure to appear violated Nuon Chea's right to a defence but were unable to act without a supermajority.[181] The issue has now come before the Trial Chamber in relation to: the appearance of the witnesses at trial, the very remedy which the Trial Chamber previously held would protect the integrity of the proceedings; and Nuon Chea's criminal responsibility, the question at the core of the Trial Chamber's competence. Yet the International Judges *still* refused to rule. This decision colours the entire procedural history and demonstrates that the Chamber's attitude was never a matter of judicial restraint but of avoidance. This last decision is the final, climactic buck-pass after years of highly practiced buck-passing. It is for this reason that the Defence stands by its depiction of this decision as 'cowardly',[182] a term it does not use lightly to characterize the conduct of a judicial officer.

74. Both the National and International Judges' treatment of Heng Samrin's (non)appearance was therefore deeply erroneous, illogical and dishonest, and falls to be explained only by the absence of judicial independence and integrity. Together with the Lemonde Book, Thet Sambath's interview, Judge Kasper-Ansermet's Note, and all of the other evidence that no meaningful judicial independence exists within the Cambodian judiciary, it is clear that Nuon Chea's right to an independent and impartial tribunal was systematically infringed over the course of the Case 002 trial and investigation. Although the very nature of the RGC's interference obscures its 'tangible impact' on Nuon Chea's fair trial – it is impossible to know what evidence a fair and impartial investigation would have yielded – Thet Sambath's and Rob Lemkin's independent research proves that exculpatory evidence directly relevant to the charges at issue in Case 002/01 and Nuon Chea's broader responsibility for events during DK

[180] **E116**, Fairness of Judicial Investigation Decision, para. 21; **E189/3**, First Kasper-Ansermet Allegations Decision, paras. 10-12.
[181] *See* para. 24, *supra*.
[182] **E314/6**, Second Trial Chamber Disqualification Application, para. 132.

was improperly excluded from the record.

75. Similarly, the failure to summons Heng Samrin constitutes a flagrant violation of Nuon Chea's right to present a defence. The impact and seriousness of that violation is demonstrated in connection with the analysis of the Trial Chamber's erroneous findings concerning CPK policy as to the treatment of Khmer Republic soldiers and officials and the evacuation of Phnom Penh.[183] As demonstrated therein, either Heng Samrin's appearance or the dismissal of all charges concerning the crimes committed at Tuol Po Chrey and extermination during the evacuation of Phnom Penh is required.

C. Ground 8: The Trial Chamber erred in law by excluding testimony concerning events after 1979

76. Also reflecting the Trial Chamber's reluctance to engage issues sensitive to the current government was its systematic refusal to allow questions during testimony which concerned the role of the PRK or the Vietnamese in Cambodia after 1979, examples of which are given below. As the Defence describes in connection with its submissions concerning the reliability of the evidence, the ECCC is unique among hybrid and international tribunals in the total control exercised over all of the evidence by the direct political opponents of the Accused for decades before any assessment was possible.[184] This fact is fundamental at this Tribunal and should have been central to the Chamber's assessment of the relevance of questioning at trial.

77. Instead, the Chamber routinely rejected questions which bore directly on the reliability and probative value of the evidence merely because those questions concerned a time period after the conclusion of the Tribunal's temporal jurisdiction. Contrary to the Chamber's repeated holdings, the fact that these questions concerned events after 6 January 1979 was not determinative of their relevance. Many questions concerned the relentless effort of the PRK and/or Vietnamese to justify its unlawful aggression against and occupation of Cambodia by grossly embellishing the CPK's supposed atrocities and the responsibility of its leaders.[185] Other questions were relevant to specific substantive issues, such as the total death toll during Democratic Kampuchea.[186] Defence counsel explained with specificity the relevance of these questions when allowed the opportunity to do so, although this was often not the case.[187]

78. One example concerns a witness who stated in a prior interview that he was personally recruited

[183] *See* paras. 569-570, *infra*.
[184] *See* paras. 125-129, *infra*.
[185] T. 23 Jul 2012 (David Chandler, **E1/94.1**), pp. 72-75; T. 9 Aug 2012 (Ong Thong Hoeung, **E1/105.1**), pp.72-74; T. 7 Dec 2012 (Hun Chhunly, **E1/150.1**), pp. 79-83.
[186] T. 6 Sep 2012 (Norng Sophang, **E1/123.1**), pp. 26:2-27:12; T. 25 Sep 2012 (Noem Sem, **E1/126.1**), pp. 94:2-95:22; T. 31 Jul 2012 (Phy Phuon, **E1/99.1**), pp. 76-79; T. 7 Dec 2012 (Hun Chhunly, **E1/150.1**), pp. 75:22-76:11, 76:23-25, 78:3-5, 78:8-24; **E185/2**, 'Third Decision on Objection to Documents Proposed for Admission before the Trial Chamber', 12 Aug 2013, para. 23.
[187] T. 31 Jul 2012 (Phy Phuon, **E1/99.1**), pp. 76-79.

by the PRK government in 1979 to help draft a new Constitution and an 'official government history text.' According to the interview, the witness was asked to 'rewrite' history so that 'the basic point was the historical solidarity between Vietnam and Cambodia'; and accordingly, to obscure Vietnam's unlawful aggression against Cambodia, an essential component of Nuon Chea's defence.[188] Any questions about this witness's extraordinary first-hand experience of the PRK's overt effort to reshape Cambodian history were excluded.[189] Another witness described in his book attending 'political training' sessions which he described as 'brainwashing'.[190] After the witness confidently assured the Chamber that this 'brainwashing' had no effect on his memory, further questioning was disallowed.[191]

79. The Judgment fails to address these issues at all, asserting simply that the Chamber excluded 'lines of questions that unnecessarily delayed the trial or were not conducive to ascertaining the truth'.[192] This was an inadequate response to the Defence's claim that 'lines of questions' were routinely excluded which were highly conducive to ascertaining the truth. As the Trial Chamber failed to engage this issue in any substantive way in the Judgment, the Defence refers the Supreme Court Chamber to the relevant portions of its Closing Brief.[193]

V. RIGHT TO PRESENT A DEFENCE

A. General principles

80. Cambodian Law and all applicable international standards recognize the fundamental right of the Accused to call evidence and make submissions in support of his defence.[194] According to the ECtHR, the exercise of this right entails that 'arguments of the defence [must] be heard as far as possible', particularly in light of 'what [is] at stake for the' accused.[195] Protecting these rights should 'not be made dependent on the fulfilment of unduly formalistic conditions'.[196] The Human Rights Committee has accordingly held that a court's decision to limit the opportunity of an accused charged with serious crimes to present evidence and argument 'without any further justification other than that the evidence was "irrelevant and immaterial", and the time constraints, while, at the same time, the number of witnesses for the prosecution was not similarly restricted, was a violation of Article 14'.[197] In this

[188] T. 9 Aug 2012 (Ong Thong Hoeung, **E1/105.1**), pp.70-71.
[189] T. 9 Aug 2012 (Ong Thong Hoeung, **E1/105.1**), pp.72-74.
[190] T. 7 Dec 2012 (Hun Chhunly, **E1/150.1**), pp. 79-83.
[191] T. 7 Dec 2012 (Hun Chhunly, **E1/150.1**), pp. 79-83.
[192] Judgment, para. 60.
[193] **E295/6/3**, Closing Brief, paras. 57-59.
[194] Cambodian Code of Criminal Procedure ('CCP'), Arts 298, 334; ECCC Law, Art. 35 *new*; ICCPR, Art. 14(3); ECHR, Art. 6(d); ICC Statute, Art. 67(1)(e); *Taylor v. Illinois*, 484 U.S. 400, 423-4 ('few rights are more fundamental than that of the accused to present witnesses in his own defense'); *Vidal v. Belgium* Judgement, ECtHR, App. No. 12351/86, 22 Apr 1992. *See also* **E182**, 'Request to Hear Defence Witnesses and to Take Other Procedural Measures in Order to Properly Assess Historical Context', 16 Mar 2011 ('Historical Context Witnesses Request'), paras. 10-13.
[195] *Pelladoah v. Netherlands*, 'Judgement', ECtHR, App. No. 16737/90, 22 Sep 1994, paras. 34, 37.
[196] *Pelladoah v. Netherlands*, 'Judgement', ECtHR, App. No. 16737/90, 22 Sep 1994, para. 41.
[197] *Larrañaga v. Philippines*, 'Views', HRC, Communication. No. 1421/2005, CCPR/C/87/D/1421/2005, 24 Jul 2006, para. 7.7.

regard, the Committee echoes the NMTs, whose 'policy' was 'to admit everything which might conceivably elucidate the reasoning of the defence'.[198] The ICTY Appeals Chamber has similarly held that the parties overall opportunity to call evidence and be heard before the Chamber must be both 'reasonably proportionate' and 'objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights.'[199]

B. Ground 7: The Trial Chamber erred in law by failing to summons other key Defence witnesses

81. In addition to failing to summons Heng Samrin, the Trial Chamber erred in law in failing to summons numerous other witnesses. The Defence submits that each of these errors violated Nuon Chea's right to present a defence.

82. *Ouk Bunchhoen*: Ouk Bunchhoen was a high-ranking East Zone military officer who, like Heng Samrin, defected to Vietnam from the CPK in 1978. He is presently a member of the Cambodian Senate and like Heng Samrin, unlawfully refused to appear before the CIJs for testimony. Prior to the establishment of the ECCC, Ouk Bunchhoen gave an interview to Stephen Heder which the Defence submits corroborates Heng Samrin's account of CPK policy as to Khmer Republic soldiers and officials at the 20 May 1975 meeting.[200] The Defence also sought his evidence in connection with, *inter alia*, the rebellion of cadres throughout the CPK against Pol Pot and Nuon Chea in light of his active participation in that rebellion.[201] As with Heng Samrin, the National Judges held that Ouk Bunchhoen's testimony was not sufficiently important to seek to summons him whereas the International Judges agreed that Ouk Bunchhoen should have testified but failed to assess the implications for Nuon Chea's fair trial rights. The National Judges' reasoning was as unpersuasive as it was in regards to Heng Samrin. They held that 'other witnesses testified about alternate command structures', identifying only one other fact witness,[202] a soldier of middling rank who had no role in opposing Pol Pot and Nuon Chea. They held that any evidence of 'conflict between the Eastern Zone and the Center in the late 1970s' was of very low importance, even though a cornerstone of Nuon Chea's defence concerns the existence of factional divisions within the CPK.[203] The National Judges ignored entirely Ouk Bunchhoen's account of the 20 May 1975 meeting.[204]

83. *Rob Lemkin*: Rob Lemkin is the co-director and co-producer with Thet Sambath of two films on the case file, *Enemies of the People* and *One Day at Po Chrey*, which were relied on a combined

[198] *Cited in* Kevin J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, 2011 ('Heller, *Nuremberg Military Tribunals*'), p.140.
[199] *Prosecutor v. Orić*, 'Interlocutory Decision on Length of Defence Case', IT-03-68-AR73.2, 20 Jul 2005, para. 8.
[200] **E295/6/3**, Closing Brief, paras. 44, 385-6.
[201] **E9/10.1**, 'Annex D: Witness Summaries with Point of the Indictment –Nuon CHEA Defence Team', No. 331.
[202] **E312**, Final Witness Decision, para. 101.
[203] **E312**, Final Witness Decision, para. 101. *See also* paras. 237-245, *infra* (concerning the importance of factional divisions to Nuon Chea's defence).
[204] *See* **E312**, Final Witness Decision, paras. 101-102.

fourteen times in the Judgment. *One Day at Po Chrey* concerns the alleged killings at Tuol Po Chrey. Lemkin contacted the Defence in 2013 to indicate that he was in possession of evidence establishing that Ruos Nhim, and not Nuon Chea, was responsible for the killings at Tuol Po Chrey. The Defence sought Lemkin's appearance at trial and an investigation into the material in his possession.[205] The Trial Chamber refused both requests.[206] For the reasons articulated in the Defence's Closing Brief, this decision was in error.[207] The Trial Chamber made no further reference to Rob Lemkin's potential important and exculpatory evidence in either the Judgment or the Final Witness Decision. The interview which Thet Sambath gave publicly after the Judgment was issued corroborates Lemkin's account of the evidence they collected, and in particular that Nuon Chea's conviction for crimes allegedly committed at Tuol Po Chrey is 'completely wrong'.[208] This interview establishes that if the Trial Chamber had contacted Lemkin, it would have found precisely what the Defence expected: that he is likely in possession of testimonial accounts from witnesses of far greater significance than anyone who has ever appeared before this Tribunal establishing that senior officials in the Northwest Zone together with senior officials in the East Zone were secretly opposed to Pol Pot and Nuon Chea and acting contrary to Party policy from the very beginning of Democratic Kampuchea. The Chamber's failure to make any effort to obtain Lemkin's testimony or his evidence was not only an error of law and a violation of Nuon Chea's right to present a defence, but also a reflection of its fundamental disinterest in obtaining exculpatory evidence.

84. *Pre-1975 Conditions*: The Defence repeatedly sought witnesses to testify to facts relevant to Nuon Chea's defence to charges concerning the evacuation of Phnom Penh. These facts included the number of refugees in Phnom Penh prior to April 1975 and particularly their living conditions, including access to food; the volume of rice available in Phnom Penh as of 17 April 1975; the sources of rice in Phnom Penh prior to 17 April 1975; the sources of aid expected going forward; and the likely living conditions in Phnom Penh had the city not been evacuated. The Defence made numerous submissions linking this evidence to precise legal defences to the charges of other inhumane acts through forced transfer and attacks against human dignity, murder and extermination.[209] These witnesses, such as TCW-258 and TCW-204 led the most prominent aid missions in Cambodia in 1975 and were ideally placed to provide the relevant evidence. The Trial Chamber dismissed all of these requests without once referring to any of these arguments. In the Final Witness Decision issued concurrently with the Judgment, the Chamber characterized these witnesses as pertaining only to

[205] **E294**, 'Request to Admit New Evidence, Summons Rob LEMKIN, and Initiate an Investigation', 11 Jul 2013.
[206] **E294/1**, 'Decision on Nuon CHEA Request to Initiate an Investigation and to Summons Mr. Rob LEMKIN', 24 Jul 2013.
[207] **E295/6/3**, Closing Brief, paras. 48-50.
[208] **F2**, First Appeal Evidence Request, para. 6.
[209] **E182**, Historical Context Witnesses Request, paras. 16-29; **E189/3/1/7.1.5**, 'Attachment 5: Request to Hear Witnesses Concerning Population Movement Phase I and II', paras. 14-22.

'context' and 'historical factors' and held that 'a significant amount of testimony has already been heard' in that regard.[210] The Chamber identified four witnesses who had offered such testimony – François Ponchaud, David Chandler, Philip Short and Stephen Heder – none of whom have any specialized expertise in, or knowledge of, the aid and refugee issues which the Defence outlined repeatedly and linked to specific legal defences. As detailed further elsewhere in this Appeal, the Chamber then made findings prejudicial to Nuon Chea on all of these issues based on virtually no evidence.[211]

85. *Khmer Republic 'Policy' Witnesses:* On 25 July 2013, the Defence sought to hear just over 100 witnesses cited in the Closing Order in connection with, or identified by the Co-Prosecutors in prior submissions as relevant to, an alleged policy to target Khmer Republic solders and officials.[212] This request followed shortly after the Trial Chamber indicated for the first time after nearly two years of trial proceedings that prior statements of these one hundred-plus individuals would be admitted into evidence. The Defence argued that the evidence in these prior statements was unreliable and almost all of a hearsay nature, that past witnesses who had appeared to testify on this subject consistently qualified or retracted their testimony, and that the evidence in the prior statements were likely to be of importance to the Co-Prosecutors' submissions in regard to crimes allegedly committed at Tuol Po Chrey. The Defence argued further that it had had no prior reason to seek the appearance of these witnesses for testimony because it had not known whether their statements would be admitted into evidence,[213] a consequence of the Trial Chamber's gross delinquence in failing to address the parties' objections for more than two years notwithstanding repeated requests to do so.[214] This request was dismissed in a one-sentence oral decision: 'The Chamber considers that the defence fails to satisfy the requirements of reasonable diligence in discovering and proposing the new witnesses pursuant to Internal Rule 87.4.'[215] The Trial Chamber then proceeded to rely on the prior statements of these witnesses extensively in the Judgment.[216] This was a flagrant error of law and more evidence of the Chamber's indifference to defence evidence or argument.

86. The Final Witness Decision asserts that the Trial Chamber heard 20 witnesses sought by the Nuon Chea defence over the course of the Case 002/01 trial.[217] While technically true, the vast majority

[210] **E312**, Final Witness Decision, para. 32.
[211] *See* para. 439, *infra*.
[212] **E291/2**, 'Request to Summons Witnesses in Respect of Alleged Policy of Targeting Khmer Republic Officials', 25 Jul 2013 ('Khmer Republic Targeting Policy Witnesses Request').
[213] **E291/2**, Khmer Republic Targeting Policy Witnesses Request, paras. 23-25.
[214] The Defence set out this procedural history in a subsequent filing seeking an extension of time to file closing submissions as a consequence of the Trial Chamber's failure to issue an earlier decision on witness statements. *See* **E295/3**, 'Request for Clarification Concerning Decision on Admissibility of Witness Statements, Complaints and Transcripts and for Extension of the Deadline for Closing Submissions', 9 Aug 2013, paras. 13-14.
[215] T. 23 Jul 2013 (Stephen Heder, **E1/227.1**), p. 68.
[216] Judgment, paras. 831-3. *See also* paras. 584-599, *infra*.
[217] **E312**, 'Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01', Aug 2014, para. 111.

of these witnesses were fundamentally prosecution witnesses sought by the Defence for the purposes of cross-examination. Only three Defence witnesses were heard during the trial which were *not* also sought by another party.[218] Seen in this light, the Trial Chamber's refusal to hear even a small number of carefully selected witnesses[219] for well-defined purposes, 'without any further justification other than that the evidence was "irrelevant and immaterial" and the time constraints',[220] amounts to a serious error of law. Indeed, the ICTY Appeals Chamber in *Orić* held that the Trial Chamber's decision to allow the accused 30 witnesses was 'not remotely proportional' to the 50 witnesses granted the prosecution.[221] The evidence called by the Trial Chamber in this case falls drastically below this standard and further reflects the Chamber's antipathy to exculpatory evidence.

87. The Defence notes, with no small amount of exasperation and disbelief, that notwithstanding the Trial Chamber's dogged refusal to hear any witnesses relevant to Nuon Chea's affirmative defence, the Co-Prosecutors continue to oppose the narrow and carefully reasoned requests for new witnesses sought by the Defence before this Chamber.[222] Although the Defence has been prohibited for seven years from conducting any investigations, the Co-Prosecutors nevertheless insist that this Chamber strictly construe a rule adopted from a system in which parties are entitled to call their own witnesses in order to ensure that the one, last opportunity to hear any evidence contrary to their simplistic narrative of DK is omitted from the record.[223] If the Co-Prosectors had any genuine interest in ascertaining the truth, they would welcome the testimony sought by the Defence as a unique opportunity to answer questions central to the allegations about which very little evidence, and no live testimony, exists on the record. Instead, they adhere to a win at-all-costs attitude.

C. Grounds 13 & 14: The Trial Chamber erred in law by unduly restricting the admission and use of documents at trial

88. The Trial Chamber imposed an extremely stringent legal scheme on both the admission of documents into evidence and use of documents at trial. The rules it adopted in this regard were completely unfounded in any applicable law, including domestic and international procedure and the Internal Rules. The adoption of these rules accordingly constituted an error of law. These errors significantly hindered Nuon Chea's ability to prepare for and ultimately confront every witness to appear before the Trial Chamber. This legal scheme, which presently remains in place before the Trial

[218] **E295/6/3**, Closing Brief, para. 56
[219] While the Defence's earliest witness lists were extensive, these lists were formulated six months prior to trial as defence strategies were still in development. Witness requests were refined over time and even its shortest and most focused requests were rejected without reasons. *See* para. 439, *supra*.
[220] *See* para. 80, *supra*.
[221] *Prosecutor v. Orić*, 'Interlocutory Decision on Length of Defence Case', IT-03-68-AR73.2, 20 Jul 2005, para. 8.
[222] **F2**, First Appeal Evidence Request; **F2/1**, Second Appeal Evidence Request; **F2/4**, 'Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 25 Nov 2014 ('Third Appeal Evidence Request').
[223] **F2/2**, 'Co-Prosecutors' Response to Nuon Chea Defence First and Second Requests Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 16 Sep 2014.

Chamber, continues to cause prejudice in Case 002/02. Accordingly, the Trial Chamber's errors invalidate the Judgment, or, in the alternative, constitute a legal question of considerable importance for the jurisprudence of the Tribunal and, in particular, the conduct of Case 002/02.

i – Admission of documents into evidence

89. Internal Rule 80(3) provides that prior to the Initial Hearing, parties are required to file lists of, *inter alia*, witnesses they will seek to call and documents they will seek to tender into evidence at trial. In Case 002, these lists were due in April 2011, six months prior to trial.[224] The Defence declined to do so, citing the impossibility of filing such a list so long in advance of trial and the incompatibility of the Rule 80 procedure with Cambodian law and international procedure.[225] The Chamber then held that any document which was not included on a party's Rule 80 list would be considered for admission only if it satisfied the standard in Rule 87(4): that the document 'was not available before the opening of the trial'.[226] The Chamber committed three distinct errors of law in that regard.

90. First, the Chamber failed to defer to Cambodian law, which clearly states that 'all evidence is admissible', even until the last day of trial.[227] The Chamber held that the requirement to file document lists 'is consistent with international practice dealing with cases of this magnitude and complexity.'[228] However, Cambodian law on this point is unambiguous. As such, this proposition is insufficient to justify seeking guidance in international practice pursuant to Article 12(1) of the ECCC Agreement. Indeed, the Trial Chamber upheld the constitutionality of the Internal Rules on the basis of their consistency with the ICCPR. As Cambodian law is *more* protective of the rights of the Accused, in particular the right to present a defence, the Chamber erred in relying on international procedure.

91. Document lists are furthermore illogical in the context of a civil law proceeding in which the vast majority of the evidence exists on a shared case file by the time the Trial Chamber is seized of the charges. The rationale for document lists, to provide a trial chamber with a modicum of notice of the material likely to be tendered into evidence, does not apply. Such lists are intended instead for adversarial proceedings in which each party is responsible for investigating and then presenting *their own* case. At the ECCC, the Accused were prohibited at all times from conducting any of their own investigations and instructed instead to defer to the CIJs.[229] The Defence was then also prevented from freely using the evidence produced by the CIJs' investigation and placed on the case file.

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[224] **E9**, 'Order to File Material in Preparation for Trial (TC)', 17 Jan 2011, para. 12.
[225] **E9/26**, 'Notice of Joinder in IENG Sary's Initial Submissions Regarding Documents to be Relied upon at Trial & Additional Submissions Regarding New Documents', 19 Apr 2011; **E109/3**, 'Observations Regarding Documents Considered Relevant to the Early Segments of the Trial', 22 Jul 2011; **E131/1/13**, 'List of Documents to Put Before the Trial Chamber During the First Mini-Trial', 31 Jan 2012. The Chamber's errors in requiring compliance with these procedures are elaborated herein.
[226] *See, e.g.* **E276/2**, Trial Chamber Memorandum, 10 Apr 2013, para. 2.
[227] CPP, Arts 321, 334.
[228] **E51/14**, Internal Rules Preliminary Objection Decision, para. 9.
[229] *See* paras. 31-32, *infra*.

92. Second, although the Chamber justified its procedural scheme on the basis that it was supposedly 'consistent with international practice', this simply is not true. Although other tribunals require parties to file document lists, none require parties to file such lists so far in advance of the commencement of trial, or on the basis of so little information. Nor does any international court place such tight restrictions on the admission of documents not identified on pre-trial lists into evidence.

93. Rules in place at the ICC impose only minimal requirements on parties, and especially Accused persons, to identify the documents on which they seek to rely prior to the commencement of trial proceedings. Both the ICC Statute and its RPEs provide limited guidance with regard to the admission of evidence.[230] In *Bemba*, only the prosecution was required to file lists of documentary evidence prior to trial, in the discharge of its obligation to disclose material in connection with the examination of prosecution witnesses.[231] The only advance notice requirement imposed upon the defence was to provide the Chamber and prosecution a list of documents it intended to use during the examination of any given witness no later than three days prior to that examination.[232] Nor did that requirement 'preclude the parties from requesting the submission as evidence of any item, listed or not, either in the course of the questioning of a witness or at a later stage during the proceedings through a motion.'[233] In accordance with this procedure, parties were entitled to introduce documentary material into evidence as late as seven days after the conclusion of the hearing of the evidence.[234]

94. At the ICTY and ICTR, accused persons are required to file exhibit lists only 'after the close of the case for the prosecution' – hence, after the Accused has heard all of the prosecution's evidence.[235] Document lists may furthermore be (and frequently are) amended for the purpose of introducing additional documents into evidence, where appropriate in light of the probative value of that evidence, the sufficiency of notice provided to the parties and 'the interests of justice'.[236] Even documents tendered for admission after the conclusion of a party's case are considered for admission on a case-by-case basis, taking into account the exercise of diligence, the probative value of the evidence, the stage at

[230] ICC Statute, Art. 64(3)(a) (trial chamber should 'confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings'); ICC RPE Rule 140(1) (in the absence of instructions under Article 64, parties may agree on 'the order and manner in which the evidence shall be submitted to the Trial Chamber').
[231] *Prosecutor v. Bemba*, 'Order on Disclosure of Evidence by the Office of the Prosecutor', ICC-01/05-01/08, 4 Nov 2009; *Prosecutor v. Bemba*, 'Decision on the "Prosecution's Request for Leve to Appeal the Trial Chamber's Oral Ruling Denying Authorisation to Add and Disclose Additional Evidence after 30 Nov 2009"', ICC-01/05-01/08, 28 Jan 2010; *see also* ICC Statute, Art. 77.
[232] *Prosecutor v. Bemba*, 'Decision on Directions for the Conduct of Proceedings', ICC-01/05-01/08, 19 Nov 2010, para. 16(ii).
[233] *Prosecutor v. Bemba*, 'Order on the procedure relating to the submission of evidence', ICC-01/05-01/08, 31 May 2011, para. 8.
[234] *Prosecutor v. Bemba*, 'Decision on the Motion for clarification and reconsideration of the timetable for the parties' final submissions of evidence', ICC-01/05-01/08, 30 Oct 2013, para. 9.
[235] ICTY RPE, Rule 63*ter*(G)(ii); ICTR RPE, Rule 73*ter*(B)(iv).
[236] *See, e.g.*, *Prosecutor v. Milošević*, 'Decision on Prosecution's Third Motion for Leave to Amend its Rule 65*ter* Exhibit List', IT-98-29/1-T, 23 Apr 2007, p. 3.

which the evidence is introduced and the potential for delay.[237]

95. Third, the Chamber misconstrued the Internal Rules. In particular, Rule 87(4) was designed to set standards for the admission of documents not on the case file, not to act as an enforcement mechanism for a failure to comply with Rule 80 by filing document lists. That conclusion is supported by a textual reading of Rules 80 and 87, the legislative history of the Internal Rules, and even the Trial Chamber's early interpretation of the provision.

96. Rule 87(3) sets out the process by which evidence 'from the case file' is put before the Chamber. According to Rule 87(3), 'evidence from the case file' is put before the Chamber if it satisfies a five-factored test. Rule 87(4) concerns the process by which 'new evidence' is put before the Chamber. Rule 87(4) contemplates the admission of 'new evidence' if it meets the requirements of Rule 87(3) and additionally 'was not available before the opening of the trial.' These provisions accordingly establish a distinction between evidence that is and is not on the case file, not between evidence that was and was not identified by the parties pursuant to Rule 80. Nothing in either rule suggests that the 87(4) document admission standard also applies to the documents covered by Rule 87(3). Neither sub-rule makes any mention of the procedure established by Rule 80.

97. Rule 80(3)(d), which concerns pre-trial document lists, makes the same distinction between 'new documents' and documents 'already on the case file'. Pursuant to Rule 80(3)(d), the Chamber may order parties to file documents including a 'list of new documents […] and a list of documents already on the case file'. Accordingly, the rule recognizes that 'new documents' are distinct from 'documents on the case file'. Yet, only 'new documents' are subject to the requirements of Rule 87(4).

98. This conclusion is supported by the legislative history of the Internal Rules. The provision in Rule 87(4) governing the admission of new documents was added to the Rules for the first time as part of the third revised version, issued on 6 March 2009.[238] At this time, however, no provision yet existed requiring parties to identify documents on the case file they would seek to put before the Chamber – clear evidence that the Rule 87(4) was not intended to apply to such documents. Only in the sixth revised version of the Internal Rules, issued on 17 September 2010, were parties required to file a list of new documents and 'a list of documents already on the case file.'[239] No adjustment was made to Rule 87, which retained its distinction between the standards applicable to documents already on the case file and those applicable to new documents.

99. Nor did the Trial Chamber initially indicate that documents not identified on Document Lists

[237] *Prosecutor v. Ngirabatware*,'Decision on Prosecution Motion for Leave to Reopen Prosecution Rebuttal Case', ICTR-99-54-T, 18 May 2012, paras. 22-23 (citing Appeals Chamber decisions); *Prosecutor v. Prlić et al.*, 'Decision on Jadranko Prlić's Motion to Admit Evidence Rebutting Evidence Admitted by the Decision of 6 Oct 2010', IT-04-74-T, 24 Nov 2010, paras. 15-18 (summarizing the legal standards articulated by the Appeals Chamber).
[238] Internal Rules (Rev. 3), adopted 6 Mar 2009, Rule 79(9)(d).
[239] Internal Rules (Rev. 6), adopted 17 Sep 2010, Rule 80(3)(d).

would be considered for admission pursuant to Rule 87(4). On 25 October 2011, six months after the Defence first declined to file such a list, the Chamber held that future requests for the admission of documentary material would be governed, but by the parties' exercise of due diligence and the interests of justice.[240] Only several months after that did the Chamber begin to require compliance with Rule 87(4) as a precondition to admission.[241]

100. The Chamber's decision to set a near-absolute prohibition on the admission of documents tendered by the Defence into evidence was accordingly unsupported by any applicable law. It is directly inconsistent with the CCP, it is not required by the Rules, and it deviates from the flexible procedures in place internationally, by requiring the Accused to file a comprehensive list prior to trial and then imposing draconian restrictions on the admission of documents not identified at that time. The Chamber's procedure was especially punitive in light of its failure to place the parties on notice prior to the deadline for the filing of document lists that the consequence of failing to file a list would be so drastic. It was accordingly a flagrant error of law which impacted the Defence's preparation for every witness over the course of the entire trial, and which the Chamber consistently refused to reason or reconsider despite repeated requests by the Defence that it do so.

ii – Use of impeachment documents at trial

101. Even more arbitrary was the Chamber's blanket refusal to allow parties to use documents not tendered for admission for any purpose during trial proceedings.[242] Both Cambodian law and international procedure contemplate the use of documentary material during trial proceedings for impeachment purposes without admission into evidence with limited or no notice requirement. The Chamber's error in this regard was accordingly a clear error of law.

102. There is no dispute that international procedural rules permit parties to use documents not tendered into evidence for impeachment purposes. The Co-Prosecutors admitted as much, asserting that 'there is a difference between some documents that may be required to be used to test the reliability and credibility of a witness'.[243] On 8 April 2011, the Chamber's Senior Legal Officer advised that Document Lists need not include documents relevant to other parties' witnesses.[244] It followed then from this instruction (as it does now) that parties are entitled to use documents not identified prior to

[240] **E131/1**, Trial Chamber Memorandum entitled 'Witness lists for early segments, deadline for filing of admissibility challenges to documents and exhibits, and response to Motion E109/5', 25 Oct 2011, p. 4.
[241] **E159**, 'Scheduling of Oral Hearing on Documents (16-19 Jan 2012) (TC)', 11 Jan 2012, para. 1.
[242] **E199**, Trial Chamber Memorandum entitled 'Directions regarding documents sought for impeachment purposes', 24 May 2012 (ruling that no document may be used for any purpose if not included on a Rule 80 list). The Chamber refused Defence efforts to use impeachment documents on several occasions. *See e.g.*. T. 30 Apr 2012 (Saloth Ban, **E1/70.1**), pp. 85:20–86:11; T. 23 May 2012 (Lim Sivutha, **E1/75.1**), pp. 20-23; T. 17 Jul 2012 (David Chandler, **E1/91.1**), p. 5:22-6:19 (ruling that documents not included on Rule 80 lists may be used only if the requirements of Rule 87(4) are satisfied). The Defence notes, however, was prejudiced by this rule throughout trial as it eventually stopped trying to challenge the Chamber's erroneous ruling.
[243] T. 4 Apr 2012 (Kaing Guek Eav alias Duch, **E1/59.1**), p. 19:5-16.
[244] Email from Susan Lamb to Parties, 8 Apr 2011.

trial for the purpose of disputing testimony adduced by an opposing party.

103. The position of the Co-Prosecutors and the Senior Legal Officer is well-supported by rules in place at other international tribunals. As already noted, at the ICC the only requirement prior to use of a document in the course of witness examination is brief advance notice. At the *ad hoc* tribunals, where document lists are required due to the adversarial nature of the proceedings, Chambers incorporate flexibility in trial proceedings by allowing for the use of documents not included on such lists for the limited purpose of impeaching the credibility of the witness. Documents which may not be admissible into evidence because they were not adduced during a party's case in chief or included on pre-trial lists may nevertheless be used 'for the purpose of impeaching a witness's credibility or refreshing his/her memory.'[245] Prior notice is not required in that regard because a party 'cannot know whether and on which basis it will seek to rebut evidence until the time when the witness testifies'.[246]

104. The arbitrariness of the Chamber's ruling not to allow the use of such documents for impeachment purposes was a direct consequence of its uneven and unprincipled application of Article 12(1) of the ECCC Agreement. For reasons already discussed, the Chamber's wholesale adoption of a legal scheme from the *ad hoc* tribunals directly inconsistent with the express terms of the CCP was itself unwarranted.[247] Having done so, however, the Chamber was duty-bound to ensure that the rules it developed did not distort the intent of that scheme – in this case, by incorporating the flexibility provided for at all other international courts concerning the use of documents beyond the framework of pre-trial preparation. Instead, the Chamber imposed a notice requirement unknown to Cambodian law, then expanded dramatically and beyond recognition the effect of a failure to comply with it.

D. Grounds 18: The Trial Chamber erred in law by imposing rigid and inadequate limits on the Defence's opportunity to question witnesses, experts and civil parties

105. The Trial Chamber further improperly limited the Defence's opportunity to adduce evidence by imposing rigid and inadequate limits on the time allocated for the examination of those witnesses who were called at trial. The practice throughout the trial divided time allocations for questioning witnesses, experts and civil parties in roughly equal measure between the Co-Prosecutors and the civil party lawyers, on the one hand, and the defence teams on the other. Whereas the Co-Prosecutors generally

[245] *Prosecutor v. Prlić* et al, 'Decision on Presentation of Documents', 27 Nov 2008, para. 24 (affirmed, *Prosecutor v. Prlić, et al.,* 'Decision on the interlocutory appeal against the Trial Chamber's decision on presentation of documents by the Prosecution in cross-examination of Defence witnesses', IT-04-74-AR73.14, 26 Feb 2009); *see also Prosecutor v. Perišić*, 'Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decisions of 15 and 16 Jul 2010 on Admission of "Fresh Evidence"', 17 Sep 2010, paras. 12-14, 21-23 (recognizing the distinction between admission of a document into evidence and use of a document for impeachment purposes).
[246] *Prosecutor v. Prlić et al.*, 'Decision on Presentation of Documents', IT-04-74-AR.73.14, 27 Nov 2008, para. 25 (upheld in *Prosecutor v. Prlić et al.*, 'Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses', IT-04-74-AR.73.14, 26 Feb 2009); *Prosecutor v. Taylor*, 'Decision on Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution during Cross-Examination', SCSL-03-1-T, 30 Nov 2009, para. 23.
[247] *See* paras. 89-94, *supra.*

used roughly three-quarters of this allocation, Defence counsel was often required to share one afternoon of a trial day – approximately 130 hearing minutes – between three (and at the very end of the trial proceedings, two) accused.[248] Nuon Chea was systematically provided just over a third of the total time allocated to the Co-Prosecutors to examine each individual who appeared before the Chamber.[249] Subject to very limited exceptions, these allocations were followed rigidly over the course of the trial.

106. These manifest imbalances were considerably worse in the context of the proceedings as a whole. As already noted, the Case 002/01 trial followed on a three-year investigation from which the Accused was almost entirely excluded. Yet, the Co-Prosecutors had an *unfettered* right to investigate the allegations for nearly a full year, from the moment the Case File was opened on 14 August 2006 until the Introductory Submissions were filed in July 2007.[250] These included a considerable number of interviews which were subsequently tendered into evidence.[251] None of this was permitted to Nuon Chea, who waited until the first witness appeared for cross-examination more than four years after he was arrested before his counsel first laid eyes on any witness in Case 002. Under these circumstances, the highly restrictive opportunity to examine experts, witnesses and civil parties allowed to the Accused was neither 'reasonably proportionate' to the Co-Prosecutors nor 'objectively adequate' to ensure Nuon Chea's opportunity to present a defence.[252]

E. Grounds 19: The Trial Chamber erred in law by imposing rigid and inadequate limits on the length of closing briefs

107. Having limited opportunities for cross-examination throughout the trial, the Chamber then imposed extremely rigid and inadequate limits on the length of closing briefs: the Defence's final opportunity to present argument before the Trial Chamber. The Chamber's initial page allocations contemplated an outrageous 50-page submission from each Accused and 75 pages from the Co-Prosecutors, or in the alternative, *no written closing argument at all*.[253] The Chamber was gradually coaxed to increase that limit to a still absurd 100 pages for each accused and 200 pages for the Co-Prosecutors, then eventually by a further 25 pages for all parties,[254] excluding endnotes. The indifference of the Chamber to receiving submissions of any significance from (in this case) any of the parties was an early indication of what it would reveal two years later in the Judgment: that it had

[248] One example among many – this was the case for a considerable number of experts and civil parties – is CPNLAF soldier Sum Chea, on whom the Trial Chamber relied extensively in regard to the evacuation of Phnom Penh. *See* T. 5 Nov 2012 (Sum Chea, **E1/140.1**).
[249] Although this applies across the trial, see for instance Duch's testimony between 19 Mar and 5 Apr 2012, during which time the Co-Prosecutors were allowed just under seven days of examination and the Defence roughly 2 and one-third days. This increased somewhat at the end of the trial after Ieng Sary passed away.
[250] **D3**, 'Introductory Submission No. 008', 18 Jul 2007 ('Introductory Submission').
[251] *See* **E96/8.2**, 'Annex 1 – Witness Statements: Corroborative Evidence' (tendered 40 OCP interviews, among many others, into evidence) ('OCP 'Corroborative' Witness Interviews').
[252] *See* para. 80, *supra*.
[253] **E218**, 'Trial Chamber memorandum re Scheduling of Trial Management Meeting', 3 Aug 2012, para. 20.
[254] T. 23 Jul 2013 (Stephen Heder, **E1/227.1**)

already entirely made up its mind and was not interested in the submissions of the Defence.

108. The limits imposed by the Chamber on closing submissions must again be viewed in context of the proceedings as a whole. The Co-Prosecutors' vastly disproportionate opportunity to investigate the allegations at issue was matched by their unchallenged right to make *unlimited* submissions to the CIJs as part of their Introductory, Supplementary and Final Submissions.[255] As the Defence has previously observed, these submissions totalled 1,149 pages,[256] exerting enormous influence over the direction of the judicial investigation. The defendants' input in this process was almost nil. By the time the trial began, the Co-Prosecutors were already far better placed to advance its case at trial.

109. Under these circumstances, the Trial Chamber's decision to place such substantial limitations on the Defence's one and only genuine opportunity to make submissions constituted an error of law or an abuse of discretion. As with limits imposed on witness examinations before the Chamber, Closing Briefs at trial were not reasonably proportionate to the Co-Prosecutors nor objectively adequate to protect Nuon Chea's right to 'a fair opportunity to present his case'.

F. Grounds 20 & 21: The Trial Chamber erred in law in failing to provide reasoned decisions and respond to defence submissions

110. The Defence argued in closing submissions that over the course of the trial, the Trial Chamber systematically failed to reason decisions.[257] The Chamber addressed this argument summarily in two footnotes in the Judgment, stating in both cases that Nuon Chea 'fails to either identify those decisions he believes to be deficient or substantiate this argument.'[258] This ruling was in error. The Defence referred the Trial Chamber to specific paragraphs of its Closing Brief which identified the Trial Chamber's unreasoned decisions and articulated detailed arguments why the Chamber's rulings were erroneous and reasoning was insufficient.[259] The fact that this analysis was not reiterated under the heading 'Systematic failure to reason decisions' in the Closing Brief is of no consequence.

111. The Trial Chamber's reasoning fared no better in the Judgment. The Supreme Court Chamber confirmed in the Duch Appeal Judgment that the Trial Chamber's discretion to assess the evidence is 'tempered by [its] duty to provide a reasoned opinion'.[260] The Trial Chamber accordingly erred in that case when 'well-referenced and detailed trial submissions' were 'not at any point discussed by the Trial Chamber in its Judgement.'[261] Among other purposes of detailed reasoning is its role in 'facilitat[ing]

[255] Practice Direction on Filing of Documents Before the ECCC, Art. 5.5.
[256] **D3**, Introductory Submission; **D83**, 'Co-Prosecutors' Supplementary Submission Regarding the North Zone Security Centre', 26 Mar 2008 ; **D196**, 'Co-Prosecutors' Supplementary Submission Regarding Genocide of the Cham', 31 Jul 2009; **D294**, 'CIJ' Letter to the Royal Embassy in Cambodia', 24 Dec 2009**; D390**, 'Co-Prosecutors' Rule 66 Final Submission', 16 Aug 2010.
[257] **E295/6/3**, Closing Brief, paras. 89-90.
[258] Judgment, fns. 111, 147.
[259] **E295/6/3**, Closing Brief, fns. 208-211.
[260] Duch Appeal Judgment, para. 17.
[261] Duch Appeal Judgment, para. 367.

appellate review.'[262] In this case, the Trial Chamber repeatedly failed to make reference to detailed Defence submissions on questions key to criminal liability. These include, *inter alia*: Stephen Heder's testimony concerning the alleged execution of Khmer Republic soldiers in Kampong Cham in 1973;[263] Philip Short's testimony concerning the alleged executions of Khmer Republic soldiers in Oudong in 1974;[264] Phy Phuon's consistent testimony before the Tribunal that Pol Pot specifically stated that Khmer Republic soldiers should be left unharmed;[265] Heng Samrin and Ouk Bunchhoen's out of court statements that CPK policy in regard to Khmer Republic soldiers did not contemplate executions;[266] Chhouk Rin's testimony that civilian citydwellers were never enemies of the Party and that CPNLAF forces never sought to harm them;[267] the power and authority of zone leaders within the Party and the considerable evidence cited in that regard;[268] the evidence of the fragmentation of command structures among zone-based forces within Phnom Penh just following liberation;[269] and the distinction between class theory outlined in CPK publications and the intent to commit criminal acts.[270] These errors reflect the Chamber's persistent failure to consider reasonable inferences consistent with Nuon Chea's innocence and thus to respect his presumption of innocence.

VI. ERRORS CONCERNING THE PROBATIVE VALUE OF THE EVIDENCE

112. The procedures pursuant to which evidence relied upon in the Judgment was obtained, admitted and ultimately assessed by the Trial Chamber were riddled with errors that led to systemic deficiencies in the Judgment's findings. Although the roots of these errors exist in the decisions and the Closing Order of the CIJs, the Trial Chamber compounded their effect through a series of erroneous decisions made over the course of the trial. These errors created substantial weaknesses in the credibility, reliability and overall probative value of the evidence. The Trial Chamber was accordingly required to proceed cautiously in its assessment of that evidence in the Judgment. It manifestly failed to do so.

113. The present analysis proceeds in two broad segments. The Defence first identifies procedural errors which compromised the probative value of the evidence before the Chamber. The Defence then establishes how that evidence was improperly relied upon by the Trial Chamber. Taken together, these errors invalidate the Judgment in full.

114. The Defence notes that the errors in evidentiary assessment alleged herein also led the Trial Chamber to commit errors of fact by making findings without adequate evidentiary support. These

[262] Lubanga Appeal Judgment, para. 222.
[263] T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), pp. 10-12.
[264] **E295/6/3**, Closing Brief, paras. 401-402; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**),, pp. 9-10
[265] **E295/6/3**, Closing Brief, para. 387; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**),, pp. 3-4.
[266] **E295/6/3**, Closing Brief, paras. 384-6; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), pp. 4-5.
[267] **E295/6/3**, Closing Brief, paras. 278-279; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**),, pp. 75-77.
[268] **E295/6/3**, Closing Brief, paras. 190-201; T. 22 Oct 2013 (Final Submissions Day 1, **E1/232.1**), pp. 23-25.
[269] **E295/6/3**, Closing Brief, paras. 306-309; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**),, pp. 81-83.
[270] **E295/6/3**, Closing Brief, paras. 149-164, 464-471.

errors are alleged with specificity throughout this Appeal. Should the Chamber conclude that the cumulative effect of the errors alleged herein do not invalidate the Judgment, the underlying arguments are nevertheless relied on elsewhere in the Appeal for the purpose of establishing individual errors of fact.

A. General principles

i – Discretion to admit evidence qualified by the need to ensure the fairness of the trial

115. International practice is clear that a Trial Chamber's discretion to admit relevant and probative evidence[271] is qualified by 'the need to ensure a fair trial'.[272] Accordingly, in assessing the admissibility of evidence, a Chamber must consider not only general requirements of relevance and probative value, but also 'whether the probative value of the evidence is substantially outweighed by the need to ensure a fair trial'.[273] As the ICC Trial Chamber held in *Lubanga,* its discretion to admit evidence 'must not displace [its] obligation of ensuring the accused receives a *fair trial*'.[274]

116. ECCC jurisprudence similarly holds that the exclusion of evidence 'not allowed under the law' under Rule 87(3) includes the obligation 'to ensure the fairness of trial'.[275] The Trial Chamber has accordingly recognized its 'duty to independently and appropriately weigh all evidence presented and to safeguard the fairness of trial proceedings.' [276] This approach is consistent with Rule 21(1), which provides that 'ECCC proceedings shall be *fair* and *adversarial*' and the Trial Chamber's obligation under Article 33 *new* of the ECCC Law to 'ensure that trials are *fair* and expeditious.'

ii – Standard of proof and inferences consistent with innocence of the accused

117. Foremost among the rights of the Accused in regard to the assessment of the evidence are the presumption of innocence and the Chamber's obligation to rigorously apply the applicable standard of proof: whether guilt has been established beyond any reasonable doubt. It is accordingly well-established that a Trial Chamber may draw an inculpatory inference based on circumstantial evidence only where that inference is the only reasonable one available.[277] If the Chamber is unable to exclude

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[271] *See*, e.g., ICTY Rule 89(C), STL Rule 149(C), and Rome Statute, Art. 69(3).
[272] *See*, e.g., ICTY Rule 89(D) and STL Rule 149(D); *see also*, Rome Statute, Art. 69(4), which stipulates that "[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the *probative value of the evidence and any prejudice that such evidence may cause to a fair trial* or to a fair evaluation of the testimony of a witness […]" (emphasis added).
[273] *Prosecutor v. Tolimir*, 'Decision on Prosecution's Motion for Admission of Evidence pursuant to Rule 92 *Quater*', IT-05-88/2-PT, 25 Nov 2009, para. 28.
[274] *Prosecutor v. Lubanga*, 'Decision on Victims' Participation', ICC-01/04-01/06-1119, 18 Jan 2008, para. 121.
[275] **E96/7**, 'Decision on Co-Prosecutors' Rule 92 Submissions regarding the Admission of Witness Statements and other Documents before the Trial Chamber', 20 Jun 2012 ('First Statements Decision'), para. 19; *see, also*, *Prosecutor v. Lubanga*, 'Decision on Victims' Participation', ICC-01/04-01/06-1119, 18 Jan 2008, para. 32.
[276] **E267/3**, 'Decision on Request to Recall Civil Party TCCP-187, for Review of Procedure concerning Civil Parties' Statements on Suffering and Related Motions and Responses, (E240, E240/1, E250, E250/1, E267, E267/1, E267/2)', 2 May 2013 ('Civil Party Statements of Suffering Procedure Decision'), para. 22.
[277] Stakić Appeal Judgment, para. 219 (citing Delalić Appeal Judgment, para. 458); Mugenzi Appeal Judgment, para. 88 (citing Nahimana Appeal Judgment, para. 896). *See, also*, Duch Trial Judgment, para. 332.

all exculpatory inferences beyond a reasonable doubt, it is required to acquit.[278] In assessing alternative inferences, it is insufficient for a chamber to 'simply state[] that it is not convinced by the explanations offered by the Defence […] Instead, the Chamber must convincingly explain *why* the alternative explanation is considered to be unreasonable. The Defence does not shoulder any burden of proof in this regard […] Rather, it is the Prosecution's task to *disprove* it.'[279]

iii – Credibility and reliability of testimonial evidence

118. Nancy Combs' study *Fact-Finding Without Facts* demonstrates that inconsistencies between statements given out of court and subsequent in-court testimony are 'commonplace' in proceedings at international criminal tribunals.[280] Her review of transcripts across numerous trials at the SCSL, ICTR and the East Timor Panel uncovered hundreds of inconsistencies, concerning matters of considerable importance.[281] In every trial she assessed, a 'large proportion' of witnesses testified in a way that was '*seriously* inconsistent' with their previous statements.[282] According to Combs, factors which tend to diminish the reliability of testimonial evidence include high-stress and violent experiences, the passage of time and the 'introduction of post-event information'.[283]

119. A concrete example of the dangers of relying on eyewitness testimony arises from recent events in the Karadžić trial. One of the charges against Karadžić concerned '[t]he killing of at least 9 men in a military warehouse in Pilipovići'.[284] The only proof of this incident was derived from adjudicated facts in the judgment in *Krnojelac*, which were based in turn on the testimony of a single alleged eyewitness.[285] Only later were the statements of five other witnesses disclosed which presented significantly different accounts of the incident.[286] The evidence became so inconclusive that the Prosecutor was forced to drop the charges.[287] The lesson is clear: convictions based on the evidence of a single witness, even an eyewitness, are at considerable risk of being unsafe.

120. Roel Burgler's study *The Eyes of the Pineapple* demonstrates that these failures of memory and fact-finding are prevalent in the context of Democratic Kampuchea.[288] He shows firstly that refugee accounts – a cornerstone of early assessments of the regime – typically came from upper and middle

[278] Delalić Appeal Judgment, para. 458.
[279] Katanga Trial Judgment, Dissenting Opinion of Judge Van den Wyngaert, paras. 145-6 (emphasis in original).
[280] Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, 2010 (Combs, *Fact-Finding Without Facts*'), p. 118.
[281] Combs, *Fact-Finding Without Facts*, p. 118.
[282] Combs, *Fact-Finding Without Facts*, p. 118 (emphasis in original).
[283] Combs, *Fact-Finding Without Facts*, pp. 15-16.
[284] *Prosecutor v. Karadžić*, 'Indictment', IT-95-5/18-PT, 19 Oct 2009.
[285] *Prosecutor v. Karadžić*, '94th Motion for Finding of Disclosure Violation and for Remedial Measures, IT-95-5/18-T, 24 Sep 2014', paras. 3-5.
[286] *Prosecutor v. Karadžić*, '94th Motion for Finding of Disclosure Violation and for Remedial Measures, IT-95-5/18-T, 24 Sep 2014', paras. 8-13.
[287] *Prosecutor v. Karadžić*, 'Notice of Withdraw of Incident A.5.1', IT-95-5/18-T, 18 Aug 2014.
[288] **E307/5.2.17**, Roeland A. Burgler, *The eyes of the pineapple: revolutionary intellectuals and terror in democratic Kampuchea*, 1990 ('Burgler, *Eyes of the Pineapple*').

class Cambodians who 'had lost all or most of their wealth and who, therefore, had enough reason to hate and discredit the new' government.[289] This sampling bias was aggravated by 'covert pressure from camp leaders, Thai officials and foreign agencies […] by homesickness and imagination'.[290] As Burgler observes, Michael Vickery has documented the effects of these pressures in detail through his experience interviewing refugees. Vickery shows that only a limited probe was typically required to reveal significant contradictions and inaccuracies in their accounts.[291] Among other shortcomings in the evidence was the common occurrence that 'hearsay became personal experience.'[292]

121. Vickery has shown how these early distortions in the evidence quickly became entrenched within a 'standard total view' about the DK which was increasingly difficult to dislodge as time went by. One specific example concerns Vickery's critique of François Ponchaud's book, *Cambodia: Year Zero*, possibly the most influential early account of the DK. Vickery demonstrates that while Ponchaud's conclusions are framed broadly as proving events across the country, the evidence upon which they were based was derived largely from a small number of elite Cambodians from the Northwest Zone, the part of the country closest to the Thai refugee camps.[293] Importantly, Ponchaud testified in the Case 002/01 trial and conceded that in hindsight, Vickery's critiques were correct.[294]

122. Burgler also shows that more overt forms of distortion were at work. He describes, for instance, how a series of news reports in respectable western media describing CPK 'atrocities' proved fraudulent. Although these stories were backed by photographic evidence, Thai intelligence officers later admitted to staging the photos on Thai territory.[295] Once these stories entered the mainstream, they were recycled by different news outlets even after the fraud was uncovered. Burgler cites this as 'one example of a long list of distortions and manifest dishonesty by serious and supposedly responsible, non-partisan western journals.'[296]

123. These concerns are aggravated at this Tribunal for numerous reasons. Most obviously, the passage of time between the events at issue and the recording of evidence is far longer than any other significant international criminal proceeding. Combs laments the 'three year' delay in prosecutions at the ICTR.[297] In the ICC Katanga Trial Judgment, Judge Van den Wyngaert characterized as 'deficient' an investigation which began 'three years after the fact'.[298] ICTY jurisprudence recognizes that

[289] Burgler, *Eyes of the Pineapple*, p. 2.
[290] Burgler, *Eyes of the Pineapple*, p. 2.
[291] **E3/1757**, 'Book By M. VICKERY: *Cambodia 1975-1982*' ('Vickery, *Cambodia 1975-1982*'), ERN 00396944-00396983.
[292] Burgler, *Eyes of the Pineapple*, p. 2.
[293] **E3/1757**, Vickery, *Cambodia 1975-1982*, ERN 00396961-64; T. 11 Apr 2013 (François Ponchaud, **E1/180.1**), pp. 43-45.
[294] T. 11 Apr 2013 (François Ponchaud, **E1/180.1**), pp. 18-19, 43-45.
[295] Burgler, *Eyes of the Pineapple*, pp. 1-2.
[296] Burgler, *Eyes of the Pineapple*, p. 2.
[297] Combs, *Fact-Finding Without Facts*, p. 15.
[298] Katanga Trial Judgment, Dissenting Opinion of Judge Van den Wyngaert, para. 138.

'evidence about facts that occurred ten or more years prior to giving evidence, involves inherent uncertainties due to the vagaries of human memory and perception.'[299] Most testimonial accounts in Case 002 were given more than *thirty years* after the events at issue. Those given in closer proximity to the crimes charged are generally anonymous and lack any indicia of reliability.[300]

124. The passage of time is especially detrimental to the reliability of memories in this case because so much has been said and written about Democratic Kampuchea. Charges arising, for instance, from the evacuation of Phnom Penh or the establishment of cooperatives, concern events which affected the population at large. The alleged victims of these crimes lived amongst each other for decades before the investigation in Case 002 even began.

iv – Political and institutional context

125. These circumstances aggravate another crucial feature of fact-finding at this Tribunal unique among international courts. From the day the CPK was ousted, Cambodia has been governed by the same former CPK leaders who sided with the Vietnamese communists in an unlawful invasion and occupation of Cambodian territory. As the international community as a whole recognized at the time – with the exception of the communist Soviet-bloc – this invasion had nothing at all to do with the purported humanitarian goals of the Vietnamese. Instead, it was the culmination of longstanding Vietnamese ambitions on Cambodian territory, exploited by their Soviet patrons to wage their proxy war against the Chinese.[301] As a US Congressional Sub-Committee report put it, 'the war itself was something of a pawn in the three-way struggle among Vietnam, China and the U.S.S.R.'.[302] The Vietnamese communists' quest for legitimacy accordingly turned on their astonishing ability to reframe the conflict by highlighting and grossly exaggerating the supposed atrocities of the regime they replaced.

126. The same US Congressional Sub-Committee report, prepared in October 1978, states that already earlier that year, both sides were making 'bids for world public opinion, the Vietnamese far more skillfully than the Cambodians.'[303] Essential to this effort were 'grisly atrocities charges' such as 'dismembering children […] extracting the livers of wounded to be eaten […] butchering entire

[299] Brđanin Trial Judgment, para. 25.
[300] *See* paras. 156-158, *infra*.
[301] **E3/2370**, 'Vietnam-Cambodia Report', 4 Oct 1978 ('Vietnam-Cambodia Report'), ERN 00187383-86 (describing background of Vietnamese efforts to establish control over an Indochinese Federation), 00187394-95 ('USSR, because of its intimate ties with Vietnam, has a major interest in the war. It stands firmly with the Vietnamese'; 'Moscow portrays the war chiefly in terms of Chinese hostility for Vietnam'; China's position 'is that Moscow instigated [the war] to extend its hegemony in the region. Vietnam was a willing partner in the venture since the war serves Vietnamese ambition, which is not only to establish a Federation of Indochina, but to dominate all Southeast Asia'), 00187396 (describing longtime Vietnamese ambitions; the war itself was 'something of a pawn in the three-way struggle among Vietnam, China and the U.S.S.R.').
[302] **E3/2370**, 'Vietnam-Cambodia Report', ERN 00187396.
[303] **E3/2370**, Vietnam-Cambodia Report, ERN 00187389.

families, sacking pagodas, looting hospitals and schools'.[304] David Chandler takes this a step further, concluding that PRK officials sought not only to exaggerate the scale of the atrocities, but to ensure that the Party was caricatured in such a way as to focus blame on a tiny group of Party leaders, and therefore away from their own role as senior officials in the CPK:

> Cambodians interpretations of the Pol Pot era slip easily into Manichean frameworks that make poor history but are emotionally satisfying and consistent with much of what they remember. This point has been driven home by the French psychiatrists Hiegel and Landrac, who worked in Khmer Rouge refugee camps in Thailand in the 1980s. It is always more comfortable to have a Manichean vision of the world, for that allows us not to ask too many questions, or at least to have the answer readily at hand. In this fashion, representing the Khmer Rouge as a homogenous group of indoctrinated fanatics, the incarnation of absolute evil responsible for all the unhappiness of the Khmer people, is a reductive vision of a complex phenomenon but one which a good many people find satisfying[…]
>
> Within just such a Manichean framework, the PRK regime worked hard to focus people's anger onto the 'genocidal clique' that had governed Cambodia between Aprl 1975 and January 1979 […] While the new government based its legitimacy on the fact that it had come to power by toppling the Khmer Rouge, it was in no position to condemn the entire Movement since so many prominent PRK figures had been Khmer Rouge themselves until they defected to Vietnam in 1977 and 1978.[305]

Asked about the concrete ways in which the PRK 'worked hard to focus people's anger' during his appearance before the Trial Chamber, Chandler testified:

> Certainly, in the trial of Ieng Sary and Pol Pot for genocide that took place, I think, in August 1979, also in the textbooks of Cambodian schools in early the 1980s, through such things as the annual Day of Hate of May 20th, I think every year. The institution of the Museum of Genocidal Crimes, again, not ever suggesting that the leadership of DK was as collective as we know it was, but was in the fact the sort of plaything of a corrupt and insane pair of people, Pol Pot/Ieng Sary.[306]

Chandler's reference to the PRK's creation of the 'Museum of Genocidal Crimes' at Tuol Sleng is particularly apt because it was designed with the direct participation of the Vietnamese. Mai Lan, a Vietnamese military propaganda official, was sent on a tour of several international sites, including Auschwitz, in order to learn how to portray DK to the general public. This was a familiar tactic for Vietnam, which had used exactly the same tools in its propaganda against the United States, characterizing the US involvement in Southeast Asia as 'genocidal'.[307] Vietnam's version of the 'Tuol Sleng Genocide Museum' – also designed by Mai Lan -- stands in Ho Chi Minh City as the War Remnants Museum. At its founding in 1975, it was called the 'Exhibition House for US and Puppet Crimes'.

127. The pressure to advertise the alleged atrocities of the CPK and to divert blame away from the leaders of the Vietnam-backed PRK puppets such as Heng Samrin was augmented considerably by the

[304] **E3/2370**, Vietnam-Cambodia Report, ERN 00187389.
[305] T. 23 Jul 2012 (David Chandler, **E1/94.1**), pp. 33-34 (quoting from **E3/1684**, David Chandler, 'Voices from S-21: Terror and History in Pol Pot's Secret Prison', 1999, ERN 00192688).
[306] T. 23 Jul 2012 (David Chandler, **E1/94.1**), p.35.
[307] Stephen Heder, Victors' Genocide in Cambodia, *Phnom Penh Post*, 5 Mar 1999.

uncomfortable reality that the same allegations leveled against the CPK had also been made about the Communists in Vietnam. Of particular resonance with Case 002/01, Stephen Heder describes the detention of hundreds of thousands of officers and officials of the former South Vietnamese government along with hundreds of writers, artists, journalists and publishers in the aftermath of the victory of the Vietnamese Communists on 30 April 1975. According to Heder, one study purports to describe the execution of 'thousands' of these high-ranking officials.[308] In order to have any traction, the proposition that this same military acted for humanitarian reasons and not selfish ones in occupying Cambodia required considerable and immediate substantiation.

128. As with the broader conflict, the PRK's propaganda was not merely the manifestation of a struggle between belligerent neighbours, but rather, part of a much larger campaign by the Soviets against the Chinese. Howard De Nike, a Professor at the University of San Francisco and editor of the leading collection of documents from the 1979 trial, has documented the close collaboration between the East German and Vietnamese governments – both Soviet clients – in formulating and propagating the PRK's narrative of Democratic Kampuchea in the immediate aftermath of the Vietnamese invasion. De Nike states first that East German advisors 'played a role in the design of the exhibition of torture and execution' at the museum at Tuol Sleng, portraying the Pol Pot regime as fascist and making – completely unfounded – comparisons with Nazi concentration camps.[309] De Nike subsequently found and interviewed a former leading East German public prosecutor named Carlos Foth who was 'sent' in July 1979 to 'provide counsel' in the case against Pol Pot and Ieng Sary.[310] Foth was hosted at a series of public events by the multi-talented Keo Chanda,[311] who as noted before served simultaneously as President of the PRK Information, Press and Culture Ministry, and, in an apparent extension of that role, as the Presiding Judge of the 1979 Tribunal prosecuting Pol Pot and Ieng Sary.[312] De Nike states that, although Foth was ostensibly tasked with providing counsel to the Defence, his work was intended to 'serve as a script for the trial generally' and 'offer guidance on broad political questions raised by the proceedings'.[313] These 'political' questions reflected 'the urgencies of the Cold War, as perceived in particular from the perspective of the Soviet Bloc'. One of the two main prongs of the 'defence' formulated by Foth was accordingly to establish that the 'aggressors in Peking are complicit and protectors of the accused.'[314] De Nike concludes that Foth's involvement was designed in large part to

[308] Stephen Heder, Victors' Genocide in Cambodia, *Phnom Penh Post*, 5 Mar 1999.
[309] Howard J. De Nike, 'East Germany's Legal Advisor to the 1979 Tribunal in Cambodia', Jul 1978 issue of *Searching for the Truth* ('De Nike, *1979 Trial East German Advisors*'), p. 39.
[310] De Nike, *1979 Trial East German Advisors*, p. 39
[311] *See* para. 37, *supra*.
[312] De Nike, *1979 Trial East German Advisors*, p. 40. De Nike includes a photocopy of an official invitation to a function at the Ministry of Foreign Affairs hosted by Keo Chenda.
[313] De Nike, *1979 Trial East German Advisors*, p. 41.
[314] De Nike, *1979 Trial East German Advisors*, p. 41.

assist in 'drawing parallels […] between the Nazi and Khmer Rouge regimes.'[315]

129. The best illustration of the highly skilled Soviet-style propaganda employed to portray the Pol Pot-Ieng Sary clique as fascist, barbarious and a gross violator of human rights are the documentaries *Die Angkar* and *Kampuchea: Sterben und Auferstehen*, both produced by a pair of East German filmmakers named Walter Heynowski and Gerhard Scheumann. Heynowski and Scheumann are renowned for having developed the agitational propaganda film to new levels of sophistication.[316] Their reputation is well-deserved: the films are propaganda on the highest level. The message conveyed in both documentaries is nearly an exact replica of the Closing Order and must be exactly what the Cambodian public including all those witnesses who testified before the ECCC has been hearing for almost forty years. Indeed, even the Supreme Court Chamber has fallen victim to this highly sophisticated propaganda in finding that the crimes for which Duch was convicted 'were undoubtedly among the worst in recorded human history.'[317] This was an historical faux-pas of considerable proportions.

v – The Tribunal's treatment and assessment of the evidence

130. All of these facts – the well-documented flaws in witness memories at international tribunals, the extremely long time lapse between the events at issue and the advent of the Tribunal, and the determined efforts of the Vietnamese and the PRK to reduce events during Democratic Kampuchea to a simple conflict between good and evil – should have prompted the Tribunal to take extraordinary precautions to ensure the accuracy of the evidence. Instead, the opposite happened. To begin with, no physical evidence exists of any crime site in the Closing Order. Despite allegations of 1.7 million deaths, the CIJs exhumed no dead bodies and commissioned not even the most basic forensic analysis.[318] No list of victims exists in connection with most crime sites in the Closing Order, including those charged in Case 002/01. Although the Closing Order alleges that thousands of people were killed at Tuol Po Chrey, and the Chamber held that hundreds were killed, only three names of any alleged victims have ever been identified (not to say reliably) by any witness.[319] Accordingly, no objective evidence exists to corroborate the testimonial accounts on record.

131. Despite these precarious circumstances, a series of decisions by the CIJs and later the Trial Chamber radically *limited* opportunities to test the veracity of evidence when those opportunities should have been significantly *expanded*. As demonstrated, *supra*, the CIJs conducted all interviews

[315] De Nike, *1979 Trial East German Advisors*, p. 43.
[316] **E3/3095R**, 'Die Angkar'; **E3/535R**, 'Kampuchea: Sterben und Auferstehen'. The Defence has sought Heynowski's appearance as a witness in Case 002/02. Scheumann is deceased.
[317] Duch Appeal Judgment, para. 380.
[318] Katanga Trial Judgment, Dissenting Opinion of Judge Van den Wyngaert, para.138 (an investigation was 'deficient' because it lacked 'essential forensic evidence').
[319] *See* paras. 457, *infra*; **E295/6/3**, Closing Brief, paras. 422-426.

confidentially and without the participation of defence counsel, justifying that decision on the grounds that the right of the Accused to confront the evidence would be satisfied later, by hearing witnesses live at trial.[320] The damage caused by that decision having already been done, the Trial Chamber then decided that it disagreed with the CIJs and admitted nearly 1,200 out of court statements into evidence without any opportunity for cross-examination.[321] More than 100 of these statements were given by witnesses whose appearance the Defence explicitly sought at trial for the purpose of confronting their evidence in regard to the treatment of Khmer Republic soldiers or officials.[322] Where witnesses who gave evidence to the CIJs were heard live before the Chamber, they were permitted to review their statements just prior to testifying and then to testify by answering leading questions derived from those statements.[323] The Trial Chamber closed the loop on this sequence of errors by relying on this evidence indiscriminately throughout the Judgment, paying little or no attention to questions of reliability or probative value.[324] The effect of these errors was to shepherd a vast body of evidence from creation through to conviction while ensuring maximum protection against any critical scrutiny.

132. As Judge van den Wyngaert aptly stated in her dissenting opinion in *Katanga*, the fact that substantial challenges exist in the collection and verification of evidence does not mean 'that the Court should lower its evidentiary standard and be more flexible about the evidence.'[325] Nor should it prevent 'the Court from considering the evidence of such witnesses in the same rigorous way as the evidence of any witness should be evaluated.' [326] Indeed, the opposite is true: it means that the Court must be 'extremely cautious about their testimony',[327] the reliability of which is highly uncertain. The failure of the Trial Chamber to exercise due caution in this case manifested as follows.

B. Grounds 9-10: The Trial Chamber erred in law in limiting opportunities for investigations at the trial stage

133. As argued above, as soon as the Trial Chamber was seized of the case file, the Defence sought immediately to remedy some of the prejudice caused by the investigation. On 5 April 2011, during the parties' very first appearance before the Trial Chamber,[328] the Defence alerted the Chamber to 'the letter from the investigating Judges, the OCIJ, instructing us not to contact any witnesses, and not to carry out any investigation', and sought a ruling as to 'whether we are still forbidden from carrying out

[320] *See* paras. 31-32, *infra*.
[321] *See* paras. 155-159, *infra*.
[322] **E291/2**, Khmer Republic Targeting Policy Witnesses Request; **E291/2.1**, 'Annex A: Witnesses Cited by CIJ and Co-Prosecutors in Connection with Alleged Policy to Target Lon Nol Soldiers and Officials for Execution'.
[323] *See* paras. 135-147, *infra*.
[324] *See* paras. 163-165, *infra*.
[325] Katanga Trial Judgment, Dissenting Opinion of Judge Van den Wyngaert, para. 142.
[326] Katanga Trial Judgment, Dissenting Opinion of Judge Van den Wyngaert, para. 142.
[327] Katanga Trial Judgment, Dissenting Opinion of Judge Van den Wyngaert, para. 142.
[328] With the exception of a hearing on a request for provisional release. *See* T. 31 Jan 2011 (Application for Release, **E1/1.1**).

any investigation on behalf of the defence.'[329] The Defence raised the issue in numerous other written filings, linking it repeatedly to Nuon Chea's ability to fact-find and his right to present a defence.[330] The Trial Chamber failed to even issue a clear ruling until 18 months after the question was first raised.[331] As with the 'letter' of the CIJs, no reasoning nor any reference to the applicable law is to be found. Seven years after Nuon Chea was arrested, his counsel has yet to investigate a single fact, attend a single interview, or even to be informed on what basis they were not allowed to do so.

134. Unable to investigate on its own, the Defence tried a different approach: on 11 May 2011, the Defence requested that the Trial Chamber act pursuant to Rule 93 to undertake the investigations which the CIJs had failed to carry out on its behalf.[332] Four months later, the Chamber issued an eight-page ruling on four separate defence applications raising a disparate set of issue concerning the judicial inversatigation.[333] Two paragraphs were devoted to the Defence's 26 detailed Requests for Investigative Action, including those described above as being of continuing critical importance.[334] Although the Defence sought to highlight the limitations on the role of the parties during the investigation,[335] the Chamber simply reiterated that 'the Accused has had ample opportunity […] to request of the CIJs all investigative action considered by the Accused to be relevant'.[336] The Chamber furthermore held that the fairness of the proceedings would be safeguarded at trial through the opportunity of the accused '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'.[337] Yet, over the ensuing years of trial proceedings, the Chamber refused almost all of the Defence's requests for witnesses without reasons,[338] enforced a scheme for the admission and use of documents at trial so stringent that it was impossible in practice to adduce any documentary evidence,[339] and (as discussed, *infra*) seriously limited the opportunities for meaningful cross-examination of the relatively few witnesses that did come to court to testify.[340] *Every* one of these decisions was unreasoned, most were directly inconsistent with the applicable law,[341] and the remainder constituted a gross abuse of

[329] *See* T. 5 Apr 2011 (Michiel Pestman, **E1/2.1**), p. 116:3-14; **E211**, 'Notice on the Trial Chamber Regarding Research at DC-CAM', 19 Jun 2012, paras. 3-4.
[330] **E51/3**, Consolidated Preliminary Objections, para. 17; **E9/4/4**, 'List of Proposed Witnesses, Experts, and Civil Parties', 15 Feb 2011, para. 6; **E88**, Consolidated Investigation Request, paras. 2, 8; **E182**, Historical Context Witnesses Request, para. 30.
[331] **E211/2**, 'NUON Chea Defence Notice to the Trial Chamber Regarding Research at DC-CAM (E211)', 13 Aug 2012, para. 4.
[332] **E88**, Consolidated Investigation Request.
[333] **E116**, Fairness of Judicial Investigation Decision, 9 Sep 2011.
[334] **E116**, Fairness of Judicial Investigation Decision, 9 Sep 2011, paras. 19-20; *see* para. 36, *supra*.
[335] **E88**, Consolidated Investigation Request, paras. 2, 8.
[336] **E116**, Fairness of Judicial Investigation Decision, para 19 (emphasis added).
[337] **E116**, Fairness of Judicial Investigation Decision, para. 19.
[338] *See* paras. 81-87, *supra*.
[339] *See* paras. 88-104, *supra*.
[340] *See* paras. 135-153, *infra*.
[341] *See* paras. 88-104 (concerning the use of documents at trial), 147 (concerning leading questions based on prior statements).

discretion.[342]

C. Grounds 15-16: The Trial Chamber erred in law in permitting witnesses to review prior statements before testifying and answer leading questions based on those statements

135. Having failed to recognize the shortcomings of the investigation or to take any meaningful steps at trial to remedy it, the Trial Chamber maximized the prejudice caused by these errors by (i) allowing all witnesses and civil parties to review their prior statements just before testifying and (ii) then allowing the Co-Prosecutors to examine witnesses by reading witnesses the content of these statements in order to seek confirmation of their accuracy. The ability of the Accused to test the reliability of the flawed investigation by assessing whether in-court testimony was consistent with prior statements was consequently eviscerated.

i – Review of past statements prior to testifying

136. The reasoning pursuant to which the Trial Chamber justified its decision to permit witnesses to review their past statements prior to testifying was almost non-existent. On 24 November 2011, the Trial Chamber held that witnesses would be furnished with their past statements prior to testifying in order 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 WESU's usual efforts to familiarize and orient them within the courtroom environment in advance of their testimony.[343]

137. In this short passage, the Trial Chamber committed three distinct errors of law.

Failure to consider Cambodian law

138. The Chamber failed to refer to any Cambodian legal source or national practice. The CCP sets detailed procedures for the hearing of witnesses, including the nature of the information conveyed to them in the summons issued by the court.[344] No allowance is made for showing witnesses their past statements. That practice is furthermore prohibited in criminal prosecutions before Cambodian courts. This rule is unambiguous and accordingly no further analysis was necessary or appropriate.

Failure to consider international practice

139. If guidance in international procedure had even been appropriate, the Chamber should have concluded that the review of prior statements is universally prohibited in civil law, inquisitorial systems

[342] *See* paras. 81-87 (concerning hearing witnesses at trial).
[343] **E141/1**, 'Provision of Prior Statements to Witnesses in Advance of Testimony at Trial', 24 Nov 2011; *See also*, **E141,** 'Response to Issues Raised by parties in Advance of Trial and Scheduling of Informal Meeting with Senior Legal Officer on 18 Nov 2011', 17 Nov 2011.
[344] *See* CCP, Arts. 295-297, 477.

most analogous to the ECCC.[345] The review of past statements by a witness is a creature of adversarial systems in which parties present their own case, including their own witnesses, to the court. It is unheard of in the inquisitorial system.

140. This fact was explicitly recognized by the ICC Trial Chamber in *Lubanga*, which held that rules concerning witness preparation in place at the *ad hoc* tribunals are inapplicable to the ICC's hybrid adversarial-inquisitorial system.[346] Noting several inquisitorial features of ICC procedure, the Chamber held that the 'procedure of preparation of witnesses before trial is not easily transferrable into the system of law created by the ICC Statute and Rules'.[347] The *Lubanga* Trial Chamber accordingly prohibited 'substantive preparation of witnesses for trial', which 'may well prove detrimental' to the process of ascertaining the truth.[348]

141. While true that the *Lubanga* court did allow witnesses to review their prior statements as one last vestige of witness preparation, its reasoning in support of that practice supports its prohibition before the ECCC. The *Lubanga* court's primary reason was that witnesses 'may well have given their original statements more than a year in advance of their in-court testimony' and may therefore need to refresh their memories.[349] In *Lubanga*, however, statements were given in close proximity to the events in question and long before the commencement of the trial. The accused was charged with crimes committed between July 2002 and December 2003 and the prosecution initiated an investigation beginning just six months later, in June 2004. By contrast, the trial began five years later, in January 2009.[350]

142. At this Tribunal, these facts are inverted. While a substantial majority of the statements in evidence were generated sometime between 2006 and 2010 – more than thirty years after the events in question[351] – the time elapsed between the judicial investigation and the start of trial proceedings was

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[345] This is true, in particular, under French law. *See* Cass. Crim., 7 Nov 2007, n° 07-80.437, Bull. Crim. 2007, n°267, p. 678; Cass. Crim., 26 Nov 2014, n° 13-88.353; Cass. Crim., 27 Jun 1990, n°89-87.170, Bull. Crim. 1990 n° 265 p. 678; Cass. Crim., 15 Oct 1986, n° 86-90.959, Bull. Crim. 1986, n° 289, p.738 ; Cass. Crim., 13 Feb 2008, n°07-83.168, Bull. Crim. 2011, n°153; Cass. Crim., 29 Jun 2011, n°10-85.989.

[346] *Prosecutor v. Lubanga*, 'Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial', ICC-01/04-01/06, 30 Nov 2007, para. 45.

[347] *Prosecutor v. Lubanga*, 'Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial', ICC-01/04-01/06, 30 Nov 2007, para. 45.

[348] *Prosecutor v. Lubanga*, 'Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial', ICC-01/04-01/06, 30 Nov 2007, paras. 47, 51-52.

[349] *Prosecutor v. Lubanga*, 'Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial', ICC-01/04-01/06, 30 Nov 2007, para. 50. Chambers in *Bemba* and *Katanga* subsequently adopted this approach. *See Prosecutor v. Bemba*, 'Decision on the Unified Protocol on the practices and familiarize witnesses for giving testimony at trial', 18 Nov 2010, paras. 21-25; *Prosecutor v. Katanga*, 'Decision on a number of procedural issues raised by the Registry', ICC-01/04-01/07, 14 May 2009, paras. 17-18.

[350] Similar timelines exist in *Bemba* and *Katanga*. In *Bemba* the investigation began approximately 18 months after the crimes, and the trial six years after that. In *Katanga*, an investigation between 13 months after the events, and a trial roughly five years later.

[351] *See* **E9/31.12**, 'Annex 12: Witness Statements', 19 Apr 2011 (listing witness statements tendered into evidence and the date on which they were taken). While some of the witneses interviewed by the CIJs may have been interviewed earlier by DC-Cam, most of the interviews entered into evidence were taken by the CIJs after 2006. In any event, DC-Cam interviews

much shorter. The concern expressed by the *Lubanga* Chamber that witnesses may not remember the content of witness statements given 'a year or more in advance of their in-court testimony' accordingly applies with much greater force to the thirty year gap prior to the statements themselves than to the relatively brief period of delay prior to the appearance of the witnesses in court. There is no reason to refresh the recollection of a witness with a statement no more likely to reflect actual events than the real-time memory of the witness on the date of their appearance for questioning.

143. The Trial Chamber in this case held that making past statements available prior to testimony would address the witnesses' 'need to re-acquaint themselves with their prior statements'. Rather than answer Nuon Chea's concern, this holding reinforces it. Like the analysis in *Lubanga*, the Trial Chamber's own view that witnesses may not remember testimony given in their two year old statements applies *a fortiori* to the reliability of the thirty year old recollections in the statements themselves. The Chamber's failure even to address itself to this concern, which was fundamental to the Defence's repeated objections to the practice, was a clear error of law.

144. The *Lubanga* ruling furthermore recognized that substantive witness preparation is broadly inconsistent with inquisitorial proceedings. That Chamber's decision to allow witnesses to review their prior statements as one last vestige of witness preparation is a reflection of the considerable adversarial features retained within the ICC model. In particular, *both* parties have a full opportunity to investigate facts in support of their case. Witnesses heard by the Chamber are selected by the parties, including the defence. Out of court statements introduced into evidence are solicited by investigators working on behalf of the parties, including the defence. Allowing witnesses to review prior statements given to parties' lawyers is consistent with these adversarial features of the proceedings. It does not prejudice any one party relative to any other. Yet, at the ECCC, the difference between the parties could not be greater. No fact-finding by the Accused of any kind was permitted until the day the first witness appears for cross-examination. By contrast, the Co-Prosecutors conducted substantial investigations prior to and parallel with the judicial investigation, making detailed and extensive submissions before the CIJs.[352]

Reliance on irrelevant considerations

145. The factors on which the Trial Chamber did rely were irrelevant. The Chamber's primary justification for having witnesses review their prior statements – that witnesses may have difficulty recalling those statements – is in reality a powerful argument to avoid this practice.[353] The Chamber's secondary justification – to conserve time by having witnesses 'attest that they made these statements (for instance by verifying their signatures or thumbprints)' – is manifestly unpersuasive. The time

were still taken more than 20 years after the events in question and, as the Defence argued in its **E295/6/3**, Closing Brief, there is good reason to doubt their impartiality. *See* **E295/6/3**, Closing Brief, para. 119.
[352] *See e.g.*, Rules 55(2), (3)
[353] *See* paras. 141-143, *supra*.

required for a witness to verify a signature or thumbprint is at most a matter of minutes – the time required of a single question at the outset of an examination-in-chief.

146. Every relevant applicable legal source prohibits this practice, including Cambodian law and civil law procedures at the international level. International courts recognize that witness preparation is inconsistent with inquisitorial practice and creates a considerable risk of distorting the truth where long time lapses are at issue. The Chamber's vague reasons in support of this practice, although irrelevant in any case, are not only unpersuasive, but also militate *against* showing witnesses their prior statements. Accordingly, the Chamber erred in law or abused its discretion in allowing this practice.

ii – Leading questions derived from prior statements

147. The Chamber's decision to allow witnesses to 'testify' by confirming the content of documents read to them by the Co-Prosecutors was never justified by any reasons or legal authority, all of which prohibit this practice.[354] The Co-Prosecutors acknowledged the logic of the Defence's objections to this practice even while they invoked the Chamber's past rulings as a basis for continuing to use it.[355] Even the fig leaf of efficiency on which the Chamber based its decision to show witnesses their statements prior to testifying does not apply to this practice, which involves reading witnesses lengthy passages from prior statements rather than asking short, open questions. Nor does any conceivable interest in ascertaining truth justify it: the process *limits* information available to the Chamber upon which it might make an assessment of reliability. The only possible effect of this practice was to ensure that live testimony artificially corroborates prior statements while obscuring the witness's actual, contemporaneous recollection. Answers elicited using such leading questions are entitled to substantially diminished probative value.[356]

[354] The ICTY and ICC both prohibit leading questions in regard to matters being raised for the first time. This manifests most obviously in examination in chief but also arises during cross-examination – in other words, across all parts of the questioning. *Prosecutor v. Prlić et al.*, 'Decision Adopting Guidelines for the Presentation of Defence Evidence', IT-04-74-T, 24 Apr 2008, para. 5 ('Leading questions shall not be permitted in cross-examination, except with the leave of the Chamber.'); *Prosecutor v. Katanga*, 'Directions for the Conduct of the Proceedings and Testimony in accordance with Rule 140', ICC-01/04-01/07-1665, 20 Nov 2009, paras. 66 ('As a general rule, during examination-in-chief only neutral questions are allowed.'), 74 (where an Accused examines a witness called by a co-Accused, leading questions are not allowed 'in relation to matters that are being raised for the first time'), 91; *Prosecutor v. Lubanga*, Transcript, ICC-01/04-01/06-T-104-ENG, 16 Jan 2009, p. 37 ('Leading questions are to be avoided'); *Prosecutor v. Bemba*, 'Decision on the Prosecution's Request for Leave to Appeal the Trial Chamber's Decision on Directions for the Conduct of the Proceedings', ICC-01/05-01/08-1086, 15 Dec 2010, para. 19 ('the Chamber orders the parties and the legal representative to put neutral, non-leading questions to the witness, unless otherwise authorised by the Chamber').

[355] T. 22 Apr 2013 (Chhouk Rin, **E1/181.1**), pp. 37:13-39:14 ('I undertand perfectly well my – why my learned friend takes the objection […] And when this came up on previous occasions, you will recall that you ruled in favour of the Prosecution when submissions were made to this effect').

[356] *Prosecutor v. Bagosora et al.*, 'Decision on Modalities for Examination of Defence Witnesses', ICTR-98-41-T, 26 Apr 2005, para. 6 (leading questions 'undermine the credibility of such testimony'); *Prosecutor v. Prlić et al.*, 'Decision on Prosecution Motion concerning Use of Leading Questions, the Attribution of Time to the Defence Cases, the Time Allowed for Cross-Examination by the Prosecution, and Associated Notice Requirements', IT-04-74-T, 4 Jul 2008, para. 19 (leading questions impact 'the assessment of the credibility of the witness, as the witness has not told the story in his or her own words, but has, merely, affirmed or rejected, statements of the party conducting such questioning').

D. Grounds 11-12: The Trial Chamber erred in law in unduly restricting the scope of cross-examination

148. Having set up cross-examination to fail, the Chamber then limited that cross-examination in more direct ways. Throughout the course of the trial, the Chamber continuously and improperly interfered with the ability of the Defence to confront witnesses against Nuon Chea by challenging, *inter alia*, the credibility and reliability of their evidence. The Chamber frequently held that such questions were irrelevant or that that no further questioning on a given subject was necessary. The Chamber consistently failed to recognize Nuon Chea's right as an accused of the most serious international crimes to an adequate opportunity to confront the evidence against him, especially in light of the numerous improper restrictions in that regard imposed by both the CIJs and the Trial Chamber. This approach stands in stark contrast with the NMTs, which admitted even evidence it considered 'strictly irrelevant and might well be regarded as the red herring drawn across the trial' on the ground that 'the Tribunal's policy throughout the trial has been to admit everything which might conceivably elucidate the reasoning of the defence'.[357] The Trial Chamber's rulings were clearly erroneous and constituted repeated violations of the right to confrontation.

149. Many of these rulings concerned the manner in which evidence in WRIs was obtained during the judicial investigation. In this regard, the Defence argued as follows in its Closing Brief:[358]

> In particular, the Defence was prohibited from exploring whether witnesses had been […] coached,[359] shown documents,[360] coerced, intimidated or influenced,[361] misunderstood or misquoted,[362] or interviewed multiple times without audio records being prepared.[363] […] The Chamber denied Defence attempts to cross-examine a witness as to whether OCIJ investigators has said anything 'off the record' to the witness during his interview, despite the fact that it had previously been revealed that investigators had done so with another witness living in the same town, who was a DK-era colleague of the current witness, and who had been interviewed 20 minutes prior to the witness being cross examined.[364] Defence efforts to question a witness regarding an incident in which the witness was heard to ask OCIJ investigators if he could look at his notes before responding to a question were also denied.[365] The prejudice from these decisions was exacerbated by the unreliability of witness memory, which, as already discussed, is a significant

[357] *Cited in* Heller, *Nuremberg Military Tribunals*, p.140.
[358] **E295/6/3**, Closing Brief, para. 76.
[359] *See e.g.,* **E234,** 'IENG Sary's Request that the Trial Chamber seek Clarification from the OCIJ as to the Questioning of Witness Norng Sophang on 17 Feb 2009 and Summon the OCIJ Investigators to Give Evidence Regarding this Interview,' 27 Sep 2012 ('Ieng Sary's Norng Sophang Request'); T. 5 Sep 2012 (Norng Sophang, **E1/122.1**), pp. 86:21-99:3; T. 23 Oct 2012 (Sokh Chhin, **E1/137.1**), pp. 59:10-64:8.
[360] T. 14 Nov 2012 (Pe Chuy Chip Se, **E1/144.1**), pp. 40:19-53:12.
[361] T. 2 Oct 2012 (Khiev En, **E1/128.1**), pp. 18:9-22:3; T. 23 Jul 2012 (David Chandler, **E1/94.1**), 23 Jul 2012, p.117:12-120:7.
[362] **E142**, 'Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews', 17 Nov 2011, para. 4(a); **E142/3**, 'Decision on Nuon Chea's Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews', 13 Mar 2012.
[363] *See e.g.,* **E234**, Ieng Sary's Norng Sophang Request, 27 Sep 2012; T. 5 Sep 2012 (Norng Sophang, **E1/122.1**), pp. 86:21-102:15; **E142/3**, 'Decision on Nuon Chea's Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews', 13 Mar 2012.
[364] T. 23 Oct 2012 (Sokh Chhin, **E1/137.1**), pp. 59:10-64:21.
[365] The Trial Chamber holding that the assertion was unfounded and instructing the witness not to respond to it. *See* T. 14 Nov 2012 (Pe Chuy Chip Se, **E1/144.1**), pp. 40:19-53:12 (Although the Chamber did allow the Nuon Chea Defence to play the tape, the Trial Chamber prohibited the team from putting questions to the witness).

problem at this Tribunal.

150. The Trial Chamber also curtailed counsel's ability to probe the reliability of the evidence where the methods employed during the investigation were not at issue. In one instance of considerable importance for this trial, the Chamber refused counsel's efforts to continue to cross-examine expert Philip Short concerning the source of his claim that a policy of executing Khmer Republic soldiers existed in DK, and his related claim that such executions occurred following the CPK's capture of Oudong in 1974.[366] Although Short had given a series of confused and contradictory responses concerning the source of his claim that such executions took place, the Chamber deemed counsel's questions repetitive and prohibited further cross-examination. Not only did the Judgment erroneously find that this policy existed, it relied on Philip Short's opinion in that regard.[367] Even worse, as discussed in considerable detail elsewhere in this Appeal, the Judgment relied *solely* on Short's testimony as the basis of its clearly erroneous finding that Khmer Republic soldiers were executed in Oudong.[368] In so doing, it ignored Defence counsel's cross-examination completely and cited misleading and partial excerpts of his examination in chief.[369] The Judgment then relied on its error concerning Oudong as the singlemost important fact in its highly unreasonable analysis of the CPK's non-existent policy of targeting Khmer Republic soldiers and officials for execution.[370] Short's testimony – the cross-examination of which was improperly curtailed – was accordingly of central significance to the Chamber's final assessment of liability.

151. The Trial Chamber also repeatedly obstructed and interfered with the Defence's cross-examination of Stephen Heder, another critical witness whose role in gathering the evidence and building the case against Nuon Chea was unparalleled. The Trial Chamber's errors in that regard and its extensive reliance on Heder's evidence in the Judgment are demonstrated further *infra*.[371]

152. Countless other examples exist. For instance, Counsel sought to elicit information from the Director and Deputy Director of DC-Cam concerning the institutional motivations of the organization and the external influences to which it is subject. Although DC-Cam is in the extraordinary position of being a private institution which is the source of the overwhelming majority of the documentary material in evidence and a considerable number of interviews, these questions were rejected as irrelevant.[372] One sequence of questions limited by the Chamber concerned whether DC-Cam 'has been involved in some sort of project that would limit the prosecution of lower level DK officials.'[373]

[366] T. 8 May 2013 (Philip Short, **E1/191.1**), pp. 101-103.
[367] Judgment, para. 834.
[368] Judgment, para. 124; *see* paras. 530-535, *infra*.
[369] Judgment, fn. 360.
[370] *See* Judgment, paras. 815-817; paras. 530-535, *infra*.
[371] *See* paras 180-182, *infra*.
[372] T. 2 Feb 2012 (Youk Chhang, **E1/38.1**), pp. 101-109.
[373] T. 2 Feb 2012 (Youk Chhang, **E1/38.1**), p. 109.

Although this question pertained directly to a cornerstone of Nuon Chea's defence, the Co-Prosecutors' objection that it was irrelevant was sustained by the President.[374] Judge Cartwright subsequently intervened to explain that the 'Chamber fully understands the reasons that you have engaged in this line of questioning' but nevertheless 'considers that it has heard enough on this topic.'[375] In this particular case, the prejudice of the Chamber's intervention is plain to see: the next day, Defence counsel returned to the subject and this time was allowed to proceed. Youk Chhang admitted that in conducting interviews, DC-Cam 'did not follow' the suggestion of some scholars that 'a substantial part of the killing was committed by lower-ranking CPK officials, without specific instructions from the central leadership.'[376] Implausibly, he asserted that, of 1,000 people his organization interviewed, 'none of them committed such crime or have ever killed anyone'.[377] These admissions, which severely undermine the reliability of the evidence produced by DC-Cam, would have been obscured had counsel not pressed his questions in spite of the original ruling.[378]

153. The Chamber's entire response to these 'well-referenced and detailed submissions'[379] was:

> 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.[380]

The Chamber accordingly did not address the claim that 'unfair limitations on their ability to challenge evidence and examine witnesses' were imposed on the Accused. The Chamber did not explain how counsel could have remedied the prejudice caused by improper restrictions on cross-examination by proposing documentary evidence or 'submission in rebuttal'; nor did it acknowledge the extremely high (and improper) threshold it placed on the admission of documents into evidence at trial.[381]

E. Ground 32: The Trial Chamber erred in law and fact in its assessment of the probative value of out of court statements in the Judgment

154. Even worse than the Trial Chamber's continuous interference with the Defence's ability to confront witnesses who appeared live before the Chamber was its admission of and indiscimiante reliance on a vast body of out of court evidence without any genuine effort to assess its reliability or probative value. The Chamber failed to articulate or apply the correct standards to the admission of such documents into evidence and then failed to apply the correct standards to the assessment of that

[374] T. 2 Feb 2012 (Youk Chhang, **E1/38.1**), pp. 109-111.
[375] T. 2 Feb 2012 (Youk Chhang, **E1/38.1**), pp. 111-112.
[376] T. 6 Feb 2012 (Youk Chhang, **E1/39.1**), p. 77.
[377] T. 6 Feb 2012 (Youk Chhang, **E1/39.1**), p. 77.
[378] Numerous other examples exist. Defence counsel was prevented from questioning Duch concerning whether he believed the content of the confessions obtained at S-21. *See* T. 3 Apr 2012 (Kaing Guek Eav, **E1/58.1**), pp. 82-84. Defence counsel was prevented from sources of knowledge were contaminated by recent public broadcasts about crime sites in the Closing Order to which he was connected. *See* T. 15 Aug 2012 (Suong Sikoeun, **E1/108.1**), pp. 41-45.
[379] Duch Appeal Judgment, para. 367.
[380] Judgment, para. 62.
[381] *See* paras. 88-104, *supra*.

evidence in the Judgment.

i – Out of court written statements

Approach of the Trial Chamber

155. Although Cambodian law mandates the appearance of any inculpatory witness for cross-examination at trial, in June 2012 the Trial Chamber held that the rules of the *ad hoc* tribunals governing the admission of out of court witness statements constituted 'procedural rules established at the international level' applicable before the ECCC.[382] According to the Chamber, these rules permit the admission into evidence of any statement which does not concern the acts and conduct of the accused.[383] The Defence subsequently argued that the Chamber misstated the standards for the admission of such evidence before the *ad hoc* tribunals, which are in fact much narrower and require consideration of numerous other factors, including whether statements concern a live issue in dispute between the parties.[384] The Chamber dismissed this argument in its final decision on the admission of written statements into evidence ('Second Statements Decision'),[385] characterizing the additional restrictions urged by the Defence as 'technical and detailed requirements' of the ICTY legal scheme which had not been adopted in the First Statements Decision.[386] Accordingly, the Chamber admitted every statement tendered into evidence except those which concerned only the acts and conduct of the accused.[387]

156. The First Statements Decision also recognized that both the admission and probative value of out of court statements could be affected by their reliability, in particular, the circumstances under which they were created.[388] For instance, as regards civil party applications, the Trial Chamber held:

> Civil party applications (which were often prepared by various intermediary organizations on behalf of Civil Party applicants), in the absence of information regarding the circumstances in which they were recorded […] may ultimately be able to be afforded little, if any weight.[389]

Although the lead co-lawyers provided no further 'information regarding the circumstances in which [civil party applications] were recorded',[390] in the Second Statements Decision these documents were

[382] **E96/7**, First Statements Decision, para. 20 ('The legal framework and jurisprudence of the ad hoc tribunals and other internationalized tribunals have weighed numerous factors when deciding whether to admit evidence in the form of written statements or transcripts without requiring their authors to be present in court for cross-examination. In the context of mass crimes trials, the Trial Chamber considers these rules and jurisprudence to strike an appropriate balance between the Accused's fair trial rights and the efficiency of the proceedings').
[383] **E96/7**, First Statements Decision, paras. 21-25.
[384] **E96/8/1**, 'Preliminary Response to Co-Prosecutors' Further Request to Put Before the Chamber Written Statements and Transcripts', 8 Nov 2012 ('Defence Response to Putting Written Statements Before Chamber'), paras. 6-13.
[385] **E299**, 'Decision on Objections to the Admissibility of Witness, Victim and Civil Party Statements and Case 001 Transcript Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers', 15 Aug 2013 ('Written Statements Admissibility Decision').
[386] **E299**, Written Statements Admissibility Decision, fn. 69.
[387] **E299**, Written Statements Admissibility Decision, paras. 23-34.
[388] **E96/7**, First Statements Decision, para. 23 (evidence will be admitted where it is, *inter alia*, reliable).
[389] **E96/7**, First Statements Decision, para. 29.
[390] *See* **E208/4**, 'Civil Party Lead Co-Lawyers' Request to the Decision on the Co-Prosecutors' Rule 92 Submission

admitted freely into evidence, as was every other type of document.[391] No documents of any kind were excluded for lacking adequate indicia of reliability.

157. As the Defence argued at trial, this sequence of contradictory and poorly reasoned decisions amounted to a clear error of law or abuse of discretion.[392] Cambodian law, the Internal Rules, and the express instructions of the CIJs during the investigation all provide that the Defence is entitled to hear any inculpatory witness at trial.[393] By resorting to international procedure in the face of these unambiguous requirements, the Chamber decided not to apply the protections guaranteed by Cambodian law would not apply to ECCC proceedings.[394] The Chamber then *also* discarded the key safeguards of the international procedure it purported to adopt. Overall, the rules employed in Case 002/01 in this regard were less respecting of the rights of the accused than *either* Cambodian *or* international law. The Chamber failed to reason this arbitrary approach beyond its cursory finding that the limitations urged by the Defence do not constitute internationally recognized procedural rules.[395] As the Defence argued in closing submissions, this finding was clearly erroneous.[396]

158. These errors led to the admission of an unprecedented number of documents, close to 1,200 out of court statements.[397] The volume of this evidence dwarfs any other international criminal proceeding: it is nearly ten times larger than in *Karadžić*, the trial which comes closest at the *ad hoc* tribunals.[398] More than half of these statements were civil party applications or victim complaints, documents created for the purpose of litigation by parties to the proceedings with a clear vested interest in the outcome. As the Trial Chamber recognized, each of these *six hundred* documents is a product of the victim's or civil party's own narrative and was not derived from an interrogation or examination by a judicial authority or any other party. No independent effort was ever made to assess the reliability of their underlying claims.[399] These documents would not have satisfied the bare minimum requirements

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Regarding the Admission of Written Statements and Others Documents Before the Trial Chamber (E96/7), and to Memorandum E208/3, Including Confidential Annexes 1 and 2', 27 Jul 2012, paras. 24-27 (in response to the Trial Chamber's decision, stating merely that 'not all of the civil party applications were performed in the same manner'); *see also*, **E223/2/7**, 'Lead Co-Lawyers' Response to Trial Chamber Directives on Tendering Civil Party Statements and Other Documents (With Confidential & Strictly Confidential Annexes)', 4 Mar 2013.

[391] *See* **E299**, Written Statements Admissibility Decision, para. 21 (indicia of reliability to be assessed in assigning probative value).

[392] **E295/6/3**, Closing Brief, paras. 107-109.

[393] **E223/2/8**, 'Objections to Request to put Before the Chamber Written Statements and Transcripts', 26 Apr 2013 ('Objection to Putting Written Statements Before Chamber'), paras. 6-12.

[394] **E223/2/8**, Objection to Putting Written Statements Before Chamber, paras. 8-12.

[395] **E299**, Written Statements Admissibility Decision, fn. 69.

[396] **E295/6/3**, Closing Brief, paras. 107-9.

[397] *See* **E299.1**, 'Decision on Objections to the Admissibility of Witness, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers (Confidential Annex A: Statements and Transcripts Put Before the Chamber), 15 Aug 2013 ('List of Statements Put Before Chamber'), (listing statements admitted into evidence and assigned an E3 number).

[398] **E96/8/1**, Defence Response to Putting Written Statements Before Chamber, para. 3. Most trials have admitted far fewer statements.

[399] While these documents were assessed by the CIJs, this assessment was carried out on the face of the written evidence. The civil parties and victims themselves were never questioned on the substance of their statements.

for admission at the *ad hoc* tribunals,[400] the legal scheme from which the rules for their admission were supposedly derived. Another substantial block of statements were taken outside the framework of the Tribunal, including interviews by various governments, NGOs such as DC-Cam and individual researchers such as Henri Locard, François Ponchaud and Stephen Heder.[401] These documents would also have failed the minimum requirements for admission at the *ad hoc* tribunals.[402] Only about a third of the statements of witnesses who did not appear for cross-examination – less than 400 – were taken by the CIJs.[403]

159. The prejudice caused by the admission of these statements into evidence could have been averted by a careful application of the correct standards to the assessment of both reliability (including the circumstances under which the statements were created) and probative value (including, *inter alia*, whether the statements concern facts in dispute between the parties).[404] Since the Chamber erroneously failed to apply these standards in assessing admissibility, it was required to protect the right of the Accused to a fair trial by declining to cite evidence it should have excluded from evidence.[405] Yet, as discussed *infra*, the Chamber consistently failed to give these factors any consideration in the Judgment.[406]

Applicable standards

160. The Defence set out the standards applicable to the admission and assessment of statements admitted absent cross-examination in its Closing Brief and prior filings.[407] Due to the page restriction the Defence incorporates these submissions by reference, but reiterates key principles herein.[408]

161. The jurisprudence uniformly holds that Chambers are required to assess the extent to which such statements are cumulative of live evidence given at trial.[409] A statement is cumulative to live evidence

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[400] *See e.g.*, ICTY Rule 92*bis*(B).
[401] *See e.g.*, **E299.1**, List of Statements Put Before Chamber (Witnesses Nos 2, 1054-1114).
[402] The Defence notes that the legal scheme for the admission of written statements at the *ad hoc* tribunals applies only to documents prepared for the purpose of litigation. Most of these documents (aside from interviews taken by DC-Cam) do not satisfy this condition. At the *ad hoc* tribunals, these documents would accordingly be assessed pursuant to the standards applicable to hearsay evidence instead of those adopted by the Trial Chamber in the First and Second Statements Decisions. The Defence notes that the vast majority of the evidence in these statements is given by anonymous sources and would accordingly be entitled to very low or no probative value if assessed within that framework. *See* para. 163, *infra*.
[403] This assessment is based on a word search in the Chamber's annex to its final decision admitting written statements into evidence. *See* **E299.1**, List of Statements Put Before Chamber.
[404] Indeed, with regard to civil party applications, the Defence has some sympathy for this approach. As with victim impact testimony, civil party applications and victim complaints may be relevant for a variety of purposes other than the guilt or innocence of the Accused. Once the documents are admitted, however, the Chamber is required to ensure that the use to which they are put in the Judgment is consistent with the right of the accused to a fair trial, in particular, to confront the evidence against him.
[405] **E295/6/3**, Closing Brief, paras. 107-110; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**),, pp. 21-22.
[406] *See* paras 163-165, *infra*.
[407] **E295/6/3**, Closing Brief, paras. 107-110; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**),, pp. 21-22; **E96/8/1**, Defence Response to Putting Written Statements Before Chamber, paras. 12-13.
[408] As noted, the Trial Chamber did not dispute the content of these principles, and acknowledged in principle that they apply to the assessment of probative value. *See* para. 155, *supra*.
[409] ICTY Rule 92*bis*(a)(i); ICTR Rule 92*bis*(a)(i).

given at trial if it corroborates live evidence given at trial.[410] Statements not deemed cumulative to live evidence may be denied admission into evidence,[411] and if admitted, are entitled to reduced probative value.[412] The jurisprudence also establishes that a witness statement given out of court 'may lead to a conviction only if there is other evidence which corroborates the statement'.[413]

162. The jurisprudence further holds that any statement must be subject to cross-examination which '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'.[414] One example of information pivotal to the Prosecution case concerns the acts and conduct of subordinates of the accused. Statements which tend to show the 'widespread' conduct of the subordinates of the accused may well be 'sufficiently pivotal to the prosecution case' that cross-examination is required.[415] This is because, when the accused is charged with command or superior responsibility 'there is often but a short step from a finding that the acts constituting the crimes charged were committed by [his] subordinates to a finding that the accused knew or had reason to know that those crimes were about to be or had been committed by them'.[416] Evidence used as a basis to infer the individual criminal responsibility of the Accused may 'be of substantial importance to the prosecution case' and require cross-examination.[417]

Trial Chamber's treatment of the evidence

163. The Trial Chamber's treatment of the evidence shows that it failed to make any meaningful effort to apply these standards. The Chamber failed to even once make explicit reference to either the absence of cross-examination or the reliability of any single WRI, statement, civil party application or complaint. The Chamber furthermore cited constantly to a single out-of-court witness statement as the

[410] *Prosecutor v. Bemba*, 'Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III entitled "Decision on the Admission into Evidence of Materials contained in the Prosecution's List of Evidence"', ICC-01/05-01/08, 3 May 2011, para. 78; *see also* **E223/2/8**, Objection to Putting Written Statements Before Chamber, paras. 24-30 (arguing that only statements which corroborate live evidence at trial is cumulative and that most of the statements tendered into evidence do not satisfy this condition).
[411] *See e.g.*, *Prosecutor v. Tolimir*, 'Decision on Prosecution's Motion for Admission of Written Evidence Pursuant to Rules 92 *BIS* and 94 *BIS*', IT-05-88/2-T, 7 Jul 2010, paras. 111-118, 121, 124, 129; *Prosecutor v. Gotovina et al.*, 'Decision on the First Batch of Rule 92 *bis* Witnesses', IT-06-90-T, 3 Jun 2008, para. 8; *Prosecutor v. Haradinaj et al.*, 'Decision on Fourth Batch of Rule 92 *bis* Witnesses and Protective Measures for One of These Witnesses', IT-04-84-T, 6 Nov 2007, para. 4.
[412] This proposition was, at least in principle, adopted by the Trial Chamber. *See* First Statements Decision, paras. 24, 28.
[413] *Prosecutor v. Galić*, 'Decision on Interlocutory Appeal concerning Rule 92 *bis* (C)', IT -98-29-AR73.2, 7 Jun 2002, fn. 34; *see also*, Lukić & Lukić Appeal Judgment, para. 570; *Prosecutor v. Šešelj*, 'Decision on Prosecution's Motion to Add One Exhibit to its Rule 65 *ter* List and for Admission of Evidence of Witness Matija Bošković pursuant to Rule 92 *quater*', IT-03-67-T, 9 Mar 2009, para. 19; *Prosecutor v. Karadžić*, 'Decision on Prosecution Motion for Admission of Testimony of Six Witnesses and Associated Exhibits pursuant to Rule 92 *quater*', IT-95-5/18-T, 30 Nov 2009, para. 8.
[414] *Prosecutor v. Nzabonimana*, 'Decision on Third Defence Motion for the Admission of A Written Statement and Accompanying Documents', ICTR-98-44D-T, 19 Oct 2011, para. 18 (emphasis added); *Prosecutor v. Milošević*, 'Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92 *bis*', IT-02-54-T, 21 Mar 2002, para. 24.
[415] *Prosecutor v. Galić*, 'Decision on Interlocutory Appeal concerning Rule 92 *bis*(C)', IT -98-29-AR73.2, 7 Jun 2002, para. 15 (emphasis added).
[416] *Prosecutor v. Galić*, 'Decision on Interlocutory Appeal concerning Rule 92 *bis*(C)', IT -98-29-AR73.2, 7 Jun 2002, para. 14 (emphasis added).
[417] *Prosecutor v. Galić*, 'Decision on Interlocutory Appeal concerning Rule 92 *bis*(C)', IT -98-29-AR73.2, 7 Jun 2002, para. 18.

sole evidence to establish key facts in dispute between the parties.[418] Dozens of findings of murder during, or deaths caused by conditions in, the Phase I and II movements are supported only by the out of court statement of a single individual.[419] A single out of court statement is used to substantiate numerous allegations of murder of Khmer Republic soldiers and officials.[420] Although not a single witness who appeared before the Chamber testified to having actually witnessed a single execution of a single soldier, the Chamber relied on the supposedly widespread nature of these killings, proven exclusively by evidence not subject to cross-examination, as the primary basis for its conclusion beyond reasonable doubt that a Party policy of killing Khmer Republic soldiers existed.[421]

164. The Chamber also failed to give any serious consideration to the reliability of the sources from which written statements were derived. The Chamber relied repeatedly on unauthenticated out of court statements taken by people or organizations who did not testify and without any evidence of the circumstances under which the statements were created.[422] The sources underlying these statements were frequently anonymous.[423] These documents were often relied upon as the sole evidence in support of highly contentious questions of fact.[424] For instance, an anonymous source contained in a single

[418] *See e.g.*, Judgment, fns. 353, 1794-6, 1810, 1813, 2354, 2620, 2622, 2576.
[419] *See* paras. 302-307, 312-318, *infra*. While the Co-Prosecutors are likely to argue that these allegations corroborate each other, the Defence refers the Supreme Court Chamber to its submissions, *infra*, that in light of the number of people involved in the evacuation of Phnom Penh and (supposedly) the Phase II movement, the number of people who gave evidence before the Chamber and the CIJs in that regard, and the Chamber's finding that CPK forces killed people openly and at will, the evidence of deaths during either movement is limited and sporadic.
[420] *See* paras. 585, 587, 594-596, *infra*.
[421] *See* paras. 583-596, *infra*. While the Trial Chamber cited other supposed evidence of Party policy, this evidence was manifestly inadequate. *See* paras. 554-572, *infra*. In reality, the Trial Chamber's findings relied primarily on the supposedly widespread nature of the killings. *See e.g.* Judgment, para. 561 (finding the existence of a 'deliberate, organized, large-scale operation to kill former officials of the Khmer Republic' on the basis of the supposed evidence that soldiers and officials were identified at checkpoints around Phnom Penh and subsequently killed); *see also* T. 8 May 2013 (Philip Short **E1/191.1**), pp. 99-100 (Philip Short testifying that his conclusion that the Party intended to kill soldiers and officials is based on his opinion that these killings happened 'everywhere'). This use of out of court evidence to prove widespread conduct as the basis of criminal liability was inappropriate. *See* para. 162, *supra*.
[422] For instance, the Chamber relied 8 times on research performed by Henri Locard (E3/3209, E3/2071), 27 times on statements attached to submissions by a variety of governments and international organizations to the United Nations Commission on Human Rights (E3/1802, E3/1804, E3/1805, E3/1806, E3/2060, E3/3327, E3/3400, E3/4521), 12 times on an alleged statement from a former Khmer Republic general taken by the French Embassy (E3/2666), and continuously on other similar accounts in a variety of other government telegrams and reports (see e.g., E3/4135, E3/3004, E3/3006, E3/4197, E3/3472). The Chamber also relied a combined 101 times on refugee statements taken by François Ponchaud (E3/4590) and Stephen Heder (E3/1714). Although Ponchaud and Heder testified, they gave no evidence concerning most of these interviews.
[423] Ponchaud obscured the identities of all of the individuals named in his book for the purpose. *See* T. 10 Apr 2013 (François Ponchaud, **E1/179.1**), p. 96. This is also apparent from the compilation of interviews on the case file. *See* **E3/4590**, 'Refugee Accounts' ('Ponchaud Refugee Interviews'), ERN 00820319-22. Many of the interviews in Heder's compilation are anonymous on their face, including those on which the Chamber relied. *See e.g.*, **E3/1714**, Report for Ishiyama Committee: 'Interview with Kampuchean Refugees at Thai-Cambodia Border', Feb-Mar 1980 ('Heder Refugee Interviews'), ERN 00170723 (statement of 'a man from tambon 13', cited in Judgment, fns. 340, 440, 1621), 00170757 (statement of 'ex-soldier from Ang Snuol area', cited in Judgment, fn. 353), 00170755 (it is clear on the face of the document that Heder was unable to clearly determine his true identity, cited in Judgment, fns. 1517, 1521). With regard to the source at ERN 00170723, Heder was asked by the Co-Prosecutors whether he could provide any further information as to his identity. Heder responded, 'No. I've got a vague recollection of the guy's appearance but I couldn't tell you anymore.' *See* T. 10 Jul 2013 (Stephen Heder, **E1/221.1**), p. 107. With regard to the numerous government reports and submissions relied upon, it is typically impossible to tell on the face of the (unauthenticated) document who the source was or, if a source is listed, whether an alias is being employed. *See e.g*, **E3/3006**, *Bangkok Post*, 'International media article entitled "the New Cambodia"', 1975.
[424] For instance, in fn. 2574, the Chamber cited a report from the United States National Security Council and a submission of the International Commission of Jurists to the UN Commission on Human Rights as key evidence to prove that a policy of

report of the United States Embassy was considered sufficient to establish beyond a reasonable doubt that Khmer Republic soldiers were executed in Battambang in 1974.[425]

165. The Chamber similarly relied extensively on civil party applications and victim complaints without any consideration of the dubious circumstances under which they were created. Many of the Chamber's findings concerning conditions during population movements derive exclusively from these documents, or nearly so.[426] One striking example concerns the Chamber's finding that those who refused to leave Phnom Penh or obey orders during the evacuation were 'shot and killed on the spot'.[427] Of the twenty-six accounts cited by the Trial Chamber, eighteen are civil party applications, victim complaints and reports produced by foreign governments (as demonstrated in detail, *infra*, among the remaining eight accounts is not a *single* eyewitness to a *single* killing who appeared before the Chamber).[428] In other cases, a *single* document is cited to characterize the experience of many thousands of people,[429] such as the finding that 'the Khmer Rouge', in general, did not distribute food on boats during the Phase II movement,[430] or that upon arrival at their destination, those transferred were, in general, under-nourished.[431] These were remarkable conclusions to make on the basis of documents which the Chamber itself initially believed were entitled to 'little, if any weight'.[432]

F. Ground 32: The Trial Chamber erred in law and fact in its assessment of hearsay evidence in the Judgment

Applicable standards

166. This Chamber addressed hearsay evidence twice in the Duch Appeal Judgment, both times refusing an application for civil party status because the information on which it was based contained only hearsay evidence. One of these applicants gave hearsay evidence 'from a source whose credibility is highly dubious.'[433] The second applicant gave hearsay evidence from 'a soldier named Reth', a source which this Chamber characterized as 'not clearly identified.'[434] Importantly, the Chamber held that this evidence was insufficient to establish civil party status even on the lower standard of proof of a

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targeting Khmer Republic soldiers and officials 'was expressly ordered and affirmed by the Party leadership'. *See* Judgment, para. 817. While the Chamber also cited the WRIs of two CPK soldiers, as the Defence shows *infra*, neither statement remotely supports this proposition, even on their face. *See* paras. 560-561, *infra*.

[425] *See* para. 548, *infra*.

[426] Judgment, fns. 1402, 1404, 1465, 1793-6, 1838.

[427] Judgment, para. 474.

[428] *See* Judgment, para. 474, fns. 1402, 1404. The Chamber's findings concerning killings and death during the Phase I movement is analyzed in detail at paras. 296-320 *infra*. As the Defence shows, three of these eight other accounts are derived from civil party testimony and a fourth from a witness who appeared before the Chamber, none of whom witnessed any killings. The other four accounts were given to the CIJs, and two of these witnesses also never saw a single killing. *See* paras. 296-305, *infra*.

[429] Judgment, fns. 1810, 1815. The Chamber made similar findings based on unauthenticated statements not taken by the CIJs other than civil party applications and victim complaints. *See e.g.*, Judgment, fn. 1855.

[430] Judgment, fn. 1810.

[431] Judgment, fn. 1855.

[432] *See* para. 156, *supra*.

[433] Duch Appeal Judgment, para. 547.

[434] Duch Appeal Judgment, para. 557.

balance of probabilities.[435]

167. In principle, the Judgment recognizes that these principles governing hearsay evidence apply. The Trial Chamber held that 'less weight may be assigned' to evidence not subject to cross-examination,[436] citing among other sources the relevant paragraphs of the Duch Appeal Judgment. The Trial Chamber further cited to the Duch Trial Judgment, which held, '[w]ith regard to hearsay statements, the Chamber gave particular consideration to whether the Accused was able to confront the source of such statements.'[437] Accordingly, the Trial Chamber accepted that where hearsay evidence is at issue, it was required to assess the reliability of the underlying source.

168. This implicit finding is consistent with international practice. Factors relevant to the assessment of the probative value of hearsay evidence include, *inter alia*, '[t]he absence of the opportunity to cross-examine the person who made the statements';[438] 'the number of intermediaries who transmitted the testimony',[439] in other words, 'whether the hearsay is "first-hand" or more removed';[440] and 'the identity and other characteristics of the initial declarant as well as the possibilities for that declarant to have learned the relevant elements'.[441] In general, 'the weight or probative value to be afforded to [hearsay] evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined'.[442]

169. The jurisprudence furthermore establishes that a Trial Chamber 'is compelled to pay *special attention* to indicia of [...] reliability' of hearsay evidence.[443] Thus, the ICTY Trial Chamber held in *Krajišnik* that 'in those cases where a witness did not specify the source of the hearsay', it 'has generally not relied on [it]'.[444] Even where a source is specified, a brief account of events tends to be too weak to support a finding beyond a reasonable doubt without corroboration. In *Nahimana*, the ICTR Appeals Chamber held that:

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[435] Duch Appeal Judgment, para. 531.
[436] Judgment, para. 34.
[437] Duch Trial Judgment, para. 43.
[438] *Prosecutor v. Galić*, 'Decision on Interlocutory Appeal concerning Rule 92 *bis* (C)', IT -98-29-AR73.2, 7 Jun 2002, fn. 49 (emphasis added).
[439] *Prosecutor v. Blaškić*, 'Decision on the Standing Objection of the Defence to the Admission of the Hearsay with No Inquiry as to its Reliability', IT-95-14-T, 21 Jan 1998, para. 12.
[440] *Prosecutor v. Galić*, 'Decision on Interlocutory Appeal concerning Rule 92 *bis* (C)', IT -98-29-AR73.2, 7 Jun 2002, fn. 49 (emphasis added).
[441] *Prosecutor v. Blaškić*, 'Decision on the Standing Objection of the Defence to the Admission of the Hearsay with No Inquiry as to its Reliability', IT-95-14-T, 21 Jan 1998, para. 12.
[442] *Prosecutor v. Galić*, 'Decision on Interlocutory Appeal concerning Rule 92 *bis* (C)', IT -98-29-AR73.2, 7 Jun 2002, fn. 49 (emphasis added).
[443] *Prosecutor v. Tadić*, 'Decision on Defence Motion on Hearsay', IT-94-1-T, 5 Aug 1996, para. 16 (emphasis added).
[444] Krajišnik Trial Judgment, para. 1190. *See also* Katanga Trial Judgment, Dissenting Opinion of Judge Van den Wyngaert, para. 158 ('it is quite uncontroversial in my view that one cannot speak of meaningful corroboration when the source of information for [the] statements [...] are unknown.'); *Prosecutor v. Tadić*, 'Decision on Defence Motion on Hearsay', IT-94-1-T, 5 Aug 1996, paras. 159 (anonymous hearsay is 'highly unreliable'), 164 ('I feel unable to rely on large parts of his evidence because it consists mainly of speculation or opinion evidence, much of it based on anonymous hearsay'). See also Lubanga Appeal Judgment, paras. 245-6 (in assessing appellant's view that the Trial Chamber erred in its reliance on hearsay, noted that Chamber's conclusion that the witness had independently verified the facts described).

> a reasonable trier of fact could not rely solely on the short account by Doctor Blam in order to establish beyond reasonable doubt proof of the murder of the Medical Director of Cyangugu, of the circumstances surrounding it and of its date. In the absence of other evidence corroborating Doctor Blam's account, the Trial Chamber consequently erred in finding that the murder of the Medical Director of Cyangugu was proved.[445]

Trial Chamber's treatment of the evidence

170. All of these considerations completely vanish in the Trial Chamber's assessment of the evidence. As with written statements, the Chamber relied on hearsay freely while failing *even once* to consider the effect of its hearsay character in assessing probative value.[446] The Chamber never once even considered the reliability of the underlying source from which hearsay evidence emanated, even when those sources were anonymous[447] or constituted the only live evidence heard before the Chamber.[448] Indeed, the Chamber relied repeatedly on hearsay evidence which was *both* anonymous *and* uncorroborated to establish facts of critical importance in dispute between the parties.[449] The worst abuse of the evidence was without question the Trial Chamber's finding that Khmer Republic soldiers were executed in Oudong in 1974,[450] *solely* on the basis of Philip Short's supposed conversations with 'villagers'. Although Short could not describe, identify or even remember these conversations except by reference to the endnote in his book, the Chamber simply asserted that these conversations took place and then found that the executions occurred beyond a reasonable doubt.[451] This absurd finding then became the cornerstone of the Chamber's conclusion that a CPK policy of targeting Khmer Republic soldiers existed prior to 1975 and thereafter.[452]

171. Often, the Chamber failed even to acknowledge the hearsay nature of the evidence it relied on. For instance, while the Trial Chamber found that those who refused to evacuate Phnom Penh or attempted to turn back were killed 'on the spot' by CPNLAF forces, it failed to cite a single eyewitness to these killings who testified before the Chamber. Undoubtedly conscious of this significant limitation in the evidence, the Chamber characterized the evidence it cited in such a way as to obscure these facts: it claimed that one witness 'described how a school friend of hers who stayed to wait for her husband

[445] Nahimana Appeal Judgment, para. 510.
[446] *See e.g.*, Judgment, fns. 360, 1391, 1402, 1404, 1449, 1462, 1529, 1537, 2620, 2636, 2639. While the Chamber did refer to the hearsay character of the evidence twice, both instances concerned Khieu Samphan's role in the CPK. *See* Judgment, paras. 395-6. The Chamber therefore failed to consider hearsay at any point in assessing Nuon Chea's criminal liability.
[447] *See* Judgment, paras. 474 (citing testimony of Pin Yathay and WRI of Khoem Nareth), 486 (citing testimony of Lay Bony), 490 (citing testimony of Sydney Schanberg).
[448] *See* Judgment, paras. 471, 511 (relying heavily on hearsay testimony of Sum Chea to describe the use of 'any means necessary', including killing, to evacuate Phnom Penh, and the use of loudspeakers to gather and then kill Khmer Republic soldiers, even though no other evidence of such orders or practices was given), 832 (relying on hearsay testimony of Hun Chhunly as the only live evidence of alleged killings of Khmer Republic officials in Battambang in Apr and May 1975, the hearsay testimony of Pechuy Chipse as the only live evidence of killings of Khmer Republic officials in Siem Reap in the same period; along with Ponchaud, these were the only live accounts of killings of Khmer Republic officials *at all*).
[449] Judgment, para. 124 (concerning killings in Oudong; see paras 530-535, *infra*), fn. 2620 (concerning killings in Kampong Cham; see para. 548, *infra*).
[450] Judgment, para. 124.
[451] Judgment, para. 124; *see* paras. 530-535, *infra*.
[452] This sequence of findings is deconstructed in detail in connection with the Chamber's erroneous findings concerning the alleged policy of targeting Khmer Republic soldiers and officials. *See* paras. 530-580, *infra*.

was killed on the spot', a second 'recounted how a soldier had shot a boy who had sought to return home to collect something, stating "this is what happens to recalcitrants"', and a third confirmed that 'those who resisted the evacuation were shot'.[453] The Chamber failed to state that all of this evidence constituted hearsay, a fact which no observer without access to the trial transcripts would understand. The Chamber repeatedly mischaracterized the evidence in a similar fashion.[454]

G. Ground 33: The Trial Chamber erred in law and fact in its assessment of the probative value of fact witnesses in the Judgment

172. This section, together with the two which follow it, concern the live witnesses cited by the Chamber in the Judgment. This section addresses fact witnesses, the second section addresses civil parties, and the third section addresses expert testimony. As the Defence argues herein, the Judgment consistently applied incorrect standards to the assessment of all three categories of evidence: experts are relied on repeatedly in relation to questions of fact to which they are not competent to speak, civil parties are relied on indiscriminately without any acknowledgement of their limited role in the proceedings and the absence of safeguards applicable to witness testimony, and basic questions concerning the reliability and sources of knowledge of fact witnesses are ignored completely.

173. Prior to explaining the details of these errors, an overview of the manner in which testimonial evidence was employed in the Judgment is highly instructive. The Trial Chamber heard 92 individuals testify, including 31 civil parties, 3 experts and 58 fact witnesses. An overwhelming amount of attention was given to experts: 101 references to Philip Short's testimony and 67 to David Chandler's.[455] The next most significant focus was on the civil parties, each of whom was cited on average just over 26 times. Last were the fact witnesses – the witnesses whose should have formed the foundation of the Judgment – on whom the Trial Chamber relied approximately 23.6 times each.

174. Further analysis of the fact witnesses on which the Trial Chamber did see fit to rely demonstrates an uncanny correlation between the frequency with which they were cited and the unreliability of their evidence. Among the eight most frequently cited fact witnesses are the four foreigners heard before the Chamber – François Ponchaud, Stephen Heder, Sydney Schanberg and Al Rockoff – each of whom witnessed at most a few hours' worth of events during Democratic Kampuchea.[456] Of the genuine fact witnesses who actually bore witness to the events at issue, the three most frequently cited are exactly the same three witnesses whom either this Chamber or the Trial Chamber found gave false or unreliable

[453] Judgment, para. 474. The Trial Chamber also cited a fourth witness, Lay Bony, as the sole evidence to prove that those who 'persisted in trying to return to Phnom Penh were shot'. Lay Bony also gave only hearsay evidence, but this fact was acknowledged by the Chamber. *See* Judgment, para. 486.

[454] *See e.g.*, Judgment, fns. 1462 (mischaracterizing the civil party application of Meas Saran; *see* para. 314, infra), 1462 (mischaracterizing the evidence of Pech Ling Kong; *see* para. 316, *infra*), 2639 (mischaracterizing the evidence of both François Ponchaud and Chhea Leanghorn: *see* paras. 585, *infra*).

[455] The third expert, Chhim Sotheara, appeared for the limited purpose of describing victim impact. His evidence was cited 14 times in the Judgment.

[456] The evidence given by Ponchaud and Heder is discussed in paras. 180-182, *infra*.

evidence before the Tribunal. These witnesses were Duch, Phy Phuon and Lim Sat.[457] Duch is by far the most frequently cited witness of any kind. These seven witness together account for more than 40% of the total citations to fact witnesses in the entire Judgment. Despite these facts, there is not one sentence in the Judgment addressing the credibility or reliability of any of these witnesses, except for the purpose of deciding to reject Lim Sat's exculpatory testimony.[458] Excluding references to these witnesses from the analysis, the average number of citations per fact witness drops to a meager 16; barely half of the attention given to the civil parties and an afterthought relative to the experts. The Trial Chamber's errors in regard to these witneses, experts and civil parties, elaborated in detail herein, were accordingly fundamental to the Chamber's findings. The Judgment as a whole collapses as a consequence.

i -- Inconsistent and unreliable testimony

175. While 'it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer', this discretion is 'tempered by the Trial Chamber's duty to provide a reasoned opinion.'[459] Where the Chamber itself determines that parts of a witness's testimony are not credible or reliable, it is under a heightened duty to reason its decision to rely on that witness for other purposes:

> [I]t is not the case that if there are reasonable doubts about part of a witness' testimony, this automatically disqualifies the rest of it. However, considerable caution should be exercised in this regard. There have to be cogent reasons that convincingly explain why a witness' memory is faulty with regard to one part of her testimony but is nevertheless still considered reliable in relation to another part. The same applies with even greater force when a witness has been found to have lied in relation to part of his or her testimony. Witnesses who have lied – especially when under oath – should be treated with extreme prudence. Indeed, I am of the view that if it has been found that a witness has given false testimony about a matter that is directly relevant to the charges, then the entire testimony should, in principle, be discarded. This is because when a witness has knowingly provided the Court with false information, this shows willingness on his or her part to pervert the course of justice, which renders the entire testimony highly suspect.[460]

176. The Trial Chamber's treatment of the evidence falls so far below this standard so consistently that it amounts to a pervasive error of law. This fact is most apparent as concerns the two witnesses whose evidence has been clearly rejected in significant respects by either this Chamber in Case 001 or the Trial Chamber in the Judgment. The first witness is Duch, about whom this Chamber – concurring with the Co-Prosecutors – stated the following in the Duch Appeal Judgment:

> KAING Guek Eav failed to offer a complete picture of his factual knowledge of this case in order to *minimise his role in the crimes*. He carefully avoided responding in full when confronted with allegations related to this personal involvement, *seeking to attribute the responsibility for the crimes*

[457] The evidence of these witnesses is discussed in paras. 451-453, 566, *infra*.
[458] Judgment, para. 665.
[459] Duch Appeal Judgment, para. 17 (citing Kupreškić Appeal Judgment).
[460] Katanga Trial Judgment, Dissenting Opinion of Judge Van den Wyngaert, para. 153.

> *to others*, and uttered statements which are inconsistent with available evidence.[461]

Although the Defence invoked this passage during closing submissions,[462] the Chamber failed to refer to the issue of Duch's credibility at all. Instead, the Chamber cited his testimony constantly, often as a source of considerable importance in support of highly disputed findings of fact.[463] The Chamber's failure to attempt any effort to justify relying on Duch's testimony under these circumstances constitutes an error of law.

177. The Trial Chamber also failed to consider Duch's repeated admissions that he had no contemporaneous first-hand knowledge of numerous facts to which he testified. He explained that he never attended any meeting of the Standing or Central Committee, saw the minutes of any such meeting,[464] or asked anyone what happened at those meetings,[465] that he did not know anything about the working relationship between Pol Pot, Nuon Chea, Ieng Sary, Son Sen and Vorn Vet,[466] and that he never visited Office 870 and did not know where it was.[467] He admitted that he studied Democratic Kampuchea extensively after 1979, including by reading numerous books[468] and reviewing the Case 001 case file. He had weeks or months to review that documentation prior to answer the written questions of the investigating judges.[469] In response to one particular question, he explained:

> If you really want me to only talk about what I knew back then, I'm afraid I may not have anything to tell the world about this because I was confined to S-21 in particular.[470]

In spite of this unambiguous testimony, the Chamber cited Duch repeatedly for purposes beyond the scope of his knowledge.[471]

178. The Trial Chamber's treatment of the evidence of the second witness, Rochoem Ton *alias* Phy Phuon, was even worse. Phy Phuon was a critical witness who acted as a bodyguard and messenger for senior CPK leaders for many years prior to and during Democratic Kampuchea. The Chamber relied on his testimony repeatedly for inculpatory purposes, often with little or no corroboration in support of key

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[461] Duch Appeal Judgment, para. 368.
[462] T. 22 Oct 2013 (Final Submissions Day 1, **E1/232.1**), p. 112.
[463] *See e.g.,* Judgment fns. 311, 326-337, 615, 1006, 1032-4, 1039-41, 1720, 1760, 1873, 1923, 1926, 1931, 1937, 2528, 2542, 2643.
[464] T. 5 Apr 2012 (Kaing Guek Eav alias Duch, **E1/60.1**), p. 67:2-20.
[465] T. 9 Apr 2012 (Kaing Guek Eav alias Duch, **E1/61.1**), p. 25:20-24.
[466] T. 9 Apr 2012 (Kaing Guek Eav alias Duch, **E1/61.1**), pp. 14:1-15:7.
[467] T. 9 Apr 2012 (Kaing Guek Eav alias Duch, **E1/61.1**), p. 15:12-20.
[468] T. 5 Apr 2012 (Kaing Guek Eav alias Duch, **E1/60.1**), pp. 73:24-76:12, 79:2-22.
[469] T. 9 Apr 2012 (Kaing Guek Eav alias Duch, **E1/61.1**), pp. 64:3-67:17.
[470] T. 20 Mar 2012 (Kaing Guek Eav alias Duch, **E1/51.1**), p. 42:20-22.
[471] Judgment, fns. 326 (CPK had a 'policy' of smashing enemies), 615 (Standing Committee exercised 'effective control' over the entire CPK), 1006 (Nuon Chea's responsibility for 'Party Affairs' involved a role in 'the monitoring and implementation of disciplinary actions on Party members'), 1720 (means of production were under the control of the Party), 1760 (Sao Phim reporting to Pol Pot and Nuon Chea about population movements), 1873 (role of mobile units), 1923 (Party policy as to New People), 1926 (similar), 1931 (similar), 1937 (similar), 2542, 2643 (Lon Nol soldiers were smashed, no indication this was at S-21).

findings disputed by the Defence.[472] Yet, the Chamber rejected or otherwise failed to cite his exculpatory testimony on points of central importance. This includes his testimony of unparalleled probative value that Pol Pot's express instructions were that Khmer Republic soldiers were not to be 'touched'.[473] Not only did the Chamber continuously rely on Phy Phuon's uncorroborated, inculpatory testimony while rejecting his exculpatory testimony, and also fail to explain why it relied on his testimony despite rejecting it in critical respects, the Chamber chose simply not to acknowledge that the exculpatory evidence exists. As a consequence, the Chamber was able to cite freely to Phy Phuon's testimony without the question of his credibility even arising on the face of the Judgment. This constituted a clear violation of the Chamber's duty to 'set[] out the exact factors intrinsically affecting' credibility.[474] It was plainly improper and a flagrant error of law.

179. Similar difficulties arise from the Chamber's treatment of the evidence of the three witnesses who appeared to give evidence as to the alleged executions at Tuol Po Chrey.[475] Although the inconsistencies in this evidence are addressed in detail elsewhere in this Appeal, at this stage the Defence notes that, as with Duch and Phy Phuon, the Chamber found that one of these witnesses, Lim Sat, lied before the Chamber and that his memory was flawed in numerous important respects. These findings did not, however, prevent the Chamber from relying freely on his testimony in relation to the same sequences of events, nor did they prompt the Chamber to reason its decision to do so.[476] The Chamber furthermore identified numerous other inconsistencies among the testimony of all three witnesses concerning important details of the events at Tuol Po Chrey. While it may have been within the Chamber's discretion to prefer one witness's testimony over another, the Chamber chose instead to seek to reconcile the evidence, leading it to formulate internally illogical conclusions which misrepresented the evidence of *both* witnesses.[477] These conclusions, although entirely implausible, allowed the Chamber to labour under the fiction that the evidence was consistent and reliable. These findings reflect the Chamber's disinterest in a fair and impartial assessment of the evidence and reveal its true objective: to find the most efficient path through the evidence toward a conviction.

ii – Testimony of Stephen Heder and François Ponchaud

180. The Trial Chamber relied extensively on Stephen Heder and François Ponchaud's evidence for improper purposes. Although Heder and Ponchaud have conducted research into events during the DK,

[472] *See e.g.*, Judgment, fns. 307, 335, 338, 387, 419-426, 772, 962, 1032, 1384-5, 1467, 1484, 1498, 1547, 1599, 2334. Some of these citations concern the Jun 1974 meeting at which the evacuation of Phnom Penh was decided upon. Although Nuon Chea does not dispute this as such, Phy Phuon's testimony in this regard was later relied on in part to establish that zone secretaries 'reported to' the Party leaders. This conclusion was erroneous. *See* paras 225-231, 686, *infra*.
[473] *See* paras.566, *infra*.
[474] Muvunyi Appeal Judgment, paras. 146-147.
[475] Judgment, paras. 661-677.
[476] *See* paras. 451-453, *infra*.
[477] *See* paras. 454-456, *infra*.

both appeared before the Chamber as *fact witnesses*. The Defence acknowledges that Heder and Ponchaud personally witnessed a limited number of relevant events first-hand and has no objection to the Chamber's reliance on their evidence for that purpose.[478] However, the Chamber's reliance on both witnesses far exceeds these limits.[479] Each such citation was an error of law.

181. It is well established that 'a factual witness should testify *only* to "things he knows by reason of *use of his five senses*", rather than what he thinks or what his opinions are'.[480] Only in limited circumstance may fact witnesses express their opinions; that is, when the opinions 'emanate from personal experience'.[481] Accordingly, '[w]here a party chooses to call a highly qualified or skilled individual as a factual, rather than an expert witness, it implicitly makes a choice to limit the witness's testimony to matters which he personally saw, heard, or experienced'.[482] In such a case, the Trial Chamber is required 'to prevent the witness from straying into irrelevant detail, matters of personal opinion or expertise falling beyond the remit of a factual witness'.[483] In one such instance, the ICTR Trial Chamber instructed the witness that:

> We have special rules which govern the testimony of expert witnesses, and the rule is very simple. *Factual witnesses are not really allowed to give opinion evidence*. A factual witness's testimony which is based on research that that factual witness has done and that is presented to the court as though it is true is not part of our fact-finding process.[484] [...]
>
> Now, you have not been set up as an expert. In fact, you have heard Mr. Sow say today that he is relying on you as a factual witness. What that means is that the testimony that you should give is the testimony that emanates from your personal activity, your personal experience, not the information you gathered as a researcher.[485]

182. For multiple reasons, special considerations arise from the Chamber's reliance on Heder's opinions. First, there is probably not a single living person more directly involved in and responsible for building the case against Nuon Chea at this Tribunal. Heder drafted the blueprint for the Introductory

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[478] In particular, Ponchaud witnessed a portion of the evacuation of Phnom Penh and was located inside the French embassy for several weeks after 17 Apr 1975. Stephen Heder was present in Phnom Penh from 1973 through 1975 and visited both Kampong Cham and Oudong following their capture by CPNLAF forces in 1973 and 1974, respectively.
[479] *See* Judgment, fns. 294-5, 307, 309, 318, 324, 335, 340, 344, 479, 523, 629, 631,635, 637, 638, 644, 646, 647, 649, 665, 680, 962, 1408, 1412, 1547, 1717, 1788, 1833, 1836, 2516, 2529, 2571, 2574, 2643, 2653-4.
[480] *Prosecutor v. Ndindiliyimana et al.*, 'Decision on the Prosecution's Motion Opposing the Testimony of Witness DE4-30 as A Factual Witness', ICTR-00-56-T, 16 May 2007, para. 8 (emphasis added); *see also*, *Prosecutor v. Karemera et al.*, 'Decision on "Requête de la Défense de M. Ngirumpatse en Retrait de la Déposition du Témoin GFJ et des Pièces Afférentes"', ICTR-98-44-T, 6 Aug 2008, para. 3.
[481] *Prosecutor v. Karemera et al.*, 'Decision on "Requête de la Défense de M. Ngirumpatse en Retrait de la Déposition du Témoin GFJ et des Pièces Afférentes"', ICTR-98-44-T, 6 Aug 2008, para. 4.
[482] *Prosecutor v. Karemera et al.*, 'Decision on "Requête de la Défense de M. Ngirumpatse en Retrait de la Déposition du Témoin GFJ et des Pieces Afférentes"', ICTR-98-44-T, 6 Aug 2008, para. 4, citing *Prosecutor v. Ndindiliyimana et al.*, 'Decision on the Prosecution's Motion Opposing the Testimony of Witness DE4-30 as A Factual Witness', ICTR-00-56-T, 16 May 2007, para. 9.
[483] *Prosecutor v. Ndindiliyimana et al.*, 'Decision on the Prosecution's Motion Opposing the Testimony of Witness DE4-30 as A Factual Witness', ICTR-00-56-T, 16 May 2007, para. 9.
[484] *Prosecutor v. Karemera et al.*, 'Decision on "Requête de la Défense de M. Ngirumpatse en Retrait de la Déposition du Témoin GFJ et des Pièces Afférentes"', ICTR-98-44-T, 6 Aug 2008, para. 1 (emphasis added by the Trial Chamber), citing *Prosecutor v. Karemera et al.*, Transcript, 28 Apr 2008, p. 59.
[485] *Prosecutor v. Karemera et al.*, 'Decision on "Requête de la Défense de M. Ngirumpatse en Retrait de la Déposition du Témoin GFJ et des Pièces Afférentes"', ICTR-98-44-T, 6 Aug 2008, para. 3, citing *Prosecutor v. Karemera et al.*, Transcript, 28 Apr 2008, p. 59.

Submissions in March 2004 with the publication of *Seven Candidiates for Prosecution*,[486] including explicit reference to the elements of crimes for which he believed Nuon Chea was responsible. He was then employed with the Co-Prosecutors while the Introductory Submissions were drafted and then immediately afterwards by the CIJs for the purposes of investigating those submissions and drafting the Closing Order. Had Heder been called as an expert, he would have been required to testify 'with the utmost neutrality and with scientific objectivity'.[487] During the Case 001 trial, the Trial Chamber acknowledged that the testimony of Craig Etcheson, who was also employed by the Co-Prosecutors, had to be taken with 'a grain of salt'.[488] Heder's appearance as a fact witness renders the Chamber's reliance on his opinion evidence more improper, not less; the Chamber was accordingly obliged to take his prior affiliation with the Co-Prosecutors into account in relying on what was essentially expert testimony. Second, the Chamber violated Nuon Chea's right to confront the evidence against him by systematically and improperly limiting the Defence's cross-examination of Heder's testimony. While the Co-Prosecutors were permitted to seek Heder's opinion by framing their questions as factual inquiries into his primary research,[489] the same approach was obstructed and disallowed during cross-examination.[490] In addition to being outside the scope of his competence as a fact witness, Heder's opinion evidence therefore also violated the equality of arms. The Defence objected to the Chamber's imbalanced treatment of Heder's testimony in writing immediately following his testimony and Nuon Chea withdrew his previously stated intention to continue testifying as a consequence,[491] a position he maintains as of the date of this Appeal and will adhere to as long as the Trial Chamber remains composed of the panel which issued the Case 002/01 Judgment. The Chamber was therefore obliged to refrain from citing Heder's testimony as a remedial measure. Every reference to his testimony constitutes an error of law.

iii – Nuon Chea's Testimony

183. The Trial Chamber relied repeatedly on Nuon Chea's testimony for inculpatory purposes without even once giving credence to his exculpatory evidence.[492] It rarely sought to reason these assessments

[486] **E3/48**, Stephen Heder, 'Seven Candidates for Prosecution', Mar 2004.
[487] Nahimana Appeal Judgment, para. 199, citing *Prosecutor v. Sylvestre Gacumbitsi*, 'Decision on Expert Witnesses for the Defence, Rules 54, 73, 89 and 94 bis of the Rules of Procedure and Evidence', ICTR-2001-64-T, 11 Nov 2003, 'Gacumbitsi Decision of 11 Nov 2003', para. 8. *See also*, *Prosecutor v. Akayesu*, ICTR-96-4-T, 'Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness', 9 Mar 1998, p. 2 ('in order to be entitled to appear, an expert witness must not only be recognized expert in his field, but must also be impartial in the case').
[488] T. 26 May 2009 (Kaing Guek Eav alias Duch, **E3/56**), pp. 79:13-80:12.
[489] *See, e.g.*, T. 10 Jul 2013 (Stephen Heder, **E1/221.1**), pp. 58, 89-90, 106; T. 11 Jul 2013 (Stephen Heder, **E1/222.1**), pp. 25-27, 48-49; T. 15 Jul 2013 (Stephen Heder, **E1/223.1**), pp. 51-52; see also **E287/2**, 'Withdrawal of Notice of Intent pursuant to Internal Rule 90', 30 Jul 2013 ('Withdrawal of Notice of Intent – Heder'), para. 17, fn. 23.
[490] **E287/2**, Withdrawal of Notice of Intent – Heder, paras. 6-12, 17, fn. 23.
[491] **E287/2**, Withdrawal of Notice of Intent – Heder.
[492] The Judgment cites Nuon Chea's testimony for purportedly inculpatory purposes constantly. *See, e.g.*, Judgment, fns. 308, 376-7, 415, 428, 710-11. Exculpatory evidence identified in Closing Submissions is however omitted. *See, e.g.*, **E295/6/3**, Closing Brief, fn. 478 (citing testimony on 8 Feb 2012). This last citation was ignored notwithstanding the Chamber's reliance on the pages immediately preceding and immediately following it. See Judgment, fn. 1017. The Trial Chamber also cited

of his credibility. The testimony of an Accused constitutes evidence before the Chamber which is subject to the usual standard of proof and may therefore be rejected only if deemed implausible beyond a reasonable doubt. As Judge van den Wyngaert stated in dissent in *Katanga*:

> [T]he Majority seems to find everything the accused said that it considers incriminating credible, but systematically rejects his testimony whenever it tends to contradict the Majority's version of events […] It is also important to remember that when the accused gives evidence in his defence, this should be evaluated in accordance with the standard of proof. This means that the mere fact that the Majority is not persuaded by certain parts of his evidence is not sufficient to ignore the reasonable doubt it creates.[493]

This problem is exacerbated in the Judgment because the Chamber's total disbelief of Nuon Chea's exculpatory testimony co-exists with its failure to question inculpatory testimony of any civil party.

184. The imbalance in the Trial Chamber's assessment of Nuon Chea's evidence was acutely apparent in its treatment of his statements in *Enemies of the People* concerning the treatment of Khmer Republic officials. In that video, Nuon Chea openly admits that he agreed with the decision to execute the 'super-traitors', yet in the same sequence denies having been aware of any alleged executions of ordinary Khmer Republic soldiers and officials at Tuol Po Chrey. The relevant excerpt is as follows:

> At that time, I did not know about these killings. And if I had known, we would have taken preventive measures to stop that kind of killing. They had done nothing wrong, they were normal people, no different from ordinary people.[494]

The Defence cited this portion of the video in its Closing Brief and argued that its credibility was augmented by Nuon Chea's simultaneous open admission that the seven highest ranking Khmer Republic officials were executed. Nevertheless, the Chamber cited to the inculpatory segment (which ends 19 seconds before Nuon Chea's denial)[495] without referring to the exculpatory portion in the course of its analysis of the alleged 'targeting' policy. Having concluded that this policy existed,[496] the Chamber *then* reasoned – 42 pages later, as part of its analysis of Superior Responsibility – that *because* of Nuon Chea's supposed 'role in developing the Targeting Policy', his assertion in the video was not reliable.[497] Put otherwise, the Chamber rejected Nuon Chea's claim to be innocent because they had already determined him to be guilty. This circular analysis was absurd: the Chamber should have referred to the video, in light of Defence submissions and considerable exculpatory evidence from well-placed witnesses,[498] as *part of* its analysis of whether the policy existed at all. That analysis would have compelled the Chamber to accept Nuon Chea's unrehearsed statement as credible. Instead, the

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selectively to Thet Sambath and Gina Chon's book *Behind the Killing Fields*. A holistic review of the book shows that it is largely exculpatory, and indeed the Defence cited it numerous times in its Closing Brief: *see*, *e.g.*, **E295/6/3**, Closing Brief, fns. 396, 425, 948, 1004. Yet the only citations in the Judgment are (purportedly) inculpatory. *See* Judgment, fns. 719, 2490.

[493] Katanga Trial Judgment, Dissenting Opinion of Judge Van den Wyngaert, paras. 168-9.

[494] **E186/1R**, 'One Day at Po Chrey', 22:30-24:00.

[495] Judgment, fn. 1510.

[496] Judgment, para. 835.

[497] Judgment, para. 938

[498] *See* para. 566-572, *infra*.

Chamber failed to meaningfully consider Nuon Chea's evidence. Accordingly, it erred in this unreasoned, highly selective use of evidence critical to Nuon Chea's criminal responsibility.[499]

H. Ground 34: The Trial Chamber erred in law and fact in its assessment of the probative value of civil party statements in the Judgment

185. Civil parties appeared before the Chamber during the Case 002/01 trial pursuant to two distinct procedures: (i) in the course of the substantive hearing and (ii) during a four-day victim impact hearing held just prior to the end of trial between 27 May and 4 June 2013. Civil parties who appeared during the substantive hearing had a full day to present evidence, divided equally between the Lead Co-Lawyers and the Co-Prosecutors on the one hand and the defence teams on the other. Civil parties who appeared during the victim impact hearing were allotted 75 minutes each, of which 50 minutes were given to the Lead Co-Lawyers and the remaining 25 minutes were divided equally between the Co-Prosecutors and the two Accused. Accordingly, each defence team was allowed approximately eight minutes to cross-examine each civil party.[500] Civil parties who appeared in the course of the substantive hearing were also permitted to express their suffering in a 'statement of suffering' given 'freely […] at the conclusion of their testimony'.[501] The Defence response to this portion of their testimony was limited to an opportunity to comment 'once the Civil Party left the courtroom'.[502]

186. The Defence notes that throughout this Appeal, it generally refers to victim impact statements and statements of suffering as 'victim impact'. Any reference to civil party evidence without this qualifier was given in the course of the substantive hearing.

i – Victim impact testimony and statements of suffering

187. Both victim impact testimony and statements of suffering given at the end of trial were relied on extensively as material evidence throughout the Judgment, especially in connection with the conditions of the evacuation of Phnom Penh and the Phase II population movement.[503] The Defence's analysis shows that these statements were cited an astonishing 255 times over the course of the Judgment. Each such reference constituted an error of law. Victim impact testimony and statements of suffering should have been excluded entirely from the Chamber's consideration of the substance of the allegations. This follows from both international and domestic practice, past practice at the ECCC and the express assurances of the Trial Chamber.[504]

188. International standards uniformly distinguish between statements given only for the purpose of

[499] *See* para. 183, *supra*.
[500] T. 21 May 2013 (Philippe Jullian-Gaufres, **E1/194.1**), pp. 119-120.
[501] **E267/3**, Civil Party Statements of Suffering Procedure Decision, para. 14.
[502] **E267/3**, Civil Party Statements of Suffering Procedure Decision, para. 18.
[503] While these references are pervasive throughout the Judgment, the following examples are representative: *see* Judgment, fns. 1394, 1397, 1401, 1457, 1459, 1461-2, 1470, 1472-3, 1789, 1807, 1832, 1862, 1902.
[504] As 'victim impact' testimony and 'statements of suffering' share the same relevant characteristics and should have been treated in the same fashion, the Defence refers to them interchangeably herein.

proving victim impact and evidence relevant to the substance of the charges. In many domestic jurisdictions, victim impact statements are not even allowed until the sentencing phase, which takes place only if and after the accused is convicted.[505] In Australia, 'a court may, if it considers it appropriate to do so, receive and consider a victim impact statement at any time *after* it convicts, but *before* it sentences, an offender'.[506] Similar rules apply, for instance, in Canada, New Zealand, the United States and Israel.[507] Such testimony is *ipso facto* inadmissible in relation to the substance of the charges, because it is given after this issue is determined.[508] International tribunals similarly limit victim impact statements to sentencing and reparations, and distinguish these statements from evidence which bears on the guilt or innocence of the accused. At the ICC, it is necessary 'to separate the evidence that relates to the charges from the evidence that solely relates to reparations, and to ignore the latter *until* the reparations stage',[509] 'ensuring that evidence concerning reparations does not have an impact on the decision on the charges'.[510] If evidence relevant to the determination of the charges is given in the course of a statement intended to assess reparations, 'consideration will need to be given in open court as to whether it is fair for the Chamber to take this into account when deciding on the accused's innocence or guilt'.[511]

189. This principle applies equally before the ECCC. Evidence of victim impact is relevant to the 'gravity of a crime', which is considered as a factor at sentencing.[512] Accordingly, the Trial Chamber held that 'considerations for determining aggravating or mitigating circumstances in relation to any eventual sentence […] have *no bearing on the guilt or innocence* of the Accused.' The 'sole purpose' of such evidence is 'to enable the Trial Chamber to determine matters relevant to sentencing'.[513]

190. Consistent with these principles, the Trial Chamber repeatedly informed the parties in Case 002 that victim impact statements would not constitute evidence of guilt. The Trial Chamber emphasised

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[505] Linda Carter and Fausto Pocar (eds.), 'International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems', 2013 ('Carter and Pocar, *International Criminal Procedure*'), p. 168.
[506] *R v. Wilson*, [2005] NSWCCA 219, 17 Jun 2005, para. 25 (emphasis added); *see also*, *R v. Slack*, [2004] NSWCCA 128, 10 May 2004, paras. 8, 59 ('such *unsworn* and *untested* material is unlikely to be able to contribute significantly to the finding of facts adverse to an accused which are required to be sustained by proof to the criminal standard').
[507] Carter and Pocar, *International Criminal Procedure*, p. 168, fn. 8. *See also*, Criminal Code of Canada (2013), s.722; New Zealand Victims' Rights Act 2002, s. 17-21.
[508] In some domestic systems, such as the US, it is not even clear whether victim impact statements may be given weight during sentencing. For discussions on this subject, *see*, e.g., Robert P. Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules* (2003) 88 Cornell L. R. 543. In New South Wales, this issue is left to the discretion of a court, *see*, e.g., *R v. Slack*, [2004] NSWCCA 128, 10 May 2004, para. 60.
[509] *Prosecutor v. Lubanga*, 'Decision on Victims' Participation', ICC-01/04-01/06-1119, 18 Jan 2008, para. 121 (emphasis added).
[510] *Prosecutor v. Lubanga*, 'Decision on the Defence and Prosecution Requests or Leave to Appeal the Decision on Victims' Participation of 18 Jan 2008', ICC-01/04-01/06-1191, 26 Feb 2008, para. 52 (emphasis added).
[511] *Prosecutor v. Lubanga*, Decision on Victims' Participation, ICC-01/04-01/06-1119, 18 Jan 2008, para. 121 (emphasis added).
[512] Duch Trial Judgment, para. 596; Lukić & Lukić Trial Judgment, para. 1050.
[513] Case 001, **E72/3**, 'Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character', 001/18-07-2007/ECCC/TC, 9 Oct 2009 ('Civil Party Sentencing Submissions Standing Decision'), para. 46 (emphasis added).

that it was necessary to '[distinguish] at all times between testimony on the facts at issue […] and general statements of suffering',[514] requiring that the latter be 'limited to the purpose for which they are intended'[515] – namely, to serve as an opportunity for the victims to express their suffering and speak to reparations.[516] Whereas evidence given in the course of the substantive hearing was 'confined to the scope of [the case] and subject to adversarial argument',[517] victim impact statements are 'not so confined'[518] and include 'suffering during the DK era in general'.[519]

191. Accordingly, the Trial Chamber held that 'Civil Party statements of suffering cannot become a pretext to introduce new facts or to make allegations against the Accused that have not been subject to adversarial argument'. Thus, '[w]here a Civil Party statement of suffering does introduce new factual allegations, particularly if considered inculpatory to the Accused, an opportunity for adversarial challenge in relation to those allegations shall be given to the Defence and may warrant the recall of the Civil Party for further examination'.[520] This position was consistent with the view of the Lead Co-Lawyers, that the Trial Chamber's use of victim impact statements should be limited to its assessment of the gravity of the crimes,[521] a factor relevant to sentencing and reparations but *not* the substance of the charges.[522] The Chamber even brought this finding directly to Nuon Chea's attention to seek his permission to proceed with the four-day victim impact hearing during his absence from proceedings due to illness, in part because the hearing would 'be limited exclusively to victim impact'.[523]

192. As the ICTY Appeals Chamber has held, the fact that a piece of evidence 'may contain information going both to the guilt of an accused' and some other purpose (such as credibility or sentencing) does not necessarily mean that this evidence should be used by the Chamber for both purposes.[524] The purpose for which evidence was admitted must therefore be clearly specified. A failure to do so 'may cause confusion, prejudicing [the accused] in the organization of his case', and infringe his right to a 'fair opportunity' to challenge the evidence against him.[525] Such prejudice may cause reversible error.[526]

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[514] **E267/3**, Civil Party Statements of Suffering Procedure Decision, para. 14 (emphasis added).
[515] **E267/3**, Civil Party Statements of Suffering Procedure Decision, para. 18 (emphasis added).
[516] *See e.g.*, **E267/3**, Civil Party Statements of Suffering Procedure Decision, para. 13; **E236/5/3/2**, 'Order for Video-Link Testimony of Civil Party TCCP-13', Case File No. 002/19-09-2007/ECCC/TC, 22 May 2013.
[517] **E267/3**, Civil Party Statements of Suffering Procedure Decision, para. 14 (emphasis added).
[518] **E267/3**, Civil Party Statements of Suffering Procedure Decision, para. 18.
[519] **E267/3**, Civil Party Statements of Suffering Procedure Decision, para. 16.
[520] **E267/3**, Civil Party Statements of Suffering Procedure Decision, para. 19 (emphasis added).
[521] **E267/3**, Civil Party Statements of Suffering Procedure Decision, para. 5 (citing E240, para. 16).
[522] *See* paras. 188-189, *supra*.
[523] **E236/5**, 'Further Information regarding Trial Scheduling', 7 Feb 2013, para. 4.
[524] *Prosecutor v. Prlić et al.*, 'Decision on the Interlocutory Appeal against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses', IT-04-74-AR73.14, 26 Feb 2009, para. 29.
[525] *Prosecutor v. Delić*, 'Decision on Rasim Delić's Interlocutory Appeal against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317', IT-04-83-AR73.1, 15 Apr 2008, para. 22.
[526] *Prosecutor v. Delić*, 'Decision on Rasim Delić's Interlocutory Appeal against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317', IT-04-83-AR73.1, 15 Apr 2008, para. 23.

193. Had the Trial Chamber not informed the Accused that victim impact testimony would be used only to determine sentencing and reparations, the Defence would have objected to the grossly disproportionate schedule pursuant to which that testimony was heard before the Chamber. It would have attempted a proper cross-examination of each civil party and objected when its eight-minute time allotment expired. It would have made submissions on these statements in its Closing Brief. At this stage, it is too late to remedy this prejudice. Each and every reference to victim impact testimony in the Judgment for any purpose other than reparations and sentencing constitutes an error of law.[527]

ii – Civil party testimony

194. Civil parties also testified during the Case 002/01 trial in the course of the substantive proceedings. The Co-Prosecutors sought a ruling at trial that the weight and probative value of such testimony should be assessed 'on a case-by-case basis [...] pursuant to the same standards as applied to the testimony of witnesses.'[528] The Trial Chamber effectively granted the Co-Prosecutors' request, holding that 'the weight to be given to Civil Party testimony will be assessed on a case-by-case basis in light of the credibility of that testimony.'[529] In so doing, the Trial Chamber erred in law.

195. The Trial Chamber's reasoning in support of this conclusion was virtually non-existent. Despite detailed submissions from multiple defence teams citing applicable rules of Cambodian law, international procedure and the Internal Rules – and identifying with specificity the prejudice which would result from admitting civil party testimony as evidence relevant to the determination of the charges – the Chamber's analysis consisted of two paragraphs which failed to address any of these arguments or cite a single relevant authority.[530] Instead, the Chamber noted its practice in the Duch Trial Judgment before 'indicat[ing] that in the current case it will follow the same approach'.[531]

196. The Judgment confirms that the Trial Chamber considered civil party testimony extremely relevant to the determination of criminal liability and that it failed to make any distinction between the probative value of civil parties and witnesses. The Chamber cited to civil party testimony indiscriminately throughout the Judgment: the Defence's analysis shows that the 31 civil parties who testified before the Chamber were cited a total of 787 times. This same analysis shows that civil parties were cited, on average, *more frequently than witnesses*.[532] The Chamber cited a *single* civil party

[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.
[528] **E267**, 'Co-Prosecutor's Rule 92 Submission Regarding Civil Party Testimony', 21 Feb 2013, paras. 22-23.
[529] **E267/3**, Civil Party Statements of Suffering Procedure Decision, para. 22.
[530] **E267/1**, 'Reply to Co-Prosecutor's Rule 92 Submission Regarding Civil Party Testimony', 4 Mar 2013; **E267/2**, 'IENG Sary's Response to Co-Prosecutor's Rule 92 Submission Regarding Civil Party Testimony', 4 Mar 2013; *cf.* **E267/3**, Civil Party Statements of Suffering Procedure Decision, paras. 21-22.
[531] **E267/3**, Civil Party Statements of Suffering Procedure Decision, para. 22.
[532] *See* paras 172-173, *supra*.

testimony as the *sole* in support of numerous contentious conclusions,[533] and frequently cited civil party testimony as the primary or sole evidence in support of conclusions concerning conditions during both population movements.[534] The Chamber entered numerous murder convictions on the basis of the uncorroborated, unsworn testimony of a single civil party.[535] Indeed, evidence of killings during the population movements was comprised overwhelmingly of civil party evidence.[536]

The role of civil parties in the ECCC procedural scheme is limited

197. The distinction between a civil party and a witness under both Cambodian law and the Internal Rules is unambiguous. Article 312 of the CCP, entitled 'Incompatibility of Status of Civil Party and Witness', stipulates categorically that '[a] civil party may never be heard as a witness'. Rule 23(4) similarly provides that a 'Civil Party cannot be questioned as a simple witness'.

198. The Internal Rules and the jurisprudence of this Chamber accordingly recognize that the role of civil parties in trials before the ECCC is limited. The interests of civil parties 'are principally the pursuit of reparations.'[537] According to Rule 23(1), the role of civil parties in relation to the criminal responsibility of the accused is merely to 'support[] the prosecution'. The Trial Chamber has held that Rule 23 mandates a 'restrictive interpretation of rights of Civil Parties', which 'does not confer a general right of equal participation with the Co-Prosecutors.'[538] This Chamber has confirmed that the role of the civil parties is 'subsidiary – not alternative – to the Co-Prosecutors'.[539]

199. This restrictive view of the role of civil parties is intended in part to protect the rights of the accused. The Chamber has held that the presence of two opposing parties, both of whom are seeking to establish the guilt of the accused, 'is a matter which can affect the fairness of the proceedings'.[540] The right of the accused to the equality of arms 'includes the right to face one prosecuting authority only. Accordingly, and while the Civil Parties have the right to support or assist the Prosecution, their role within the trial must not, in effect, transform them into additional prosecutors.'[541]

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[533] Judgment, fns. 1449 ('Evacuees who made to return to Phnom Penh were threatened and told to move on', based solely on the evidence of Pech Srey Phal), 1450 ('Those who persisted in trying to return to Phnom Penh were shot', based solely on the evidence of Lay Bony), 1791 ('People were sick on trucks, but received no assistance', based solely on the evidence of Denise Affonço), 1798-1801 ('technicians, doctors, military officers and intellectuals' were separated and a rumor spread they were killed, based solely on the evidence of Pin Yathay), 1812 ('many' people on boats during the Phase II movement were ill, based solely on the evidence of Or Ry), 1834 (Khmer Rouge soldiers provided no assistance to sick or vulnerable people, based solely on the evidence of Yim Sovann), 1845 ('Khmer Rouge soldiers shot at those who tried to escape', based solely on the evidence of Toeng Sokha).
[534] Judgment, fns. 1466, 1469-79, 1487-90, 1496, 1499-1500, 1548-50, 1789-1822, 1832-5, 1844-50, 1853-4, 1867.
[535] *See* paras. 297-298, 300., 309-311, *infra*.
[536] *See* paras. 297-298, 300., 306, 309-311, 313-314, *infra*. In fact, many of the allegations of murder were derived from civil party applications and victim complaints rather than live testimony, documents of even less relevance to the charges. *See* paras. 156, 165, *supra*.
[537] Case 001, **E72/3**, Civil Party Sentencing Submissions Standing Decision, para. 33.
[538] Case 001, **E72/3**, Civil Party Sentencing Submissions Standing Decision, paras. 13, 25.
[539] **F10/2**, 'Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01', 26 December 2014, para. 12.
[540] Case 001, **E72/3**, Civil Party Sentencing Submissions Standing Decision, para. 26.
[541] Case 001, **E72/3**, Civil Party Sentencing Submissions Standing Decision, para. 26.

200. The Defence notes that as a matter of practice, civil party testimony was led by the civil party lawyers. This mode of proceeding may be appropriate where civil party testimony is employed 'principally [for] the pursuit of reparations'. However, where such testimony constitutes a key source of evidence to prove the substance of the crimes charged, civil party lawyers indeed transform into 'additional prosecutors'. Whatever the precise contours of civil parties' right to 'support' the prosecution, the use to which civil party evidence was put in the Judgment manifestly exceeds it. Evidence given by civil parties and led by civil party lawyers was afforded as prominent a role in establishing guilt as evidence introduced by the Co-Prosecutors – often, considerably more.[542]

Civil party testimony lacks the safeguards of witness testimony

201. Civil parties furthermore appear before the Chamber pursuant to procedures which lack the safeguards intended to protect the integrity of the evidence. As this Chamber has previously held, civil parties are not required to take an oath.[543] Moreover, while defence counsel and the Co-Prosecutors are prohibited from having any contact with witnesses prior to testimony, civil party lawyers are entitled to meet freely with their clients.[544] These restrictions do not apply to civil parties, precisely because their evidence is not intended to establish the guilt of the accused.[545] Civil party testimony which does concern the guilt of the accused is therefore *ipso facto* less reliable.

202. The Trial Chamber has upheld the right of civil parties to consult with counsel at all stages during the proceedings, and has protected such consultations even in the midst of a civil party's appearance before the Chamber.[546] Importantly, the Chamber grounded this ruling on the distinction between civil parties and witnesses:

> Here, at this court, civil party is responsible for claiming for reparation, and that the civil party lawyers are representing them for this cause. Civil parties are supposed to tell the Court about their harms, and such right by the civil party is not really – or do not really see in the provision with regard to witnesses.'[547]

This rationale is turned on its head where evidence of criminal liability is based substantially on the evidence of civil parties. The premise of the Chamber's ruling, that civil party evidence is limited to reparations, is simply not true.

203. As the Trial Chamber noted, this rule does not apply to witnesses, who are prohibited from contact with any parties' lawyers prior to or during testimony.[548] Even at the ICC, where witnesses are called by the parties in a more adversarial procedure, 'any discussion [between counsel and witnesses]

[542] *See* para. 196, *supra*.
[543] *See* Rule 24 (requiring witnesses to take an oath).
[544] *See* paras. 202-203, *infra*.
[545] *See* para.202, *infra*.
[546] T. 7 Dec 2011 (Romam Yun, **E1/18.1**), pp. 27-29.
[547] T. 7 Dec 2011 (Romam Yun, **E1/18.1**), p. 28.
[548] *See e.g.*, para. 202, *supra*; **E87/3**, Trial Chamber Memorandum re 'Decision in regard to IENG Sary Defence Motions', 7 June 2011.

on the topics to be dealt with in court or any exhibits which may be shown to a witness' is prohibited.[549] Such discussions 'could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony'.[550] This rule was derived in part from the 'greater intervention by the Bench' contemplated by ICC procedure relative to the *ad hoc* tribunals.[551]

204. Civil parties are not only allowed to consult freely with their lawyers: they are also allowed to discuss their experiences with other civil parties. Indeed, these consultations are *encouraged*. Civil parties are invited to conferences and gatherings where the very purpose is to discuss and share their experiences in Democratic Kampuchea. Unlike witnesses, civil parties are not restrained in any way from attending trial and hearing the evidence of other witnesses and civil parties on matters to which they themselves subsequently testify in court. All of this is perfectly well-suited to the civil parties' 'principal' role of seeking reparations. It is anathema to the manner in which their evidence was used in the Judgment: as the principal evidence upon which a substantial number of the convictions entered against Nuon Chea were based.

205. The right of civil parties to testify without giving an oath further undermines the reliability of their evidence. Evidence given under oath is entitled to probative value because it entails a risk of 'sanctions for false testimony'.[552] The ICC Trial Chamber has accordingly held that while victims may express their views and concerns without giving an oath, any evidence which concerns criminal responsibility must be given as a witness appearing before the Chamber under oath.[553] Civil parties testifying at the ECCC without taking an oath are not at risk of charges for perjury and accordingly have a reduced incentive to tell the truth.[554]

206. Charges of the magnitude at issue in Case 002/01 should not be resolved based substantially on the evidence of unsworn parties with an interest in the proceedings and entitled to consult freely with their attorneys prior to and in the course of their testimony. The Trial Chamber's repeated reliance on such testimony as the primary (or only) evidence to substantiate the crimes charged constituted an error of law.

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[549] *Prosecutor v. Lubanga*, 'Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial', ICC-01/04-01/06, 30 Nov 2007, para. 51.
[550] *Prosecutor v. Lubanga*, 'Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial', ICC-01/04—01/06, 30 Nov 2007, para. 51.
[551] *Prosecutor v. Lubanga*, 'Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial', ICC-01/04-01/06, 30 Nov 2007, para. 45.
[552] *Prosecutor v. Prlić et al.*, 'Decision on Praljak Defence Notice concerning Opening Statements under Rules 84 and 84 *Bis*', IT-04-74-T, 27 Apr 2009, p. 9.
[553] *Prosecutor v. Lubanga,* 'Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to Express Their Views and Concerns in Person and to Present Evidence during the Trial', ICC-01/04-01/06-2032-Anx, 26 Jun 2009, para. 25. While the Supreme Court Chamber has characterized ICC jurisprudence concerning victims as 'inapposite' in regard to the participation of civil parties in the proceedings, that jurisprudence remains relevant to the probative value of civil party testimony. *See* **F10/2**, 'Decision on Civil Party Lead Co-Lawyers' Requests Relating to the Appeals in Case 002/01', 26 December 2014, para. 16. Victims at the ICC and civil parties at this Tribunal both lack the same, key safeguards applicable to witnesses.
[554] *See* Rule 36 (providing for sanctions against a 'witness' for giving false testimony 'under Solemn Declaration').

I. Grounds 30 & 31: The Trial Chamber erred in law and fact in its assessment of the probative value of expert testimony and secondary sources in the Judgment

207. The CCP contemplates the appointment of experts to assist the investigating judges with 'technical questions' and instructs that their mandate 'shall cover only the technical aspects of the case'.[555] These rules reflect international practice, which recognizes 'a fundamental difference between [a fact] witness called to testify about the crimes with which the accused is directly charged and, on the other hand, an expert, whose testimony is intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field'. [556] An expert is accordingly not permitted to '*testify on disputed facts* as would ordinary witnesses'.[557] In that regard, it is crucial 'to recognise the distinction between factual evidence and opinion evidence, between statements of fact and the ultimate opinion formed on the basis of such facts'.[558]

208. Where an expert opinion is based on facts collected from other sources, the expert's account of these facts may not constitute evidence of facts in dispute between the parties. In *Nahimana*, the ICTR Appeals Chamber held that the fact that evidence of certain children's deaths was given by an expert witness 'does pose a problem' because 'the role of expert witnesses is to assist the Trial Chamber in its assessment of the evidence before it, and not to testify on disputed facts as would ordinary witnesses'.[559] As the evidence given by the expert was the only basis for the Trial Chamber's finding that the deaths occurred, the Appeals Chamber held that murder was not sufficiently proved.[560]

209. In principle, the Trial Chamber recognized these limitations on expert opinion, holding that this evidence was heard on 'specific technical issues, to assist [the Chamber] in understanding evidence presented during trial.'[561] Despite this, the Chamber made no apparent effort to distinguish fact and opinion evidence, and erred in law by routinely relying on expert testimony as direct evidence in support of factual findings in dispute between the parties. These include, for instance that: between 1970 and 1975, villagers 'were transferred and sent to remote mountain and jungle areas' and that 'their original homes, if not already destroyed, were burned down to stop them from returning'[562]; the 'CPK imposed increasingly difficult working conditions on members of cooperatives'[563]; Ta Mok killed

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[555] CCP Arts. 162, 165.
[556] *Prosecutor v. Akayesu*, 'Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness', ICTR-96-4-T, 9 Mar 1998, p. 1; *see also*, *Prosecutor v. Bizimungu et al.*, 'Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison des Forges', ICTR-99-50-T, 2 Sep 2005, para. 18.
[557] Nahimana Appeal Judgment, para. 509 (emphasis added).
[558] *Prosecutor v. Bizimungu et al.*, 'Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison des Forges', ICTR-99-50-T, 2 Sep 2005, para. 21.
[559] Nahimana Appeal Judgment, para. 509.
[560] Nahimana Appeal Judgment, para. 509.
[561] Judgment, para. 30.
[562] Judgment, para. 105.
[563] Judgment, para. 114. Although the Chamber cited the evidence of Kham Phan, his testimony did not support this aspect of the findings. The support was derived instead from Philip Short and Stephen Heder's testimony, and secondary sources authored by David Chandler and Ben Kiernan.

Central Committee member Prasith in 1974 because he was an enemy of the Party[564]; Khmer who had previously studied in Vietnam were killed on their return in 1973[565]; Khmer Republic soldiers were treated in a 'uniform' fashion and that this fact establishes the existence of a policy in that regard[566]; Khmer Republic soldiers were killed in Oudong[567]; the atmosphere within the Standing Committee was 'collegial'[568]; Nuon Chea exercised a prominent role in the military[569]; the CPK's expressed fear of American bombing of Phnom Penh was 'knowingly false'[570]; decisions were taken in May 1975 determining that the Front was no longer useful[571]; the decisions which led to the Phase II movement originated in the Central Committee[572]; the CPK viewed city people as enemies of the Party[573]; lies were the 'very fabric' of the regime[574]; it was not possible for zone commanders to act outside the broad policy consensus of the Party Center;[575] and a litany of other findings. The Chamber also occasionally made findings which may technically have constituted a matter for professional or expert opinion, but which were plainly beyond the capacity of the expert in question. For instance, the Chamber relied on Philip Short's view that it would have been easier to feed the population of Phnom Penh had they not been evacuated.[576] All of these findings constituted errors of law and fact.

210. The Chamber similarly relied frequently on (academic) work from a variety of authors as sources of considerable importance in support of findings of fact in dispute between the parties.[577] While this evidence does not technically constitute expert opinion, the underlying problem is the same: these authors did not witness any of the events at issue with their 'five senses'.[578] This problem is aggravated considerably by the fact that the authors did not appear for cross-examination. Often, their knowledge is completely untested; for example, two authors cited prominently in the Judgment are Elizabeth Becker and Ben Kiernan, neither of whom testified in court. Also in this category is research from Philip Short and David Chandler about which they gave no testimony during their appearance before the Chamber. This evidence was highly unreliable and entitled to very low probative value.

211. Likewise, the Chamber made no genuine effort to assess the expertise of any of these authors or experts or to explain why it considered their account of the facts reliable. David Chandler's claim to

[564] Judgment, para. 118.
[565] Judgment, para. 118.
[566] Judgment, paras. 122, 834.
[567] Judgment, para. 124.
[568] Judgment, para. 226.
[569] Judgment, para. 332.
[570] Judgment, para. 528.
[571] Judgment, para. 740, fn. 2335.
[572] Judgment, para. 749.
[573] Judgment, paras. 111-2, 787.
[574] Judgment, para. 834.
[575] Judgment, para. 894.
[576] *See e.g.*, Judgment, paras. 538 (fn. 1611), 539 (fn. 1617).
[577] *See* Judgment, fns. 307, 318, 340, 352, 356, 1562, 1599, 1730, 1737, 1754, 1761, 1790, 1853, 1856, 1918, 1944.
[578] *See* para. 181, *supra*.

expertise as a professional historian and specialist in Cambodian studies fluent in written and spoken Khmer deserves considerably different treatment from the journalists who deemed themselves qualified to pronounce on the inner workings of a government which the Trial Chamber repeatedly held was shrouded in secrecy.[579] Philip Short's claim to authority appears to be that he wrote a book based on research he began twenty years after the DK ended and without any prior background in Khmer politics, history or language. 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. Neither does her week-long visit to DK in December 1978. On any measure, the Judges and lawyers at this Tribunal, who have had access to hundreds of confidential interviews and all of DC-Cam's archives over seven years of analysis are better placed as 'experts' than either one. Indeed, even David Chandler admits that considerable material cited in the Closing Order was unavailable to him in the course of his research and would have improved his understanding of the CPK.[580] Ben Kiernan may have nominal expertise, but the objectivity of his analysis as a 'vile and odious hireling' of the Vietnamese is doubtful.[581] As noted, similar issues arise in relation to the Chamber's reliance on Stephen Heder's evidence and academic research given his longstanding association with the Co-Prosecutors and the direct link between his research and the decision to bring charges against Nuon Chea.[582]

VII. ERRORS CONCERNING FACTS AND POLICIES OUTSIDE THE SCOPE OF CASE 002/01

212. The Trial Chamber made numerous findings concerning facts and policies outside the scope of Case 002/01. While these errors do not invalidate the Judgment or cause a miscarriage of justice, the Defence submits that they are subject to appellate review on the basis of this Chamber's *de novo* appellate jurisdiction.[583] The Defence first reviews key principles regarding the severance of Case 002 and then substantiates the Chamber's errors concerning CPK policy.

A. General principles

213. For reasons set out in closing submissions and in prior filings before the Trial Chamber, the decision to sever the Closing Order required the Trial Chamber to exclude from consideration any evidence concerning policies and facts not at issue in Case 002/01 aside from that which directly establishes the intent of the Standing Committee.[584] This conclusion follows from the Trial Chamber's repeated, explicit guarantees in that regard and the fact that no live testimony on these issues was

[579] Judgment, para. 199.
[580] T. 23 Jul 2012 (David Chandler, **E1/94.1**), pp. 22-24.
[581] **E3/1593**, Kiernan, *The Pol Pot Regime*, ERN 00678489.
[582] *See* para. 182, *supra*.
[583] *See* paras. 2-12, *supra*.
[584] **E295/6/3**, Closing Brief, para. 94.

heard.[585] The use of any other evidence for this purpose accordingly violated Nuon Chea's right to confront the evidence against him and to fair notice of the charges.[586]

214. The fact that no evidence of 'implementation' of policies was admissible made almost any findings concerning the existence of the 'policies' impossible. As the Co-Prosecutors rightly argued, evidence of the implementation of a policy is relevant to its existence and accordingly 'there is total interaction between the policy itself and its application.'[587] By the same token, evidence that a policy was not implemented or that it was implemented in an inconsistent manner supports the conclusion that the policy did not exist (and that, contrary to the Chamber's findings, the CPK was not in a strictly hierarchical Party in which the orders of the 'Party Center' were consistently and loyally executed). Assuming that the presumption of innocence exists at this Tribunal, a Chamber which heard no evidence of 'implementation' was required to assume that nothing was implemented. Only if the existence of a 'policy' could somehow be established beyond a reasonable doubt *irrespective* of what occurred on the ground were any findings in that regard possible. In practice, the scope of any such findings were likely to be highly circumscribed.

215. The Defence notes that in certain respects the Trial Chamber was properly judicious in its treatment of facts outside the scope of Case 002/01. The Chamber rightly made no findings concerning CPK policy as to the treatment of the Cham, Buddhists or Vietnamese, and no findings as to CPK policy concerning cooperatives and worksites within the temporal jurisdiction of the Tribunal.[588] This was the correct approach in light of the foregoing considerations. However, the Chamber did make findings concerning supposed CPK policies relative to the regulation of marriage, Nuon Chea's role at S-21 and the total death toll in Democratic Kampuchea (in addition to the 're-education of bad elements and killing of enemies', which is discussed separately, *infra*). Some of these findings constituted errors of law because they were based on 'implementation evidence'. Others constituted errors of fact because

[585] **E295/6/3**, Closing Brief, paras. 93-101.
[586] In the Judgment, the Trial Chamber held that it had admitted evidence relevant to the existence of policies outside the scope of the trial and furthermore that it had explained to the parties how it distinguished between evidence relevant to policy (and hence admissible) and evidence relevant to implementation (and hence inadmissible). *See* Judgment, paras. 46-47. However, the prior rulings it referred to and its further discussion in the Judgment failed to address the absence of confrontation and furthermore constituted a series of meaningless tautologies. For instance, the Chamber held that it 'has admitted evidence relevant to Democratic Kampuchea policies and crime sites outside the scope of Case 002/01, usually when this evidence is adduced as part of directly relevant evidence'. *See* Judgment, fn. 124 (citing **E299**, Written Statements Admissibility Decision, para. 20). In other words, relevant evidence is admitted when it is relevant. The same non-answer is provided in the Judgment:

> [O]n 3 Jun 2011, the Chamber indicated that evidence of facts falling outside the scope of Case 002/01 was admissible if demonstrably relevant. Throughout the proceedings, the Chamber admitted evidence of facts outside the scope of Case 002/01 where it was demonstrably relevant to proof of, *inter alia*, the Democratic Kampuchea policies alleged in the Closing Order, the contextual elements of crimes against humanity or the impact of crimes on victims […] On 18 Oct 2011, the Chamber clarified that, although the development of the five policies as a general matter fell within the scope of, and could be examined in Case 002/01, there would be no examination of the implementation of policies other than those pertaining to the specific factual allegations falling within the scope of Case 002/01.

None of these rulings addressed the fact that Nuon Chea was denied an opportunity to confront *live, fact witnesses* at trial.
[587] T. 26 Jun 2013 (Document Presentation, **E1/213.1**), pp. 41-42.
[588] Judgment, paras. 113-116, 119.

the limited record before the Chamber was inadequate to support them. Both sets of errors are alleged herein.

B.Ground 28: The Trial Chamber erred in law and fact in finding that the CPK adopted a policy of regulation of marriage

216. The Trial Chamber held that 'regulation of marriage' was a CPK policy.[589] The Trial Chamber based this conclusion on the fact that it 'heard some evidence concerning arranged and involuntary marriages',[590] in addition to other evidence purportedly concerning the CPK's marriage policy.[591]

217. The Trial Chamber erred in law in concluding that 'there is some evidence of arranged and involuntary marriages'. It is uncontested that forced marriages were outside the scope of Case 002/01 and that the occurrence of forced marriage constitutes evidence of implementation 'on the ground'.[592] The Trial Chamber ruled repeatedly that testimony concerning forced marriage was outside the scope of the trial.[593] The Defence notes that the only evidence cited by the Trial Chamber was one civil party's victim impact testimony – which the Chamber held did not need to respect the scope of Case 002/01 precisely because it did not concern the substance of the evidence – and five civil party applications. The Chamber's decision to hold that any forced marriages occurred while prohibiting any live testimony or cross-examination on this issue was a blatant abuse of Nuon Chea's right to confront the evidence and to fair notice of the charges against him.[594]

218. The Trial Chamber erred in fact in concluding on the basis of the evidence it cited that 'regulation of marriage was a CPK policy.'[595] The Defence notes that according to the Chamber, there was 'some evidence' or arranged marriages and 'therefore' it is able to find that a CPK policy exists.[596] Clearly, evidence of six arranged marriages – even if it were not blatantly inappropriate to rely on it – falls far below the level of evidence required to establish a nationwide and systematic CPK policy. The only actual witness cited by the Chamber testified (in an excerpt apparently deliberately omitted by the Chamber) that *no* forced marriages occurred.[597] The balance of the evidence cited by the Chamber overwhelmingly concerns population growth with virtually no mention of marriage.[598] The Chamber's conclusion on the basis of this limited selection of evidence was patently unreasonable.

219. The Defence notes that forced marriage is within the scope of the trial in Case 002/02.[599] The

[589] Judgment, paras. 128, 130.
[590] Judgment, para. 128.
[591] Judgment, para. 128, fn. 371.
[592] *See* para. 214, *supra*.
[593] *See e.g.,* T. 12 Jun 2013 (Sim Hao, **E1/206.1**), pp. 104-5; T. 12 Dec 2012, (Kham Phan, **E1/152.1**), p. 39.
[594] *See* paras. 213-214, 216, *supra*.
[595] Judgment, para. 130.
[596] Judgment, para. 130.
[597] Judgment, fn. 371 (citing testimony of Chuon Thi).
[598] Judgment, fn. 371.
[599] **E301/9/1**, 'Decision on Additional Severance of Case 002 and Scope of Case 002/02', 4 Apr 2014, Disposition, para.3.

primary allegation of Nuon Chea's responsibility for forced marriage concerns his agreement to a forced marriage policy.[600] The Defence contests that a forced marriage policy existed.[601] In light of the Trial Chamber's lax treatment of evidence of Nuon Chea's role and the structure of the CPK in Case 002/01, which ascribed criminal liability to Nuon Chea for crimes allegedly committed pursuant to any alleged CPK policy merely by virtue of his position,[602] these erroneous findings are likely to be determinative, or nearly so, of Nuon Chea's criminal liability for forced marriage in Case 002/02. In light of the unique circumstances surrounding Case 002/02, the Defence submits that this Chamber should pre-empt the bias of the Trial Chamber bias in this regard and hold that the evidence relied on in the Judgment is manifestly inadequate to establish the existence of a CPK forced marriage policy.

C. Ground 27: The Trial Chamber erred in law in making findings concerning Nuon Chea's alleged role at S-21

220. The Chamber's analysis of Nuon Chea's role at S-21 consists of a short-form summary of the Co-Prosecutors' closing argument in that regard without mention of any of the detailed and compelling responses to precisely this evidence proffered by the Defence at trial.[603] Having matter-of-factly described the Co-Prosecutors' case, the Chamber innocently declared that Nuon Chea's role at S-21 will be 'considered in future proceedings.'[604] This analysis exists in the Judgment for one reason: to ensure that the Trial Chamber's view that Nuon Chea had an extensive role at S-21 is on the record in the event a judgment in Case 002/02 is never rendered, while disclaiming any legal finding in order to preserve its claim to impartiality. It is yet further proof of bias.

221. Nowhere is the Chamber's bias more apparent than in its highly misleading assertion that 'there is some question whether' certain annotations on a small collection of six S-21 confessions were made by Nuon Chea, as the Co-Prosecutors claim.[605] In fact, the only person who has ever suggested that these annotations may have been made by Nuon Chea was Duch, who told the CIJs 'I don't know who wrote that' particularly since 'I did not see Nuon Chea's handwriting often'.[606] Duch then guessed that the handwriting 'perhaps' belonged to Nuon Chea, a claim which the CIJs found sufficient to rely on repeatedly in the Closing Order. During his appearance before the Trial Chamber, Duch testified that he did not see a *single* confession containing a *single* annotation from any of his superiors prior to 1999, when one such confession was shown to him by a journalist.[607] There is not 'some question whether' the annotations were made by Nuon Chea. There is no evidence that the annotations were made by

[600] **D427**, 'Closing Order', 15 Sep 2010, paras. 216-220.
[601] **E295/6/3**, Closing Brief, paras. 482-4.
[602] *See* paras. 260-265, *infra*.
[603] Judgment, paras 343-345. T. 22 Oct 2013 (Final Submissions Day 1, **E1/232.1**), pp. 100-113.
[604] Judgment, para. 346.
[605] Judgment, para. 344.
[606] **E3/355**, Written Record of Interview of KAING Guek Eav alias Duch, ERN 00242876.
[607] T. 4 Apr 2012 (Kaing Guek Eav alias Duch, **E1/59.1**), p. 82.

Nuon Chea. To this Trial Chamber, the mere *supposition* of an inculpatory fact by the Co-Prosecutors is sufficient. Affirmative proof that the only evidence in existence is patently unreliable leads the Trial Chamber to consider the possibility of innocence. This is the Trial Chamber's attitude toward proof of guilt.

D. The Trial Chamber erred in law in making findings concerning the total death toll during Democratic Kampuchea

222. The Trial Chamber devoted paragraph 174 of the Judgment to a discussion of DK demographic analyses. The Chamber stated as follows:

> Experts suggest that there is a high probability that [identified] mass grave sites contain the remains of only a sample of those who died as a result of Khmer Rouge policies and actions *during the DK era* […]. Overall, estimates indicate that between 600,000 and 3 million died *as a result of Khmer Rouge policies and actions*. Within this range, *experts accept estimates falling between 1.5 and 2 million excess deaths as the most accurate*.[608]

223. This amounts to a factual finding that there were excess deaths of 'between 1.5 and 2 million' people 'during the DK era', since the Trial Chamber stated affirmingly that 'experts accept' the accuracy of this suggested range of excess deaths, and then did not refer to it again, much less dispute it, at any other point in the Judgment. By making such a finding, the Trial Chamber flagrantly erred in law, violating Nuon Chea's right to fair notice of the crimes charged and to confront the evidence against him. Neither the crimes charged in Case 002/01 nor its temporal scope necessitated making such a finding. Indeed, the Chamber itself twice insisted in the Judgment that the temporal scope of Case 002/01 was limited to 17 April 1975 to December 1977 only,[609] which is far less than the entire DK period. Furthermore, throughout Case 002/01, the Chamber blocked Defence attempts to examine variables that may have affected death toll assessments. For instance, the Chamber consistently shut down Defence lines of questioning concerning the post-1979 K-5 labor program.[610] The Chamber also declined to call several witnesses who the Defence had sought to testify as to pre-April 1975 living conditions, ruling that Case 002/01 related to 'events that occurred after 17 April 1975,' that a 'significant amount of testimony' had already been heard in this regard, and that hearing the witnesses was 'unwarranted' on the basis that in the Chamber's view, many of these witnesses 'appear to lack direct knowledge of events in Cambodia'.[611]

224. Alternatively, the Trial Chamber erred in fact in making this finding based on the limited record. The Trial Chamber itself noted that estimates of deaths in the DK era vary between 600,000 and 3 million, representing a preposterous difference of approximately *2.4 million deaths* between the lowest

[608] Judgment, para. 174 (footnotes omitted, emphasis added).
[609] Judgment, paras. 169, 193.
[610] *See*, **E295/6/3**, Closing Brief, para. 58.
[611] **E312**, Final Witnesses Decision, paras. 32-33.

and highest intervals. This is based on widely varying results produced by a sizeable number of experts. Given such variance, it was unreasonable for the Chamber to reach such a conclusion by taking experts' findings at face value to reach its finding, instead of first permitting significant adversarial debate and an assessment of the relevant evidence. The Chamber did not assess the reliability of the data, methodologies or assumptions underlying experts' estimated excess death tolls, or explore the possibility that other variables not considered by these experts could have substantially impacted the validity of their conclusions.

VIII. STRUCTURE OF THE CPK

A. Ground 37-39: The Trial Chamber erred in fact in repeatedly characterizing the CPK as a unified, rigidly hierarchical and pyramidal entity

225. The Trial Chamber repeatedly portrayed the CPK as a cohesive, highly structured Party in which lower level cadres loyally and consistently implemented the instructions of the 'Party leadership'. The Chamber held that the Standing Committee exercised 'effective control' over the CPK,[612] and that decisions were 'made centrally, by the upper echelons of the Party, to whom the lower echelons would report and from whom they would receive instructions.'[613] This holding was extended to the relationship between the so-called 'Party leadership' and 'zone secretaries and officials', including Ruos Nhim, Sao Phim, Ta Mok, Koy Thuon, Chou Chet and Ke Pauk, who 'reported' or 'answered' to Party leaders.[614]

226. These general findings concerning Party structure were applied to determine Nuon Chea's criminal liability in multiple ways. The Chamber relied repeatedly on the allegedly strict hierarchy of the CPK's administrative structure to conclude that the direct perpetrators of the crimes charged were acting pursuant to Party policy and instructions. Thus, the decisions of the 'Party Center' concerning the evacuation of Phnom Penh 'amounted to orders which were implemented' by 'lower-level cadres [who] accepted the authority and decisions of the CPK',[615] the Phase II movement was 'disseminated through the Party ranks' and 'strictly implemented by lower-level cadres',[616] and executions at Tuol Po Chrey were ordered by Ruos Nhim as part of the 'dissemination of orders through the ranks'.[617] These findings were significant components of the Chamber's conclusion that Nuon Chea planned, ordered, instigated and aided and abetted the crimes charged. They also served as a basis on which to reject

[612] Judgment, para. 203.
[613] Judgment, para. 223.
[614] Judgment, paras. 773, 741, 859.
[615] Judgment, para. 885. *See also*, Judgment, para. 892 (crimes committed during the evacuation of Phnom Penh were committed by officials 'acting within the established administrative hierarchy').
[616] Judgment, para. 904.
[617] Judgment, para. 924.

Nuon Chea's well-substantiated account of the events.[618] Furthermore, the Chamber relied on its assessment of CPK structure to conclude that Nuon Chea had effective control over the alleged direct perpetrators for the purposes of determining superior responsibility.[619]

227. The Defence submits that the Trial Chamber completely failed to substantiate its findings concerning the structure of the CPK, all of which constitute manifest errors of fact. Although the Chamber analyzed the CPK's administrative and communication structures at length,[620] its findings amount to little more than an elaborate organizational chart. Omitted almost entirely is any effort to assess how power was actually distributed and exercised within the broad outlines of the CPK's organizational skeleton. The existence of levels of hierarchy does not prove who in that hierarchy held effective control or who made operational decisions – in other words, who had actual control over how policies were implemented on the ground.

228. The evidence in fact reveals that orders from the Party center were rarely issued and poorly specified,[621] that executions were ordered at levels far below the Party center,[622] and that conditions varied dramatically across the country.[623] There is 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.[624] Some of these facts derive directly from the Closing Order.[625] Most of the evidence supporting these conclusions emanate from sources upon which the Trial Chamber relied extensively and explicitly found credible and reliable.[626]

i – The Trial Chamber erred in fact in its assessment of the role of zone leaders

The Trial Chamber unreasonably downplayed the authority of zone leaders who were themselves members of the Standing Committee

229. The Trial Chamber held that one of the core founding principles of the CPK was democratic centralism, according to which decisions were made collectively within the upper echelons of the Party.[627] According to the Trial Chamber, decisions of the Standing Committee were made 'with the input of, and with a broad consensus from, the entire Committee.'[628] The Chamber's rigid interpretation of this principle was essential to its finding that Khieu Samphan in particular agreed with

[618] Judgment, paras. 859-60.
[619] Judgment, paras. 893 (during Phase I movement, zone secretaries reported to and executed orders from Pol Pot and Nuon Chea), 913 (during Phase II movement, a 'strict hierarchical structure' and 'strict reporting line' existed), 933-4.
[620] *See* Judgment, paras. 199-302.
[621] *See* paras. 232-233, *infra*.
[622] *See* para. 247, *infra*.
[623] *See* para. 248, *infra*.
[624] *See* paras. 239-243, *infra*.
[625] *See* para. 239, *infra*.
[626] *See*, *e.g.*, paras. 247-248, *infra*.
[627] Judgment, para. 223.
[628] Judgment, para. 228.

key decisions of the Party.[629]

230. However, the Trial Chamber failed to make parallel findings with regard to zone leaders such as Ta Mok, Sao Phim and Ruos Nhim – who alongside Nuon Chea were also members of the Standing Committee which allegedly exercised effective control over the CPK – but whom the Chamber consistently portrayed as subordinate to the ill-defined 'Party leadership'.[630] According to the Trial Chamber, Sao Phim was a founding member of the CPK and member of the Standing Committee in 1960 along with Pol Pot, Nuon Chea and Ma Mang.[631] Ta Mok was appointed to the Standing Committee in 1963.[632] Ruos Nhim was a member of the Central Committee as of 1963, and joined the Standing Committee following liberation.[633] Sao Phim was present at the First Party Congress in 1960,[634] and all three men participated in the Second Party Congress in 1963 along with Pol Pot, Nuon Chea, Ieng Sary and Vorn Vet.[635] By contrast, Khieu Samphan was never a member of the Standing Committee and was not a full rights member of the Central Committee until 1976 – after most of the crimes charged in Case 002/01 had allegedly been committed.[636] Khieu Samphan did not attend a meeting of the Central Committee until 1971.[637] Nevertheless, Khieu Samphan was characterized as a member of the 'Party leadership' to which Ruos Nhim and Sao Phim 'reported'.[638] This was a ludicrous finding. The Defence is left to wonder whether this narrative would have remained intact had Ta Mok survived long enough to be prosecuted by this Tribunal.

231. The Chamber's manifestly erroneous characterization of leading cadres such as Ta Mok, Sao Phim, Ruos Nhim and Chou Chet as mere zone leaders outside the Party leadership facilitated its finding that their conduct constituted implementation of 'orders' or 'instructions' conveyed downward from Nuon Chea throughout the CPK hierarchy.[639] In reality, these 'zone leaders' helped formulate the CPK's non-criminal common purpose pursuant to the principle of democratic centralism, and concurred in the decision to liberate the country and evacuate Phnom Penh.[640] As the Defence establishes throughout this Appeal, crimes were committed under their authority through their (often very different) implementation of broad objectives of the revolution.

The Trial Chamber mischaracterized the evidence of instructions issued by the Party center, which were rare and limited in scope and substance

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[629] Judgment, paras. 142, 735, 997, 1006, 1019.
[630] *See* para. 225, *supra*.
[631] Judgment, para. 87.
[632] Judgment, para. 203.
[633] **E3/1815**, 'How Pol Pot Came to Power', ERN 00487316-7; Judgment, para. 219.
[634] Judgment, para. 87.
[635] Judgment, para. 89.
[636] Judgment, paras. 384-5.
[637] Judgment, para. 95.
[638] Judgment, para. 773.
[639] *See e.g.*, Judgment, paras. 773, 859-860.
[640] Judgment, paras. 133-4, 142. *See also*, paras. 505-507, 641-642.

232. Evidence of communications between the Party center and officials in the national administrative structure corroborate this view of the CPK's administrative structure. The Chamber's findings in this regard mischaracterized the evidence, which in fact demonstrates that communications issued by the Party center were rare and did not contemplate the commission of criminal acts. This was especially true in regards to Nuon Chea, who rarely communicated with officials in the national administrative structure except in person.

233. Relying solely on the testimony of telegram encoder Norng Sophang, the Trial Chamber held that 'the Party center sent out general directives to the lower echelons by telegraph dealing with "all aspects of the country" and "the overall situation"'.[641] Yet the Chamber neglected this same witness's much more detailed testimony – given less than four hours later – that 'we did not have a lot of outgoing telegrams', that the telegrams which were sent were 'very brief' and mainly concerned 'distribution of the goods' to the base, and that a telegram from the Party center was sent 'once in every ten days'.[642] This testimony was confirmed by other evidence relied on by the Chamber, including Autonomous Sector 105 secretary Sao Sarun who testified that the telegrams from the Party center were about farming.[643] The only telegram cited by the Chamber as evidence of a Party center 'directive' is a two sentence document – dated March 1978 – asking cadres in Muk Kampoul to monitor enemy activities and 'take any measure based on the reality'.[644] This document corroborates Norng Sophang's testimony that Party center instructions were highly circumscribed, and establishes that they did not provide concrete instructions or contemplate unlawful activity. Teachings of the Party center were disseminated not through formal orders but by inculcating members' political consciousness.[645]

234. The Chamber also made vague and misleading findings concerning Nuon Chea's personal role in sending communications. The Chamber found that 'officials at the zone or autonomous sector level also received letters from Office 870 and from individual CPK leaders, including Nuon Chea'.[646] Yet the only live witness the Chamber cited testified repeatedly that messages from the Party center were normally sent by '870' and that 'no name was mentioned in the letter or on the envelope';[647] before later adding that letters came 'occasionally' from Nuon Chea.[648] The Chamber then declined to cite the

[641] Judgment, fn. 880 (citing T. 29 Aug 2012 (Norng Sophang, **E1/117.1**), pp. 49-50).
[642] T. 29 Aug 2012 (Norng Sophang, **E1/117.1**), pp. 75-76. *See* Closing Brief, para. 204.
[643] Judgment, para. 280.
[644] Judgment, fn. 880 (citing **E3/254**, DK Telegram, 20 Mar 1978).
[645] *See* **E3/783**, 'Revolutionary Flag', Dec 1972, ERN 00720205 check this cite – E3/783 is the Sep-Oct 1972 Rev Flag; do we want that one, or Dec 1972? ('all of our comrades must grasp the "evolving state" of our movement's revolutionary struggle'). The Defence notes that the relevant evidence was all cited in the Defence's closing submissions. *See* **E295/6/3**, Closing Brief, paras. 204-5.
[646] Judgment, para. 280.
[647] T. 11 Dec 2012 (Kham Phan, **E1/151.1**), p. 97.
[648] T. 11 Dec 2012 (Kham Phan, **E1/151.1**), p. 98. The Chamber also cited the WRI of Tha Sot, who claims to have delivered letters from Nuon Chea to various zone leaders, which were sealed and in which he 'did not know what was written'. *See*

clearest evidence of Nuon Chea's role in communicating with the base: Norng Sophang's testimony that throughout the entire period of Democratic Kampuchea he encoded only two telegrams from Nuon Chea, one which concerned the People's Representative Assembly and a second which 'urge[d] the cadres to go see the people' in the aftermath of a flood.[649] To the knowledge of the Defence, not a single communication from Nuon Chea exists on the case file.

235. The Trial Chamber sought to compensate for these failings in the evidence by holding that '[m]essages from the Zones also contained requests for instructions, guidance […] or material assistance from the Party center.'[650] Yet, the Chamber's proof of this finding consists of two telegrams describing detailed plans before concluding with the pleasantry 'Request Brother's opinions on the above report',[651] a third telegram asking the Party to send medicine back to the base with a medic dispatched to Phnom Penh for that purpose,[652] and a fourth telegram which seeks no instructions, guidance or material assistance from the Party center at all.[653] The only other evidence of any requests for instructions from the Party center from the zone level is in the form of three telegrams which concern the conduct of the war at Cambodia's borders during Vietnam's December 1977 invasion and a single message from Ruos Nhim in May 1978.[654] All four telegrams describe in detail plans of action already formulated by the zone official and no evidence exists that anyone in the Party center responded. Although hundreds of telegrams were put before the Chamber,[655] this was the totality of the evidence cited in the Judgment. A more accurate finding would accordingly have been that officials throughout the national administrative structure reported their activities to the Party center while almost never seeking its guidance or instructions.

236. The Trial Chamber furthermore failed to make any effort to read these telegrams in context. The May 1978 telegram in particular is dated just days before Ruos Nhim was defeated and arrested. Evidence put before this Chamber by the Defence shows unequivocally that the outright armed conflict between Northwest Zone forces, together with East Zone forces, against the 'Party Center', was underway long before this telegram was supposedly sent, and that Ruos Nhim was already seeking support and protection from his allies.[656] Nuon Chea does not know whether this document is authentic

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Judgment, fn. 883 (citing **E3/464**, 'Written Record of Interview of Tha Sot', ERN 00226112-3). The Defence does not deny that Nuon Chea was in contact with zone leaders and submits that this evidence is irrelevant.
[649] T. 4 Sep 2012 (Norng Sophang, **E1/121.1**), p. 36:3-11; T. 6 Sep 2012 (Norng Sophang, **E1/123.1**), pp. 16:15-17:19. *See* Closing Brief, para. 204.
[650] Judgment, para. 278.
[651] **E3/511**, 'Telegram No. 94', 2 Apr 1976; **E3/1036**, 'Telegram No. 32' (concluding with the line, 'Regarding this matter, we would like to seek additional opinion of Angkar').
[652] **E3/1196**, 'Telegram No. 33', 26 Nov 1976.
[653] **E3/519**, 'Telegram No. 32', 23 Mar 1978 (asking the Party to transmit a message to a cadre in a different unit and to report that cadre's response).
[654] *See* Judgment, fn. 2439 (citing E3/908, E3/863, E3/918, E3/910).
[655] *See* **E109/4.4**, 'Annex 4: DK Communications'.
[656] **F2/4**, Third Appeal Evidence Request, paras. 18-22; *see* paras. 241, 460, *infra*.

or what it means; certainly, he does not recall having seen it. One thing is clear, however: this document does not establish Ruos Nhim's loyalty or subordination to Pol Pot or Nuon Chea at all. The notion that Ruos Nhim was loyal or subordinate to Pol Pot or Nuon Chea is preposterous.

The Trial Chamber ignored evidence of conflict, autonomy and discretion

237. Having mischaracterized zone leaders as subordinate to the 'Party leadership', the Trial Chamber then wrongly concluded that the role of zone leaders was limited to the implementation of Party policy.[657] This finding ignored evidence demonstrating that zone secretaries had considerable authority to determine the manner in which the common purpose of the socialist revolution was implemented. This finding furthermore ignored evidence that these leading CPK officials formed alliances against Pol Pot and Nuon Chea and exploited their positions of authority to act contrary to and sabotage the intentions of the Standing Committee.[658]

238. The clearest, most direct evidence of how Pol Pot and Nuon Chea interacted with 'zone-based officials' such as Sao Phim and Ruos Nhim was given by Ieng Sary to Stephen Heder. Ieng Sary states:

> Even Pol Pot and Nuon Chea, when they were in SAO Phim's Zone, the East Zone, they were afraid of Ta Phim. I went with them once, and I knew that and saw that. That is, Pol Pot himself did not dare go down below: he was afraid of Ta Phim. So, in that Zone, if SAO Phim wanted to kill and wanted to do something, it was not necessary for him to ask upper echelon. The organization was like that; each Zone was independent, almost what would be called kill as you please, do as you please.[659]

Although the Defence relied on this evidence in its closing brief and twice in its final submissions,[660] and the Trial Chamber cited to Stephen Heder's interview notes with Ieng Sary 23 times,[661] frequently for inculpatory purposes in relation to highly disputed questions of fact,[662] the Trial Chamber failed to acknowledge that this evidence exists.

239. Ieng Sary's statement to Stephen Heder corroborates evidence, which the Chamber also chose to ignore, that zone armies led by members of the Standing Committee were themselves in conflict. The evidence is uncontroverted that a state of outright warfare existed within the Party which manifested through conflict between competing zone-based forces. Indeed, this is not simply Nuon Chea's contention but also that of the Closing Order, which assigns criminal liability to Nuon Chea for his

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[657] Judgment, para. 859.
[658] The relevant submissions before the Trial Chamber are at **E295/6/3**, Closing Brief, paras. 183-7 and in T. 22 Oct 2013 (Final Submissions Day 1, **E1/232.1**), pp. 23-25. The Defence incorporates those submissions by reference and summarizes key points in the body of the Appeal.
[659] **E3/89**, 'Interview Transcript of Stephen Heder with IENG Sary', 17 Dec 1996 ('Heder Interview with Ieng Sary'), ERN 00417608 (emphasis added). Ieng Sary similarly told Elizabeth Becker that a decision to divide people into categories was made by Ruos Nhim and Sao Phim independently, and only later acceded to by the Party Center. *See* **E3/94**, 'Interview of Ieng Sary' by Elizabeth Becker, 22 Jul 1981 ('Becker Interview with Ieng Sary'), ERN 00342504.
[660] **E295/6/3**, Closing Brief, para. 197; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), p. 66; T. 30 Oct 2013 (OCP Final Submissions Reply, **E1/236.1**), p. 60.
[661] Judgment, fns. 223, 226, 227, 235, 382, 420, 626, 672, 713, 772, 992, 1003, 1011, 1071, 1088, 1374, 1551, 1615, 1875, 2354, 2576, 2595, 2625.
[662] Judgment, fns. 382, 992,1003, 2576, 2595, 2625.

alleged complicity in purges in the East, Central and North Zones led by Ke Pauk with the support of cadres from the Southwest Zone.[663] This allegation alone is contrary to the Chamber's characterization of the CPK as a unified Party in which cadres at all levels implemented instructions conveyed downward from the Party center.

240. The evidence is furthermore clear that this internecine warfare was the direct consequence of factional divisions within the CPK, which were exploited by the Vietnamese communists as part of a long-term strategy to capture Cambodian territory. Cadres at the upper reaches of the CPK's military structure were plotting against Pol Pot from probably as early as May 1975 and were identified and arrested for treason beginning in 1976.[664] No dispute exists that by 1977, CPK officers who would shortly thereafter lead the Vietnamese occupation began openly defecting.[665] Heng Samrin's claim that planning to overthrow Pol Pot began within the East Zone military only in May 1978 – an article of faith at this Tribunal and in the history books – accordingly defies the evidence and common sense.

241. Opposition to Pol Pot and Nuon Chea came not only from pro-Vietnam factions in the East and Northwest Zones, but also from a substantial number of Party cadres loyal to Prince Sihanouk. While the Trial Chamber dismissed the GRUNK as a mere 'façade',[666] this finding reflects a gross misunderstanding of the reality within the Party. According to a report dated 16 January 1979 authored by Geng Biao, then Vice-Premier and Minister of Defence of China and Secretary-General of the Military Commission of the Chinese Communist Party, as of May 1975 the Party was divided in three factions: one loyal to Pol Pot, a second loyal to Vietnam, and a third consisting 'of the royal forces faithful to Sihanouk and old patriotic officers and men from Lon Nol's troops who turned against Lon Nol and joined the liberation war.'[667] Although Geng Biao's report is a publicly available document from the highest reaches of the government which was DK's primary patron, over the course of a three-year investigation it failed to come to the attention of the CIJs. This glaring oversight fed an ahistorical caricature, articulated by the CIJs and perfected by the Trial Chamber, of the CPK as a two-man monolith in which Party blocs, such as the one represented by the GRUNK, were written out of existence.

242. The Trial Chamber nevertheless consistently refused to hear witnesses most important to an understanding of the manner in which the so-called 'Party leadership' actually interacted with powerful officials in the national administrative structure. No witness would have been better placed to give this evidence than Heng Samrin, whose position in the East Zone military was at the intersection of the

[663] **D427**, Closing Order, paras. 192-203.
[664] **E295/6/3**, Closing Brief, para. 186.
[665] *See* **E3/3304**, 'Genocide and Democracy in Cambodia', ERN 00430242 (Hun Sen, Deputy Regimental Commander, chief of Special Regimental Staff, Defected Jun 1977; Chum Horl, Regimental Commander, Special Regiment, 'Defected 1977').
[666] Judgment, para. 100.
[667] **E307/5.2.1**, 'Geng Biao's Report on the Situation of the Indochinese Peninsula', 1979, ERN 01001622.

'Party leadership' and the direct perpetrators of the crimes charged in Case 002/01; who reported directly to Chan Chakrei, the East Zone division commander whose membership in the opposition faction extended to the beginning of the DK period; who admits to plotting against Pol Pot by 1978; who actively led troops supporting the Vietnamese invasion in December 1978; and who colluded in that regard with former CPK officials such as Hun Sen who defected as early as 1977.[668] The Chamber also refused to call numerous other witnesses who defected to Vietnam[669] and who had privileged access to information about the role of the Party center within the CPK administrative structure.[670] When Rob Lemkin volunteered having possession of evidence of how Ruos Nhim's 'agenda', and not the orders of the Party center, was responsible for crimes charged in Case 002/01, the Chamber failed to make any effort to contact him.[671] Thet Sambath has recently explained what the Chamber would have found had it done so: that cadres throughout the country – 'actually most of them' – secretly betrayed and opposed Pol Pot.[672] Evidence from the Case 004 investigation recently disclosed to the parties provides concrete proof that a competing faction of considerable strength led by Ruos Nhim existed within the Northwest Zone, confronted Southwest Zone troops throughout 1978 and conspired together with East Zone troops led by Heng Samrin.[673] This same evidence establishes that this faction likely existed as early as 1975 and was already planning its *armed* confrontation with Pol Pot at that time.[674]

243. These facts are corroborated by Vietnam's longstanding efforts to capture Cambodian territory and exert full control over Indochinese Communism. The Vietnamese stated this intention explicitly and consistently, before, during and after the CPK's armed struggle.[675] They were taken very seriously by Prince Sihanouk, who warned of Vietnam's coming efforts to 'subjugat[e]' Cambodia prior to 1970, and angrily denounced Vietnam's 'large-scale act of flagrant aggression' after 1979.[676] Sihanouk was joined in this regard by the Chinese, American and Australian governments, who described the Vietnamese invasion backed by the Soviet Union as a 'large-scale act of flagrant aggression' and a 'menace to peace'.[677]

244. The Chamber's failure to rely on any of this evidence was especially unreasonable because it

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[668] *See* paras. 62-64, *supra*.
[669] **E312**, Final Witness Decision, paras. 69, 124.
[670] **E228/2**, 'Motion in Support of IENG Sary's Request to Hear HOR Namhong and KEAT Chhon', 22 Oct 2012; **E228/4**, 'Reply to International Co-Prosecutor's Response to NUON Chea's Motion in Support of IENG Sary's Request to Hear HOR Namhong and KEAT Chhong', 23 Nov 2012; **E312**, Final Witness Decision, para. 124.
[671] *See* para. 83, *supra*.
[672] **F2/1**, Second Appeal Evidence Request, para. 6.
[673] [redacted].
[674] **F2/4**, Third Appeal Evidence Request, paras. 11, 19.
[675] **E3/9**, Short, *Pol Pot*, ERN 00396232 (Vietnamese treating Indochina as a 'single battlefield'), ERN 00396438-39 (Vietnamese still speaking of Indochinese federation in the early 1970s), ERN 00396571-72 (Vietnamese still speaking of the 'special relationship' with Laos and Cambodia in Dec 1976).
[676] **E3/9**, Short, *Pol Pot*, ERN 00396381.
[677] **E307/5.2.2**, 'Attachment 2: United Nations Security Council Official Records 2801th', 1979, 25 Mar 1982, paras. 18 and 88.

cited almost no evidence to the contrary. Indeed, the Chamber's finding that zone leaders had no role in Democratic Kampuchea beyond the faithful implementation of Party policy was articulated in a single paragraph which cited no evidence other than the CPK Statute.[678] While the Chamber claimed that these provisions of the CPK Statute were also 'demonstrated in reality,'[679] it substantiated this conclusion with yet another sequence of citations to the CPK Statute.[680] No reasonable trier of fact could have concluded that the organizational structure outlined in a constitutive document was sufficient to establish beyond a reasonable doubt that officials throughout the national administrative structure consistently implemented the orders of the Party Center through the entire DK period.

245. The Chamber's reliance on the CPK Statute was unreasonable not only because the document fails to capture the reality of power dynamics within the CPK, but also because it was adopted to constitute the CPK as *the Party Center* wanted and intended it to function. The Chamber's failure to consider whether this document was an appropriate basis on which to assess the extent to which other Standing Committee members and high-ranking cadres plotted secretly against Pol Pot demonstrates that it failed to understand the Defence's submissions or give them serious consideration. It also shows the Chamber's disinterest in, and total failure to understand, how events in DK actually unfolded.

ii – Cadres at all levels in the CPK structure had substantial autonomy and discretion

246. The Trial Chamber furthermore failed to acknowledge clear and uncontroverted evidence, also relied on at trial,[681] that cadres at all levels of the CPK structure had substantial freedom to make decisions relevant to all of the crimes charged in the Closing Order, including working hours, food distribution and the enforcement of discipline. This failure facilitated the Chamber's conclusion that the Party center intended the commission of crimes committed by lower-level cadres, and will be of considerable significance for the same reasons in Case 002/02.

247. Evidence relied on consistently by the Trial Chamber is uncontested that any killings which did occur were ordered overwhelmingly by cadres far below the Standing Committee. David Chandler and Stephen Heder both believe that most killings in Democratic Kampuchea occurred 'not as part of such a tight chain of command, but of a looser and more diffuse hierarchical structure'.[682] Heder testified that it was 'relatively rarely the case that [discipline] decision[s] went as high as the Zone Standing Committee'.[683] Although 196 security centers allegedly existed in Democratic Kampuchea, Nuon Chea

[678] Judgment, paras. 859-60.
[679] Judgment, para. 860.
[680] Judgment, fn. 2727 (citing paras. 202, 269 and 282), paras. 202 (citing the CPK Statute several times, together with other evidence intended only to establish the membership of the Central Committee over time), 269 (citing only the CPK Statute), 282 (citing one witness to prove that 'Central Zone authorities received telegrams from the Sectors approximately once a day').
[681] **E295/6/3**, Closing Brief, paras 199-202.
[682] T. 23 Jul 2012 (David Chandler, **E1/94.1**), pp. 64:10-25 (Chandler concurring with Heder's opinion).
[683] T. 11 Jul 2013 (Stephen Heder, **E1/222.1**), pp. 56:20-57:11.

is charged with criminal responsibility for acts committed at only 11 of them.[684]

248. Evidence relied on consistently by the Trial Chamber is similarly uncontroverted that conditions across Democratic Kampuchea varied considerably, even in neighboring districts and communes. François Ponchaud testified that evidence he collected from refugee accounts overwhelmingly concerned the Northwest Zone, which he later came to understand was not representative of conditions in the rest of the country.[685] Philip Short testified that CPK policy was implemented with considerable variations across the country.[686] Michael Vickery has documented these variations in detail, with evidence showing that dramatic differences existed at all levels of the CPK hierarchy.[687]

249. The Defence notes that most of this evidence concerns the implementation of CPK policy on the ground and was accordingly outside the scope of the trial.[688] In light of its decision to exclude these facts from testimony, the Trial Chamber erred in law in holding that CPK cadres acted within a 'strict hierarchical administrative structure' while failing to assess the extent to which that was 'demonstrated in reality'.[689] Had the Chamber done so, it would have been forced to conclude that lower level cadres routinely acted without clear instructions even from their direct superiors, and almost never from the Party center.

IX. ROLE OF NUON CHEA

250. The Trial Chamber erroneously ascribed to Nuon Chea a role in numerous areas of Party business which were beyond the purview of his ordinary functions. The Chamber's treatment of the evidence shows in each case that it confused the seniority of Nuon Chea's position in the Party with the nature and breadth of his tasks.[690] Nuon Chea has never denied his rank in the Party and admits that as Deputy Secretary he played a key role in formulating Party policy along with Pol Pot. Indeed, he acknowledges that he and Pol Pot 'didn't have any problems, not between 1975 and 1979 […] I can't think of a single argument'.[691] He openly admits to participating in the decision to evacuate Phnom Penh, which he has defended and justified.[692] However, it is *because* of his seniority, and not in spite of it, that Nuon Chea was not occupied with tasks such as the implementation of military policy or the discipline of cadres.

A. Ground 42: The Trial Chamber erred in fact in finding that Nuon Chea had a role in

[684] **E3/2763**, 'List of mass graves/Burial', 17 Feb 2008.
[685] T. 11 Apr 2013 (François Ponchaud, **E1/180.1**), pp. 18:23-19:01, 43:19-44:23.
[686] T. 7 May 2013 (Philip Short, **E1/190.1**), p. 84:5-7.
[687] **E3/1757**, Vickery, *Cambodia: 1975-1982*, ERN 00397003-00397063 (describing variations in a systematic, district by district analysis), 00397063-00397069 (summarizing conclusions).
[688] *See* paras. 213-214, *supra*.
[689] Judgment, paras. 859, 913.
[690] *See e.g.*, Judgment, para. 341 (finding that Nuon Chea had a considerable role in the military due to his 'very senior positions within the Party').
[691] **E3/4001R**, 'Enemies of the People', 1:03:58-1:04:24.
[692] Judgment, para. 133.

military policy and implementation

251. The Trial Chamber erred in fact in finding that Nuon Chea 'had considerable influence on DK military policy and its implementation'.[693] The Trial Chamber mischaracterized Nuon Chea's testimony regarding his alleged role in planning the 'final attack on Phnom Penh', all of which concerned the decision to evacuate Phnom Penh and other urban centers.[694] Nuon Chea has never admitted to having played any role in formulating 'military policy', and still less in implementing it, with regard to the liberation of the country.

252. The Chamber's other findings concerning Nuon Chea's supposed role in military policy are inconsistent with its own conclusion that he had considerable influence over military policy and implementation. The Chamber found that Nuon Chea received regular updates concerning the progress of the war with Vietnam along with all the other members of the Standing Committee,[695] yet found almost no evidence that he participated in any of these discussions, either by telegram or in person during meetings.[696] To the contrary, the only evidence of any input given by Nuon Chea concerning military affairs at any time was due to Pol Pot's absence from a single meeting of the Standing Committee, at which Nuon Chea insisted that Pol Pot's prior instructions concerning activities at the border be disseminated to cadres in the Northeast Zone.[697] The Chamber's only other evidence of Nuon Chea's supposed involvement in military affairs – that he was once instructed by the Central Committee to liaise with the Vietnamese concerning an arms shipment, that he ensured Prince Sihanouk's security during a visit to the liberated zones in 1973, and that he gave a speech in Pol Pot's absence to commemorate the founding of the RAK – only demonstrates how limited his role was.[698] No reasonable trier of fact could conclude that this amounted to 'considerable influence' in military 'policy and […] implementation'.

253. The Chamber also erred in failing to give fuller consideration to its own finding that Nuon Chea was not a member of the Military Committee. The Chamber concluded that the committee existed, and

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[693] Judgment, para. 341.
[694] *See* Judgment, fn. 1019. Some of the testimony cited in fn. 1019 does not concern the evacuation or the final assault on Phnom Penh and is entirely irrelevant. The only evidence cited in fn.1019 which even vaguely concerns Nuon Chea's alleged role in military policy with regard to the final assault on Phnom Penh is the testimony of Meas Voeun, who failed to confirm a statement in his WRI that Nuon Chea and Son Sen 'chaired' a meeting of military commanders. Meas Voeun explained that he was not present at the meeting and was merely informed of his orders concerning the attack on Phnom Penh from his superior officer. *See* T. 3 Oct 2013 (Meas Voeun, **E1/129.1**), p. 93.
[695] *See* Judgment, paras. 336-7 (describing Nuon Chea receiving updates at Standing Committee meeting minutes and in telegrams typically copied to the Standing Committee as a whole).
[696] *See* Judgment, paras. 336-8. *See also* T. 22 Oct 2013 (Final Submissions Day 1, **E1/232.1**), pp. 96-97 (describing evidence that Nuon Chea was not involved in meetings concerning military policy, including the testimony of Pol Pot's chief bodyguard Oeun Tan that Nuon Chea did not attend these meetings because he was 'attached to other section').
[697] Judgment, para. 336 (citing **E3/218**, Standing Committee Meeting Minutes, 26 Mar 1976, ERN 00182656).
[698] Judgment, paras. 335, 339. The Defence contests the Chamber's conclusion that Nuon Chea gave the speech concerned, but submits that the speech fails in any event to establish any substantive role in military policy. The Defence further notes that the Chamber held that Nuon Chea was involved in purges in the military. The Defence will address this finding *infra*, but further submits that it is irrelevant to Nuon Chea's purported role in 'military policy'.

accordingly found that a sub-group of the Standing Committee was appointed for the purpose of dealing with military affairs. Given that the Standing Committee was comprised of such a small group of the senior-most officials, the existence of a military sub-committee demonstrates that military policy was considered a specialized field in which seniority did not imply participation or expertise. The Chamber's failure to consider what the purpose was of the Military Committee if those outside of it retained a 'considerable' role in military affairs was unreasonable.

B. Ground 41: The Trial Chamber erred in fact in finding that Nuon Chea had a role in discipline and internal security

254. The Trial Chamber erred in fact in holding that Nuon Chea had responsibility for 'the discipline of cadres and other internal security matters.'[699] The Chamber relied on Nuon Chea's purported role in 'internal security and discipline' as part of its conclusion that he exercised effective control over all of the cadres responsible for crimes committed during the evacuation of Phnom Penh.[700] Accordingly, this error is subject to review.

255. The Trial Chamber's key witness, Saloth Ban, gave no evidence about either internal security or discipline. Instead, he testified that Nuon Chea was responsible for 'appointments'.[701] When asked whether this included a role in appointing cadres in charge of security, he testified that he did not know which kinds of appointments Nuon Chea was in charge of.[702] This latter point is significant because his testimony concerned the 'appointment' of top level officials within the Ministry of Foreign Affairs, which was one of the few structures in the CPK under the direct control of the 'Party Center'. Even on this narrow point, Saloth's testimony was contradictory: he first stated the he was 'not clear regarding this matter' before confirming his statement to the CIJs.[703]

256. The Chamber seriously mischaracterized the evidence of the second witness, telegram encoder Norng Sophang, who it claimed testified that 'matters concerning the internal security situation and the violation of moral codes [were] referred to NUON Chea because he was "in charge of the people"'.[704] Numerous errors and omissions are contained in this short sentence. Contrary to the highly misleading impression manufactured by the Judgment, Norng did not say in court that Nuon Chea was 'in charge of the people'. Instead, that phrase, which is contained in the WRI of his interview with the CIJs, was read to him by the Co-Prosecutors. In response, Norng stated: 'At that time I was not able to know this because Pon was the one who oversaw all of this'.[705] He then opined that one particular telegram concerning a cadre's 'immoral act with a woman' – about which he had no specific contemporaneous

[699] Judgment, para. 329.
[700] Judgment, para. 895.
[701] T. 23 Apr 2012 (Saloth Ban, **E1/66.1**), p. 70.
[702] T. 23 Apr 2012 (Saloth Ban, **E1/66.1**), p. 70.
[703] T. 23 Apr 2012 (Saloth Ban, **E1/66.1**), p. 69.
[704] Judgment, fn. 1005.
[705] T. 3 Sep 2012 (Norng Sophang, **E1/120.1**), pp. 27-28.

knowledge but which had been shown to him by the CIJs – might have been sent to Nuon Chea because 'he was in charge of social affairs and culture' and the message concerned 'the violation of moral code'.[706] Norng testified that during DK he never once saw any such telegrams.[707]

257. On the following day, Norng was pressed further about his statement to the CIJs (which he had already declined to confirm) that Nuon Chea was 'in charge of the people':

> Q: […] [Y]ou said that "Nuon Chea was in charge of the service relating to people", could you please explain to the Chamber exactly what you meant when you said he "was in charge of the sector relating to people"? What were, precisely, his responsibilities?
>
> A: It was a public announcement that Mr. Nuon Chea was attached the People's Representative Assembly and he was also the chairperson of that institution. So, as the people's representative, he shall know whatever matters that – relevant to the people, as he was representing them.[708]

Yet, the Trial Chamber described the People's Representative Assembly as a 'worthless' 'façade' lacking any actual authority.[709] Norng Sophang's statement to the CIJs that Nuon Chea was 'in charge of the people' because he led that institution is meaningless. This excerpt obliterates the probative value of Norng's testimony.

258. More fundamentally, it is apparent that Norng Sophang's testimony is nothing more than his description of what he heard about Nuon Chea's formal position in the CPK – that Nuon Chea was the Chairman of the PRA and the Party member in charge of 'social affairs and culture'.[710] In light of the Chamber's own finding that the CPK was 'shrouded in secrecy', this conclusion is far more grounded in reality than the Chamber's superficial finding that a telegram encoder was a reliable source on which to base an assessment of Nuon Chea's personal responsibilities. Norng's testimony accordingly has no bearing at all on Nuon Chea's supposed role in 'internal security' or 'discipline', and still less to do with the outlandish use to which this finding was put in the Judgment: that Nuon Chea had effective control over every single soldier who implemented the evacuation of Phnom Penh.[711]

259. The final witness cited by the Chamber was Duch, who testified repeatedly to having had no contemporaneous knowledge of the roles of the CPK senior leaders during the DK period and to having read secondary sources extensively.[712] The Chamber accordingly erred in relying on it.

C. Ground 43: The Trial Chamber erred in fact in characterizing Nuon Chea as the 'ultimate

[706] T. 3 Sep 2012 (Norng Sophang, **E1/120.1**), p. 28.
[707] T. 4 Sep 2012 (Norng Sophang, **E1/121.1**), pp. 57-58 (indicating that he has never seen any telegram concerning 'rape' other than the one shown to him in court).
[708] T. 4 Sep 2012 (Norng Sophang, **E1/121.1**), pp. 56-57.
[709] Judgment, paras. 233-4. The Defence notes for the record that the document which supposedly describes the PRA as 'worthless', and on which the Co-Prosecutors have relied repeatedly for that purpose, is wrongly translated and says no such thing. A more accurate translation is that cadres should not speak lightly of the PRA so that it is not *seen to be* worthless. As this issue has no material implications for the Judgment, the Defence has not appealed it.
[710] T. 3 Sep 2012 (Norng Sophang, **E1/120.1**), p. 28; Judgment, para. 232 (noting correctly that in Oct 1975, he was assigned responsibility for 'Party Affairs, Social Action, Culture and Propaganda').
[711] Judgment, para. 895.
[712] **E295/6/3**, Closing Brief, para. 120.

decision maker'

260. The Trial Chamber held that Nuon Chea 'enjoyed oversight of all Party activities' and 'exercised the ultimate decision-making power of the Party', including as to 'the administration of DK and to military matters'.[713] On this basis, the Chamber held that 'NUON Chea held and exercised the power to make and implement CPK policies and decisions.'[714]

261. This finding played a pivotal role in the Chamber's ultimate analysis of Nuon Chea's criminal liability. The Chamber repeatedly relied on this finding as proof that Nuon Chea planned, ordered, instigated and aided and abetted the crimes charged in the absence of any concrete evidence.[715] Indeed, the Chamber extended the notion that Nuon Chea 'exercised the ultimate decision-making authority of the Party' into a yet broader claim that Nuon Chea 'used this *de jure* and *de facto* authority to instruct lower-level Khmer Rouge cadres and soldiers to commit crimes'.[716] While the Defence will contest these conclusions within the context of each set of crimes charged,[717] close scrutiny of the Chamber's vague conclusion that Nuon Chea was the 'ultimate decision-maker' of the Party is of considerable importance.

262. This scrutiny reveals that the Chamber's finding is little more than a meaningless generalization bereft of substantive content. The Chamber's analysis consists of two paragraphs which notes Nuon Chea's 'seniority within the leadership' and reiterates its untenable findings concerning Nuon Chea's role in military affairs, internal security and discipline.[718] The only evidence comprises four excerpts from the testimony of experts David Chandler and Philip Short, a patently inappropriate use of expert testimony on a factual question of such central importance.[719]

263. This expert testimony in any event says little more than that Nuon Chea was a top-ranking cadre who worked together with Pol Pot to make important decisions on questions of Party policy. As said before Nuon Chea has never denied that he helped define the political and strategic lines of the Party and was responsible with Pol Pot for setting its political objectives. Necessarily this involved decisions which ran the gamut of Party policy. Thus, Nuon Chea participated in decisions to liberate the country, to evacuate Phnom Penh, to abolish money, to achieve three tons of rice per hectare, to defend the country against military threats, to establish cooperatives, to improve irrigation, to build dams. It does not follow – and it is not true – that Nuon Chea formulated military strategy or strategized agricultural policy. Consistent with the seniority of his rank and his role in articulating Party objectives, Nuon Chea

[713] Judgment, para. 348.
[714] Judgment, para. 348.
[715] Judgment, paras. 884, 887, 907-8, 923-4, 926.
[716] Judgment, paras. 884, 887, 896, 907-8, 923-4, 926.
[717] *See* paras. 643-651 (ordering), 654-660 (planning), 661-670 (instigating), 671-673 (aiding and abetting), *infra*.
[718] Judgment, para. 347.
[719] *See* paras. 263-264, *infra*.

devoted considerable time to disseminating political lines to Party cadres. His role in propaganda and Marxist-Leninist education is an acknowledgement of his rank, not an effort to diminish it. It means that he was responsible for policies and not for plans or implementation.[720]

264. The Chamber's erroneous decision to rely on so-called 'expert' testimony as the primary evidence to make such critical factual findings on which so many determinations of criminal liability turned was aggravated even further by its failure even to describe that evidence in full. In particular, Short's testimony that Nuon Chea was a key decision-maker within the Party – the primary evidence on which the Chamber relied – co-exists with his view that Nuon Chea had no role in military policy.[721] Why the Chamber found one opinion worth citing and not the other is a riddle left unsolved. One thing, however, is certain: given that the Chamber cited seven consecutive pages of Short's transcript while omitting a single page at exactly the halfway point[722] – the page on which Short states 'I don't think he had a military role' – it is clear the Chamber read that page and made a conscious decision not to mention it. Had the Chamber done otherwise, it would have had to acknowledge that this notion of 'ultimate decision-maker' – whatever it is that it means – has no concrete implications for the nature of Nuon Chea's tasks. Both Chandler and Short furthermore testified that they were unable to discern the precise nature of the relationship between Nuon Chea and Pol Pot. Chandler expressed the view that Nuon Chea 'deferred to' Pol Pot, who 'had the final word most of the time',[723] while according to Short, 'we don't know' the extent of Nuon Chea's role in the decisions of the Standing Committee.[724] The least the Chamber could have done in relying on evidence inappropriately was to rely on it honestly.

265. The Chamber's most poorly articulated and least justified finding was that Nuon Chea 'held and exercised the power to make *and implement* CPK policies and decisions.'[725] No part of the Chamber's analysis of Nuon Chea's CPK role supports this finding. Indeed, the only evidence on implementation was Philip Short's testimony (one page prior to the excerpt cited by the Chamber) that he could not speak to the extent to which the Standing Committee monitored and implemented its policies.[726] No explanation is forthcoming of what Nuon Chea's role in 'implementation' entailed.

D. Ground 44: The Trial Chamber erred in fact in finding that Nuon Chea was commonly known as Brother Number Two or was the Acting Prime Minister of DK

[720] The Defence notes that the notion that Nuon Chea was the 'chief ideologue' of the Party, a claim commonly made in the media, is baseless. Indeed, it is contrary to the Trial Chamber's findings concerning democratic centralism. There was no 'chief ideologue' in the CPK.
[721] T. 8 May 2013 (Philip Short, **E1/191.1**), p. 81.
[722] The Chamber cited Short's testimony between pages 78 and 84, omitting only page 81, where Short denied Nuon Chea's role in military affairs.
[723] T. 18 Jul 2012 (David Chandler, **E1/91.1**), p. 36; T. 6 May 2013 (Philip Short, **E1/189.1**), p. 78.
[724] T. 8 May 2013 (Philip Short, **E1/191.1**), p. 40.
[725] Judgment, para. 348 (emphasis added).
[726] T. 6 May 2013 (Philip Short, **E1/189.1**), p. 65.

266. The Trial Chamber found that 'several witnesses confirmed that' the alias 'Brother Number Two' was used to refer to Nuon Chea.[727] While Nuon Chea does not and has never disputed his role as the Deputy Secretary of the CPK and the second-ranking member of the Party,[728] this finding simply is not true. Nuon Chea has no incentive at all to deny it, it has no bearing whatsoever on his criminal liability – and indeed, for the purposes of this Appeal, the Defence readily concedes that this finding did not cause a miscarriage of justice. Yet it is important to emphasize it in any case because, like much else in the Judgment, this finding was both based on astonishingly thin evidence and entirely illogical. Two of the five witnesses the Chamber cited simply said nothing of any such alias,[729] whereas another two witnesses cited in support of this purely factual finding were François Ponchaud and David Chandler, whose opinions are obviously completely irrelevant. The two fact witnesses, Pech Chim and Phy Phuon, referred to Nuon Chea as second *Uncle* and *Om* number two, respectively. The Chamber apparently has no interest in the difference between 'brother', 'uncle' and 'om', despite the sharp distinctions between these terms in the Khmer language. The final witness, who was, unsurprisingly, Duch, merely said that Koy Thuon once referred to Nuon Chea as Brother Number Two, adding that Koy Thuon was 'the only person who told me' about this supposed alias.[730] The only other evidence was a single S-21 confession addressed to 'Brother N. 2', again, made by Duch.[731] This is a far cry from the Chamber's conclusion that the alias 'was […] used' to refer to Nuon Chea.[732]

267. The Defence further notes the Chamber's erroneous conclusion that Nuon Chea was the Acting Prime Minister.[733] This finding, which was supported almost exclusively by documentation from foreign governments,[734] is equally of no significance for criminal liability and Nuon Chea equally has no reason to deny it. However, it simply is not true. Both findings are subject to review based on this Chamber's *de novo* appellate jurisdiction over errors of fact.

X. ALLEGED CPK POLICY OF 'SMASHING ENEMIES'

A. Ground 26: The Trial Chamber erred in law and fact in finding that the CPK adopted a policy of 'smashing enemies' and defining the scope of such policy

268. The Trial Chamber held that the CPK adopted a policy of 're-education of "bad elements" and "smashing" those who had been found to be enemies.'[735] The Chamber held that this policy was implemented at security centers, where those 'who were perceived as enemies, were interrogated and

[727] Judgment, para. 312.
[728] **E295/6/3**, Closing Brief, para. 9; T. 22 Oct 2013 (Final Submissions Day 1, **E1/232.1**), pp. 13, 83.
[729] Judgment, fn. 962 (citing T. 31 Jul 2012 (Rochoem Ton, **E1/99.1**), pp. 37-38 (describing Nuon Chea as Om Number Two), T. 1 Jul 2013 (Pech Chim, **E1/215.1**), pp. 72-75 (describing Nuon Chea as the second 'uncle').
[730] T. 5 Apr 2012 (Kaing Guek Eav alias Duch, **E1/60.1**), p. 118.
[731] Judgment, fn. 964.
[732] Judgment, para. 312.
[733] Judgment, paras. 321-3.
[734] Judgment, fns. 989-990, 993.
[735] Judgment, para. 117.

smashed.'[736] Smashing enemies meant executing them.[737] The Trial Chamber also made findings concerning the identity of those considered 'enemies'. The Chamber held that during the civil war, spies, CIA, KGB and the Vietnamese were the key enemies.[738] The Chamber held that from before 1975, Khmer Republic soldiers and officials became the 'key enemies'.[739] The Chamber furthermore found that '[t]he way in which "enemy" was defined was tactical, remaining vague enough to allow various interpretations and to create an uncertain atmosphere.'[740] The Chamber held that this policy of 'smashing enemies' existed from at least 1970 and continued 'throughout the DK era'.[741]

269. Given the manner in which Case 002 was severed, the implementation of this policy was outside the scope of the trial. However, both its alleged existence and certain aspects of its implementation were of great significance to the Chamber's findings in relation to crimes charged in Case 002/01. In particular, the supposed status of Khmer Republic soldiers and officials as 'key' enemies figured prominently in the Chamber's (otherwise cursory) analysis of the CPK's supposed policy of targeting those officials and its conclusion that this policy involved the commission of crimes at Tuol Po Chrey.[742] Indeed, the Co-Prosecutors described as the 'principal basis' of Nuon Chea's liability for crimes committed at Tuol Po Chrey his alleged 'participation in a broad joint criminal enterprise […] that sought to identify or eliminate persons who were class enemies or politically opposed to the CPK.'[743] These findings are furthermore critical to Case 002/02, the scope of which includes charges involving security centers, genocide, and cooperatives and worksites. Errors of law and fact in this regard are accordingly subject to appellate review.

i – Errors concerning the finding that CPK policy involved 'smashing' of 'enemies'

270. Like the CIJs and the Co-Prosecutors, the Trial Chamber somehow continues to maintain that the CPK had a policy of 'smashing enemies' while finding at the same time that the overwhelming majority of so-called 'enemies' were never smashed. The breadth of people described as enemies throughout the Judgment is staggering. It includes imperialists, feudalists, capitalists, intellectuals, the petty bourgeoisie, Khmer Republic soldiers, Khmer Republic officials, every person living in a city as of 17 April 1975, spies and the Vietnamese.[744] In most of these cases, it is simply uncontested that individuals belonging to these groups were not executed or even targeted for execution.[745]

[736] Judgment, para. 117.
[737] Judgment, para. 117. The Chamber held that smashing did not mean merely to kill but it held that killing was always involved. See *also*, Judgment, para. 118 (holding that 'enemies' were 'killed').
[738] Judgment, para. 118.
[739] Judgment, para. 118.
[740] Judgment, para. 117,
[741] Judgment, para. 118.
[742] Judgment, paras. 815, 818, 835.
[743] T. 30 Oct 2013 (OCP Final Submissions Response, **E1/236.1**), p. 101.
[744] Judgment, paras. 118, 169, 613, 616, 726.
[745] *See* paras. 372-381, 341-344 (re New People, intellectuals, petty bourgeoisie).

271. One key reason why the Chamber erroneously found that the CPK adopted a policy of 'smashing enemies' is that it wrongly assumed that each use of the word 'enemy' by the CPK connotes the intent to commit criminal acts. Every state has enemies, warns its citizens that those enemies are dangerous, and uses its monopoly of force, including to cause death, against these enemies. Even the United States – a rich, secure country facing no significant military threat – routinely threatens imagined 'enemies'. Most striking is the numerous ways in which those threats resonate with CPK publications: in characterizing enemies as relentless and determined, in describing the struggle against those enemies as ongoing and indefinite, in stating in no uncertain terms that enemies will be killed where necessary, and then sometimes following through on those promises with the use of violence. Speaking of the 'war on the terror', President George W. Bush warned Americans that 'our enemies are innovative and resourceful [and] never stop thinking about new ways to harm our country and our people.'[746] This enemy 'is never tired, never sated, never content with yesterday's brutality'[747] and is 'patient and determined to strike again.'[748] Americans were engaged in the struggle of their 'generation […] in a long war against a determined enemy.'[749] Security dictated that 'we cannot let our enemies strike first'[750]and 'will accept no outcome except complete victory.'[751] Bush reportedly warned French President Jacques Chirac that the war against terror was a confrontation 'willed by God who wants this conflict to erase his people's enemies before a new age begins.'[752]

272. While the Americans have made good on these threats in specific ways, this fact does not amount to a generalized policy of executing every possible radical Muslim. A recent report by human rights group Reprieve shows that 41 men targeted for execution without trial in 'targeted' drone strikes outside the framework of a military conflict caused 1,147 admittedly innocent deaths.[753] Countless supposed 'enemies' were (and continue to be) unlawfully detained and tortured without trial at prisons around the world under the guise of the extraordinary rendition program operated by the CIA.[754] Whatever the legality of this conduct (which the Americans continue to assert[755]), allegations of criminal conduct would require evidence of specified illegal acts – not broad inferences based on political exhortations in favor of security and national defence, no matter how vigorous.

273. This small handful of examples demonstrates that, contrary to the impression manufactured by

[746] 'Bush's Campaign Trail Gaffe', *The Guardian*, 6 Aug 2004.
[747] Simon Seerfaty, 'Which Past War is Iraq', *The Washington Post*, 29 Aug 2007.
[748] 'President Bush's Last Televised Address', *The Caucas*, 15 Jan 2009; David Jackson, 'Bush warns of U.S. enemies in farewell address', *USA Today*, 16 Jan 2009.
[749] Tom Hayden, 'The Long War Quagmire', *Los Angeles Times*, 28 Mar 2010.
[750] 'Bush outlines strategy of pre-emptive strikes, cooperation', *USA Today*, 3 Mar 2005.
[751] 'Bush Declares War', *CNN*, 20 Mar 2003.
[752] Mitch Potter, 'Was Bush on a Mission from God?', *Toronto Star*, 29 May 2009.
[753] Reprieve, *You Never Die Twice: Multiple Kills in the US Drone Program* (2014), pp. 4.6.
[754] David Leppard, 'Inquiry into MI5 Torture and Rendition', *The Sunday Times*, 1 Mar 2009.
[755] 'Lawfulness of Lethal Operations Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force' (United States Department of Justice White Paper, 2012).

the Judgment, 'enemies' language is common, pervasive and remains in use today by regimes of different political inclinations, including democracies. Yet, crimes require proof of *acts*, not words. In this case, however, the evidence of acts is so limited and so inconsistent that the notion of a 'policy of smashing enemies' is rendered entirely meaningless. Certainly, the evidence does not justify broad attributions of criminal liability, even though this was precisely the way in which this 'policy' was employed in the Judgment.[756]

274. One pointed way to illustrate the ambiguities in the evidence is by reference to an excerpt from Duch's testimony in Case 001 concerning the treatment of Khmer Republic soldiers. The Co-Prosecutors argued and the Trial Chamber found that Khmer Republic soldiers were not merely 'enemies', but the CPK's '*key* enemies' starting before 1975.[757] According to the Co-Prosecutors, Duch was a key figure in the CPK's implementation of the enemies policy: the chairman of the most important security center in the country who, they claim, reported directly to Son Sen and later Nuon Chea. In Case 001, Duch's testimony about the CPK's 'key enemies' was that they were divided into three groups: some were killed, some were 'detained in the re-education camp', and some were 'regarded as the new people' – in other words, on par with well over a third of the country as of 17 April 1975.[758] If Duch himself testified that the most important enemies were subject to treatment ranging from killing to detention to nothing, what remains of the CPK 'policy' of 'smashing' enemies? Which 'enemies' were smashed, and why? Who decided?

275. The evidence does not resolve any of these ambiguities. On the contrary, these ambiguities are actually highlighted in the one issue of *Revolutionary Flag*, dated September 1977, handpicked by the Chamber to demonstrate that a policy to smash enemies existed. According to this document:

> We divided our enemies into three groups: First, to win over those enemies who could be won over in some circumstances. Second, to neutralize those who could be neutralized, so they could not carry out actions against us. Third, to isolate the most vicious, in order to attack them. We differentiated our enemies and, in certain circumstances, were able to make use of their internal contradictions.[759]

The Defence notes that this passage relates to the period prior to April 1975. Accordingly, it proves that a Communist party in the midst of an armed struggle recognized it had enemies. It further proves that the Party sought to treat those enemies judiciously, winning over some, neutralizing others, and attacking 'the most vicious'. It affirmatively proves that a 'policy' of smashing 'enemies' *did not exist*.

276. The expert evidence in this respect is similar. According to the Chamber, Philip Short testified

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[756] *See* Judgment, para. 815; *see also*, paras. 549-556, *infra*; T. 30 Oct 2013 (OCP Final Submissions Reply, **E1/236.1**), p. 102.
[757] Judgment, para. 118.
[758] T. 30 Oct 2013 (OCP Final Submissions Response, **E1/236.1**), p. 84; T. 18 May 2009 (Kaing Guek Eav alias Duch, **E3/345**), pp. 9-10.
[759] **E3/11**, 'Revolutionary Flag', Sep 1977, ERN 00486235.

that all urban deportees were enemies.[760] This characterization of 'urban evacuees' as enemies is itself absurd and directly contrary to all of the evidence, as the Defence demonstrates in further detail, *infra*.[761] However, more relevant to this discussion of the supposed policy of 'smashing' enemies, it is uncontested and obviously true that the CPK did not have a policy of 'smashing' urban evacuees. Even Philip Short would surely agree. However, in the exact same footnote, the Chamber also relied on Duch's testimony that 'whenever the Party regarded someone as an enemy we had to smash him or her […] When the Party determined a person as an enemy, we had nothing but to smash that enemy for the Party.'[762] Duch's testimony that 'enemies' were invariably smashed directly contradicts Short's testimony that all urban evacuees – whom no one alleges were targeted for execution – were enemies. Yet, the Chamber cited both witnesses in the same footnote in support of the same finding that the same completely unspecified 'policy' of 'smashing enemies' existed.

277. These contradictions demonstrate that the 'policy' of 'smashing enemies' is a chimera: an artificial construct employed by the Chamber to distort, mischaracterize and misrepresent a simple policy of national defence adopted by a revolutionary state under siege from actual (and not imagined) enemies. It is no more accurate or meaningful than a claim that the United States has a 'policy' of killing radical Muslims. As Duch's testimony in Case 001 concerning the CPK's treatment of Khmer Republic soldiers forcefully demonstrates, the putative policy of smashing enemies has no direct link to any concrete acts, still less to any criminal conduct.

278. However, the findings in the Judgment about the CPK's actual treatment of enemies is strikingly limited, precisely because the implementation of this 'policy' was outside the scope of Case 002/01 and was therefore *never subject to cross-examination*. The Judgment accordingly makes only four findings concerning the concrete manifestations of this 'policy'. None of these findings elucidate the 'policy' in any way. One example was that the M-13 security center existed, which Duch testified held 200 people over its five year existence during a civil war, many of whom were released.[763] A second was that the Kraing Ta Chan security center existed, another security center about which the Chamber heard no evidence and made no findings.[764] A third was that a single person, Prasith, was executed in 1974 by Ta Mok, an allegation beyond the scope of the Closing Order and supported by reference only to Short's expert testimony.[765] All of these facts prove exactly nothing about the CPK's 'policy' of 'smashing' 'enemies'.

279. The fourth concrete example, the alleged killing of former CPK cadres following their return

[760] Judgment, fn. 334 (citing Philip Short's testimony).
[761] *See* paras. 384-399, *supra*.
[762] Judgment, fn. 334 (citing Duch's testimony).
[763] T. 19 Mar 2012 (Kaing Guek Eav alias Duch, **E1/50.1**), pp. 49-53.
[764] Judgment, para. 117.
[765] Judgment, para. 118.

from Hanoi in 1972 or 1973,[766] was an unreasonable and illogical finding. The same evidence on which the Chamber relied to find that the returnees were killed asserts that in this same time period, Vietnamese soldiers who had previously been integrated into CPNLAF units were expelled from Cambodia.[767] The Closing Order similarly alleges that in this same period, Vietnamese residents in Cambodia were systematically expelled from the country.[768] The Trial Chamber accordingly inferred that the CPK engaged in a concerted effort to recall hundreds or even thousands of Khmer citizens from Vietnam whom they regarded as enemies merely for the purpose of killing them while they simultaneously negotiated fiercely for, and achieved, the expulsion of all Vietnamese military and civilian personnel who were already on Cambodian territory. In light of this contradiction, the irrelevance of the evidence relied on by the Chamber is particularly apparent: it does assert not returnees were killed, but that they were 'arrested',[769] 'disappeared'[770] or 'expelled'.[771] Yet, even these supposed arrests and disappearances were not proven by any eyewitness testimony or by the evidence of any significant CPK official.[772] One anonymous interviewee relied on by the Chamber was described simply as 'man from tambon 13, Takeo in the southwest, presumably party person'.[773] Stephen Heder, the interviewer, believed he had a 'vague recollection of the guy's appearance but I couldn't tell you any more'.[774]

280. Only a minor adjustment to the Chamber's finding is required to rectify it: the CPK identified *certain* people as enemies, *some of whom* were killed. Indeed, Nuon Chea admits to having been aware of and agreeing with (although not specifically responsible for) the decision to kill numerous key enemies. These include, for instance, the seven supertraitors,[775] Ruos Nhim and Koy Thuon.[776] For both the Co-Prosecutors and, in its zeal to convict, the Trial Chamber, this is dangerous territory: in the context of Case 002/01, any refinement of the definition of the policy to 'smash' 'enemies' brings the questions which determine Nuon Chea's criminal liability within the scope of its implementation, and

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[766] Judgment, para. 118.
[767] **E3/1714**, Heder Refugee Interviews, ERN 00170725 ('Then in Apr 1972 our army started to drive them out in cases where they didn't respect our state power. In some places there was heavy fighting, in others the Vietnamese just withdrew'), 00170726 ('After the fighting in Apr 1972, the Vietnamese were gone from half of our zone but they remained in the frontier areas. It was only in the end of 1973 that they left from the frontier areas. They were completely gone, they were not left on Cambodian territory').
[768] **D427**, Closing Order, paras. 794-6.
[769] T. 22 Apr 2013 (Chhouk Rin, **E1/181.1**), pp. 82-84.
[770] T. 19 Jun 2013 (Nou Mao, **E1/209.1**), p. 32.
[771] **E3/1714**, Heder Refugee Interviews, ERN 00170725.
[772] The Defence notes that the Chamber misrepresented the evidence of Nou Mao, who did not testify that Ta Mok told him about the returnees. The same is true of Chhouk Rin: *see* fn. 340. The Defence notes that the Chamber also cited the testimony of David Chandler and the opinion of Ben Kiernan, both of which are irrelevant to this narrow question of fact. *See* paras. 207-211, *supra*.
[773] **E3/1714**, Heder Refugee Interviews, ERN 00170723.
[774] T. 10 Jul 2013 (Stephen Heder, **E1/221.1**), p. 107.
[775] **E186.1R**, 'One Day at Po Chrey', 22:06-22:25 ('Q: Uncle, what were the political orders for the top four or five leaders [of the previous regime]? A: They were to be liquidated. They deserved the severest penalty. They'd betrayed the nation to foreigners').
[776] **E295/6/3**, Closing Brief, para. 180; T. 22 Oct 2013 (Final Submissions Day 1, **E1/232.1**), p. 28.

hence outside the scope of the trial.

ii – Errors concerning the definition of 'enemy'

281. The Trial Chamber erred in fact in finding that the way in which enemy was defined was 'tactical, remaining vague enough to allow various interpretations to create an uncertain atmosphere.'[777] This finding is unsupported by the evidence and completely illogical. The only proper evidence upon which the Chamber was relied in reaching this conclusion was the same September 1977 issue of *Revolutionary Flag* which constituted its only contemporaneous evidence of the so-called enemies policy. Once again, this document directly contradicts the Chamber's finding. As already noted, the document does not describe shifting definitions of 'enemy' but rather states that those identified as 'enemies' in the midst of a civil war were treated in varying ways depending on the circumstances.[778] Apart from being both legal and sensible, the real content of the document inverts the Chamber's finding: the CPK did not indiscriminately identify people as enemies who were thereby marked for death, but identified legitimate enemies whom it confronted as the circumstances required.

282. This finding is furthermore both illogical and inconsistent with other findings in the Judgment. The Chamber did not find that the CPK sought to marginalize, persecute or terrorize the general Cambodian population but to achieve a socialist revolution among that population.[779] That revolution involved *collective* agricultural work toward the goal of building the country. According to the Chamber, the purpose of the supposed enemies policy was to defend that very revolution.[780] A policy of deliberately 'creat[ing] an uncertain atmosphere'[781] by making it difficult to discern what constitutes prohibited conduct accordingly has no logical connection to any alleged CPK objective. Furthermore, to the extent this finding suggests that the CPK allowed cadres to identify the enemies of the Party on their own, it is also inconsistent with the Chamber's own characterization of the CPK as 'strictly hierarchical'.[782]

283. The Chamber further erred in fact in finding that 'starting before 1975, former soldiers and officers of the LON Nol regime were also identified as the key enemies.'[783] The absurdity of this finding is in its own words: 'before 1975', soldiers and officers were not 'former' members of the LON Nol regime, they were current members of the LON Nol regime. They were the army the CPK was fighting. Hence the rather unsurprising testimony of Pean Khean that during the final assault on Phnom

[777] Judgment, para. 117.
[778] *See* para. 275, *supra*.
[779] Judgment, para. 777.
[780] Judgment, para. 777.
[781] Judgment, para. 117.
[782] *See* paras. 225-226, *infra*.
[783] Judgment, para. 118.

Penh, Khmer Republic soldiers were described as 'enemies'.[784] The only other evidence in this regard was given by Duch, who ran a security center at which a maximum of 2% of detainees were Khmer Republic soldiers and officials, including almost none prior to March 1976.[785] The Chamber's reliance on both of these witnesses was unreasonable.[786]

XI. MURDER AND EXTERMINATION DURING POPULATION MOVEMENTS

284. The Trial Chamber made numerous findings that CPK forces[787] were legally responsible for deaths that occurred during both the Phase I and Phase II population movements. These included willful killings of both civilians and soldiers and deaths due to conditions allegedly imposed during the two population movements. The Chamber held that each death allegedly caused during the evacuation of Phnom Penh constituted murder and that the overall death toll during both population movements amounted to extermination.

285. All of these findings were clearly erroneous. Notwithstanding the fact that *dozens* of witnesses and civil parties testified live before the Chamber concerning the two population movements, and *hundreds* more out-of-court statements are in evidence, the number of people who described seeing any deaths was very limited and the quality of their evidence strikingly poor. Not one person gave evidence sufficient for any reasonable trier of fact to conclude beyond reasonable doubt that even a single death occurred and was unlawfully caused by CPK forces. Every finding that murder was committed during the Phase I movement accordingly constituted an error of fact leading to a miscarriage of justice.

286. It follows further that no evidence exists on which a reasonable trier of fact could have concluded that death occurred 'on a massive scale' as required for extermination. No clear evidence exists of how many people died during either population movement, and none that any such deaths were the *consequence* of either movement. Extermination is furthermore not merely the act of causing death on a massive scale, but of doing so intentionally or by imposing conditions of life *calculated* to cause death as part of a *vast murderous enterprise*. Accordingly, the Chamber erred in law in applying an erroneous definition of extermination, and in fact in finding that extermination was committed.

A. Grounds 48-97: The Trial Chamber erred in law and fact in finding that murder was committed during the Phase I movement through the willful killings of civilians

287. The Trial Chamber held as follows:

> [N]umerous victims who refused to leave their homes in Phnom Penh, as well as those who did not

[784] Judgment, fn. 336 (citing testimony of Pean Khean).
[785] T. 8 Jul 2013 (Document Presentation Response, **E1/219.1**), pp. 67-68; T. 24 October 2013 (Final Submissions Day 2, **E1/233.1**), pp. 43-44; **E295/6/3**, Closing Brief, paras. 398-399.
[786] *See* **E295/6/3**, Closing Brief, para. 120 (Duch admitted that he was 'confined to' S-21, and accordingly the Chamber may not rely on testimony which does not concern it).
[787] The Defence uses the phrase 'CPK forces' here because it refers to both CPNLAF forces who implemented the evacuation of Phnom Penh and those forces which implemented the Phase II movement.

> immediately follow the instructions of Khmer Rouge soldiers during the march out of the city were shot and killed on the spot. There was also substantial evidence of the individual killing of victims both in Phnom Penh and during the course of the evacuation for no discernible reason.[788]

The Chamber found that each one of these alleged killings constituted murder.[789]

288. The Trial Chamber cited evidence of 48 instances of willful killings during the evacuation of Phnom Penh. Of these, ten accounts were given as live testimony at trial, five were given as interviews to the CIJs, and 33 constitute either civil party applications, victim complaints or statements recorded independently of the ECCC framework.

289. The Trial Chamber's analysis ought to have first placed live testimony under close scrutiny to determine whether that evidence was sufficiently clear, detailed and reliable to establish beyond a reasonable doubt that the specific killings concerned occurred.[790] If so, the Chamber should then have successively considered WRIs produced by the CIJs, civil party applications and victim complaints, and other statements. This evidence should have been assessed in light of the circumstances under which it was gathered, the level of detail it provided about each alleged incident, and the extent to which it echoed the evidence given live before the Chamber.[791] The Defence submits that the Trial Chamber's cavalier treatment of the evidence shows that it did none of this.

290. In particular, the Trial Chamber's failure to consider the weakness in the evidence of willful killings in the live testimony it cited was fatal to its overall analysis of such killings during the evacuation. Although the Chamber nominally identified ten relevant live witnesses, it carefully avoided detailed discussion of even a single one, preferring instead to make findings of murder beyond a reasonable doubt in a few words,[792] or otherwise, as a series of citations in a footnote without reference even to names of witnesses in the body of the Judgment.[793] The *most* attention devoted to any one finding of murder during the evacuation was one single sentence.[794]

291. While a trial chamber is not required to articulate the basis of its assessment of each and every piece of evidence, the live testimony relied upon in this instance is so weak that the only reasonable conclusion is that Trial Chamber must have failed to assess it at all, or otherwise erred in fact in doing so. Of the ten live witnesses relied upon, three gave victim impact testimony which may not be used to prove the truth of its contents,[795] three gave anonymous hearsay evidence from an unknown source[796]

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[788] Judgment, para. 553.
[789] Judgment, paras. 553, 559.
[790] *See* paras. 175, 181, 183 (witnesses), 187-192, 201-205 (civil parties), *supra*.
[791] *See* paras. 33, 164-165, *supra*.
[792] Judgment, para. 490 ('victims including a famous film actor').
[793] Judgment, fns. 1402, 1404, 1462.
[794] Judgment, para. 490 (noting three alleged instances of murder in one sentence each).
[795] Judgment, para. 490 (citing testimony of Chheng Eng Ly, Thouch Phandarasar and Yos Phal).
[796] Judgment, paras. 474 (citing testimony of Pin Yathay), 486 (citing testimony of Lay Bony), 490 (citing testimony of Sydney Schanberg).

and two more gave hearsay evidence without explaining the sources of knowledge of the supposed eyewitness.[797] Seven of the witnesses did not know the alleged victim(s)[798] and none were involved in any way in the incident in which the killing allegedly occurred. Of the three remaining witnesses, two gave so little detail concerning the circumstances of the alleged killing that it is impossible even to determine if the killings were unlawful.[799] Indeed, the Chamber cited only one eyewitness account of a civilian killing given live at trial which contains any detail. Tellingly, this testimony describes civilians killed not for refusing to evacuate, but for trying to 'loot' Phnom Penh's rice supplies.[800]

292. Despite making reference to none of these weaknesses in the evidence, the Trial Chamber used this testimony as the foundation on which to bring dozens of out-of-court statements of alleged killings into evidence.[801] Even then, only five of these out-of-court statements were WRIs generated by the CIJs – of which only two purport to be eyewitness accounts.[802] Accordingly, the proof that civilians were murdered during the evacuation consists overwhelmingly of civil party applications and victim complaints: unauthenticated documents created by unexamined parties with an interest in the proceedings and without any verification or oversight by the CIJs or Co-Prosecutors, let alone the Defence. These documents provide even less information than the live testimony before the Chamber about the killings they purport to describe. They are almost all identified as a single reference in a string citation in the footnotes without any discussion or analysis in the Judgment.

293. It is essential to recall that each one of these references in each one of these footnotes amounts to a conviction for murder. These murder convictions are based on no physical evidence, no dead bodies and in almost all cases, no names or identifying information of any alleged victims. In each case, the *entire* basis for the conviction was the 'evidence' of one single individual. A conviction under these circumstances demands compelling evidence subject to thorough cross-examination considered in detail by the Chamber.

294. The Defence notes that the question for the Trial Chamber was not merely whether each killing *occurred* but whether it was *unlawful*. The evacuation of Phnom Penh began hours after the nominal end of hostilities in a vicious seven-year civil war.[803] The Chamber itself found that combat continued in Phnom Penh for at least several days after 17 April 1975.[804] Any one killing could very likely have been legally justified by military necessity. Any one killing could very likely have been committed by soldiers acting without the requisite *mens rea*. Not a *single* alleged killing is proven with sufficient

[797] Judgment, para. 474 (citing testimony of Denise Affonço and Sum Chea).
[798] The one exception is Denise Affonço. *See* para. 297, *infra*.
[799] Judgment, para. 490 (citing testimony of Yim Sovann and Morm Sam Oeun). *See* para. 311, *infra*.
[800] Judgment, fn. 1462 (citing testimony of Chum Sokha).
[801] *See* para. 288, *supra*.
[802] *See* paras. 302-304, *infra*.
[803] Judgment, para. 464.
[804] Judgment, para. 554.

detail for any reasonable trier of fact to have made any of these assessments.

295. The Defence will analyze the Trial Chamber's murder convictions in two stages: (i) killings allegedly due to a failure to follow the orders of the CPNLAF forces and (ii) killings allegedly for any other reason.[805] No reasonable trier of fact could have concluded that any of these murders were proven beyond reasonable doubt. These errors accordingly caused a miscarriage of justice.

i – Alleged killings for failing to obey orders

Live evidence given at trial

296. Although the evacuation of Phnom Penh was the overwhelming focus of the crime base evidence given at trial – 19 witnesses and civil parties appeared specifically for that purpose[806] – the Trial Chamber failed to identify *a single person* who described seeing a *single killing* first-hand. Instead, the Trial Chamber identified three civil parties and one witness, each of whom claimed to have known of or heard about one person (or in one case, one small group of people) allegedly killed for refusing to obey an order of CPK forces. As discussed in detail above, each one of these four individuals, whose extraordinarily weak hearsay testimony constitutes the only evidence *of any kind* that a murder was committed, was given nearly forty years after the events took place, speaking about one of the most widely publicized events in recent Cambodian history, almost immediately after reviewing an out of court statement produced without any input or participation of defence counsel.[807] Even under these conditions, these three civil parties and one witness said almost nothing of relevance to the charges.

297. The first cite was to civil party Denise Affonço, who also testified against Pol Pot and Ieng Sary at the 1979 show trial. Although the Trial Chamber held simply that Affonço 'described how a school friend of hers who stayed to wait for her husband was killed on the spot',[808] in fact she did not describe seeing any such killings.[809] Instead, she testified that she heard later from her friend's siblings that her friend had been killed. Not only was Affonço not an eyewitness, she did not say if her friend's siblings had been eyewitnesses, how they knew their sister was killed by CPNLAF forces, or, if she was killed by CPNLAF forces, why they had killed her. No party asked any follow-up questions, and no further details concerning this alleged killing were put before the Chamber.

298. The Trial Chamber's treatment of the second witness, civil party Pin Yathay, who only gave victim impact testimony, was similar. According to the Trial Chamber, Pin 'recounted how a soldier

[805] As the Defence establishes in section XIX(B), *infra*, any killings which did occur are not imputable to Nuon Chea. The Defence divides the Chamber's findings in these two categories because this conclusion is particularly clear with regard to killings which the Trial Chamber held did not serve any apparent purpose connected with the evacuation.
[806] **E312.1**, 'Annex I: Individuals heard over the course of trial in Case 002/01', 7 Aug 2014. 2. Some of the witnesses heard under the Population Movement heading spoke only about Phase II or about evacuations elsewhere in the country in Apr 1975, and are accordingly excluded from this total number.
[807] *See* paras. 170-171, *supra*.
[808] Judgment, para. 474.
[809] T. 12 Dec 2012 (Denise Affonço, **E1/152.1**), p. 71:17-19.

had shot a boy who had sought to return home to collect something, stating "this is what happens to recalcitrants"'.[810] Contrary to this matter-of-fact account, Pin gave multi-layered hearsay testimony rife with ambiguity. Indeed, Pin 'recounted' nothing at all: he was merely read an excerpt from his book, asked whether it was correct, and replied, 'Yes, it is.'[811] According to that excerpt, Pin heard a gunshot, after which he saw a soldier holding an AK47 and a dead body 'up the street'. In the ensuing chaos, 'everyone around asked each other what had happened'. Soon after, 'word reached us' – from a source which Pin himself clearly could not identify – that a CPNLAF soldier had shot the victim for turning back to his house in defiance of an order.

299. The third witness was Sum Chea,[812] a CPK soldier who stated that he never witnessed a single killing of a single civilian.[813] Sum testified that a battalion commander named 'Bong Hak' told him that 'one or two' civilians were killed by soldiers in other units.[814] Sum believed that the 'harshest' treatment was by East Zone soldiers, which guarded a different section of the city and would not have interacted with soldiers in Sum's unit.[815] The Chamber's reliance on this evidence was accordingly yet another reason why cross-examination of Heng Samrin – the senior living East Zone officer to have participated in the evacuation – was essential to Nuon Chea's defence.[816] Despite giving substantial emphasis to this lone account of civilian casualties, the Chamber neglected to cite the evidence of numerous other CPNLAF soldiers that no civilians were killed during the evacuation.[817]

300. Most alarming is the Trial Chamber's reliance on the testimony of civil party Lay Bony as the sole evidence to establish that 'those who persisted in trying to return to Phnom Penh were shot.'[818] Lay Bony gave double hearsay evidence from an anonymous original source that dead bodies she saw along the side of the road were of people who had wanted to turn back to Phnom Penh.[819] There is no evidence of the identity of Lay Bony's source, the basis for her source's conclusion that people were

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[810] Judgment, para. 474.
[811] T. 7 Feb 2013 (Pin Yathay, **E1/170.1**), p. 51:20-21.
[812] Judgment, para. 474.
[813] T. 5 Nov 2012 (Sum Chea, **E1/140.1**), p. 24:18-22.
[814] The Defence submits that the English language translation of Sum's testimony is incorrect, and accordingly refers the Supreme Court Chamber to the original Khmer language transcript. According to Sum Chea, he heard from Bong Hak that 'one or two' soldiers in other units were killed. *See* T. 5 Nov 2012, p. 14; *see also*, paras. 511, *infra*.
[815] T. 5 Nov 2012 (Sum Chea, **E1/140.1**), p. 15:4-11 (Sum's unit guarded the area around Phsar Thmei and Chrouy Changvar); **E3/9**, Short, *Pol Pot*, ERN 00396483 (East Zone troops came in along National Road 1); para. 59, *supra*, **E295/6/3**, Closing Brief, paras. 306-309 (Phnom Penh was divided in four rigidly defined zones).
[816] The Defence notes that Sum Chea's account is inconsistent with Ben Kiernan's, who characterizes East Zone soldiers as 'generally much better behaved'. *See* **E3/1593**, Kiernan, *The Pol Pot Regime*, ERN 00678514-8. As the Defence argues further in connection with the Chamber's errors as to other inhumane acts, the evidence of conditions and events during the evacuation is limited and in numerous ways inconsistent. *See* paras. 422-429, *infra*. This constitutes further evidence of the contradictions in the evidence.
[817] T. 24 Oct 2012 (Kung Kim, **E1/138.1**), p. 105:13-14; **E3/424**, Written Record of Interview of Meas Voeun, ERN 00421071; T. 20 May 2013 (Ieng Phan, **E1/193.1**) (CPNLAF soldier who participated in the evacuation, testifying for a full day without mention of killing of civilians). *See also*, T. 22 Apr 2013 (Chhouk Rin, **E1/181.1**), pp. 86-87 (during attack on Kampot, received instructions from superiors 'to be careful not to target the people's location'), 92-94 (during the evacuation of Kampot, received no instructions concerning how to get people to leave the city; 'soldiers requested them to leave').
[818] Judgment, para. 486.
[819] T. 23 Oct 2012 (Lay Bony, **E1/137.1**), pp. 90-91.

killed for attempting to return to Phnom Penh, or why the clear alternative inference – that the individuals were killed in battle – was unreasonable. Yet the Trial Chamber was satisfied on that basis alone that all those who tried to return to Phnom Penh were, in general, shot.

301. In all of these cases, the Trial Chamber's lax treatment of the evidence falls well short of the standard of the reasonable fact finder. The Chamber did not consider whether rumors circulating through the crowd in the streets of Phnom Penh were true. The Trial Chamber did not consider whether a single double hearsay account proved that all people who tried to return to Phnom Penh during the entire evacuation were shot. The Chamber did not consider if Affonço's friend's siblings described what they had actually seen. Instead, it entered three murder convictions in two sentences, each one based on uncorroborated rumors and hearsay passed on in each instance by a single witness.

Evidence given to the CIJs

302. The CIJs produced well over 650 WRIs,[820] of which 114 were specifically identified by the Co-Prosecutors as containing evidence of the evacuation of Phnom Penh.[821] Of these, the Trial Chamber identified only two witnesses who claim to have witnessed even a single killing for a failure to obey orders during the evacuation.[822] The Trial Chamber identified only two other witnesses interviewed by the CIJs who heard about any killings from any source.

303. The first purported eyewitness is Seang Chann. According to his WRI, Seang claims to have seen 'people shot to death because they were hesitating and did not know which route to take.'[823] This account is the *opposite* of the conclusion it purports to prove, that people were killed for refusing to obey orders: anyone who did not know which route to take had evidently received no instructions to disobey. Indeed, it is not logical that soldiers would kill people who were willingly evacuating but uncertain in which direction to travel. Because Seang did not appear for testimony, and no further detail about these killings appears anywhere in his statement, no answers to these questions exist.

304. The second purported eyewitness was Khiev Horn. A single sentence in his WRI alleged that those who opposed the evacuation were killed, without describing a single instance of such executions and without any follow-up questions concerning those alleged killings by the investigators.[824] It was accordingly impossible for any trier of fact to assess the reliability of Khiev's evidence, including whether he witnessed any killings or whether those killings, if they occurred, were unlawful. Khiev's

[820] This is a rough count based on the number of statements entered into evidence by the Co-Prosecutors. *See* **E96/8.2**, OCP 'Corroborative' Witness Interviews; **E208.1**, 'Annex I: Witness statements relating to forced movement of the population from Phnom Penh (Phase 1)' ('List of Phase 1 WRIs') (listing 114 WRIs concerning Phase I). Note also that the Co-Prosecutors sought the admission of a further 51 statements in connection with Phase II. *See* **E208/2.1**, 'Annex I: Witness statements relating to forced movement of the population from Phnom Penh (Phase 2)'. As many (but not all) of these overlap with the lists which concern Phase I, the Defence does not include them in its count.
[821] **E208.1**, List of Phase 1 WRIs.
[822] Judgment, fns. 1402, 1404.
[823] **E3/5505**, 'Written record of Interview of SEANG Chan' ('SEANG Chan WRI'), ERN 00399168
[824] Judgment, fn. 1404 (citing **E3/5559**, 'Written record of Interview of Civil Party KHIEV Horn', ERN 00377368).

claim that the alleged victims were killed for opposing the evacuation is equally impossible to assess.

305. The other two statements do not even purport to be eyewitness accounts. Khoem Nareth told the CIJs merely that 'he was told that those who refused to leave the city were shot dead'.[825] Not only does this constitute anonymous hearsay evidence about unknown victims killed under unknown circumstances, even on the face of the document it is unclear whether Khoem was told about any actual killings. The final witness, Sot Sem, claimed to have seen people shot dead but did not know the reason, supposing that they were 'likely' house owners who refused to leave their homes.[826]

Evidence given in civil party applications and victim complaints

306. Beneath this extremely thin veneer of evidence given to ECCC authorities, it is apparent that the Trial Chamber's generalized conclusions that civilians were 'shot and killed on the spot' for failing to obey orders is based almost entirely on unauthenticated civil party applications and victim complaints.[827] Almost without exception, these documents fail to provide even the slightest indication of the circumstances under which the supposed killings took place. Almost never do the documents describe killings of persons known to or travelling with the civil party. Rarely do they state whether the civil party witnessed the events in question, and if they do, there is little or no explanation as to how they know the reason why the alleged victim was allegedly killed. Where the descriptions of alleged killings are not portrayed as eyewitness accounts, there is similarly no explanation of how the civil party knows any killings occurred at all.[828] The fact that all of these documents relay 40-year old memories and describe and reflect a widely circulated common narrative goes without saying.[829] None of these issues were explored by the Co-Prosecutors or the CIJs, let alone defence counsel.

Other statements

307. Two other statements taken outside the procedural framework of the ECCC and not authenticated by any person involved in creating them were also cited by the Chamber: statements

[825] **E3/1747**, 'Written record of Interview of KHOEM Nareth' ('KHOEM Nareth WRI'), ERN 00243009.
[826] **E3/4654**, 'Written record of Interview of Civil Party SOT Sem', ERN 00400463-4.
[827] Judgment, fns. 1402, 1404.
[828] As this is true of all or nearly all of the documents cited in footnotes 1402 and 1404, the Defence refers the Chamber to all of this evidence. The following is an arbitrary selection of the first few civil party applications, which reflect these ambiguities well. In each case, the excerpt quoted constitutes the entirety of the information provided concerning the alleged killings: **E3/4689**, 'Civil Party application of Mr. Sot Sem', ERN 00446581 ('They ordered us to take National Road number one and those who resisted would be shot death. Along the road, I saw too many dead people killed by the Khmer Rouge. Some of them had just been shot dead (with fresh bleeding). Some of those bodies were already swollen and smelly.'); **E3/4724**, 'Civil Party application of POK Sa Em', ERN 00487675 ('On 17 Apr 1975 when the Khmer Rouge entered Phnom Penh all the city dwellers were forced to leave the city. We were told to live in the country for a while. Those who protested such order were killed by gun shots.'); **E3/4734**, 'Civil Party application of SUONG Khit', ERN 00865178 ('In Apr 1975 (after the Khmer New Year's celebration period), when the Khmer Rouge entered Phnom Penh, they ordered the evacuation of the whole population from their homes to rural areas. Anyone who dared argue against the order was killed.'); **E3/4680**, 'Civil Party application of Ms. MEA Chhin', ERN 00885702 ('My children and I were driven out of the city one or two days after the fall of the regime, on 18 Apr 1975. The Khmer . fired at anyone who refused to leave.').
[829] *See* paras. 120-124, *supra*.

taken by the government of Norway and the French embassy in Bangkok.[830] Again, these accounts are unverifiable and therefore highly unreliable.[831] In light of the other weaknesses in the evidence, they are inadequate to constitute proof of murder beyond a reasonable doubt.

ii – Alleged willful killings for other reasons

Live testimony

308. The Trial Chamber cited the evidence of six civil parties and one witness as to willful killings for reasons other than disobeying orders. Three citations were to victim impact testimony, in regard to which the Chamber erred in law by citing for the truth of their contents.[832] Two of these three individuals were not eyewitnesses and all three of them discussed a single alleged killing of a single stranger unknown to the witness.[833] The sole live witness gave hearsay evidence from unspecified sources about unspecified victims killed for unspecified reasons.[834]

309. Only three civil parties – Chum Sokha, Yim Sovann and Mom Sam Oeurn – offered eyewitness accounts of killings of civilians given as live evidence before the Trial Chamber. As the Chamber rightly noted, all of the evidence they gave purports to describe incidents which occurred for 'no discernible reason'.[835] Indeed, all three civil parties gave evidence concerning alleged killings which, on their face, were not related in any way to the purpose or objectives of the evacuation.

310. This feature of the evidence is especially noticeable in the unsworn testimony of civil party Chum Sokha. According to Chum, 'some were wounded and killed' while trying to loot rice stored in a warehouse – looting in which he himself was involved and from which he 'ran away' with a sack of rice.[836] Importantly, this incident was Chum's sole example of any violence of any kind in response to a general inquiry concerning whether 'people were wounded by the Khmer Rouge' after they entered Phnom Penh. Rather than cite Chum's testimony as evidence that violence was used only to counter unlawful activity such as looting, the Chamber inserted a reference to his testimony without comment into a footnote purporting to prove that 'Khmer Rouge soldiers [were] shooting and killing civilians'.

311. The second live witness, Yim Sovann, testified to having witnessed a single shooting of the driver of a single vehicle. She was not involved in the events she described, provided no reason why this particular individual was supposedly shot, and was not questioned by any of the parties concerning

[830] Judgment, fns. 1402 (citing **E3/1805**, United Nations Economic and Social Council, Commission on Human Rights: Sub-Commission on Prevention of Discrimination and Protection of Minorities, 31st Session, 18 Jul 1978), 1404 (*citing* **E3/2666**, 'Testimony of Brigadier-General SOR Buon, former general in the Khmer National Armed Forces (FANK)', 23 Jun 1975, Bangkok). With regard to the reliability of Sor Buon's letter, see paras. 318, 323, *infra*.
[831] *See* paras. 160-165, *supra*.
[832] *See* paras. 188-192, *supra*.
[833] Judgment, para. 490 (citing testimony of Chheng Eng Ly, Thouch Phandarasar and Yos Phal).
[834] Judgment, para. 490, fn. 1462 (citing testimony of Sydney Schanberg).
[835] Judgment, para. 553.
[836] As this incident took place within Phnom Penh it could only have occurred at the very beginning of the evacuation and not in the context of any alleged poor conditions allegedly caused by the evacuation.

the circumstances of the alleged shooting.[837] Civil party Mom Sam Oeurn stated in unsworn testimony that she 'witnessed the shooting of people' without explaining who those people were, why they were shot, or how many people were supposedly killed. No examining attorney asked any follow up questions. The Chamber had little basis on which to conclude that anyone was in fact shot and none at all to conclude that the shootings, if they happened, were unlawful.

Evidence given to the CIJs

312. The Trial Chamber cited only one interview taken by the CIJs describing alleged killings for no discernible purpose. Norng Ponna indicated that he was inside a pagoda where 'nothing was done' but that 'outside the pagoda they were shooting people to death'.[838] Norng did not witness those killings and did not explain how he knew they occurred. The WRI provides no detail at all of the circumstances of the killings, including who was killed, how, by whom, and why. Norng did not appear for cross-examination, and no audio recording of this particular interview exists. It is accordingly impossible to explore these questions.

Evidence given in civil party applications and victim complaints

313. Again, the overwhelming majority of the evidence is derived from unreliable civil party applications and victim complaints. The Defence's prior comments apply equally here: almost all of these documents describe alleged killings in a single sentence without any detail upon which any trier of fact could assess whether the killing took place.[839] Indeed, these allegations are even less reliable, because they all concern killings which allegedly occurred for 'no discernible reason': if the Trial Chamber has determined that it does not know why the killing occurred, it could not possibly have concluded that the killing, if it occurred, was unlawful. This is especially true in the very first hours after a ceasefire in such a long and vicious war. No reasonable trier of fact could enter a conviction for murder without any evidence that the killing concerned was unlawful.

314. The Defence notes further that one of these civil parties, Meas Saran, appeared for testimony before the Trial Chamber, providing an instructive lesson as to the reliability of these documents. While the Judgment simply refers to the phrase 'saw many people unreasonably killed along the road' from Meas Saran's English language application,[840] the original Khmer language version states that the civil party saw people taken away during the evacuation whom he *believes* were then killed.[841] The phrase translated as 'unreasonably killed' furthermore actually states that he did not know why these people

[837] Judgment, para. 490.
[838] **E3/5131**, 'Written record of Interview of NORNG Ponna' ('NORNG Ponna WRI'), 0023185.
[839] *See* paras. 292-293, *supra*.
[840] Judgment, fn. 1462 (citing **E3/3966**, 'Civil Party application of Mr. MEAS Saran', ERN 00362196).
[841] **E3/3966**, 'Civil Party application of Mr. MEAS Saran', KH ERN (00362176).

were supposedly killed.[842] Meas Saran confirmed during his appearance in court that he saw no dead bodies and 'only saw people who were travelling with me were taken away'.[843] The Judgment considers none of the ambiguities in the English language translation, fails to refer to the Khmer language original, fails to mention that the civil party appeared for testimony, and instead treats the seven-word excerpt from the incorrect English-language translation of a civil party application as a soundbyte to prove without further analysis that 'Khmer Rouge soldiers [were] shooting and killing civilians'. This is indicative of the Chamber's misleading treatment of the evidence.

Other statements

315. The Trial Chamber cited three other statements from outside the framework of the Tribunal. Although the reliability of this evidence is inherently questionable, it is apparent that the Trial Chamber failed to subject any of them to any assessment of probative value.

316. The Trial Chamber cited the refugee account of a 'pilot' named 'Pech Ling Kong', taken by François Ponchaud, to support the conclusion that seriously ill people in hospitals and the disabled were killed during the evacuation.[844] The Trial Chamber's reliance on this statement acutely demonstrates its failure to make any genuine effort to assess the evidence. Although no further identifying information exists on the face of the statement, 'Pech Ling Kong' purports to possess a vast range of knowledge concerning CPK policy, the activities of its leadership and even the private affairs of King Father Sihanouk.[845] Nevertheless, the Chamber made no effort of any kind to assess who this witness was or whether his anonymous hearsay evidence was reliable. In fact, considerable documentation on the case file suggests that a former Khmer Republic pilot named 'Pech Lim Kuon' defected to the CPK in 1973 and then in 1976 subsequently defected again, escaping to Thailand. It is clear from Ponchaud's own testimony that this is the same person as Pech Ling Kong.[846] This Pech Lim Kuon gave statements to numerous individuals, including journalists and the French government.[847] These statements establish that, contrary to the Chamber's claim that he 'saw' patients chased out of a hospital,[848] Pech Lim Kuon arrived in Phnom Penh on 27 April 1975, witnessing no part of the evacuation.[849] One statement explicitly states that, although he was in CPK-occupied territory for three years, Pech Lim Kuon 'has

[842] **E3/3966**, 'Civil Party application of Mr. MEAS Saran', KH ERN (00362176).
[843] T. 22 Nov 2012 (MEAS Saran, **E1/145.1)**, p. 35.
[844] Judgment, fn. 1462 (citing **E3/4590**, Ponchaud Refugee Interviews, ERN 00820523).
[845] **E3/4590**, Ponchaud Refugee Interviews, ERN 00820523-24.
[846] T. 10 Apr 2013 (François Ponchaud, **E1/179.1**), pp. 52, 96-98. Ponchaud's refugee statements indicate that he met Pech Ling Kong, a 'pilot', in June 1976 in Klong Yai district in Thailand. At trial, Ponchaud described meeting Pech Lim Kuon 'perhaps' in July 1976 in Mairut, located in Klong Yai district. Ponchaud's description of Pech Lim Kuon's account resembles that given by 'Pech Ling Kong' in important respects.
[847] **E3/4060**, 'Conversation with Pech Lim Kuon'; **E3/4062,** 'Cambodia: Two Views From Inside, Newsweek, Swedish Collection', 17 May 1976; **E3/4063**, The Times: 'Defecting Khmer Rouge helicopter pilots tells of life in Phnom Penh', 4 May 1976
[848] Judgment, fn. 1411.
[849] **E3/4060**, Conversation with Pech Lim Kuon, ERN 00823177.

not seen anyone being killed'.[850] These other statements furthermore make assertions inconsistent with findings in the Judgment, in particular that regular shipments of rice were being delivered from China and that, '[t]hanks to a relatively good yield, there has been a slight improvement in the economic situation.'[851] Indeed, the Chamber did not even mention that when Ponchaud appeared before the Chamber he discussed this 'Pech Lim Kuon' and stated as follows: 'I asked him what "Angkar" was. He said Angkar comprised of Comrades Pot, Hem, Vorn. I asked him again who was Comrade Pot, and he said he didn't know.'[852] Kiernan similarly states that Pech Lim Kuon told a journalist that 'Saloth Sar was Democratic Kampuchea's top leader, but added that "Pol Pot" was "not an important man."'[853] These statements completely undermine Pech Ling Kong's claim to be privy to such wide-ranging information about the CPK. Most troubling is that elsewhere in the Judgment the Chamber cited a newspaper article describing 'Pech Lim Kuon's account of the number of people in Phnom Penh without ever venturing a link to Ponchaud's 'Pech Ling Kong'.[854] The Chamber did not make 'findings' about Pech Ling Kong. The Chamber located an inculpatory-sounding sentence in a document and copied it into a footnote.

317. The Trial Chamber also cited the anonymous evidence of a person they described only as 'Mr. Worker' to establish beyond a reasonable doubt that Khmer Rouge soldiers shot and killed 'a famous film actor' named Kong Savuon.[855] Mr. Worker's description, which is contained in a compilation prepared by François Ponchaud, is so vague that it is not even possible to discern on the face of the statement whether the 'famous film actor' is the person whom this anonymous Mr. Worker somehow came to believe was killed.[856] The statement does not clearly indicate whether 'Mr. Worker' was an eyewitness, nor why the alleged victim (who may or may not have been Kong Savuon) was killed. Needless to say, 'Mr. Worker' did not appear before the Chamber. None of these considerations are reflected in the reasoning of the Chamber, which concluded on the basis of this single anonymous out-of-court statement that murder was established beyond a reasonable doubt.

318. Finally, the Trial Chamber cited the double hearsay, out of court statement of Khmer Republic general Sor Buon – as it was retold in a letter from the French Ambassador to Bangkok – to establish that Khmer Rouge soldiers shot and killed 'those who became too weak to continue'. Sor Buon's tale is

[850] **E3/4060**, Conversation with Pech Lim Kuon, ERN 00823178.
[851] **E3/4060**, Conversation with Pech Lim Kuon, ERN 00823178.
[852] T. 10 Apr 2013 (François Ponchaud, **E1/179.1**), p. 97.
[853] **E3/1593**, Kiernan, *The Pol Pot Regime*, ERN 00678666. Kiernan's account appears to invert Ponchaud's: one says that Pech Lim Kuon knew who Pol Pot was but not Saloth Sar, whereas the other says the opposite. In either case, his information was obviously incomplete.
[854] *See* Judgment, fn. 1554.
[855] Judgment, fn. 1462.
[856] **E3/4590**, Ponchaud Refugee Interviews, ERN 00820348 ('The deportees cried. Mr Kong Savuon (a famous film actor) cried: he had only one set of clothes and his Mercedes. In answer to the question: "Two Swiss members of *Terre des Hommes* have told me that the KR kept registers and recorded names." "That is not true." People grumbled, including one pharmacist. The KR beheaded him and left his body on the road.')

of a leading Khmer Republic general who claimed to have crossed 'the entire northern half of Cambodia practically without having to hide' because 'he was lucky enough' to have secured a 'laissez-passer' under an assumed identity from unspecified CPK forces in Phnom Penh on 18 April 1975. The Chamber declined to consider whether any other account of the evacuation of Phnom Penh describes the issuance of a 'laissez-passer' to anybody for any reason; to attempt to reconcile Sor Buon's claim that a piece of paper enabled him to travel freely across Cambodia for weeks with its own characterization of CPK forces as uneducated, vicious, violent and irrational;[857] to attempt to reconcile the apparent failure of CPK forces to question that piece of paper with its own conclusion that a 'deliberate, organized, large-scale operation to kill former officials of the Khmer Republic' was in place at checkpoints throughout the country;[858] or to consider the patently obvious question of whether, as a leading member of the Khmer Republic, there may have been some reason to question Sor Buon's account of the brutality of the regime which had just weeks earlier ousted him from power. Instead, the Chamber inserted the Ambassador's letter as the last entry in a footnote and concluded, unquestioningly and on that basis alone, that 'those who simply became too weak to continue' were, in general, killed.

iii – Overall prevalence of willful killings of civilians

319. For all the foregoing reasons, the Defence submits that not a single murder of a single civilian was proven at trial beyond a reasonable doubt. It follows therefore that killings were neither 'numerous' nor 'substantial', as the Trial Chamber held. In any case, however, the Defence additionally submits that even if the Trial Chamber's findings concerning specific allegations of murder had been sound, they would not support its overall characterization of killings during the evacuation as 'numerous' and 'substantial'. Rather, the evidence unambiguously establishes that killings during the evacuation were, *at most*, extremely rare.

320. Importantly, the Trial Chamber's conclusion was that 'those who did not *immediately* follow the instructions of Khmer Rouge soldiers during the march out of the city were shot and killed *on the spot*'.[859] The Chamber's presumption is that these killings occurred in full public view in streets supposedly crowded with thousands of people. Yet after scouring the extensive case file, the Chamber identified exactly three witnesses who claim to have witnessed any killings for refusing to obey orders. None of these individuals were cross-examined.[860] The only conclusion available to any reasonable trier of fact was that if any such killings took place, they must have been extreme outliers.

[857] *See e.g.*, Judgment paras. 472-5 (soldiers were 'aggressive and shouting', 'fired shots in the air', 'subjected [evacuees] to physical abuse', 'threatened to kill', 'shot and killed on the spot', 'shot a boy', 'those who resisted the evacuation were shot'), 489-490 (describing beatings and rape, 'terror and threats of violence'), 563, 565, 919 (Nuon Chea subjected 'uneducated peasants' to 'strict indoctrination').
[858] Judgment, para. 561.
[859] Judgment, para. 474.
[860] *See* paras. 302-305, *supra*.

B. Grounds 98-131: The Trial Chamber erred in law and fact in finding that murder was committed during the Phase I movement through killings of Khmer Republic soldiers

321. Allegations concerning killings of Khmer Republic soldiers during the evacuation of Phnom Penh are a significant component of the Trial Chamber's conclusions concerning the alleged policy of targeting such officials. Accordingly, these allegations are addressed in detail in connection with this policy, *infra*.[861] For reasons articulated therein, the Defence submits that no killings of Khmer Republic soldiers and officials during the evacuation have been proven beyond reasonable doubt.

C. Grounds 132-157: The Trial Chamber erred in law and fact in finding that murder was committed due to conditions during the evacuation of Phnom Penh

322. The instant Appeal addresses conditions imposed during the evacuation in the course of its analysis of the Chamber's errors in connection with other inhumane acts. As the Defence demonstrates therein, the Judgment wildly exaggerates the uniformity and severity of the conditions during the evacuation. Although many people undoubtedly experienced harsh conditions, the evidence shows that evacuees travelled at their own pace to destinations of their choosing and that both food and shelter were far better available than the Judgment suggests.[862] Many people furthermore already faced grave conditions in Phnom Penh prior to 17 April 1975.[863] The Trial Chamber additionally held that these conditions caused deaths during the evacuation. This latter finding, which was also in error, is addressed at this juncture of the Appeal.

323. The Trial Chamber held that during the evacuation of Phnom Penh, 'some [evacuees] even died' due to the conditions of the journey.[864] The Chamber supported this conclusion by reference to almost no admissible evidence, citing instead to a series of witnesses who appeared only to give victim impact testimony.[865] This conclusion therefore depended solely on the supposed observations of Sor Buon, the same Khmer Republic general who claims to have travelled unmolested across Cambodia for weeks witnessing the crimes of his enemies.[866] No reasonable trier of fact could consider this sufficient to establish beyond a reasonable doubt that evacuees died.

324. The Chamber held that due to 'severe and unrelenting conditions during the […] evacuation, some evacuees either killed themselves or soon died from a combination of exhaustion, malnutrition or disease.'[867] The Chamber's star witnesses were Sydney Schanberg, whose diary stated that 'foreigners who trickled into the embassy' in the days after 17 April 1975 told him that people on the road had died

[861] *See* paras. 588-596, *infra*.
[862] *See* paras. 424-429, *infra*.
[863] *See* paras. 424, 427, *infra*.
[864] Judgment, para. 491.
[865] Judgment, fn. 1472.
[866] *See* para. 318, *supra*.
[867] Judgment, para. 497.

due to illness or exhaustion,[868] and civil party Pin Yathay, who testified that he saw two dead women whom he believed had hung themselves.[869] Obviously, neither individual – the only two the Chamber cited – could possibly have known what happened to any of these people. Im Sunty told the CIJs that her 'Mother-in-law died during the evacuation because of her advance age'. This was the sum total of her evidence about this death which formed the basis of a conviction for murder beyond a reasonable doubt.[870] The Chamber cited no other interviews collected during the judicial investigation, relying instead on telegrams from the US Embassy in Bangkok and a handful of civil party applications. No reasonable trier of fact could have found beyond a reasonable doubt that these deaths occurred and were caused by the evacuation.

325. Other findings that people died due to conditions imposed during the evacuation were equally baseless. The Chamber held that 'numerous witnesses' recounted seeing people dying in the streets and along the roadside,[871] citing three inadmissible victim impact statements, an anonymous refugee statement, a civil party application, and two offhand references in live testimony which fail to specify how many people died, where those people were or how the witness could possibly have known they were 'dying'.[872] The Chamber held that 'children in particular' succumbed to hunger and illness, citing no live testimony or evidence given to the CIJs, but only two unexamined civil party applications concerning a total of three deaths, and three anonymous refugee statements.[873] The Chamber held that numerous children died of gastrointestinal illnesses, citing the statement of a mysterious 'Dr. Hay' described in a UK government report.[874] The only other person who spoke of any deaths due to conditions at any time during the evacuation was civil party Pech Srey Phal, who described her baby's death. Although plainly tragic, for the purposes of proof of murder beyond a reasonable doubt in a court of law, there is insufficient evidence concerning the cause of death on which to establish that the conditions of the evacuation as such are to blame.[875] Given this paucity of evidence, no reasonable trier of fact could have made any of these conclusions.

326. The only other evidence on which the Chamber relied in finding that conditions caused some people to die during the evacuation was that dead bodies were seen along the road.[876] The Chamber acknowledged that many of these people were soldiers, that the 'exact circumstances of the death of those whose corpses were visible along the roads, are unclear', and that many of these people were

[868] Judgment, fn. 1487.
[869] Judgment, fn. 1487.
[870] Judgment, fn. 1487.
[871] Judgment, para. 497.
[872] *See* Section VI (E, F, H), *supra*.
[873] Judgment, para. 498, fn. 1491.
[874] Judgment, para. 498, fn. 1492.
[875] Judgment, para. 498. Other live witnesses cited in connection with deaths during the evacuation gave only victim impact testimony. *See* Judgment, paras. 492 (citing the testimony of Seng Sivutha), 498 (citing the testimony of Bay Sophany).
[876] Judgment, paras. 499-500.

'likely' killed during the attack which immediately preceded the evacuation.[877] The Chamber nevertheless concluded beyond a reasonable doubt that some of the bodies were evacuees solely on the basis of its prior, erroneous finding that people died due to conditions during the evacuation.[878] This circular analysis – that dead bodies prove that deaths were caused by conditions because deaths due to conditions occurred – was erroneous and unreasonable.[879] In light of the conflict surrounding Phnom Penh which immediately preceded the evacuation, the presence of bodies along the road was irrelevant to the Chamber's assessment of whether the conditions of the evacuation caused death.

D. Grounds 158-171: The Trial Chamber erred in law and fact in finding that deaths occurred during and were unlawfully caused by the Phase II movement

327. The evidence that deaths were caused by the Phase II movement is even weaker. Despite finding that hundreds of thousands of people were moved over more than two years, the Chamber found only two people, both civil parties, who testified to having seen anyone die at any time during the Phase II movement. It is clear that neither individual knew the alleged victims or had any basis on which to assess the effect of the conditions of the movement on the strangers' health.[880] Two other witnesses, including François Ponchaud, testified that they heard about unspecified deaths due to unspecified causes from unspecified sources.[881] The Chamber also held that '[w]itness Sokh Chin, a railway repairman, buried decomposing bodies found along the tracks'.[882] In fact, Sokh Chin testified to burying a single body he found near the tracks.[883] He saw other bodies but 'could not give […] an estimate' as to the number. This testimony is plainly insufficient to establish that the conditions of the Phase II movement caused any deaths, much less that such deaths occurred commonly or frequently.

328. The Defence notes that the Chamber also found that during the Phase II movement, 'Khmer Rouge soldiers shot at those who tried to escape'.[884] This generalized conclusion which supposedly covers hundreds of thousands of people in locations across the country over a 27 month period, was supported by the evidence of only one civil party who 'did not see any people being killed' but merely heard from unspecified people that people who were trying to escape were shot at.[885] No reasonable

[877] Judgment, para. 500.
[878] Judgment, para. 500 (referring to paragraphs 497-498).
[879] This is especially true because much of the evidence to which the Chamber had previously cited to establish that people died due to conditions was nothing more than that they saw dead bodies. *See* Judgment, para. 497 (citing the testimony of Pin Yathay and Pech Srey Phal), fn. 1488 (evidence cited largely concerning dead bodies along the road), para. 498 ('Dr. Hay' having seen bodies of children along the road). Accordingly, the Chamber unreasonably found that the mere sight of dead bodies established that evacuees had died, then relied on that holding to prove that dead bodies belonged to evacuees instead of people killed in combat.
[880] Judgment, fns. 1836-7 (citing the testimony of Pech Srey Phal), 1849 (citing the testimony of Pin Yathay). The Defence notes that the Chamber also cited victim impact testimony from two other witnesses which was inadmissible for the truth of its contents.
[881] Judgment, fn. 1836 (citing evidence of François Ponchaud and Nou Mao).
[882] Judgment, para. 597.
[883] T. 23 Oct 2012 (Sokh Chhin, **E1/137.1**), p. 26:11-12.
[884] Judgment, para. 598.
[885] T. 4 Dec 2012 (TOENG Sokha, **E1/147.1**), p. 50.

trier of fact could have made this conclusion.

E. Ground 173: The Trial Chamber erred in law in defining extermination

329. The Trial Chamber held that the *actus reus* of extermination 'consists of an act, omission or combination of each that results in the death of persons on a massive scale'. The Chamber held that the *mens rea* is the intent to kill on a massive scale or to 'inflict serious bodily injury or create conditions of life 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*).'[886]

330. The only authority the Trial Chamber cited for this definition was its own judgment in Case 001 and the *Krstić* Trial Judgment from the ICTY. Although the Trial Chamber acknowledged that appellate jurisprudence from the ICTY and ICTR 'has seemingly evolved to exclude *dolus eventualis* from the definition of the *mens rea* for extermination', it held that all of this appellate jurisprudence was erroneous.[887] The Chamber considered that 'there was no reasoned basis for a departure from the original approach taken in the *Krstić* Trial Judgment, which encompassed *dolus eventualis* and was based on a review of pre-1975 jurisprudence.'[888] The Trial Chamber declined to examine any of that case law, to identify which of these cases it found compelling or to explain the flaws in the reasoning of the *ad hoc* tribunal Appeals Chambers. Accordingly, the Chamber rested its statement of the law as of 1975 on a single trial judgment of the ICTY which it agreed was no longer good law.

331. The Trial Chamber's definition of extermination was erroneous in two related respects: (i) it failed to recognize that 'conditions of life' may amount to extermination only if calculated to bring about destruction of a part of a population; and (ii) it held that extermination need not be part of a 'vast murderous enterprise'.

i – Conditions of life not calculated to bring about destruction of a population

332. The law is clear that where extermination is allegedly caused by the imposition of conditions of life leading to death, those conditions must be 'calculated to' destroy a part of a population. Although the Closing Order includes this requirement in its definition of extermination[889] and the Defence explicitly argued that this element was not satisfied,[890] the Trial Chamber declined to consider the issue at all. The Chamber convicted Nuon Chea of extermination due to deaths allegedly caused by conditions during both the Phase I and Phase II population movements on this basis.[891]

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[886] Judgment, paras. 416-7.
[887] Judgment, para. 417.
[888] Judgment, para. 417.
[889] **D427**, Closing Order, para. 1382.
[890] **E295/6/3**, Closing Brief, para. 267. The Defence did not make submissions on this particular point in its **E295/6/3**, Closing Brief because space was highly circumscribed and it limited this discussion to points on which it disagreed with the definition of the law in the Closing Order.
[891] Judgment, paras. 562, 648.

333. The Defence notes that while the Trial Chamber excluded this requirement from the definition of extermination, all of the case law on which it relied includes it. Indeed, in its discussion of the *actus reus* of extermination, the Chamber held that the perpetrator's role may include 'creating conditions of life aimed at destroying part of the population'.[892] This requirement mysteriously vanishes in the Trial Chamber's definition of extermination in the very next paragraph.[893] Accordingly, the Chamber's definition of extermination did not accord with the case law it cited or even its own analysis.

334. This is most apparent in the Chamber's misrepresentation of the findings in *Krstić*, the sole authority upon which its theory of extermination via *dolus eventualis* rested. While true that the ICTY Trial Chamber in *Krstić* included *dolus eventualis* in articulating the *mens rea* of extermination, it also held that the acts or omissions of the accused must be 'calculated to bring about the destruction of part of the population.'[894] Indeed, that Chamber held that extermination was distinguishable from genocide only 'by the fact that the targeted population does not necessarily have any common national, ethnical, racial or religious characteristic.'[895] It is clear that the *Krstić* court would never have held that an accused could be guilty of extermination merely for having imposed conditions of life 'in the reasonable knowledge that' death on a massive scale would result.

335. The pre-1975 jurisprudence on which the Chamber purported to rely on without any independent analysis is similarly clear that extermination signifies a deliberate campaign of destruction through death. According to the IMT Judgment:

> The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories. Originally the policy was similar to that which had been in force inside Germany. Jews were required to register, were forced to live in ghettos, to wear the yellow star, and were used as slave laborers. In the summer of 1941, however, plans were made for the "final solution" of the Jewish question in all of Europe. This "final solution" meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of Section B 4 of the Gestapo, was formed to carry out the policy.[896] (emphasis added)

336. The Chamber also failed to refer to the Eichmann Judgment, the case most widely associated with the definition of extermination.[897] Like the IMT, the Eichmann Judgment directly connects the charge of extermination to the advent of the final solution. Eichmann was convicted of extermination for acts beginning 'from August 1941',[898] the same date on which the court found that he was informed

[892] Judgment, para. 416. The Chamber's use of the phrase 'aimed at' appears to have been a deliberate effort to downplay this aspect of the test, which the jurisprudence the Chamber relied on defines using the somewhat stronger phrase 'calculated to'.
[893] Judgment, para. 417.
[894] Krstić Trial Judgment, para. 502.
[895] Krstić Trial Judgment, para. 500.
[896] IMT Judgment, p. 249-250.
[897] The only 'reference' to *Eichmann* was to ignore it: *see* para. 338, *infra*.
[898] Eichmann Judgment, para. 200.

of the 'final solution'.[899] The objective of the final solution was 'none other than total extermination'.[900] The Court explicitly found that in March 1941, no such plan yet existed.[901]

337. The Defence notes that, according to the District Court, Eichmann held positions of significant executive authority concerning Jewish affairs from as early as September 1939. By March 1941 at the latest, Eichmann 'dealt centrally with all matters in the RSHA (Reichssicherheitshauptamt) connected with operations against Jews.'[902] Of substantial resonance with the case at hand, Eichmann had authority over 'Emigration and Evacuations' from before January 1940.[903] Yet only in August 1941, that is, after Eichmann was informed of the final solution, did his criminal liability for extermination arise.

ii – Vast murderous enterprise

338. For related reasons, the Trial Chamber erred in law in finding that extermination does not require that deaths were part of a 'vast murderous enterprise' or that the accused have knowledge in that regard.[904] The Trial Chamber acknowledged that the *Vasiljević* Trial Judgment concluded that this element existed prior to 1975 based on the IMT Judgment and the Eichmann Judgment. Without engaging in any analysis of any of the relevant case law, the Trial Chamber held that the portions of the IMT Judgment which 'set out the respective defendants' knowledge of the schemes in which they were involved […] simply reflect[] the facts of each case' rather than establish the elements of the offence.[905] As before, the Trial Chamber did not address the Eichmann Judgment at all.

339. The Trial Chamber's conclusion that the IMT judgment was describing the facts of the case instead of the elements of the crimes ignores the fact that none of the Judgments issued by the IMT or the NMT explicitly state the elements of any of the crimes charged. Instead, these are routinely deduced from the facts as they were described by the tribunal. Indeed, this was the approach of this Chamber in assessing the elements of crimes at issue in the Duch Appeal Judgment.[906]

340. The Trial Chamber's single conclusory statement about the pre-1975 case law furthermore failed to address key jurisprudence which clearly links extermination to the deliberate campaign of killing undertaken by the Nazis.[907] There is hardly any doubt that death on a massive scale occurred in ghettos, labor camps and concentration camps in both Germany and Nazi-occupied territories between 1939 and 1941. Certainly, these deaths were a great deal more foreseeable than any deaths which allegedly

[899] Eichmann Judgment, para. 163.
[900] Eichmann Judgment, para. 163.
[901] Eichmann Judgment, para. 163.
[902] Eichmann Judgment, para. 78.
[903] Eichmann Judgment, para. 78.
[904] Judgment, paras. 418-9.
[905] Judgment, para. 419.
[906] *See e.g.*, Duch Appeal Judgment, para.144.
[907] *See* paras. 335-337, *supra*.

occurred during population movements in DK. Yet, it was only the final solution which 'meant the extermination of the Jews'.[908]

iii -- Population movements did not constitute 'extermination'

341. Had the Trial Chamber adopted the proper definition of extermination, it could not possibly have held that any alleged deaths caused by the evacuation of Phnom Penh or the Phase II movement satisfied it. Neither movement was driven by or resulted in the destruction of part of a population.

342. First, the result of both population movements show that neither one constituted extermination. The Trial Chamber found that less than a quarter of one percent of the population of Phnom Penh died during the evacuation.[909] It made no specific findings as to the number of people who died during the Phase II movement, but it was at most a very tiny fraction of the 'hundreds of thousands' who were allegedly moved.[910] If the CPK's population movements were designed as part of a vast murderous enterprise or calculated to lead to destruction, they were very poorly executed.

343. This is further corroborated by the manner in which the evacuation was conducted after evacuees left the immediate vicinity of Phnom Penh. While no uninformed reader of the Judgment would ever know it, the evidence consistently shows that outside Phnom Penh, few restrictions were placed on where evacuees should go and at what pace. Accounts of the evacuation on the case file consistently describe evacuees travelling a few kilometers per day or resting for extended periods as they chose. Of the 80% of the city's population which had moved to Phnom Penh since 1970, a considerable number simply returned to their home villages – as the Chamber rightly found.[911] These facts, which are set out in greater detail in the connection with the Chamber's errors concerning the conditions of the evacuation,[912] are profoundly inconsistent with 'extermination'. Nuon Chea and Khieu Samphan are surely the first defendants in history convicted of extermination for forcing a group of people, no matter how large, to go home.

344. Second, the findings of the Chamber uniformly establish that population movements were the antithesis of extermination. The Trial Chamber held that the CPK's population movement policy was designed to 'mobili[se] all forces to focus on agriculture', requiring that 'people had to be coerced to join the cooperatives'.[913] New People accordingly had 'to be driven from their unproductive activities to participate in food production.[914] Even the Chamber's erroneous findings that population movements were intended in part to target enemies and 'the always suspect New People' are inconsistent with

[908] *See* paras. 335-337, *supra*.
[909] Judgment, paras. 520 (up to 2.5 million people were transferred), 521 ('several thousand' people died).
[910] Judgment, paras. 646-7.
[911] Judgment, para. 485.
[912] *See* paras. 424-425, *infra*.
[913] Judgment, paras. 782-3.
[914] Judgment, para. 783.

extermination: they presume that 'New People could be reeducated and class divisions could be erased, while all worked to achieve the Party's production targets.'[915] The CPK's alleged forced marriage policy was allegedly designed to *increase* population across the country.[916]

345. These objectives of evacuating the cities and populate agricultural cooperatives as part of a socialist revolution must be viewed in perspective. Nazis exterminated Jews. The Republika Srpska exterminated Muslims in Srebrenica. The Turks exterminated Armenians. The CPK did not exterminate New People by forcing them to leave Phnom Penh.

F. Grounds 174 & 175: The Trial Chamber erred in fact in finding that death on a massive scale was caused by population movements

346. The Trial Chamber furthermore erred in law and fact in finding that death on a massive scale was caused by both the Phase I and Phase II movements.[917] This error invalidates convictions for extermination caused by conditions during both movements.

347. With regard to the evacuation of Phnom Penh, the Defence notes that the Trial Chamber made findings concerning the total number of people who died 'during the evacuation and subsequent journey.'[918] The number of people who died *during* the journey is not the same as the number who died *because of* the journey. Only the latter deaths are legally attributable to the decision to evacuate Phnom Penh. The Trial Chamber failed to undertake this analysis and thus erred in law and fact.

348. The Defence notes that the evacuation of Phnom Penh affected 2.5 million people. It is alleged to have lasted up to 'several weeks'.[919] In any population of this size, some substantial number of people would have been expected to die under any conditions. Although estimates vary substantially, statistics show that the morality rate in Cambodia just prior to the evacuation was at least 20.9 per 1000 people per year.[920] These statistics are reasonably consistent through at least the 1950s. Within a population of 2.5 million people, more than 52,000 people would accordingly have been expected to die under normal conditions over the course of a year. Assuming the evacuation lasted approximately one month, the normal mortality rate would have been just over 4,000 people over the same period.

349. Conditions in Phnom Penh on 17 April 1975 were not normal. Living conditions were very poor and food supplies were scarce.[921] Only a few days' worth of rice was left in the city as of 17 April

[915] Judgment, para. 784.
[916] Judgment, para. 128.
[917] Judgment, paras. 560, 647.
[918] Judgment, para. 521.
[919] Judgment, para. 487.
[920] This estimate is actually lower than the period immediately prior to the evacuation, which is approximately 24.0 deaths per 1000 people per year. Given the effect of the war, the Defence instead uses the average value from the period between 1965 and 1970. The Defence notes that this is the *lowest* average figure on record prior to 1975. It is accordingly a conservative estimate. These data are derived from UN population figures, available online here: https://data.un.org/Data.aspx?d=PopDiv&f=variableID%3A65.
[921] Judgment, para. 158.

1975.[922] Conditions of 'widespread starvation' were expected by the United States government by late 1975 and 1976.[923] The Chamber did not seek to make any estimate of the number of people among the 2.5 million living in Phnom Penh who would have died over the period of the evacuation had it not taken place. Indeed, no clear evidence in that regard was adduced at trial. The principal reason it was not adduced at trial is that the Chamber refused the constant requests of the Defence to hear the testimony of specific individuals well-placed to provide it.[924] Accordingly, it may be that in the weeks after liberation, the mortality rate in Phnom Penh would have reached the normal level of around 4,000. It may be that it would have been much higher.

350. The Defence notes that the Trial Chamber found that 'there are no precise figures as to the number of people who died during the evacuation'.[925] The Chamber found that ascertaining the precise number of people who died is 'impossib[le]'.[926] Despite this, the Chamber found beyond a reasonable doubt that 'at least several thousand people died during the transfer of the population from Phnom Penh to the countryside.'[927] The only question relevant to the extermination charges is whether this number is higher than the number of people who would have died had no evacuation taken place. No reasonable trier of fact could conclude beyond a reasonable doubt that the unknown number of people who died during the evacuation (but is at least 'several thousand') is higher than the unknown number of people who would have died without it (but is at least four thousand).

351. The Defence notes that the Chamber's analysis of extermination refers back to the twenty or so statements of individuals describing deaths due to conditions during the evacuation in order to support its finding that death on a massive scale occurred.[928] This evidence is irrelevant. Obviously, some of the 2.5 million people who were evacuated died.[929] The fact that a few witnesses appeared to describe some of these deaths proves nothing about the effect of the evacuation in that regard. This applies equally to the Chamber's conclusion that the CPK knew that 'vulnerable' groups such as the old, young and sick were especially prone to die during the evacuation.[930] Vulnerable groups are of course more likely than the general population to die under any circumstances. The relevant legal question remains whether these deaths were caused by the fact of the evacuation. For all the foregoing reasons, no reasonable trier of fact could have found that an answer to this question exists.[931]

352. With regard to Phase II, the Chamber's error is more straightforward: there is simply no evidence

[922] **E295/6/3**, Closing Brief, para. 243.
[923] Judgment, para. 160.
[924] *See* paras. 84, *supra*.
[925] Judgment, para. 521.
[926] Judgment, para. 521.
[927] Judgment, para. 521.
[928] Judgment, para. 560.
[929] *See* paras. 347-348, *supra*.
[930] Judgment, para. 558.
[931] *See* paras. 347-350, *supra*.

at all that death on a massive scale occurred, let alone that it was caused by the CPK. The Chamber held that there is 'evidence that many died due to starvation, exhaustion and at the hands of their Khmer Rouge guards', yet not a single witness gave credible evidence that even a single person died 'due to' starvation or exhaustion.[932] Eyewitness testimony given before the Chamber establishes that perhaps half a dozen people died for any reason during the evacuation.[933] No OCIJ statements describe any deaths. The totality of the other evidence is five civil party applications or victim complaints and two anonymous refugee statements, none of it authenticated or subject to cross-examination. The overwhelming weight of Phase II movement evidence describes no deaths at all.

353. Lacking any actual proof of death on a massive scale caused by the Phase II movement, the Chamber inferred it from the supposed fact that 'hundreds of thousands of people were re-located with insufficient accommodation and assistance and under inhumane conditions.'[934] This dramatic misrepresentation of the evidence is far more extreme a conclusion than even the Chamber was willing to make in the course of its (already erroneous) assessment of the conditions of the movement.[935] It accordingly reflects the Chamber's effort to reframe the facts as necessary to squeeze a conviction out of the facts at all costs. The Chamber similarly 'consider[ed]' that the handful of deaths described by 1,200 live and out of court witnesses and civil parties[936] was 'but a representative sample of the total number'.[937] No evidence and no reasoning support this naked assertion.

354. These findings were accordingly beyond the discretion of the reasonable fact finder. Instead of inferring that the handful of deaths described in out of court statements were representative of events involving 'hundreds of thousands' of people, the Chamber should have made the more straightforward conclusion that the limited evidence of death proves that the number of deaths was limited. This was, at a bare minimum, a reasonable inference consistent with innocence which the Chamber was not entitled to exclude.

XII. PERSECUTION DURING POPULATION MOVEMENTS

355. The Trial Chamber found that persecution was committed on political grounds against New People and Khmer Republic soldiers and officials during the Phase I movement and against New People during Phase II. The Chamber erred in law defining political persecution (section A, *infra*) and in fact in finding that New People could be the target of such persecution pursuant to that definition (section B, *infra*). The Chamber further erred in finding that *mens rea* and discrimination in fact were proven in regard to Phase I (section C, *infra*) and II (section D, *infra*).

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[932] *See* para. 324, *supra*.
[933] *See* para. 326, *supra* (describing the evidence of Sokh Chhin, Pin Yathay and Pech Srey Phal).
[934] Judgment, para. 647.
[935] *See* paras. 430-432, *infra*.
[936] *See* para. 9, *supra*.
[937] Judgment, para. 647.

A. Ground 190: The Trial Chamber erred in law in defining political persecution

356. As the Defence argued at trial, persecution on political grounds can be committed only against victims holding 'political views or membership in a political group'. The case law shows as follows:

> [T]he Trial Chamber in *Simic et al*., found the Accused guilty of political persecution where members of the Party of Democratic Action and the Croatian Democratic Party were arrested and detained, while members of the Serbian Democratic Party were not. In contrast, courts have found a political group was not established in circumstances where the victims did not have a distinct connection to political views. The *Semanza* Trial Chamber rejected the Prosecution's contention that moderate Hutus or Tutsi sympathisers were a 'political' group. The Trial Chamber in the *Media* case did enter a conviction for persecution but also did not find that moderate Hutu political opponents were a 'political group.' Despite substantial factual findings that opponents of the Hutu regime and Tutsi sympathisers were attacked the Chamber held there was 'persecution on political grounds of an ethnic character.' Notably, in considering the crimes against humanity chapeau requirement of a discriminatory 'attack' on political grounds, the *Akayesu, Kayishema and Ruzidana,* and *Bagosora* Trial Chambers referred to the victims' 'political beliefs', 'political ideology' or 'political leanings' in defining a political group. These findings should apply, *mutatis mutandis*, to the Chamber in considering the definition of a political group.[938]

357. The Trial Chamber addressed this argument in the following way:

> 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' 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.[939]

The Trial Chamber committed two distinct errors of law in this paragraph.

i – Members of a political group or those holding political views

358. The Trial Chamber erred in law in finding that political persecution may be committed against groups other than members of a political group or those holding political views. The Chamber's reasoning in this regard mirrors its analysis of the state policy requirement of crimes against humanity: it has merely identified that a conflict exists in the jurisprudence.[940] The Chamber acknowledges that case law exists limiting the definition of political persecution to groups which hold political views or constitute a political group. Yet the Chamber failed to assess that case law or give any reasons in support of its decision to favor some cases over others. If the jurisprudence is inconsistent, it follows that the applicable law is unsettled. Accordingly, the narrower definition applies pursuant to the principle of *in dubio pro reo*.

359. In any event, the Trial Chamber badly misinterpreted the limited case law it did cite, which in fact supports the Defence's position. In the *Kvočka* Appeals Judgment, the ICTY Appeals Chamber held that the accused would have committed political persecution only if there had been proof that

[938] **E295/6/3**, Closing Brief, paras. 223-5.
[939] Judgment, para. 430.
[940] *See* paras. 474, *supra*.

victims of the acts of persecution were 'asked about [their] opinion regarding secession' prior to determining whether they should be singled out.[941] If political persecution consisted of acts driven by a political 'motivation' or 'agenda' of the *perpetrator* regardless of the political views of the *victim* (as the Trial Chamber suggests), the only relevant consideration would be whether the *perpetrator's* conduct was intended to and did serve the goal of secession. Instead, the determining factor in *Kvočka* was whether the *victim* opposed secession – in other words, whether the victim held a political view. Other case law cited by the Trial Chamber merely copies the stock phrase from the ICTY Statute, entering convictions for 'political, racial or religious grounds'.[942]

360. The Trial Chamber's analysis of case law from the late 1990s onward to define political persecution as it existed at the height of the Cold War in 1975 was furthermore a factual anachronism and a violation of the principle of legality. Communist ideology, which governed the lives of a third of the world's population in 1975, is premised on the existence of competing classes within society and the use of revolutionary violence to abolish those classes and achieve equality. These goals were not conceived of in terms of *discrimination* and *animus* but as *political objectives*. The same applied on the other side of the Cold War divide. American intervention overseas in the 1970s – particularly in Southeast Asia – was explicitly conceived as a battleground between fundamentally incompatible political ideologies. In both cases, the use of violence within a political struggle would never have been understood as 'persecution' of a political opponent, any more than a war between states itself manifests 'persecution' of a race or ethnicity – at least without some additional evidence that the belligerents to the conflict were so motivated. This would remain true even if a state used illegal means to pursue that war; without further evidence in that regard, no question of *discrimination* or *animus* arises. In the late 1990s, following the end of the Cold War, this notion of a global *political conflict* no longer had significance.

ii – Political 'motivations' or 'agendas' are insufficient

361. The Trial Chamber committed a second error in holding that persecution may occur on political grounds 'where discrimination has been effected pursuant to political motivations or a political agenda against a group which itself may not hold any political views.'[943] This was an exceptionally broad definition directly inconsistent with the Duch Appeal Judgment and all applicable case law.

362. This Chamber's definition of persecution on political grounds in the Duch Appeal Judgment states, in relevant part, that:

> [A]n act or omission is discriminatory in fact where "a victim is targeted because of the victim's

[941] Kvočka Appeal Judgment, para. 456.
[942] *See* Judgment, fn. 1290 (citing Kordić and Čerkez Trial Judgment and Appeal Judgment and Blagojević and Jokić Trial Judgment). The Stakić Trial Judgment and Appeal Judgment did not specify the grounds of persecution at all.
[943] Judgment, para. 430.

> membership in a group *defined by the perpetrator* on specific grounds, namely on political, racial or religious basis." With regard to political grounds specifically, the perpetrator may define the targeted victims based on a subjective assessment as to what group or groups pose a political threat or danger. The 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).[944]

The key feature of this definition is that the 'grounds' of discrimination, be they political, racial or religious, are *features of the persecuted group*. Although the definition of that group is articulated by the perpetrator, that definition must have a political, racial or religious character.[945] Accordingly, where political persecution is concerned, the perpetrator must believe that the members of a group pose a 'political threat or danger'.

363. The Trial Chamber's approach to political persecution is contrary to this Chamber's definition. In the Trial Chamber's formulation, the 'political' is endowed entirely by the perpetrator's 'motivation' and 'agenda'. The characteristics of the persecuted group are irrelevant, so long as the perpetrator subjects the group to ill-treatment in furtherance of a political purpose. As already established, the law manifestly fails to support this position. The *Kvočka* Appeal Judgment limits political persecution to discriminatory conduct directed against groups holding an identifiable political view.[946] Other case law is irrelevant.[947]

364. The Trial Chamber's approach is also illogical. This is apparent if one attempts to apply it to other grounds of persecution. Persecution on religious grounds, for instance, would occur where 'discrimination has been effected pursuant to [religious] motivations or a [religious] agenda'. For the Chamber, a perpetrator who persecuted people with red hair because he believes his religion required it would commit religious persecution. It would be entirely irrelevant whether the perpetrator believes that the group he targeted was a religious group. This outcome is not contemplated by the Supreme Court Chamber's jurisprudence and is contrary to the natural and ordinary meaning of discrimination.

B. Grounds 191 & 192: The Trial Chamber erred in law and fact in finding that New People constitute a political group

365. For two distinct reasons, the Trial Chamber erred in finding that New People constitute a political group: (i) as characterized in the Judgment, 'New People' are not 'sufficiently discernible'; and (ii) New People held no common set of political views, nor were they viewed as political opponents by the CPK. Each ground independently requires dismissal of all charges for political persecution of New People.

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[944] Duch Appeal Judgment, para. 272.
[945] *See also*, Duch Appeal Judgment, para. 228 ('when the victim is targeted because of the victim's membership in a group as subjectively defined by the perpetrator on "political, racial or religious" grounds'.).
[946] *See* para. 359, *supra*.
[947] *See* para. 360, *supra*.

i – The Trial Chamber failed to articulate a consistent definition of New People

366. The Trial Chamber held that political persecution was charged as to two groups in relation to the evacuation of Phnom Penh: civilian and military officials of the Khmer Republic, and 'New People' or '17 April people'.[948] With regard to population movement Phase II, the Chamber found that persecution was charged only as to New People, which it held included civilian and military officials of the Khmer Republic.[949] The Trial Chamber held that political persecution was proven against each of these groups.[950]

367. No dispute exists that a political group must be 'sufficiently discernible'.[951] Yet, the Trial Chamber failed to articulate a consistent definition of 'New People'. On the one hand, it repeatedly held that the CPK 'identified the "New People", including former government officials, intellectuals, landowners, capitalists, feudalists and the petty bourgeoisie, as key enemies of the revolution and collectivization.'[952] Yet, the Chamber also constantly characterized 'New People' as the ambiguously defined 'city people', 'people who lived in the city', or those evacuated from Phnom Penh.[953]

368. These differences are not semantics. While the population of Phnom Penh as of 1970 was only around 500,000, an additional two million people from around the country had fled to Phnom Penh between 1970 and 1975 due to the effects of the civil war, including the massive and devastating American bombing in the countryside.[954] The vast majority of these new arrivals are certain to have been farmers by trade. In addition, although the Defence has access to no statistics, it is obvious that the 500,000 people who lived in Phnom Penh prior to 1970 included substantial numbers of laborers and those broadly within the 'proletariat'.[955] Therefore, taking into account the existence of both of these groups, it is clear that only a small percentage of those who 'lived in the city' on 17 April 1975 could have been classified as former government officials, intellectuals, landowners, capitalists, feudalists or petty bourgeoisie.

369. Nor was the Chamber's failure to articulate a consistent definition of 'New People' a linguistic accident. Instead, it was central to the Chamber's effort to link the CPK's alleged antipathy to narrowly defined groups of people to the indiscriminate treatment of the entire population of Phnom Penh during

[948] Judgment, para. 650.
[949] Judgment, para. 652.
[950] Judgment, paras. 574, 657.
[951] Duch Appeal Judgment, para. 274.
[952] Judgment, para. 169. *See also*, Judgment, paras. 195 (characterizing 'feudalist and capitalist classes' as '"New People" [...] perceived as political and social enemies of the revolution and the collective system'), 613 (by being moved, New People were separated from 'their former capitalist and feudalist lives').
[953] Judgment, paras. 517, 569.
[954] T. 23 Jul 2012 (David Chandler, **E1/94.1**), p. 47 (the population as of 1975 was between 2 and 2.5 million, but had been only around 500,000 in '1970, 71').
[955] For reasons articulated, *infra*, it is clear from CPK publications that this was the CPK's view. *See* paras. 379, *infra*.

the evacuation.[956] If the Chamber itself is unable to describe the characteristics of the persecuted group, it follows that it has failed to establish that it was 'sufficiently discernible'. Accordingly, it erred in law in entering convictions for political persecution against 'New People'.

ii – The Trial Chamber erred in finding that New People constitute a political group

370. No evidence exists that 'New People' held any common set of political views. Accordingly, they do not constitute a political group, properly defined.[957] However, the evidence is furthermore crystal clear that New People were not viewed as political opponents by the CPK. Should the Chamber find that a political group includes all political opponents as defined by the Accused, New People do not satisfy this definition, either.

371. The Trial Chamber's conclusion that New People constituted a political group was based to a considerable degree on evidence demonstrating that the CPK believed that cities contained corrupting influences. This evidence was irrelevant. Persecution is committed against groups of people, not against places, value systems or ideological constructs. In order to find that political persecution was committed against a group defined to include all people living in a city as of 17 April 1975, the Chamber was required to find that the CPK viewed this entire *group of people* as such. For the reasons to follow, the Chamber's findings are either irrelevant to this standard or manifestly unsubstantiated.

The Chamber's analysis of the crime of persecution during the evacuation of Phnom Penh

372. The Chamber's entire analysis of the status of New People as a political group is as follows:

> The Khmer Rouge identified several groups it regarded as enemies or as obstacles to the pursuit of its political agenda of social reform, in particular […] people who lived in the city who became known as "17 April people" or "new people". As these groups were identified pursuant to criteria defined by the CPK leadership, and the backgrounds of each were verifiable, as demonstrated by checkpoints and questioning of the latter two groups along the way, the Chamber is satisfied that each constitutes a sufficiently discernible group.'[958]

The Trial Chamber failed to cite *any* evidence supporting this conclusion. Indeed, paragraph 569 of the Judgment – in which these findings are set out – does not include a single footnote.

373. Its reasoning in these two short sentences is furthermore illogical. The Chamber held that the notion that people who lived in the city were regarded as enemies is proven by the fact that they were identified through questioning during the evacuation.[959] But every person who was evacuated was a person 'who lived in the city'. This finding is so incoherent that it defies efforts to contest its veracity.

Other findings concerning 'New People' or 'city people'

374. Although the Chamber did not cite them in its analysis of persecution, the Defence notes that

[956] *See* paras. 370-387, *infra*.
[957] *See* paras. 362-363, *supra*.
[958] Judgment, para. 569.
[959] Judgment, para. 569. This claim concerns 'the latter two groups', which in the context of the para. includes New People.

throughout the Judgment are haphazard references to the CPK's alleged view that 'New People' were viewed as enemies or otherwise opposed to the CPK. These findings were consistently erroneous.

375. Even more than other aspects of the Judgment, the Chamber's findings concerning CPK policy as to New People relied extensively on evidence from experts, quasi-experts and unauthenticated secondary sources.[960] The Chamber cited *twice* to François Ponchaud's opinion that citydwellers were seen as corrupt by the CPK because they had long hair and wore improper clothes.[961] This use of evidence was highly inappropriate: it concerns a question of fact regarding the mindset of CPK leaders, a matter on which so-called experts are not qualified to testify.[962] Furthermore, extensive direct evidence exists on the case file concerning CPK philosophy, including dozens of CPK publications and the testimony of numerous CPK insider witnesses. This should have been the primary source of the Chamber's evidence.

376. Yet the Chamber cited only one fact witness in direct connection to the CPK's attitude toward cities and the people who lived there: Chhouk Rin. It is instructive to compare the Chamber's characterization of Chhouk's evidence with the portions of his testimony disregarded by the Chamber. According to the Chamber, Chhouk's testimony was as follows:

> Witness confirmed that it was common knowledge before 17 April 1975 that those who lived in the cities were not yet under Khmer Rouge control and that the cities were occupied by enemies. As a military man, witness knew that people who occupied the cities were enemies.[963]

This same witness had the following exchange with the Co-Prosecutors – not cited in the Judgment despite reference to it in Defence submissions at trial[964] – concerning the evacuation of Kampot:

> Q. What reasons were given to the dwellers of Kampot for them being evacuated?
>
> A. The reason was that enemies would be among the population and they would pose some risk to us and for safety reasons they had to be evacuated.
>
> Q. So were all the dwellers of Kampot considered to be enemies at this time?
>
> A. No, they weren't, but the war was still going on and we had no reason to treat all civilians as enemies, and I did never receive any instructions as such. But we were advised that during such time if the enemies attacked us, if the population had not been evacuated, it would pose some risk.
>
> Q. You said yesterday that even a baby would have known in 1973 that city dwellers were the enemy. Was that still the case for Kampot or had it changed?
>
> A. We never treated anyone, including a baby, as an enemy, because the war was not yet fully over, although at some part, the war was over, but in Phnom Penh the war was still going on. And we never treated young people or children, including babies, as enemies, because we had to liberate the cities and we never waged war with the civilians. Indeed, we treated other opponents, like other -

[960] *See*, *e.g.*, fns. 306-310, 1547, 2498-50.
[961] Judgment, fns. 307, 1547.
[962] Least of all fact witnesses giving opinion evidence beyond the scope of their personal experience or those without Khmer language capabilities. *See* para. 211, *supra*.
[963] Judgment, fn. 2498.
[964] Closing Brief, paras 278-9; T. 24 October 2014 (Final Submissions Day 2, **E1/233.1**), pp. 75-77.

> the soldiers of the other party opposing us as our enemies, but we never treated civilians as our enemies.[965]

377. This essential distinction between the population of the cities as such and the small number of enemies the CPK expected to find within it was not contradicted by any fact witness at trial. Indeed, CPK documentation cited by the Chamber and even the Chamber's own findings reinforce it consistently. The Chamber relied on the so-called August 1975 'Report of the Standing Committee's visit to the Northwest Zone' urging vigilance against 'no-good elements among the new people',[966] yet omitted the next two sentences: 'Let us not talk about this handful. We prefer to talk about the overwhelming majority of base and new people who are good.'[967] This apparently deliberate misrepresentation, which directly inverts the meaning of a document purporting to reflect the views of the Standing Committee on a question at the heart of CPK policy, was grossly unreasonable.[968] Other evidence cited by the Chamber uniformly distinguishes between the citydwellers on the one hand and the capitalists and feudalists on the other.[969] The Defence is not aware of a *single* exception.

378. The Trial Chamber understood full well these limitations in the evidence and accordingly set out to misrepresent it. The Chamber held that opponents of the revolution were described as 'city dwellers, intellectuals, government officials and petty bourgeois',[970] yet the CPK publications it relied on make no reference to 'citydwellers'.[971] The Chamber held that the CPK believed it was 'essential to attack the "New People", the remnants of the feudalists and capitalists', citing to an issue of Revolutionary Flag in

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[965] T. 23 Apr 2013 (CHHOUK Rin, **E1/182.1**), pp. 5-6 (emphasis added). Chhouk similarly testified that prior to the capture of Kampot, 'my superiors told me to be careful not to target the people's location. We had to be careful. So this is the order or the advice from our superior […] They ordered us not to hit civilian target. We do not target civilians.' *See* T. 22 Apr 2013 (CHHOUK Rin, **E1/181.1**), pp. 86-87.
[966] Judgment, para. 745.
[967] **E3/216**, 'Standing Committee Report', 20-24 Aug 1975, ERN 00850976.
[968] This same document was subsequently relied on for the proposition that 'New People were to be on the outskirts of society, learning from the Old People and being re-fashioned into peasants through hard labour.' *See* Judgment, para. 615. The document actually says, 'the cooperatives have absorbed [the New People] completely, supplying them with food and, moreover, deploying their strength to work.' *See* **E3/216**, 'Standing Committee Report', 20-24 Aug 1975, ERN 00850975-6. The Chamber's reference to 'hard labour' was, simply, made up.
[969] Judgment, para. 169 (citing **E3/5**, 'Revolutionary Flag', Aug 1975, ERN 00401486-7, 001401501, 00401505-6 (describing, variously, the opposition of the capitalists and feudalists and the need to eliminate private ownership); **E3/10**, 'Revolutionary Flag', Sep-Oct 1976, ERN 00450529 (describing the new people as including feudalists, capitalists, petty bourgeoisie and other workers and laborers, among whom contradictions exist only with the feudalists and capitalists); **E3/743**, 'Revolutionary Flag', Jul 1977, ERN 00476163 (describing feudalists landowner classes)); Judgment, para. 613, fn. 1323 (citing **E3/729**, 'Revolutionary Youth', Oct 1975, ERN 00357910 (describing class combat against 'imperialist-feudalist-capitalist world views'); **E3/50**, Report on Third Anniversary of the Organization of Peasant Cooperatives, 20 May 1976 (describing private ownership and feudalists, landowners and capitalists); as to **E3/10**, 'Revolutionary Flag', Sep-Oct 1976, *see* para. 379, *infra*)); Judgment, para. 613, fn. 1928 (citing Document **E3/5**, 'Revolutionary Flag', Aug 1975, ERN 00401486-7 (describing feudalist, capitalist and petty bourgeoisie), 00401504-6 (describing eradication of private ownership and how those who had done office work 'went to work to increase production, for instance growing some vegetables around the office', work which was obviously less difficult that the wet-rice cultivation which constituted the ordinary occupation of most of the base people); **E3/748**, 'Revolutionary Flag', Oct-Nov 1975, ERN 00495820 (describing 'class abolition' and the fight between the collectivist and private ownership regimes); as to **E3/729**, 'Revolutionary Youth', Oct 1975, *see* para. 380, *infra*; **E3/10**, **E3/797**, **E3/50** and **E3/99** are irrelevant on their face)); Judgment, para. 616, fn. 1938 (citing **E3/733**, 'Revolutionary Youth', May 1976, ERN 00357877 (describing imperialists, feudalists and capitalists).
[970] Judgment, para. 544.
[971] *See* Judgment, fn. 1625.

which the phrase 'New People' does not even appear.[972] The Chamber held that 'New People were perceived as political and social enemies of the revolution', citing evidence which concerns only capitalists and feudalists.[973] This rhetorical tool, which mimics the Co-Prosecutors' misrepresentation of similar documents,[974] betrays the Trial Chamber's guilty conscience: it knows there is a missing link in its analysis, and that something more was required from the evidence. The Chamber resolved this contradiction by changing the content of the evidence instead of the outcome of its analysis. On other occasions, the Trial Chamber was more straightforward, stating repeatedly that enemies of the CPK were not the citydwellers but the small number of no-good elements which existed 'among' them.[975]

379. Occasional references to New People which do exist in evidence cited by the Chamber were consistently misrepresented.[976] The Chamber asserted that the September-October 1976 *Revolutionary Flag* establishes that 'Class Struggle referred to the Party's opposition to the New People'.[977] In fact, the document says exactly the opposite:

> Among the old peasants there are poor peasants, lower-middle peasants, mid-level peasants, upper-middle peasants, and wealthy peasants. Among the new peasants are the petty bourgeoisie, the capitalists, the feudalists, and other workers and laborers. Therefore there are contradictions within the old peasants from upper-middle peasants on up, in particular with the wealthy peasants, that are life-and-death contradictions. There are also contradictions within the new peasants, contradictions with capitalists and feudalists that are life-and-death contradictions.[978]

According to this document, there are contradictions between the wealthy Old People and all of the other Old People, and contradictions between New People who are capitalists and feudalists and all of the other New People. This document affirmatively proves that whether someone is a 'New Person' is not a relevant criterion to whether they are in contradiction with the goals of the revolution.

380. The Chamber also cited to the October 1975 *Revolutionary Flag* to establish that 'New People

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[972] Judgment, para. 616, fn. 1938. The Defence notes that the document referred to by the Chamber is number **E3/733**, 'Revolutionary Youth', May 1976, a May 1976 issue of Revolutionary Flag which does not match in any way the excerpt quoted by the Chamber. The Defence infers that the Chamber intended to refer to **E3/734**, 'Revolutionary Youth', Jul 1976, a Jul 1976 issue, which does refer to smashing the remnant debris of the bourgeois system. The magazine explains (in a passage deliberately omitted by the Chamber) that smashing these remnants is accomplished by the elimination of private property. *See* **E3/734**, 'Revolutionary Youth', Jul 1976, ERN 00184272. In any event, neither document contains the phrase 'New People'.

[973] Judgment, para. 195 (citing paras. 117-8, 169 and 726). Paragraphs 117-8 make no mention of New People or any other class, and paragraphs 169 and 726 concerns only capitalists and feudalists.

[974] *See* **E295/6/3**, Closing Brief, para. 155 (describing an instance during oral argument before the Trial Chamber in which the Co-Prosecutors read an excerpt from a *Revolutionary Flag* magazine instructing cadres to smash 'class, regime and ideology', and then summarized the document as an instruction to smash 'these people, and their class, and their regime, and their ideology').

[975] Judgment, paras. 615, 745.

[976] *See* para. 378, *supra*.

[977] Judgment, para. 613, fn. 1923.

[978] **E3/10**, 'Revolutionary Flag', Sep-Oct 1976, ERN 00450529. In another striking misuse of the evidence, the Chamber claims that in 1976, the 'Party leadership' decided that the people 'had to be separated according to their class'. *See* Judgment, para. 769. Despite citing for this proposition Elizabeth Becker's notes of her interview with Ieng Sary, the Chamber failed to explain that two sentences prior, Ieng Sary states that 'in 1975, at the evacuation of the cities, town, we didn't separate the people by base or network.' *See* **E3/94**, 'Interview of Ieng Sary' by Elizabeth Becker, 22 Jul 1981, ERN 00342504. Ieng Sary furthermore claims that later on, 'poor people from the cities' were distinguished from 'people who supported Lon Nol'. *See* **E3/94**, 'Interview of Ieng Sary' by Elizabeth Becker, 22 Jul 1981, ERN 00342504.

could be refashioned into peasants'[979] in cooperatives and that '[c]lass struggle referred to the Party's opposition to the New People'.[980] However, the only reference to 'New People' in this issue instructs cadres to 'maintain security for' and 'obtain products to sustain' and 'distribut[e] products to' them.[981]

381. Perhaps only in contrast with real evidence of real persecution is it fully apparent just how far the Chamber has distorted this evidence in the Judgment. Can the Supreme Court Chamber imagine the infamous Nazi propaganda newspaper *Der Stürmer* speaking of 'the overwhelming majority of [Jews] who are good'? Could Hitler have stood upon a podium and delivered a fiery exhortation instructing NSDAP members to 'maintain security for' and 'obtain products to sustain' the Jews? The absurdity is just as apparent in reverse. Could an issue of *Revolutionary Flag* have ever asserted that if 'the danger of the reproduction of that curse of God in [New People] blood is finally to come to an end, then there is only one way- the extermination of that people whose father is the devil'?[982] Could Nuon Chea have ever instructed cadres during a political education session that 'the [New People] in [Cambodia] must be killed […] exterminated root and branch'?[983] These questions need no answers.[984]

382. A deeper truth about the CPK is at issue here: that its attitude toward the cities was not 'political' in any meaningful sense. The Party's attitude was not about political position or power, or any effort to seize, control or contest it. Indeed, as the Chamber found, the essential principles of the CPK's revolution were codified in 1960,[985] when the Party was a small collection of idealists without any political authority or any ability to employ violence to obtain it. CPK philosophy was beyond politics: it was social, economic and ideological. It reflected 'a new concept of society'.[986]

383. The approach adopted by the Trial Chamber in the Judgment accordingly reads the 'political' out of political persecution. As the Chamber explicitly held, it extends the concept of persecution to the definition of any group for any purpose which accomplishes a political objective.[987] This approach would recast any class-based theory of society as the potential basis for an international crime. Indeed,

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[979] Judgment, para. 613.
[980] Judgment, para. 613.
[981] Judgment, para. 613, fn. 1923 (citing **E3/729**, 'Revolutionary Youth', Oct 1975, ERN 00357903). One other document cited in this footnote contains a reference to 'new peasants', which is even more clearly contrary to the Trial Chamber's analysis. *See* para. 379, *supra*. Other findings about 'New People' include that they 'could not be trusted, [and] were assigned secondary tasks.' *See* Judgment, para. 770, citing for support a 27 page extract of an issue of Revolutionary Flag in which the words 'New People', 'trust', 'city' and 'Phnom Penh' do not appear to exist.
[982] IMT Judgment, p. 303.
[983] IMT Judgment, p. 303.
[984] The Defence recalls the two propaganda films created by the East German filmmakers Heynowski and Scheumann, discussed at para. 129, *supra*. The Defence refers the Supreme Court Chamber to the second of these films, *Kampuchea: Sterben und Auferstehen*, which includes a chilling dramatization in which a young child stands next to a distinguished older woman. The young child states, 'I am an Old Person', after which the distinguished citydweller states, 'I am a New Person'. It is clear in the film that in the DK state represented in the film, the young child has been given a hugher position and prestige than his elder. This film appears to be an early manifestion, or at least a reflection, of the effort to caricature the abuse of New People by Old People in DK.
[985] Judgment, paras. 86-87.
[986] Judgment, para. 544.
[987] Judgment, para. 430.

the Trial Chamber cited to CPK publications asserting that the feudalist and capitalist classes must be treated equally in *support* of its finding that the CPK leadership held the requisite persecutory intent.[988] This extreme conclusion amounts to an indictment of Communism itself – and confirms the Defence's claim advanced during closing argument that the charges against Nuon Chea are in substantial part the final word of the West in its victory in the Cold War.[989] It is also an inversion of history: a view which holds that the subordination of the powerful to the collective is an act of violence against the former instead of an act of justice by the latter.

C. Grounds 193-195: The Trial Chamber erred in law and fact in finding that *mens rea* and discrimination in fact were proven in regard to the evacuation of Phnom Penh

New people

384. The Trial Chamber also held that discriminatory intent as to New People during the evacuation of Phnom Penh was proven by:

> 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[990].

Yet the Trial Chamber cited no evidence of the 'attitudes' of CPNLAF soldiers toward city people. The only such attitudes the Defence can discern anywhere in the Chamber's factual findings concerning the evacuation are that soldiers had a 'serious demeanor' and used 'threatening looks', clearly insufficient to manifest discriminatory intent.[991]

385. Nor does the alleged treatment of New People 'in the base villages' prove the discriminatory intent of the soldiers who implemented the evacuation. The acts identified by the Chamber as persecutory all occurred during the evacuation itself: the movement of population from Phnom Penh,[992] and the alleged use of violence and ill treatment by CPNLAF troops in the course of the movement.[993] Obviously, the discriminatory character of this conduct cannot be proven by the subsequent conduct of those 'in the base villages'. In any event, the evidence of a small handful of the 2.5 million people who were evacuated that they were treated differently than base people in the villages at which they arrived manifestly fails to prove the existence of discriminatory intent.[994] Indeed, the Chamber concluded that 'people had been previously instructed to prepare to accept the evacuees' and accordingly that 'new arrivals were initially greeted and helped by the "base people" or 'old people' who gave the evacuees

[988] *See e.g.*, Judgment, para. 613, fn. 1928 (citing **E3/99**, 'Document: Follow-Up of Implementation of the Political Line in Mobilizing the National Democratic Front Forces of the Party', 22 Sep 1975, 00244275 (civil servants, petty bourgeoisie, traders, domestic compradors and aristocrats 'did not enjoy the political and economic status as they used to').
[989] T. 22 Oct 2013 (Final Submissions Day 1, **E1/232.1**), pp. 53-55.
[990] Judgment, para. 571.
[991] Judgment, para. 475.
[992] *See* Judgment, fn. 1687.
[993] *See* Judgment, fns. 1688-9.
[994] *See* Judgment, para. 571 (citing Judgment, para. 517).

food and shelter, and even built them homes.'[995]

386. Furthermore, the evidence shows – and the Trial Chamber found – that evacuees were not generally forced to go to a particular place and that most simply returned to their home villages (from which the vast majority had only recently left).[996] There is no evidence or reason to believe that these people were treated in a discriminatory fashion in their own villages. More fundamentally, an order to, in effect, return home, hardly reflects persecutory or discriminatory intent.

387. The Trial Chamber's conclusion that New People were discriminated against during the evacuation of Phnom Penh is also erroneous. The Chamber repeated its illogical finding that victims were identified 'as city people' at checkpoints, even though everyone who was evacuated was a 'city person'.[997] The Chamber also concluded that New People were discriminated against as they 'might harbor individuals who disagreed with the CPK's ideology'.[998] This conclusion is factually erroneous,[999] but also establishes that New People *themselves* were not political opponents.[1000]

Khmer Republic soldiers and officials

388. The Trial Chamber found that persecution of Khmer Republic soldiers and officials was effected by the killing of high-ranking military and civilian officials and other officers on or after taking Phnom Penh.[1001] As set out in detail elsewhere in this Appeal, the Defence disputes the Chamber's finding that killings occurred[1002] and, if any sporadic killing did occur, that they fall within the ambit of Nuon Chea's criminal liability.[1003] The Trial Chamber further held that persecution was established through arrests of Khmer Republic soldiers.[1004] For reasons set out in connection with the Defence's analysis of the chapeau elements of crimes against humanity, these arrests were lawful.[1005]

D. Grounds 178, 196-197: The Trial Chamber erred in law and fact in finding that *mens rea* and discrimination in fact in regard to the Phase II population movement

389. The Chamber found that *mens rea* and discrimination in fact were satisfied during the Phase II movement in a one-paragraph discussion at paragraph 655 of the Judgment. In support of this finding, the Chamber cited a disparate set of factual findings about the Phase II movements. None of these

[995] Judgment, para. 516. Even this finding failed to incorporate much of the evidence cited by the Defence in its Closing Brief in this regard. *See* **E295/6/3**, Closing Brief, para. 280.Some of this evidence – which was ignored by the Chamber – was given by witnesses on whom the Chamber relied extensively. *See e.g.*, **E295/6/3**, Closing Brief, para. 280 (citing testimony of Pin Yathay and Hun Chhunly); *cf.* Judgment, fns. 510, 683, 692, 740, 809-10, 1366, 1372, 1374-5, 1379-81, 1393, 1403, 1410, 1413, 1422, 1435, 1440, 1446, 1451, 1479, 1483, 1487, 1489, 1531, 1602, 1730-1, 1739, 1766, 1777, 1786, 1797-1802, 1841, 1846-7, 1849-50, 1853-4, 1857, 1862, 1867, 1889, 2077, 2635, 3262, 3272, 3274, 3279.
[996] Judgment, para. 485.
[997] Judgment, para. 572. *See* paras. 373-373, *supra*.
[998] Judgment, para. 572.
[999] *See* paras. 378-379, *supra*.
[1000] *See* paras. 378-379, *supra*.
[1001] Judgment, para. 570.
[1002] *See* paras. 588-596, *infra*.
[1003] *See* para. 624, *infra*.
[1004] Judgment, para. 570.
[1005] *See* paras. 479-481, *supra*.

findings prove either *mens rea* or discrimination in fact, although for different reasons. Accordingly, the Defence addresses these allegations in five distinct categories.

The Trial Chamber's finding that the Phase II movement targeted New People

390. The primary basis on which the Chamber found the existence of discriminatory *animus* and discrimination in fact was that the Phase II movement primarily targeted New People.[1006] While the Trial Chamber recognized that in many locations both New People and Old People were moved, it held that movements of Old People 'occurred for specific reasons', including distrust of people in the East Zone or the 'drive to fill their production quotas'.[1007]

391. This conclusion was in error. The Trial Chamber purported to link the Phase II movement to the CPK leadership almost exclusively on the basis of the Party's desire to transfer labor to the North and Northwest Zones for agricultural purposes.[1008] The Chamber's finding that the 'specific reason' for the movement of Old People was the 'drive to fill their production quotas'[1009] is therefore unreasonable: by the Chamber's own definition, that was the purpose of the entire movement. The Trial Chamber further undermined its finding that the movement was motivated by *animus* by finding that 'some village chiefs and Khmer Rouge officials asked for volunteers.'[1010]

392. To whatever extent New People were moved with greater frequency than Old People, the Chamber erroneously failed to conclude that New People were chosen not out of discriminatory *animus* but because they were often outsiders who had just arrived in base villages. The Trial Chamber found that the decision as to who was to be moved was made by 'village chiefs and Angkar',[1011] Angkar simply being the manner in which witnesses and civil parties described the position of the village chiefs with whom they interacted.[1012] It is hardly surprising that some village chiefs selected the New People: the Old People, or Base People, were residents of their villages whom they had known their whole lives. While the Chamber held that 'local officials' were provided with lists of New People to be moved,[1013] its only evidence was the out-of-court statement of a single village chief concerning an event which was not even part of the Phase II movement.[1014]

The Chamber's finding that New People were sent to worse destinations or 'disappeared'

393. The Trial Chamber also found both discriminatory *animus* and discrimination in fact because 'Khmer Rouge soldiers and officials questioned people about their history in order to identify "New

[1006] Judgment, para. 655.
[1007] Judgment, para. 655.
[1008] *See* Judgment, paras. 580-1, 584-7, 602-12, 796-7.
[1009] Judgment, para. 655.
[1010] Judgment, para. 588.
[1011] Judgment, para. 588.
[1012] *See* Judgment, fn. 1775.
[1013] Judgment, para. 623, fns. 1967-8.
[1014] **E3/5255**, 'AU Hau Interview Record', ERN 00250043-5.

People'", who were then sent to locations with more difficult working conditions.[1015] As already demonstrated, however, no evidence establishes that 'Khmer Rouge soldiers and officials' parsed evacuees based on their backgrounds prior to selecting them for the Phase II movement.[1016] Similarly, the Chamber's finding that 'people were questioned about their past' during the Phase II movement was manifestly unfounded.[1017] Other evidence describes evacuees being directed to specific locations by CPK forces, but does not establish that New People were subject to differential treatment.[1018] To the contrary, evidence cited by the Chamber in fact asserts that New People with appropriate skills were assigned to work in workshops,[1019] that people experienced conditions with 'no discrimination' as between New People and Old People,[1020] and that those sent to establish new cooperatives were ultimately 'reintegrated into the old village to mingle with the old villagers'.[1021] The Chamber also found that 'some were permitted to choose the commune to which they would be taken'.[1022]

394. The Chamber also found that 'many' New People disappeared after being moved.[1023] This was supported by one witness's testimony, Nou Mao, who described: (i) the alleged disappearance of unspecified people after evacuations in the liberated zones pre-1975;[1024] and (ii) the evacuation of people to Battambang without describing any disappearances.[1025] Nou Mao was not involved in and did not witness the evacuation to Battambang. He was told about it by 'both New and Old people'.[1026]

The Chamber's finding that New People were sent to security centers and execution sites

395. The Trial Chamber made a series of findings about alleged transfers of New People to security centers, execution sites and other locations. All of these findings are outside the scope of Case 002/01. Both the Closing Order and the Judgment link the Phase II movement to the redistribution of labor and

[1015] Judgment, para. 655, fn. 2057 (citing Judgment, paras. 600-1, 617).
[1016] *See* para. 392, *supra*.
[1017] Judgment, para. 600, fn. 1854. Four of the seven testimonials cited in fn. 1854 – Sokh Chin, Pin Yathay, Chhit Savun and the 'Refugee Account' – do not mention screening. Lay Bony testified that she was asked what her occupation had been *after* reaching Kaoh Chum village, her final destination during the Phase II movement. She added that 'they did not question us' and 'we were not asked to write a biography'. Chea Sowatha's civil party application similarly states that *after* reaching his final destination, people were divided by their technical skills and assigned to different projects on that basis; as he was a 'technician', he went to work at a dam. Toeng Sokha's testimony appears to have been that at some point during the evacuation of Phnom Penh her family was temporarily grouped at Trapeang Angk, a place for intellectuals. In July or August 1975 – 'before the rainy season' – they were moved from Trapeang Angk to Pursat. *See* T. 4 Dec 2012 (TOENG Sokha **E1/147.1**), pp. 47-48.
[1018] Judgment, para. 601, fns. 1859, 1866 (*citing* **E3/5424**, 'PHAN Yim Victim Complaint'). Other evidence cited in fn. 1866 affirmatively proves that New People were not treated differentially (*see* fns. 1024-1026), or in the case of Sophan Sovany's testimony, was inadmissible for the truth of its contents (*see* paras. 188-191, *supra*). No evidence demonstrates that New People were grouped in jungle cooperatives on the basis of screening carried out by any CPK officials.
[1019] Judgment, para. 601, fn. 1866 (citing T. 21 May 2013 (PRUM Son, **E1/194.1**), p. 15).
[1020] Judgment, para. 601, fn. 1866 (citing T. 21 May 2013 (PRUM Son, **E1/194.1**), p. 16).
[1021] Judgment, para. 601, fn. 1866 (citing T. 21 May 2013 (PRUM Son, **E1/194.1**), p. 15).
[1022] Judgment, para. 601 fn. 1860.
[1023] Judgment, para. 655 (citing Judgment, para. 614).
[1024] Judgment, para. 614 (citing T. 19 Jun 2013 (NOU Mao, **E1/209.1**), p. 44).
[1025] Judgment, para. 614 (citing T. 19 Jun 2013 (NOU Mao, **E1/209.1**), pp. 52-53).
[1026] Judgment, para. 614 (citing T. 19 Jun 2013 (NOU Mao, **E1/209.1**), p. 53).

the imperatives of the CPK's agriculture plans.[1027] As such, 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. Thus, the claim that New People were sent to Ta Ney prison in Kampot or Sgnok Mountain in Kampong Speu,[1028] the alleged transfer of a teacher from his village in Kratie to a detention facility in the same district,[1029] the alleged removal of people from the commune to which Lay Bony had previously been transferred during the Phase II movement,[1030] and the alleged transfer of detainees from a security center in Thkaol for execution at a site called Pheak[1031] are not part of the Phase II movement. Indeed, the Chamber disallowed questions concerning Thkaol security center because it was outside the trial scope.[1032] Alleged arrests and/or executions of New People and Khmer Republic soldiers and officials in various other locations are similarly beyond the scope of Case 002/01.[1033] These allegations were furthermore beyond the scope of the Closing Order, which makes no mention of Ta Ney, Sgnok Mountain or Thkaol security center, let alone persecution of New People at these locations. Convictions based on these facts accordingly violate Nuon Chea's right to notice of the charges against him.[1034]

396. For the same reason, the alleged mistreatment of New People at security centers and execution sites was not a matter in dispute between the parties and was never established by the evidence. The Defence notes that other evidence similarly outside the scope of the trial shows that New People were not discriminated against.[1035] The arbitrary selection of examples cited by the Trial Chamber is therefore woefully inadequate to establish that CPK officials acted with discriminatory intent.

[1027] Judgment, paras. 575-6 ('According to the Closing Order, the main reason for the decision to move people lay in the effort to focus labour resources on agriculture and infrastructure projects.'). *See also*, Judgment, paras. 581,602-6. While the Judgment also claims that the Closing Order alleges that 'New People had to be moved in order for them to be refashioned into peasants', most of the references to the Closing Order do not support this claim. *See* Judgment, fn. 1710 (*citing* **D427**, Closing Order, paras. 165, 277, 1460). The one paragraph of the Closing Order referred to in the Judgment which does concern refashioning of New People into peasants, para. 161, clearly refers to the evacuation of Phnom Penh. Indeed, the main document cited is an alleged Party publication dated September 1975 which asserts that new people *already* 'do not enjoy the political and economic status as they used to'. *See* **D427**, Closing Order, fn. 469; **E3/99**, 'Document: Follow-Up of Implementation of the Political Line in Mobilizing the National Democratic Front Forces of the Party', 22 Sep 1975, ERN 00244275. As this document is dated just as the alleged Phase II movement was beginning, it shows clearly that the Phase II movement was not contemplated for this purpose.

[1028] Judgment, fn. 2058 (citing Judgment, para. 619).

[1029] Judgment, fn. 2058 (citing Judgment, para. 622, fn. 1966).

[1030] Judgment, para. 601, fn. 1861.

[1031] Judgment, fns. 2058-9 (citing Judgment, para. 618, fns. 1948-51). The Trial Chamber badly mischaracterized this evidence. The Chamber held that people were 'sent to zones which allegedly had plentiful food' after which '[t]hese people disappeared, including Civil Party LAY Bony's husband'. While this description sounds vaguely like the Chamber's characterization of the Phase II movement, Lay Bony's actual testimony was that while she was detained in a security center in Thkaol, she heard that there was a place called a 'zone' to which people were being sent, and that this 'zone' was a place which had plentiful food. But she later discovered that the 'zone' was in fact an execution site called Pheak nearby the Thkaol security center where she was allegedly detained.

[1032] T. 2 May 2013 (LIM Sat, **E1/187.1**), pp. 59-61.

[1033] Judgment, fns. 2058-9 (citing Judgment, para. 623, fns. 1969-70).

[1034] Nahimana Appeal Judgment, paras. 257, 405. Further submissions concerning the requirement that 'material facts' are pled in the indictment are set out in section XX(A), *infra*.

[1035] *See, e.g.* **E295/6/3**, Closing Brief, para. 280 (citing evidence that New People were given assistance, including food and shelter, upon arrival at cooperatives after the evacuation of Phnom Penh).

The Chamber's findings concerning Khmer Republic soldiers and/or officials

397. The Chamber also found that Khmer Republic soldiers and officials were transferred to security centers and/or disappeared during the Phase II movement.[1036] For the same reasons set out above, these allegations did not occur during the Phase II movement and were accordingly not charged in Case 002/01.[1037] These allegations are furthermore not found in the Closing Order. For the above reasons, the Trial Chamber erred in law in finding that these allegations constitute persecution.

398. The Defence additionally notes that the Chamber correctly held that the Closing Order does not charge political persecution against Khmer Republic soldiers and officials during the Phase II movement.[1038] While the Chamber held that Khmer Republic officials were considered New People and persecuted on that basis during the Phase II movement,[1039] the Chamber's underlying findings of fact were that Khmer Republic officials were targeted because of their status *as officials* and accordingly as a 'distinct group'.[1040] As the Chamber rightly held, these allegations were outside the scope of the Closing Order. Accordingly, the Chamber erred in law in entering convictions for persecution on the basis of those facts.

The Chamber's findings concerning other acts

399. Finally, other findings are insufficient to constitute a persecutory act or to manifest discriminatory intent. Witness Yun Kim testified that he was instructed to classify people into categories based on whether they were base, candidate or new people.[1041] However, he also testified that these classifications had no concrete effect on the food regime and that he did not know their purpose or effect.[1042] The alleged instruction of the Party leadership to 'administer[]' no-good elements separately similarly does not constitute or amount to persecution.[1043] Nor is it relevant to the alleged treatment of the entirely distinct group of 'New People', as the 'no-goods are not numerous, comprising *maybe only 2 percent*'.[1044] This fact, which is consistent with other CPK documentation,[1045] was omitted from the Chamber's analysis.

XIII. OTHER INHUMANE ACTS DURING POPULATION MOVEMENTS

A. Grounds 179 & 183: The Trial Chamber erred in law in defining other inhumane acts

[1036] Judgment, para. 655, fn. 2058 (citing Judgment, para. 617).
[1037] *See* para. 395, *supra*.
[1038] Judgment, paras. 651.
[1039] Judgment, para. 652.
[1040] Judgment, para. 651.
[1041] Judgment, fn. 2058 (citing Judgment, para. 622 (citing T. 19 Jun 2012 (YUN Kim, **E1/88.1**), pp. 62-66; T. 20 Jun 2009 (YUN Kim, **E1/89.1**), pp. 29-30))
[1042] Judgment, fn. 2058 (citing Judgment, para. 622 (citing T. 20 Jun 2009 (YUN Kim, **E1/89.1**), pp. 29-30))
[1043] Judgment, fns. 2058-9 (citing Judgment, para. 614).
[1044] Judgment, para. 614 (citing **E3/798**, 'Minutes of Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments', 30 Aug 1976, ERN 00183968) (emphasis added).
[1045] *See* para. 377, *supra*.

through forced transfer and enforced disappearances

400. The Trial Chamber held that 'other inhumane acts' was a crime against humanity in 1975 which satisfied the principle of legality and that both enforced disappearances and forced transfer constituted other inhumane acts at that time. The Trial Chamber then defined the elements of these offences and held that both were committed by CPK troops.[1046] However, the elements set out by the Chamber did not amount to conduct which constituted other inhumane acts in 1975, nor did the conduct of CPK troops constitute other inhumane acts under all the circumstances. Accordingly, the Trial Chamber erred in law, invalidating convictions entered for other inhumane acts through both forced transfer and enforced disappearances. As these errors derive in part from the Chamber's erroneous analysis of the principle of legality, the Defence addresses this preliminary issue first.

i – The application of the principle of legality to other inhumane acts

401. The Trial Chamber's application of other inhumane acts was erroneous in two respects: (i) it held that the principle of legality is irrelevant to the interpretation of the content of other inhumane acts; and (ii) it failed to apply a case by case approach.

Principle of legality

402. With regard to the principle of legality, the Trial Chamber held as follows:

> 'Other inhumane acts' was established as a crime against humanity under customary international law before 1975 and was thus both accessible and foreseeable to the Accused.
>
> The NUON Chea Defence submits that in order to respect the principle of legality, indications that a form of conduct specifically charged in the Closing Order was not considered a crime against humanity at the relevant time precludes criminal responsibility. Contrary to this view, the conduct underlying the crime of 'other inhumane acts' need not itself have had the status of a crime against humanity. The Pre-Trial Chamber has previously ruled that 'other inhumane acts' is in itself a crime under international law and that it is accordingly unnecessary to establish that each of the sub-categories alleged to fall within the ambit of this offence were criminalised. Rather, the principle of legality attaches to the entire category of 'other inhumane acts' and not to each sub-category of this offence. The Trial Chamber agrees with the reasoning of the Pre-Trial Chamber and accordingly rejects the NUON Chea Defence submission.[1047]

403. However, while the Pre-Trial Chamber held that other inhumane acts is an independent crime and that underlying conduct need not be expressly criminalized,[1048] it did not hold that the application of the offence could never violate the principle of legality. To the contrary, it emphasized that criminal conduct must be sufficiently 'accessible and foreseeable' for individuals to 'determine in advance whether certain conduct will or will not fall within its parameters.'[1049] Accordingly, courts assessing conduct charged as other inhumane acts must draw on the principle of *esjudem generis* (being of the

[1046] Judgment, paras. 448, 450.
[1047] Judgment, paras. 435-6.
[1048] **D427/1/30**, 'Decision on IENG Sary's Appeal Against the Closing Order', 11 Apr 2011 ('Ieng Sary's Closing Order Appeal Decision (Reasons)'), para. 378.
[1049] **D427/1/30**, Ieng Sary's Closing Order Appeal Decision (Reasons), para. 384.

same kind) and norms set out in relevant international instruments, such as the Hague and Geneva Conventions and international human rights treaties.[1050] These norms provide the content to other inhumane acts without which it would lack the 'specific[ity]' required by the principle of legality.[1051]

404. The Pre-Trial Chamber's decision reflects international standards in these respects. The principle of legality provides one of the most important procedural guarantees in the criminal process: it requires that conduct subject to criminal sanction is both foreseeable and accessible.[1052] Foreseeability requires that the Accused be able to appreciate that the 'concrete conduct' charged is criminal.[1053] Thus, a norm upon which a conviction is based 'must make it sufficiently clear what act or omission would engage his criminal responsibility.'[1054]

405. The Defence's submissions were consistent with these principles. The Defence did not argue, as the Trial Chamber misleadingly asserted, that forced transfer and enforced disappearances were not criminalized in 1975. The Defence argued that these offences as they were defined by the Trial Chamber did not exist in any form under customary international law.[1055] As the offences did not derive from applicable legal sources, they were not sufficiently foreseeable, as the Pre-Trial Chamber properly held was required.[1056]

406. Thus, the Trial Chamber wrongly held that because other inhumane acts was a recognized crime against humanity in 1975, no further analysis of the principle of legality was required.[1057] As a consequence, it failed to adequately consider whether it was foreseeable in 1975 that the conduct it characterized as forced transfer and enforced disappearances would constitute an other inhumane act. The effect of this error in relation to specific crimes is demonstrated *infra*.

Case by case approach

407. The Trial Chamber further held:

> Acts or omissions must be of a nature and gravity similar to other enumerated crimes against humanity, the severity to be assessed on a case-by-case basis with due regard for the individual circumstances of the case. These may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim, as well as the impact of the act upon the victim.

[1050] **D427/1/30**, Ieng Sary's Closing Order Appeal Decision (Reasons), paras. 385-96.
[1051] **D427/1/30**, Ieng Sary's Closing Order Appeal Decision (Reasons), paras. 385-96.
[1052] *Prosecutor v. Hadžihasanović et al.*, 'Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility', IT-01-47-AR72, 16 Jul 2013, para. 34.
[1053] *Prosecutor v. Hadžihasanović et al.*, 'Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility', IT-01-47-AR72, 16 Jul 2013, para. 34.
[1054] *Vasiljević* Trial Judgment, para. 193. *See, also, Vasiljević* Trial Judgment, para. 201 ('the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity *under customary international law* for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible. When making that assessment, the Trial Chamber takes into account the specificity of international law, in particular that of customary international law. The requirement of sufficient clarity of the definition of a criminal offence is in fact part of the *nullum crimen sine lege* requirement, and it must be assessed in that context').
[1055] **E295/6/3**, Closing Brief, para. 229; **E163/5/11**, '[NUON Chea] Preliminary Submissions Concerning the Applicable Law', 18 Jan 2013 ('Applicable Law Submissions'), paras. 11-17.
[1056] **D427/1/30**, Ieng Sary Closing Order Appeal Decision, paras. 388-95.
[1057] Judgment, paras. 435-6.

> The NUON Chea Defence submission that "the failure during the relevant period to characterize or prosecute any particular act as a crime against humanity would tend to establish … that it was not seen to be of sufficient gravity to rise to the level of an 'other inhumane act'" ignores the requirement that the severity of particular conduct needs to be assessed on a case-by-case basis with due regard for the individual circumstances of the case. Accordingly, while previous characterisation or prosecution of conduct as a crime against humanity may give a general indication of the severity, it is not determinative of severity of the conduct in a particular case.[1058]

408. However, the Trial Chamber's treatment of the conduct alleged to constitute other inhumane acts did not accord with its own statement of principle. Rather than assess the 'particular conduct' of CPK troops 'on a case-by-case basis with due regard for the individual circumstances of the case', the Chamber articulated the elements of specific crimes and held that conduct which satisfied those elements was criminal as such.[1059] The conduct for which it convicted Nuon Chea (the elements constituting forced transfer and enforced disappearances) was therefore not the same conduct that it previously held satisfied the principle of legality (conduct of a gravity similar to enumerated crimes against humanity, assessed on a case-by-case basis). In order to convict the Accused on this basis, the Chamber was therefore required to assess whether a norm constituted *of these particular elements* existed in 1975.

ii – Other inhumane acts through forced transfer

409. In the case of forced transfer, the Chamber adopted a series of highly specific requirements which today characterize forced transfer and applied them to define other inhumane acts through forced transfer as of 1975. These requirements had the effect of limiting significantly the circumstances under which a forced transfer would be lawful. According to the Chamber, a forced transfer must accord with narrow exceptions concerning military necessity or civilian security, be 'the least intrusive instrument possible', and return evacuees to their homes as soon as possible.[1060] This was not the case-by-case assessment of the gravity requirement of other inhumane acts which the Trial Chamber held was consistent with the principle of legality. It was the application of a set of elements comprising the definition of a legal construct which did not exist in 1975.

410. As the Defence argued at trial, in 1975 no international instruments prohibited forced transfer within the borders of a state.[1061] To the contrary, both state practice and *opinio juris* prior to 1990 unambiguously demonstrate that forced transfer within a state was broadly a matter of sovereign prerogative. Importantly, this includes not only the fact that such transfers were routinely carried out on a widespread basis – which they were – but also the statements of principle through which states

[1058] Judgment, para. 438.
[1059] Judgment, paras. 448, 450, 549-50, 640-1.
[1060] Judgment, paras. 549-51.
[1061] **E163/5/11**, Applicable Law Submissions, paras. 11-12, 15-17, 22-23.

articulated the law.[1062] This state of affairs changed through a concrete sequence of developments in the law which began around 1990.[1063] However, while as of 1975 it was true that both deportation across borders and transfers of the population within an occupied territory were prohibited, customary international law distinguished this conduct sharply from forced transfer within the borders of a non-occupied state.[1064]

411. Without any analysis of the relevant legal sources, the Trial Chamber summarily rejected this argument by holding that '[t]he Tokyo Charter, Nuremberg Charter and Control Council Law No. 10 each codified unlawful displacement both as a war crime and crime against humanity.'[1065] This finding constituted a clear error of law: each of these sources unambiguously criminalized *deportation*, not 'unlawful displacement', a phrase without any legal significance.[1066] The necessary implication of the Chamber's finding is that no distinction exists between deportation and forcible transfer at all. This error is so flagrant that even the Co-Prosecutors acknowledge it.[1067]

412. Like the CIJs and the Co-Prosecutors before them, the Trial Chamber failed to identify a single instance of a single charge of forcible transfer within the borders of a non-occupied state prior to 1975.[1068] The Chamber held that in the *Pohl* case before the NMT, convictions were entered for forcible transfers from locations within occupied Poland to locations within occupied Poland 'without concern for the status of annexed or occupied portions of Poland'.[1069] Yet the fact that only transfers which took place within occupied Poland were charged speaks for itself: numerous prominent labor camps, concentration camps and collection points existed within Germany proper, including Buchenwald, Dachau, Ravensbrück and Bergen-Belsen. Large numbers of people were transferred from locations within Germany to these camps, among many others. Yet, as the Defence showed at trial, the IMT and NMT indictments and judgments concern only transfers from Germany to the East, from the occupied countries to Germany, and within those occupied countries.[1070] Only transfers within

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[1062] *See, e.g.*, **E163/5/11**, Applicable Law Submissions, paras. 11, 22.
[1063] **E163/5/11**, Applicable Law Submissions, paras. 22-23.
[1064] **E163/5/11**, Applicable Law Submissions, paras. 18-22.
[1065] Judgment, para. 454.
[1066] **E163/5/11**, Applicable Law Submissions, para. 11.
[1067] **D427/1/17**, 'Co-Prosecutors Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals Against the Closing Order', 19 Nov 2010, para. 191 (acknowledging the distinction between forced transfer and deportation).
[1068] As the Defence emphasized at trial, this does not amount to a claim that forced transfer was not an independent crime, but that no court saw fit to prosecute forcible transfer as an other inhumane act. *See* **E163/5/11**, Applicable Law Submissions, fn. 19. The Trial Chamber dismissed this argument on the grounds that each act charged as an other inhumane act is assessed in the totality of the circumstances on a case by case basis. *See* Judgment, para. 438. This finding was erroneous for two reasons: first, as noted the Chamber did not in fact apply a case by case approach but rather convicted Nuon Chea for the elements constituting deportation; and second it presumes that every instance of forcible transfer in recorded legal history, including those which could have been at issue at Nuremberg, were of a greater gravity than in this case. Obviously, this proposition is absurd.
[1069] Judgment, fn. 1345.
[1070] **E163/5/11**, Applicable Law Submissions, fns. 29-30. The Defence notes that there are numerous references in the various NMT judgments to transfers between locations within Germany, such as between these various camps, without any apparent censure, except when the transfer is for the purpose of extermination. For instance, in the *Pohl* case, the Tribunal states that, 'in Dec 1940, all priests imprisoned in various concentration camps were moved to Dachau', within Germany. *See* Pohl

Germany were omitted. The reason was explicitly stated by the NMT in *Milch*: 'displacement of groups of persons from one country to another is the proper concern of international law in as far as it affects the community of nations.'[1071]

413. Given that the distinction between deportation and forced transfer *does* exist, the question before this Chamber is whether an Accused in 1975 could have foreseen that the two acts would be criminalized under identical conditions.[1072] The answer is self-evident: *every* legal source existing in 1975 placed greater and more specific restrictions on deportation than forced transfer. As the NMT in *Milch* recognized, the difference between these categories of conduct is grounded in the fundamental distinction between acts within the borders of a state and those outside of it. Prior to the adoption of the Second Additional Protocol in June 1977, this distinction was the core principle upon which the entire edifice of international humanitarian law was built. It is, among other things, why war crimes charged at this Tribunal require proof of an international armed conflict. No accused could have foreseen in 1975 that forty years later, a court would determine that it was just not that important.

414. Accordingly, the Trial Chamber erred in law in holding that the law of deportation and the Geneva Conventions applied to forced transfer *within* a state in 1975. Instead, the Chamber should have applied the case-by-case approach which it properly held was required. As the Defence shows in section XIII(C), *infra*, that analysis demonstrates that the evacuation of Phnom Penh was lawful.

iii – Enforced disappearances

415. The Chamber recognized that no legal source of any kind existing as of 1975 had ever made reference to 'enforced disappearances', including the elements of which it was comprised and even its name. The first source to mention the term was a non-binding 1978 UN General Assembly Resolution.[1073] Subsequent non-binding declarations were adopted in 1983 and 1992,[1074] and disappearances were held to constitute a violation of the ACHR in 1988.[1075] A binding regional convention was adopted in 1994 and an international convention came into force in 2010.[1076]

416. The only source pre-existing the crimes charged was the IMT Judgment and the *Justice* Judgment, both of which entered convictions for conduct involving the implementation of the *Nacht*

Judgment, p. 1074. The Tribunal then states: 'For a short period, they were unmolested and were even allowed to hold chapel services. But on 24 Sep 1941, the Polish priests were deprived of their prayer books, rosaries, and all religious articles, and committed to manual labour.' The Tribunal then proceeded to describe the 'intolerable' living conditions at Dachau. It was accordingly these conditions, and the practice of forced labour, rather than the act of transfer – which is characterized as benign until forced labour begins – which is subject to sanction. Similary, the summary of the evidence presented in the Pohl case includes an excerpt from a document which describes the transfer of 2,000 prisoners from Dachau concentration camp to Buchenwald, both within Germany. *See* Pohl Case, p. 361. This fact does not appear to return in the analysis of criminal liability.

[1071] **E163/5/11**, Applicable Law Submissions, para. 14.

[1072] As already noted, the Trial Chamber erred in failing to consider this question. *See* paras. 409-411, *supra*.

[1073] Judgment, para. 446.

[1074] Judgment, fn. 1323.

[1075] Judgment, fn. 1321.

[1076] Judgment, fn. 1323.

und Nebel ('Night and Fog') decree.[1077] *Nacht und Nebel* was a Gestapo program which involved the arrest, typically of political dissidents in Nazi-occupied territory, their transportation to Germany for secret sham trials, and their subsequent execution and/or detention under extreme conditions.[1078] The IMT Judgment convicted one defendant of war crimes for his role in the decree and the *Justice* Judgment convicted a second of war crimes and the crimes against humanity of deportation, enslavement and imprisonment.[1079] No conviction was entered for other inhumane acts.

417. According to the Trial Chamber, convictions relating to *Nacht und Nebel* establish that '[e]nforced disappearances have previously been found to amount to criminal conduct.'[1080] However, merely because conduct that constituted *Nacht und Nebel* satisfied the elements of specifically enumerated crimes against humanity does not establish that this conduct also constituted an other inhumane act. Following this logic, any conduct which constitutes an enumerated crime against humanity would, by virtue of that fact, also constitute an other inhumane act. As the Trial Chamber rightly found, however, other inhumane acts functions as a 'residual category, criminalizing conduct which meets the criteria of a crime against humanity but does not fit within one of the other specified underlying crimes.'[1081] The Justice Judgment found that the conduct concerned *did* fit within the definition of other enumerated crimes, specifically 'deportation, enslavement and imprisonment'. The *Justice* Judgment accordingly entered convictions for deportation, enslavement and imprisonment to the exclusion of other inhumane acts.[1082] The question of whether *Nacht und Nebel* was considered an other inhumane act at the time of the judgment in the Justice Judgment was answered by the court which issued it. The answer was no.

418. This conclusion was a correct interpretation of other inhumane acts under Control Council Law No. 10. The elements of enforced disappearances as defined by the Trial Chamber show that the *gravamen* of the offence lies in the 'refusal to disclose information regarding the fate or whereabouts of the person concerned, or to acknowledge the deprivation of liberty.'[1083] Unlike other enumerated crimes against humanity at the NMT, which included murder, extermination, enslavement, torture, imprisonment and deportation, this conduct does not implicate the physical integrity of the person.[1084]

[1077] Judgment, paras. 444-5.
[1078] IMT Judgment, pp. 232-3; Justice Case, p. 75; Justice Judgment, pp. 1031-3, 1056-9.
[1079] IMT Judgment, p. 291; Justice Judgment, p. 1057.
[1080] Judgment, para. 444.
[1081] Judgment, para. 437.
[1082] Justice Judgment, p. 1057. Other inhumane acts was charged at Nuremberg. *See* Control Council Law No. 10, Art II(1(c)). A conviction for other inhumane acts separate from deportation, enslavement and imprisonment was accordingly available to the Tribunal.
[1083] Judgment, para. 448.
[1084] The District Court of Jerusalem in its 1951 decision in *Ternek* agreed that other inhumane acts 'were intended to inflict the most extreme punishment known to the penal code only for those inhumane actions which resemble in their type "murder, extermination, enslavement, starvation and deportation of a civilian population."' *See* Antonio Cassese, *International Criminal Law*, 2008, pp. 42, 49, 89, 114 (describing the findings in *Ternek*). Conduct which does not reach this standard has been deemed not to amount to other inhumane acts at the *ad hoc* tribunals. Tadić Trial Judgment, para. 748 (neither an act

Accordingly, the NMT found that the deportation of the victim and the deprivation of his liberty constituted criminal acts, but that the failure to inform the victims' families of their whereabouts did not warrant an additional criminal sanction.

419. These facts should be dispositive: even a professional attorney reviewing the jurisprudence as of 1975 would be unable to discern the existence of a criminal charge independent of deportation, enslavement and imprisonment from the *Justice* Judgment. Indeed, it is clear that had the instant trial taken place in 1975, the conduct held to constitute other inhumane acts as enforced disappearances in the Judgment would not have been so charged. It is charged at this Tribunal only because a distinct norm has since crystallized under customary international law. The accessibility and foreseeability required of the principle of legality is accordingly not satisfied.

420. The Defence further submits that had the Trial Chamber attempted the 'case-by-case' analysis which it held was required,[1085] it would have found that the alleged conduct of CPK troops fails to satisfy this test. The *Nacht und Nebel* decree was a systematic effort to crush political dissent and spread terror in the occupied territories by arresting and in most cases executing political dissidents, and then deliberately keeping their fate hidden from their families for the purpose of inducing fear. The citation to the *Justice* Judgment upon which the Trial Chamber relied for its definition of enforced disappearances states that *Nacht und Nebel* was instituted 'for the purpose of making [inhabitants of occupied territories] disappear without a trace and so that their subsequent fate remained uncertain. This practice created an atmosphere of constant fear and anxiety among their relatives, friends and the population of the occupied territories.'[1086] The judgment summary, on which the Trial Chamber also relied, similarly states, 'it is clear that the cognomen of Night and Fog was well chosen since in theory and practice the victims vanished as in the blackness of night and were never heard from again.'[1087] Even this extreme conduct failed to persuade the court that a separate conviction was warranted for obscuring the whereabouts of the disappeared person. By contrast, the Trial Chamber found that the families of people moved in the Phase II movement for the purpose of improving agricultural production sometimes did not know where those people were sent.[1088] There is simply no comparison.

421. In the alternative, if *Nacht und Nebel* constitutes the sole basis upon which Nuon Chea's criminal

committed against a corpse, nor the act of forcing a fire extinguisher down a person's throat, amounted to conduct similar to other enumerated crimes against humanity).

[1085] *See* paras. 407-408, *supra*.

[1086] Justice Judgment, p. 1057. The Defence notes that while the Chamber referred to page 1075 in footnote 1326 of the Judgment, it appears to have intended to refer to page 1057.

[1087] Justice Case, p. 75.

[1088] Judgment, para. 641 (citing, *e.g.*, Judgment, paras. 599, 609). The Defence notes that other findings in the Judgment concern individuals who were allegedly transferred to security centers and other sites for refashioning under extreme conditions. *See* Judgment, para. 641 (citing, *e.g.*, Judgment, paras. 619, 622). However, these allegations do not form part of the Phase II movement, were not subject to cross-examination and are outside the scope of the trial. These issues are discussed in greater detail in connection with the Chamber's errors of fact and law as to findings of enforced disappearances. *See* paras. 444-445, *infra*.

liability for enforced disappearance rests, the elements of the offence charged must be derived from the IMT Judgment and the *Justice* Judgment alone. Consistent with the principle of *in dubio pro reo*, the Chamber must apply the narrowest definition of criminal liability available. For the foregoing reasons,[1089] if any criminal offence is to be deduced from the vague collection of facts about *Nacht und Nebel* in the *Justice* Judgment, it would be limited to disappearances implemented with (i) the specific intent to make the whereabouts of the victim unknown; (ii) causing a generalized atmosphere of fear among the population from which the victim disappeared. 'Enforced disappearances' as they were defined by the Trial Chamber did not exist.

B. Grounds 176 & 177: The Trial Chamber erred in fact in making findings concerning conditions during population movements

422. The Trial Chamber committed a litany of errors concerning the conditions as such, including the treatment of evacuees by CPK forces and the availability of food, water and shelter. These findings constituted the basis of the Chamber's convictions for other inhumane acts through attacks against human dignity and, in part, extermination and other inhumane acts through forced transfer.[1090] These findings were furthermore relevant to the Chamber's assessment of Nuon Chea's individual criminal responsibility.[1091] The Chamber's errors in this regard individually or cumulatively caused a miscarriage of justice with respect to convictions entered for all three of these crimes. Accordingly, the Defence first establishes the Chamber's errors of fact prior to linking these errors to the convictions erroneously entered by the Trial Chamber.[1092]

423. The Defence does not dispute that some evacuees faced poor conditions, threats and/or violence during both population movements. However, the Trial Chamber's findings grossly exaggerate both the severity of these conditions and the uniformity with which they were experienced by evacuees.

i -- Evacuation of Phnom Penh

Implementation of the evacuation

424. While there is no dispute that no one was permitted to remain in Phnom Penh following the evacuation, it is also undisputed that 80% of those living in the city had fled there sometime after 1970 seeking security from the war. Substantial numbers were living in temporary camps in and around the city, while many others were homeless.[1093] It is clear that living conditions were 'horrendous' and that the city was 'jammed with people who didn't have enough to eat or sanitary conditions to live

[1089] *See* para. 420, *supra*.
[1090] Judgment, paras. 552, 556-7, 562-5, 632, 635, 639, 644, 646-8.
[1091] *See* paras. 622-625, *infra*.
[1092] *See* paras. 424-448, *infra*.
[1093] T. 29 Jan 2013 (Al Rockoff, **E1/166.1**), pp. 6-11.

under',[1094] although the record in that regard remains incomplete because of the Trial Chamber's repeated, unreasoned refusal to hear a small number of carefully selected witnesses for that purpose.[1095] The mere fact that people were required to leave the city on short notice accordingly does not necessarily prove that threats or physical force were employed to ensure that they left.[1096] Nor does it establish whether or how many people were deprived of food or shelter as a consequence of the evacuation, because a lack of food and shelter were already widespread in Phnom Penh.

425. Furthermore, there is no evidence that, once outside the general vicinity of the city, evacuees were forced to travel in any particular direction or at any particular pace. On the contrary, as the Chamber held, evacuees were largely permitted to go where they liked and a great many returned to their home villages.[1097] The Chamber's finding that 'under all circumstances, evacuees were forced to keep moving'[1098] was clearly erroneous. The evidence upon which the Chamber relied mostly concerns events within Phnom Penh in the first hours after the evacuation began[1099] or is so vague that it is impossible to determine what happened or where.[1100] Some witnesses cited by the Chamber simply describe seeing people they did not know on the side of the road.[1101] One civil party cited by the Chamber says that when her daughter blacked out, her family waited with her until she recovered.[1102] Another civil party application claims that 'they were forced to keep moving forwards and were not even allowed to rest'.[1103] Yet this same civil party describes travelling for two full months to reach Boribour district in Kampong Chhnang, approximately 160 kilometers from the city.[1104] This account echoes others who describe travelling an average of three or four kilometers per day,[1105] or stopping for

[1094] T. 23 Jul 2012 (David Chandler, **E1/94.1**), pp. 47-48.
[1095] *See* para. 84, *supra*.
[1096] T. 29 Jan 2013 (Al Rockoff, **E1/166.1**), pp. 11-13.
[1097] Judgment, para. 485. *See also* E3/414, ERN 00374039 (was not in Phnom Penh, but her family came from Phnom Penh to their home village, where she was living); **E3/5124**, 'Written Record of Interview of IM Proeung', ERN 00223393-94; **E3/1747**, KHOEM Nareth WRI, ERN 00243009-10; **E3/5131**, NORNG Ponna WRI, ERN 00223185; **E3/5521**, 'Written Record of Interview of NUT Nouv', ERN 00422319-20; **E3/5505**, SEANG Chan WRI, ERN 00399167; **E3/5562**, 'Written Record of Interview of Civil Party SENG Chon' ('SENG Chon WRI'), ERN 00400454-55 (returned to wife's home village); **E3/5267**, 'Written Record of Interview of UT Seng' ('UT Seng WRI'), ERN 00282351.
[1098] Judgment, para. 492.
[1099] Judgment, fn. 1476 (citing testimony of Meas Saran (describing events around Monivong bridge), civil party application of Nguon Thi (describing events within Phnom Penh), civil party application of Saidnatter Roshne (describing events on 17 Apr 1975), victim complaint of Eam Teang (describing events between Lok Sang hospital and Pochentong)).
[1100] Judgment, fn. 1476 (citing civil party application of Soth Navy, victim complaint of Preab Ken).
[1101] Judgment, fn. 1476 (citing testimony of civil party Chau Ny).
[1102] Judgment, fn. 1476 (citing statement of Mom Sam Oeurn).
[1103] Judgment, fn. 1476 (citing civil party application of Chey Yeun).
[1104] **E3/4824**, 'Civil Party application of CHEY Yeun', ERN 00891213.
[1105] *See e.g.*, T. 23 Nov 2012 (Chau Ny, **E1/146.1**), p. 48 (reached Trapeang Sab commune, about 38 km from Phnom Penh, after walking for ten days); **E3/5004**, 'Civil Party Application of NGUON Tin', ERN 00871742 (reached the border of Kampong Chhnang province, about 45 km from Phnom Penh, after walking for ten days); **E3/5788**, 'Written Record of Interview of Civil Party CHHUM Sokha', ERN 00380711-12 (travelling approximately 100 km from Phnom Penh to Damrei Puon Commune, in one month); **E3/5133**, 'Written Record of Interview of ÊM Phoeung', ERN 00223200 (travelling more than one month to reach Cheang Tong Subdistrict, approximately 80 km from Phnom Penh); **E3/5556**, 'Written Record of Interview of Civil Party KHEN Sok' ('KHEN Sok WRI'), ERN 00377358-9 (travelling 22 kilometers to Kandal Stoeung district over 3 or 4 days); **E3/5562**, SENG Chon WRI, 00400454-55 (travelling about 45 kilometers to Preak Chhmuoh Commune over approximately one week).

extended periods and deciding for themselves when to resume and where to go.[1106] These facts are acutely illustrated by the contemporaneous diary of a civil party tendered into evidence in Case 002/02 by the civil party lawyers on 4 November 2014 and entered into evidence three weeks later by the Trial Chamber.[1107] In a calm and even tone, the diary describes an unhurried trip with nights spent at the houses of apparent acquaintances and three days of celebrations for festivities between April 24 and 26. By May 12, nearly a month after leaving Phnom Penh, the civil party reached Thnal Totoeng, about 30 kilometers from the city.[1108] These are not stories of people forced on pain of violence to travel as quickly as possible. They are not even stories of people whose movements were closely controlled or monitored by CPNLAF troops. They are stories of people who were prohibited from doing one thing: returning to Phnom Penh.

Evidence of conditions during the evacuation

426. For these reasons, no conclusions about the use of force during the evacuation or the conditions it caused necessarily follow from the fact that it occurred. Yet the Trial Chamber repeatedly made generalized findings about the experience of 2.5 million people based on a tiny selection of anecdotal evidence. For instance, the Chamber found that 'conditions throughout the journey were miserable and lacked even the most basic equipment with which to cook', citing the testimony of three civil parties, including one given during the victim impact hearing.[1109] The Chamber similarly found that the journey of 'most evacuees was marked by terror and threats or incidents of violence'.[1110] In this regard, the Chamber cited no evidence at all. Instead, the Chamber substantiated this claim by stating that 'some evacuees' walked a 'certain distance' at gunpoint (based on one civil party's victim impact testimony and another's civil party application) and that 'others' were beaten by CPNLAF troops (citing the testimony of two civil parties and two civil party applications).[1111] These six accounts, one of which was inadmissible and three more of which were given out of court, were considered sufficient to establish the experience of 'most of' 2.5 million people beyond a reasonable doubt. The Chamber further concluded that 'those evacuated' experienced terrible conditions 'throughout their journey' including a 'lack of sufficient food, clean water, medicine or adequate accommodation.'[1112] This

[1106] **E3/3958**, 'Written Record of Interview Civil Party Lay Bony' ('Lay Bony WRI'), ERN 00379157-8 (civil party Lay Bony travelled by truck with relatives until Svay Pratiel, where her family disembarked because she was ill; they stayed at the Svay Pratiel pagoda for two weeks before walking one half day to Chheu Teal commune in Kien Svay district); *see also*, T. 23 Oct 2012 (Lay Bony, **E1/137.1**), p. 93.
[1107] **E323.1.1**, Diary of Civil Party 2-TCCP-296. The Defence notes this Chamber's finding that documents tendered into evidence in Case 002/01 are automatically before the Trial Chamber in Case 002/02 and submits that the same rule logically applies in reverse. If not, however, the Defence hereby seeks the admission of this document pursuant to Rule 108(7). As the document was just produced by the civil parties in Nov 2014, it was previously unavailable to the Defence.
[1108] **E323.1.1**, Diary of Civil Party 2-TCCP-296, ERN 01036457.
[1109] Judgment, para. 487, fn. 1452.
[1110] Judgment, para. 489 (emphasis added).
[1111] Judgment, para. 489.
[1112] Judgment, para. 491.

conclusion, which purports to characterize the evacuated population at large over a period of several weeks, is supported by nine accounts, six of which were given out of court, a seventh which was given as victim impact testimony,[1113] an eighth which was given as a statement of suffering after the conclusion of adversarial testimony[1114] and a ninth which was based on hearsay. In other words, despite finding that the evidence was sufficient to establish beyond a reasonable doubt that *everyone* experienced 'terrible conditions' for the *entire period* of the evacuation, the Judgment fails to cite a single person who gave admissible eyewitness testimony to that effect before the Chamber.[1115]

427. Other findings were framed more cautiously and the Defence accordingly does not dispute them as such. For instance, it is likely true that 'many people had limited food and water supplies' and that many were required to ask for food or search for plants, vegetables and insects to eat.[1116] The Defence notes, however, that these findings are reminiscent of the evidence of conditions within Phnom Penh prior to the evacuation. Al Rockoff, who was living in the city, explained that many refugees 'were not fed on a regular basis' and were forced to 'forage[] for food'. As a consequence 'anything edible that was growing in Phnom Penh disappeared'.[1117] Many survived by stealing.[1118]

428. The Chamber's summary of this evidence in its legal findings was equally baseless. The Chamber held that the 'majority' of the 2.5 million people who were evacuated 'witnessed beatings, shootings and killings and saw countless dead bodies lying along the roads as they exited Phnom Penh.'[1119] As argued above, nothing in the evidence remotely resembles this extraordinary finding. At most a few dozen accounts on the case file describe any violence at all, and most of these were given either out of court or during victim impact hearings, almost all providing little or no detail.[1120] Indeed, the Chamber itself noted considerable evidence that evacuees 'did not see any resistance to the orders or subsequent violence.'[1121] While the Chamber appears to have wrongly determined that this was only because most people were too scared to resist (whereas in reality most were happy to leave),[1122] even if this were true (and it is not) it would still demonstrate that 'the majority' did not witness beatings, shootings and killings.

429. The Chamber similarly held that 'the evacuees' journeys were marked by the almost complete absence of food, water, medical care, shelter and hygiene facilities for periods ranging from several

[1113] Judgment, fn. 1467 (citing testimony of Nou Hoan).
[1114] Judgment, fn. 1467 (citing testimony of Chum Sokha).
[1115] *See* paras. 188-191 (admissibility of victim impact statements for the truth of their contents), 160-162 (probative value of out of court statements), 166-169 (probative value of hearsay), *supra*.
[1116] Judgment, para. 487.
[1117] T. 29 Jan (Al Rockoff, **E1/166.1**), pp. 10-11.
[1118] T. 29 Jan (Al Rockoff, **E1/166.1**), pp. 10-11.
[1119] Judgment, para. 563.
[1120] *See* paras. 164 (concerning shootings and killings), 425 (concerning beatings), *supra*.
[1121] Judgment, para. 475.
[1122] Judgment, para. 475.

days to several weeks.'[1123] This is another gross exaggeration and is unsupported even by the Chamber's own underlying findings of fact. The Chamber found that 'many people' had 'limited food', that evacuees had a 'lack of sufficient food, clean water, medicine or adequate accommodation', and that evacuees were 'forced to improvise makeshift accommodation'.[1124] Even some of these findings were baseless,[1125] but they are nevertheless a far cry from an 'almost complete absence' of food, water and shelter affecting 2.5 million people. The Chamber also cited evidence that CPNLAF soldiers did not provide assistance.[1126] Yet this finding was qualified by the fact that 'several witnesses […] gave evidence of instances of assistance', and indeed the Chamber cited almost as many witnesses who described receiving assistance as witnesses who described not receiving assistance.[1127] The failure of CPNLAF forces to provide food, water or shelter does not in any case establish that none was available. The Defence notes that the Chamber found that of 2.5 million evacuees, 'several thousand' died over the course of the 'several weeks' of the evacuation: as discussed, a fraction of one percent of the evacuated population and not clearly higher than the normal mortality rate for a population of that size over that period of time.[1128] If 2.5 million people had truly had an 'almost complete absence' of food, water, medicine, shelter and hygiene for up to several weeks, hundreds of thousands of people would have died.

ii -- Phase II Population Movement

430. The Trial Chamber made numerous generalized findings concerning conditions during the Phase II movement again based on plainly inadequate evidence. Concerning conditions on boats, it held that 'the Khmer Rouge did not distribute food' based on a single civil party application.[1129] The Chamber held that '[m]any people on board were ill, but the Khmer Rouge guards did not care for them', based on the testimony of one civil party.[1130] The Chamber held that no assistance was provided 'when boats capsized in strong currents and some people drowned', citing a single civil party application purporting to describe a single boat.[1131] The Chamber held that '[s]ome children on the boat cried because they were hungry and Khmer Rouge soldiers threatened to throw them overboard', citing the victim impact testimony of a single civil party describing a single incident.[1132]

431. Findings concerning conditions on trains were similar. The Chamber held that 'soldiers provided

[1123] Judgment, para. 564.
[1124] Judgment, paras. 487-8, 491.
[1125] *See* paras. 426-427, *supra*.
[1126] Judgment, fn. 1676 (citing Judgment, paras. 495-6).
[1127] *See* Judgment fns. 1481, 1483.
[1128] *See* para. 348, *supra*.
[1129] Judgment, fn. 1810.
[1130] Judgment, para. 594.
[1131] Judgment, para. 594.
[1132] Judgment, para. 594.

no assistance to sick or vulnerable people' based on the testimony of a single civil party.[1133] The Chamber held that '[p]eople had to ask the soldiers to stop the train to relieve themselves' based on one civil party's unsworn testimony and one civil party's victim impact testimony.[1134] On trucks, it found that 'Khmer Rouge soldiers shot at those who tried to escape' based on one civil party's unsworn testimony.[1135] The Chamber held that '[t]he trucks were crowded, conditions on the trucks were poor', but none of the evidence it cited describes 'poor conditions' and the Chamber made no findings concerning how many people could comfortably fit on a truck.[1136] It held that 'many were sick and had diarrhea', citing one civil party's unsworn testimony.[1137] It also held that 'those on board had to relieve themselves on the truck', citing four individuals, of which one failed to support this conclusion and a second contradicted it.[1138]

432. Even more than during the evacuation of Phnom Penh, it is clear that this evidence is not representative. The overwhelming majority of the evidence is comprised of individual experiences of civil parties: individuals who themselves decided to participate in the process for the purpose of describing the harm they claim to have suffered. The Chamber furthermore found that transfers occurred over more than two years originating in nine provinces using a variety of methods of transportation.[1139] Consistent with these facts, the Chamber found that conditions varied, and that some boats and trains were not crowded whereas some trains were overcrowded.[1140] People were given food at some points in the journey,[1141] whereas others were given no food at other points in the journey.[1142] Other evidence that evacuees were given food during the journey or shelter upon arrival was furthermore disregarded by the Chamber.[1143] The Chamber's generalized findings based on the evidence of one or two civil parties were therefore highly unreasonable and reflect more its own preconceptions than it does the evidence.

C. Grounds 180 & 181: The Trial Chamber erred in law and fact in finding that the evacuation of Phnom Penh constituted an other inhumane act through forced transfer

433. As the Trial Chamber applied an erroneous legal standard to its assessment of other inhumane acts through forced transfer, it made no findings directly relevant to the application of the correct test: whether the evacuation amounted to an other inhumane act under all of the relevant circumstances, and

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[1133] Judgment, para. 597.
[1134] Judgment, para. 597
[1135] Judgment, para.598.
[1136] Judgment, fn. 1846; *cf.* Judgment, fn. 2125 (citing testimony describing people clamoring to get on to trucks because they were excited to see Angkar and that 50 to 60 people enthusiastically got on each truck).
[1137] Judgment, para. 598.
[1138] Judgment, fn. 1847 (citing **E3/5022**, 'Morm Sokly Civil Party Application'; **E3/4590**, Ponchaud Refugee Interviews).
[1139] Judgment, paras. 588, 607.
[1140] Judgment, paras. 594, 597.
[1141] Judgment, para. 595.
[1142] Judgment, para. 594.
[1143] *See e.g.*, T. 19 Oct 2012 (YIM Sovann, **E1/135.1**), p. 100:8-14; T. 7 Feb 2013 (PIN Yathay, **E1/170.1**), pp. 8:25 – 9:1; T. 4 Dec 2012 (TOENG Sokha, **E1/147.1**), pp. 50:21–51:2

in light of the unambiguous state practice and *opinio juris* recognizing broad sovereign prerogative in that regard. Certain errors of fact in the Judgment are nevertheless relevant to the analysis the Chamber should have attempted. In the aggregate, and in light of the correct legal standard, these errors invalidate Nuon Chea's conviction for other inhumane acts through forced transfer in connection with the evacuation of Phnom Penh. Accordingly, the Defence summarizes its submissions before the Trial Chamber concerning the lawfulness of the decision to evacuate Phnom Penh, then addresses relevant errors of fact in the Judgment.[1144]

434. As the Defence argued at trial, the evacuation of Phnom Penh, which was in principle temporary, was a policy choice driven by a variety of legitimate factors. These included the CPK's Marxist-Leninist goal to eliminate private ownership and adopt collectivism; security threats from foreign states (especially the United States) and remnants of the Khmer Republic army; and acute food shortages within Phnom Penh.[1145] While some form of evacuation would have been undertaken for the purposes of the CPK's collectivist objectives, its parameters were not set until shortly before 17 April 1975.[1146] At that time, both security threats and food shortages led the Party to conclude that an immediate, total evacuation was needed. While the Party was aware that evacuees would experience hardship, it believed that significant hardship was likely no matter what course it chose. Seen in its totality in light of the state of the law in 1975, the evacuation was lawful and therefore not criminal.

435. The Chamber's treatment of CPK reasons for the evacuation was a caricature of this decision-making process. For instance, the Chamber held that merely because the evacuation helped secure the Party against military threats, it could not have been motivated by a fear of an imminent US air attack.[1147] In particular, the Chamber held that the CPK's claim that it evacuated Phnom Penh because of its fear of an imminent bombing was disproven by the CPK's subsequent admission that it evacuated the city in order to smash 'the Americans' "dark maneuvers and … criminal plans"' and protect itself against an 'attack […] from behind [which might have] smashed our revolutionary forces'.[1148] This finding was clearly erroneous: an American bombing campaign against Phnom Penh was precisely the kind of 'attack from behind' the CPK was justifiably afraid of. The Chamber's finding that these explanations disprove the CPK's justifications for the evacuation rather than corroborate them was therefore unreasonable.[1149]

[1144] **E295/6/3**, Closing Brief, paras. 240-258.
[1145] **E295/6/3**, Closing Brief, paras. 240-258.; T. 24 October 2013 (Final Submissions Day 2, **E1/233.1**), pp. 69-71. As the Chamber made no specific findings in relation to the correct legal test, the Defence incorporates by reference its submissions concerning the lawfulness of the evacuation.
[1146] **E3/89**, Heder Interview with Ieng Sary, ERN 00417603-04.
[1147] Judgment, paras. 530-533.
[1148] Judgment, paras. 531-2.
[1149] In another similar finding, the Chamber held that because the Defence agreed that the objectives of the evacuation were not 'humanitarian', they could not have been concerned to secure the population against US bombings. *See* Judgment, para. 436. This conclusion mischaracterizes the Defence's argument.

436. The Chamber similarly erred in holding that it was 'improbable that the American bombing campaign in Cambodia would continue following the fall of Phnom Penh' and that the CPK did not believe that the threat existed.[1150] It based this conclusion on the vote of US Congress terminating funding for bombing operations in the region and obligations undertaken by the United States under the 1973 Paris Peace Accords. Yet, nearly the entire bombing campaign had been clandestine, without Congressional support and in flagrant violation of international law and constituting grave war crimes. The Chamber's conclusion that no prospect of renewed bombing existed because it was unlawful was patently unreasonable. Indeed, as late as early April 1975 Sydney Schanberg's diary noted that rumors were circulating among journalists that the Americans might bomb the city if the CPK took power.[1151] This was consistent with the purpose of the 1973 bombing: to erect a 'ring of fire' around Phnom Penh and prevent the CPK from winning the war.[1152] In light of the CPK's lengthy experience in this regard, the Chamber's further conclusion that its leadership could not have held this concern was even more unreasonable.

437. The Defence notes the Trial Chamber's finding that the decision of the CPK Party Center to locate itself within Phnom Penh in April 1975 demonstrates that it had no genuine concern as to the prospect of renewed bombings.[1153] This finding was also unreasonable. The CPK's decisions concerning the evacuation of Phnom Penh were not made in a vacuum. It was essential to maintain a considerable military presence in Phnom Penh in order to secure the CPK's victory and to begin governing the country from within the capital. While it was relatively simple for a handful of CPK leaders to protect themselves against a possible attack, the potential consequence of bombings in a densely packed and overcrowded city would have been catastrophic – far worse than the few thousand deaths which the Chamber found occurred during the evacuation.[1154] Past American habits, particularly at the conclusion of a war, certainly gave the CPK no reason to believe that the Americans had any concern to avoid civilian casualties. The Americans' infamous firebombing of Tokyo on March 9 and 10, 1945, killed more than 100,000 civilians and injured another *one million*.[1155] As many as a quarter million people died as a consequence of the nuclear blast in Hiroshima just five months later. More to the point – both linguistically and geographically – Nixon once told Kissinger, 'The only place where you and I disagree is with regard to the bombing. You're so goddamned concerned about civilians and I

[1150] Judgment, para. 527-8.
[1151] **E236/4/1/3.1**, Diary of Sydney Schanberg, ERN 00898244.
[1152] T. 23 Jul 2012 (David Chandler, **E1/94.1**), pp. 45-46.
[1153] Judgment, para. 528.
[1154] *See* paras. 342, *supra*. For similar reasons, the Trial Chamber's finding that the risk of bombing was not credible because Nuon Chea admitted that the attack was expected to come six months after liberation was irrelevant and out of context. *See* Judgment, para. 529. Obviously, the CPK did not *know* when or even if the Americans would attack. However, the potential consequences of reacting too slowly were disastrous, and accordingly weighed heavily in the CPK's decision.
[1155] Jeff Kingston, *Tokyo firebombing and unfinished business*, Japan Times, 25 Feb 2014.

don't give a damn. I don't care.'[1156] This is the state from which, the Trial Chamber found, the CPK had no reason to fear an attack on Phnom Penh.

438. The Trial Chamber also held that the fear of American bombing was a pretense because a single ordinary soldier, Sum Chea, testified that he believed this was the case.[1157] Sum Chea had no role in the decision to evacuate Phnom Penh and his view in this regard is irrelevant. The Defence notes, however, that Sum Chea also testified that 'they had us tell the people to leave for only four or five days so we could sweep out the Lon Nol soldiers, and we deceived them by saying that soon the fighting would explode and everyone would die.'[1158] Yet the Chamber found that the threat of an attack from Lon Nol soldiers in the city was the Party's *actual* reason for the evacuation.[1159] Accordingly, the Chamber implicitly rejected Sum's testimony, although it declined to acknowledge that fact anywhere in its analysis.

439. The Trial Chamber also rejected entirely Nuon Chea's explanation that food supplies within Phnom Penh affected the decision to evacuate the city, holding that rice could have been imported through Pochentong airport or the port at Kompong Som.[1160] Yet, the Chamber failed to identify a single source of aid which was available and could have alleviated the crisis. The only aid available to the Khmer Republic in the months prior to the end of the conflict was from the United States, the very government whose proxy army the CPK had just defeated on 17 April 1975. The Chamber's finding that aid could have been obtained from outside sources while failing to indicate which sources would have provided it was unreasonable. The Chamber's finding in that regard while persistently refusing repeated Defence requests to hear witnesses on precisely this point was an error of law and a violation of Nuon Chea's right to present a defence.[1161]

440. The Chamber also implied that the plausibility of this defence is undermined by the CPK Mekong blockade, which the Chamber held caused the humanitarian crisis in Phnom Penh to worsen.[1162] However, the evidence shows unequivocally that the vast majority of US aid to the Lon Nol government was in military, not humanitarian form.[1163] Intercepting military reinforcements, and not harming civilians, was the object of the blockade. The blockade was not, in any event, responsible

[1156] Daniel Ellsberg, *Secrets: A Memoir of Vietnam and the Pentagon Papers* (Viking, 2003), p. 419. Kissinger defended himself against the outrageous charge that he had a humanitarian impulse, responding, 'I'm concerned about the civilians because I don't want the world to be mobilized against you as a butcher.' Kissinger's concern was well-placed.
[1157] Judgment, para. 530.
[1158] T. 5 Nov 2012 (Sum Chea, **E1/140.1**), p. 26.
[1159] Judgment, paras. 531-3.
[1160] Judgment, para. 538.
[1161] *See* para. 84, *supra*.
[1162] Judgment, paras. 159, 537.
[1163] **D173**, 'NUON Chea's lawyers 12th Request for Investigative Action', 3 Jun 2009, fn. 51.

for the crisis, which had been ongoing for more than *two years* before the blockade began.[1164]

441. The Chamber's reasons for rejecting Nuon Chea's explanation for the evacuation of Phnom Penh were therefore all erroneous. No reasonable trier of fact could have excluded these justifications beyond a reasonable doubt. The evacuation was accordingly consistent with customary law as of 1975, which contemplated lawful forced transfers within a state as part of large-scale programs of economic modernization. The implementation of the evacuation was immediate and comprehensive only because the circumstances confronting the CPK were extreme.

D. Grounds 178, 184 & 185: The Trial Chamber erred in law and fact in finding that other inhumane acts through enforced disappearances were committed during the Phase II movement

442. The facts upon which the Trial Chamber based its convictions for other inhumane acts through enforced disappearances were all either outside the scope of the Phase II movement (and hence the Case 002/01 trial) or failed to satisfy the definition of enforced disappearances.[1165]

Facts outside the scope

443. Most incidents which the Chamber held constituted the crime of other inhumane acts through enforced disappearance were not charged in relation to the Phase II movement and were accordingly outside the scope of Case 002/01.[1166] As the Defence argued in relation to persecution, the fact that a person was transferred between two locations between 1975 and 1977 does not render that transfer part of the Phase II movement.[1167] Accordingly, the Chamber erred in law in entering convictions for the alleged disappearance of individuals allegedly sent to security or reeducation centers.[1168]

Facts which do not amount to other inhumane acts through enforced disappearance

444. Facts which were within the scope of the Phase II movement do not constitute other inhumane acts through enforced disappearances. The Trial Chamber held that the 'location in which people were unloaded was often not the place they were told they would be transferred to'.[1169] However, the two witnesses cited in support of this conclusion both testified that they travelled together with their entire family.[1170] Accordingly, this finding does not establish that anyone 'disappeared'. Other findings concerning other enforced disappearances are not supported by any relevant factual findings.[1171]

445. Furthermore, none of the Trial Chamber's findings satisfy the minimum requirement of the definition of enforced disappearances before this Tribunal: that the perpetrators specifically intended to

[1164] Due to the Chamber's failure to call any relevant witnesses, the Defence can only refer to the evidence accumulated during the investigation. *See* **D173**, 'NUON Chea's lawyers 12th Request for Investigative Action', 3 Jun 2009, paras. 9-13.
[1165] *See* para. 421, *supra*.
[1166] Judgment, fns. 2024-5 (citing paras. 601 (fn. 1861), 611 (fn. 1915), 614 (fn. 1930), 618, 623 (fn. 1969), 625 (fns. 1976-8)).
[1167] *See* paras. 395-6, *supra*.
[1168] Judgment, fns. 2024-5 (citing paras. 601 (fn. 1861), 611 (fn. 1915), 614 (fn. 1930), 618, 623 (fn. 1969), 625 (fns. 1976-8)).
[1169] Judgment, fns. 2024-25 (citing para. 599).
[1170] T. 7 Feb 2013 (PIN Yathay, **E1/170.1**), pp. 6:11-18, 8:15-16 (describing 'my group' travelling together); **E3/3958**, Lay Bony WRI, ERN 00379159-60 (all the New People were moved).
[1171] Judgment, fns. 2024-5 (*citing* Judgment, para. 595 (making no findings of any disappearances)).

refuse to provide information concerning the whereabouts of the alleged victims, causing widespread terror.[1172] While the Trial Chamber held that CPK officials 'deliberately refus[ed] to provide information regarding the fate or whereabouts of the persons concerned',[1173] it cited no evidence in that regard. Evidence that family members were separated and lost contact during the Phase II movement is sporadic and highly limited and does not establish that CPK officials made any effort to conceal the fate of any alleged victim by refusing to provide information concerning their whereabouts.[1174] The Trial Chamber accordingly erred in law and fact in finding that the definition of other inhumane acts through enforced disappearance was satisfied.

E. Ground 182: The Trial Chamber erred in law and fact in finding that other inhumane acts through attacks against human dignity were committed during the Phase I and II population movements

446. With regard to the evacuation of Phnom Penh, the Defence has already shown that the Chamber's legal conclusions were gross exaggerations unsubstantiated by any evidence. Indeed, the Chamber's overall characterizations of the evacuation for the purpose of its legal findings far exceed even its erroneous underlying findings of fact.[1175] The evidence manifestly fails to establish that 'at least two million people' were evicted at gunpoint.[1176] An unknown percentage (probably the vast majority) of the population did not have 'houses and property' to abandon because they were homeless or living in refugee camps.[1177] This error was aggravated by the fact that the relevant facts unknown only because the Chamber persistently refused to call witnesses to give the relevant evidence.[1178] The finding that 'the majority' witnessed 'beatings, shootings and killings' was absurd.[1179] The finding that 'some even slept next to dead bodies' was based on a single incident.[1180] The fact that this single incident features in the Chamber's two-paragraph characterization of the entire evacuation as it was experienced by more than two million people reflects the sensationalist motif of this Judgment and its relentless effort to inflict maximum disgrace on the CPK. These errors caused the Chamber to find that other inhumane acts through attacks against human dignity were committed against over 2.5 million people, whereas the evidence is far more limited.

447. With regard to Phase II, the Chamber held that those transferred were provided insufficient food, water, medical assistance and hygiene facilities, that bodies were thrown from the windows of moving

[1172] *See* para. 421, *supra*.
[1173] Judgment, para. 641.
[1174] The Defence notes the Trial Chamber's finding that people did not affirmatively seek information because they were afraid to ask questions: *see* para. 641. While the Defence disputes this conclusion and the limited evidence the Chamber cited to support it, it is in any case irrelevant. Whether or not people had sought information, no evidence exists that CPK officials intentionally refused to provide information in the sense intended in the Justice Judgment.
[1175] *See* Judgment, paras. 563-4; paras. 422-432, *supra*.
[1176] *See* Judgment, para. 563.
[1177] *See* Judgment, para. 563.
[1178] *See* paras. 84, *supra*.
[1179] Judgment, para. 563.
[1180] *See* Judgment, para. 563 (*citing* Judgment, para. 488).

trains, that families were separated and that some people died.[1181] The Chamber held that 'these conditions were imposed systematically and at all stages of phase two.'[1182]

448. The evidence manifestly fails to support the Chamber's conclusion that anything occurred 'systematically and at all stages' during Phase II. The evidence instead concerns an arbitrary selection of events which were decidedly unsystematic.[1183] Even this evidence was not uniform.[1184] No reasonable trier of fact could have concluded beyond a reasonable doubt anything more than that an uncertain number of transferees suffered attacks against human dignity. This error led the Chamber to erroneously enter convictions for attacks against humanity dignity committed against hundreds of thousands of victims, and therefore caused a miscarriage of justice.

XIV. TUOL PO CHREY

449. Only three witness – Lim Sat, Ung Chhat and Sum Alat – appeared before the Chamber in regard to the events at Tuol Po Chrey. These witnesses were far removed from the events at issue and gave evidence which repeatedly contradicted itself and that of the other witnesses. The Trial Chamber nevertheless failed to subject this evidence to any serious scrutiny and instead actively sought to portray it as coherent and reliable. The Chamber's careless treatment of this testimony again reflects the lack of rigor with which it approached its findings in the Judgment, and in particular, its willingness to accept any inculpatory evidence at face value even when inconsistent or illogical. While in this particular case, the Defence does not contest that killings are likely to have occurred at Tuol Po Chrey, it is not on the basis of these three witnesses, whose evidence was plainly unreliable. The Trial Chamber failed to carry out its duty to assess the evidence impartially and in light of the presumption of innocence.

450. The Chamber's flawed approach to its assessment of this evidence led to a series of errors of fact concerning the circumstances surrounding the meeting at the Pursat town hall and the alleged executions at Tuol Po Chrey afterwards. Although the Defence as such does not contend that the executions did not occur, these findings concerning the *manner* in which the executions occurred were of considerable importance to the Chamber's ultimate assessment of Nuon Chea's criminal responsibility, and therefore caused a miscarriage of justice. Accordingly, the Defence substantiates these errors prior to linking them to the Chamber's analysis of criminal liability, *infra*.[1185]

A. Ground 203: The Trial Chamber erred in law and fact in finding the evidence of Lim Sat, Ung Chhat and Sum Alat credible and reliable

i – The Chamber rejected Lim Sat's evidence in numerous important respects

[1181] Judgment, para. 644.
[1182] Judgment, para. 644.
[1183] *See* paras. 430-432, *supra*.
[1184] *See* para. 432, *supra*.
[1185] *See* Section XVIII.

451. The Trial Chamber relied extensively on Lim Sat's testimony as one of only three witnesses to give live evidence concerning the events at the Pursat town hall and the alleged transfer of soldiers and officials from the Pursat town hall to Tuol Po Chrey for execution.[1186] Yet the Chamber identified numerous inconsistencies in Lim Sat's evidence, and furthermore found that he deliberately gave false evidence on a point of considerable importance. The Chamber rejected as far too high Lim Sat's estimate of the number of people transported from the town hall to Tuol Po Chrey.[1187] The Chamber correctly noted that Lim Sat gave a variety of widely disparate estimates of the number of trucks which transported attendees between the town hall and Tuol Po Chrey.[1188] The Chamber rejected Lim Sat's repeated and unequivocal testimony that only soldiers attended the meeting at the Pursat town hall,[1189] holding that attendees included both Khmer Republic soldiers and officials.[1190] The Trial Chamber rejected Lim Sat's live testimony that he was unaware that Khmer Republic officials assembled at the Pursat town hall would be killed, finding that he 'may be motivated to diminish or shift responsibility for his involvement in the events in question.'[1191] One can only imagine what Lim Sat's testimony would have sounded like had he not read his WRI just before testifying.

452. Significant contradictions in a witness's evidence require that Chambers proceed with caution in otherwise relying on his testimony.[1192] Chambers should be especially wary of witnesses found to have deliberately given false evidence.[1193] While the Defence does not dispute that at least one meeting at the town hall probably occurred, Lim Sat's account of it was plainly unreliable. This is not Nuon Chea's view, but the Chamber's: after repeatedly rejecting Lim Sat's evidence in key respects, it was a clear error of law for the Chamber to continue to rely on his account of the same sequence of events without some compelling reason as to why his testimony had suddenly become reliable.

453. Not only did the Trial Chamber continue to rely on Lim Sat's testimony where it was expedient to do so, it relied on that testimony as the *sole* evidence to establish numerous facts concerning precisely these types of details. These findings include: that messages concerning the town hall meeting were relayed initially to 'Lon Nol leaders', who conveyed that message to subordinates;[1194] that the purpose of assembling Khmer Republic officials was that 'the Khmer Rouge were afraid that the police and soldiers would revolt against them';[1195] that trucks were driven by drivers from the zone;[1196] and

[1186] *See* Judgment, paras. 661-680.
[1187] Judgment, para. 669.
[1188] Judgment, para. 676.
[1189] Judgment, fns. 2099, 2126.
[1190] Judgment, para. 677.
[1191] Judgment, para. 665.
[1192] *See* paras. 175, 179, *supra*.
[1193] *See* paras. 175, 179, *supra*.
[1194] Judgment, para. 666, fn. 2091 (relying on Lim Sat's testimony as the only evidence that orders went initially to 'Lon Nol leaders').
[1195] Judgment, para. 672.
[1196] Judgment, para. 674.

that trucks made multiple trips between the town hall and Tuol Po Chrey.[1197] Lim Sat's testimony on this last point was furthermore inconsistent with the evidence of another witness, Sum Alat.[1198] Each of these findings constituted an error of fact.

ii – Other evidence was inconsistent and unreliable

454. Numerous other inconsistencies in the evidence exist. Rather than acknowledge these inconsistencies, the Chamber sought to reconcile them, facilitating its portrayal of the evidence as clear and coherent. However, these efforts to reconcile the evidence were unreasonable. Had the Chamber acknowledged these inconsistencies, it would have been required to hold that none of the witnesses who appeared to testify were reliable, and accordingly that no credible evidence exists concerning the details of events before, during or after the meeting at the Pursat town hall.

455. First, directly contradictory accounts were given of the manner in which those who attended the town hall meeting arrived there. Lim Sat and Ung Chhat both testified that soldiers and officials were transported to the town hall by truck, yet also testified that those who attended were not physically rounded up by CPNLAF forces. Sum Alat – the only witness who claimed to have attended the meeting – testified that he arrived voluntarily.[1199] The Chamber sought to reconcile this evidence by holding as follows: '[a]lthough many were brought to the meeting by Khmer Rouge units, evidence suggests that attendance was nonetheless voluntary'.[1200] Yet, those who were 'brought to' the meeting could not have come voluntarily, and the suggestion that they did is inconsistent with the Chamber's general account of the manner in which CPNLAF forces interacted with the population.[1201] The Chamber's finding was therefore unreasonable.

456. Second, the Trial Chamber relied on the evidence of Lim Sat to hold that trucks made multiple trips to transport individuals between the town hall and Tuol Po Chrey.[1202] However, Sum Alat testified that he waited outside the town hall for two hours after the initial convoy left and that no subsequent trips to Tuol Po Chrey occurred.[1203] The Chamber sought to reconcile these accounts by stating that 'SUM Alat did not remain at the town-hall long enough to witness a second transfer'.[1204] This interpretation is directly inconsistent with the record. Sum Alat did not merely testify that he left the site of the town hall, but that all 50 or 60 people waiting outside left with him.[1205] Moreover, no evidence establishes the length of the alleged round trip between the town hall and Tuol Po Chrey, and

[1197] Judgment, para. 675.
[1198] *See* paras. 456, *infra*.
[1199] Judgment, fn. 2097.
[1200] Judgment, para. 668.
[1201] *See e.g.*, Judgment, paras. 471-5, 489.
[1202] *See* paras. 453, *supra*.
[1203] Judgment, fn. 2120.
[1204] Judgment, fn. 2120.
[1205] Judgment, fn. 2120.

accordingly the Chamber had no basis to conclude that Sum Alat did not wait long enough. Lim Sat's testimony that the trucks made multiple trips was furthermore only one aspect of his overall account that the trucks left two at a time from the town hall before returning to transport more people.[1206] By contrast, Sum Alat testified that the trucks all left the town hall together in a column and accordingly never returned.[1207] This fundamental inconsistency cannot be resolved merely by asserting that Sum Alat would have seen the trucks return had he waited longer at the town hall.

457. The evidence given by these witnesses was unreliable in other respects not reflected in the Chamber's evidentiary discussion. While Sum Alat claimed to have attended the meeting in the Pursat town hall with his fellow soldiers, following extensive questioning he was unable to provide a single name of a single official other than the publicly well-known Pursat provincial governor.[1208] Neither Ung Chhat, Lim Sat, nor any other witness who appeared before the CIJs attended the meeting inside the town hall. No witness claims to have been an eyewitness to the alleged killings at Tuol Po Chrey.

458. Tellingly, the Co-Prosecutors themselves were troubled by the weaknesses in the evidence of the witnesses who gave evidence as to the events at Tuol Po Chrey. Shortly after Lim Sat and Ung Chhat testified, the Co-Prosecutors acknowledged that 'their testimony did fall short, to a certain extent, of the evidence they gave in their statements'.[1209] The Co-Prosecutors accordingly sought the appearance of three additional witnesses whom they believed were necessary to ensure that they have a 'reasonable opportunity to [...] prove these events'.[1210] In part because some of these witnesses could not be located, only one, Sum Alat, subsequently testified. Given that Sum Alat's testimony directly contradicted Lim Sat's on a question of considerable importance[1211] and that he was unable to remember the name of a single one of his fellow soldiers with whom he supposedly attended this meeting,[1212] the testimony of this one additional witness did little to bolster the evidence which, the Co-Prosecutors informed the Trial Chamber, 'f[e]ll short'.

B. Ground 204: The Trial Chamber erred in fact in finding that orders to kill were given by the zone committee

459. According to the WRI of Lim Sat's interview with the CIJs, shortly after CPNLAF forces captured Pursat province, he was given orders by his superior to assemble and kill Khmer Republic soldiers and policemen.[1213] At trial, however, he testified that his orders were to assemble but not kill

[1206] Judgment, fn. 2120.
[1207] Judgment, fn. 2120.
[1208] T. 4 Jul 2013 (Sum Alat, **E1/218.1**), pp. 83:1-84:18.
[1209] T. 13 Jun 2013 (Trial Management Meeting, **E1/207.1**), p. 71.
[1210] T. 13 Jun 2013 (Trial Management Meeting, **E1/207.1**), p. 71.
[1211] *See* para. 456, *supra*.
[1212] *See* para. 457, *supra*.
[1213] Judgment, para. 664.

those individuals.[1214] The Trial Chamber considered this conflict and preferred the evidence Lim Sat gave to the CIJs.[1215] This decision was an error of fact. As it constituted the only basis on which the executions at Tuol Po Chrey were linked to the alleged JCE, it caused a miscarriage of justice.

460. The Trial Chamber provided two reasons for its decision to prefer the evidence Lim Sat gave to the CIJs. First, it found that the orders he described to the CIJs resonated with a pattern of conduct elsewhere in Cambodia.[1216] The Defence disputes this premise: no pattern of conduct of executing soldiers after assembling them for meetings existed.[1217] The Defence notes that Lim Sat did not deny during live testimony that soldiers and officials were to be gathered or that the purpose of the gathering was for going to study. The only inconsistency between Lim Sat's evidence before the CIJs and his evidence before the Chamber was whether the ultimate purpose of this meeting was to execute those assembled – and in that regard, the Chamber's findings as to a pattern of conduct were erroneous.

461. The Trial Chamber's second reason for preferring the evidence given before the CIJs was that 'the way in which orders received from the "upper echelon" were disseminated also accords with the Chamber's findings on Communication Structures.'[1218] However, Lim Sat's testimony before the Chamber described the same process of disseminating orders as his testimony before the CIJs; only the content of the orders differed. As such, the Chamber's findings as to communication structures are irrelevant. For these reasons, it had no basis on which to prefer Lim Sat's (more inculpatory) account before the CIJs to his testimony before the Chamber, and erred in fact in so doing.

462. The Defence notes further that it has since tendered into evidence [redacted], a senior official within the Northwest Zone military as of April 1975 and Ruos Nhim's [redacted].[1219] As the Defence argued in its request to admit the WRI into evidence, [redacted] is very likely to have highly relevant evidence about Ruos Nhim's involvement in the killing of Khmer Republic soldiers in general and at Tuol Po Chrey in particular. In response, the Co-Prosecutors assert that [redacted] evidence is irrelevant because his WRI does not refer to Tuol Po Chrey.[1220] It is difficult to overstate the extent to which they have missed the point. [redacted] contains no information about Tuol Po Chrey because the CIJs failed to interview him in Case 002 – a direct consequence of their biased and incompetent investigation[1221] which failed to take seriously Nuon Chea's longstanding defence that 'bad cadres' throughout the CPK hierarchy committed crimes as part of their opposition to and betrayal of the Party.

[1214] Judgment, para. 664.
[1215] Judgment, para. 665.
[1216] Judgment, para. 665.
[1217] *See* paras. 581-599, *infra*.
[1218] Judgment, para. 665.
[1219] *See* **F2/4**, Third Appeal Evidence Request.
[1220] **F2/4/1.** 'Co-Prosecutors' Response to Nuon Chea's Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal against the Trial Judgment in Case 002/01', 19 Dec 2014.
[1221] *See* paras. 19-38, *supra*.

The evidence of a Northwest Zone official as senior as [redacted] at the time the crimes were committed (the most senior official of whom the Defence is specifically aware in addition to being *Ruos Nhim's* [redacted] is critically relevant as such to the question of whether Ruos Nhim could or would have acted independently of Pol Pot and Nuon Chea's wishes, a proposition the Co-Prosecutors implausibly continue to deny[redacted] WRI furthermore explicitly states that he was personally involved in 1975 in the arrest and disarmament of Khmer Republic soldiers.[1222] Accordingly, until the Defence is given the opportunity to examine this critical witness, the evidence of a series of low ranking soldiers who continually contradicted themselves and each other should be deemed insufficient to establish any of the facts in dispute.[1223] These include whether an order to kill was given by Ruos Nhim, how those who attended the town hall meeting arrived there, whether the trucks made a second trip to retrieve those who did not initially fit on the convoy and how many alleged victims were involved (discussed *infra*).[1224]

C. Ground 205: The Trial Chamber erred in fact in finding that at least 250 soldiers and officials were killed

463. The Trial Chamber concluded that 'a minimum of 10 trucks, each bearing at least 25 people', transported attendees from the town hall meeting to Tuol Po Chrey.[1225] Accordingly, it concluded that at least 250 people were killed.[1226] This conclusion was an arbitrary assessment selected from among a wide-range of inconsistent estimates and accordingly constituted an error of fact.

464. As the Chamber observed, estimates as to the number of trucks varied substantially, from a low of six to a high of 100.[1227] Although various witnesses purported to estimate the number of people on each truck, none had any reliable basis on which to make these estimates. Instead, witnesses formulated estimates from outside the trucks, often at a distance.[1228] Witnesses who appeared before the Chamber and who estimated the number of attendees at the town hall meeting, the number of trucks and/or the total number of soldiers and officials involved, gave answers which were internally inconsistent and/or inconsistent with the evidence in their WRIs.[1229] Accordingly, the Chamber had no basis on which to

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[1222] [redacted]

[1223] International tribunals recognize the applicability of the 'best evidence rule', which requires that the Chamber should rely on the 'best evidence available in the circumstances of the case'. *See Prosecutor v. Delalić et al.,* 'Decision on the tendering of prosecution Exhibits 104 – 108', IT-96-21-T, 9 Feb 1998, paras. 14-15; *Prosecutor v. Perišić*, 'Order for guidelines on the admission and presentation of evidence and conduct of council in court', IT-04-81-T, 29 Oct 2008, para. 36; *Prosecutor v. Martić*, 'Decision adopting guidelines on the standards governing the admission of evidence', IT-95-11-T, 19 Jan 2006, para. 7.

[1224] *See* paras. 463-466, *infra.*

[1225] Judgment, para. 676.

[1226] Judgment, para. 681.

[1227] Judgment, para. 676.

[1228] T. 2 May 2013 (Lim Sat, **E1/187.1**), pp.72:20-73:19, 84:18-85:4.

[1229] T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), pp. 57-58; T. 2 May 2013 (Lim Sat, **E1/187.1**), pp. 71-74; T. 3 May 2013 (Lim Sat, **E1/188.1**), pp. 7-9, 15-19; T. 30 Apr 2013 (Ung Chhat, **E1/186.1**), pp. 57-58, 61-63; T. 4 Jul 2013 (sum Alat, **E1/218.1**), pp. 10-11, 16-17.

conclude that there were at least ten trucks or that there were 25 people on each truck. The Chamber gave no reasons for selecting these numbers.

465. Paired with these considerable deficiencies in the testimonial evidence is a total absence of any physical or documentary evidence establishing the number or identity of *even one* alleged victim. The CIJs found no list of victims and did not even *attempt* to retrieve dead bodies.[1230] The Site Identification Report created following the investigators' visit to Tuol Po Chrey describes little more than 'metal artifacts' such as a belt buckle and a fired shell casing scattered on the ground in the general vicinity of the presumed execution site.[1231] The alleged victims at Tuol Po Chrey were not a nameless group of citydwellers, but a specific group of Khmer Republic soldiers and officials stationed in a particular location. They supposedly included the provincial governor as well as the soldiers of a particular unit guarding the Po Chrey fort.[1232] The fact that 250 murder convictions were nevertheless entered on the strength of what amounts to little more than a guess is astonishing – and a harsh (but telling) indictment of the manner in which fact finding has been carried out at this Tribunal.

466. Other evidence on the record, some of which was omitted by the Chamber, furthermore suggests that substantially fewer people were involved. The CIJs' own investigators concluded that the town hall at which the meeting was held could hold no more than 200 people.[1233] This estimate accords with Ung Chhat's testimony that approximately 200 people attended.[1234] Although Sum Alat testified that some people were outside the hall during the meeting,[1235] Ung Chhat testified that he could not see what took place during the meeting because 'the meeting was held in a firmly closed door',[1236] suggesting that all of the attendees were able to fit inside. Sum Alat furthermore testified that between 50 and 60 of the people who attended the meeting were not able to fit on the trucks, such that the number of people who were transported to Tuol Po Chrey was considerably less than the number who attended the meeting.[1237] In light of the inconsistent nature of the evidence concerning the number of attendees at the meeting, the number of trucks involved and the number of people on each truck, it was not possible to determine beyond a reasonable doubt how many people were involved. The Chamber's findings in that regard were arbitrary and unreasonable.

XV. CHAPEAU ELEMENTS OF CRIMES AGAINST HUMANITY

[1230] **E3/3990**, Tuol Po Chrey Site Identification Report, 26 May 2008, ERN 00294307.
[1231] T. 24 October 2013 (Final Submissions Day 2, **E1/233.1**), pp. 53-54; **E3/3990**, Tuol Po Chrey Site Identification Report, 26 May 2008, ERN 00294325.
[1232] T. 4 Jul 2013 (Sum Alat, **E1/218.1**), pp. 22-24; T. 2 May 2013 (Lim Sat, **E1/187.1**), pp. 13, 86-88.
[1233] **E3/4599**, 'Site identification Report of Tuol Po Chrey', 26 May 2008, ERN 00294314.
[1234] T. 30 Apr 2013 (Ung Chhat, **E1/186.1**), pp. 34:19-22, 61:22-62:6.
[1235] T. 4 Jul 2013 (Sum Alat, **E1/218.1**), pp. 19:22-20:2.
[1236] T. 30 Apr 2013 (Ung Chhat, **E1/186.1**), p. 34:19-22, 61:22-62:6 ('after everyone entered the room, the door would be closed').
[1237] T. 4 Jul 2013 (Sum Alat, **E1/218.1**), p. 32.

A. Ground 45: The Trial Chamber erred in law in holding that crimes against humanity do not require proof of a nexus with an armed conflict

467. On 13 January 2011 the Pre-Trial Chamber issued preliminary rulings on the various appeals against the Closing Order. It held, *inter alia*, that in 1975 customary international law 'required a nexus between the underlying acts of crimes against humanity and an armed conflict.'[1238] On 15 June 2011, the Co-Prosecutors filed a request with the Trial Chamber seeking a ruling that the Pre-Trial Chamber was in error and that proof of a nexus between the underlying crimes against humanity and an armed conflict was no longer required as of 1975.[1239] The Defence responded,[1240] as did other defence teams.[1241] On 26 October 2011, the Trial Chamber granted the request.[1242] On 25 November 2011, the defence for Ieng Sary filed an immediate appeal with this Chamber.[1243] The appeal was deemed inadmissible.[1244] Pursuant to Rule 104(4), the Trial Chamber's decision is accordingly subject to appeal 'at the same time as an appeal against the judgment on the merits.'

468. The Trial Chamber erred in law in holding that proof of a nexus between conduct charged as crimes against humanity and an armed conflict was no longer required in 1975. While clear in 1975 that crimes which otherwise satisfied the relevant chapeau elements could be prosecuted as crimes against humanity where a nexus with an armed conflict existed, the evidence shows that no consensus had yet emerged that crimes without such a nexus – a much broader category of conduct – constitutes a crime against humanity. As Judge Meron has held, where 'a consensus among states has not crystallized, there is clearly no norm under customary international law.'[1245] Accordingly, absent clear affirmative evidence of a consensus among states, no customary rule existed recognizing such conduct as crimes against humanity in 1975. In light of the page restrictions on the instant submissions and the extensive argument required for other grounds of appeal, the Defence considers that the most efficient mode of

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[1238] **D427/2/12**, 'Decision on IENG Thirith's and NUON Chea's Appeals Against the Closing Order', 13 Jan 2011, para. 11; **D427/1/26**, 'Decision on IENG Sary's Appeal Against the Closing Order', 13 Jan 2011, para. 7.
[1239] **E95**, 'Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement From the Definition Of Crimes Against Humanity', 15 Jun 2011.
[1240] **E95/5**, 'Response to the Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement From the Definition Of Crimes Against Humanity', 22 Jul 2011 ('Response on Armed Conflict Nexus Requirement').
[1241] **E95/2**, 'Defence Response to the Co-Prosecutor's for the Trial Chamber to Amend the Definition of Crimes Against Humanity', 22 Jul 2011; **E95/3**, 'Response to the Co-Prosecutor's' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement From the Definition Of Crimes Against Humanity', 22 Jul 2011; **E95/4**, 'IENG Sary's Response to the Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement From the Definition Of Crimes Against Humanity & Request for an Oral Hearing', 22 Jul 2011'.
[1242] **E95/8**, 'Decision on Co-Prosecutors' Request to Exclude the Armed Conflict Nexus Requirement From the Definition Of Crimes Against Humanity', 26 Oct 2011 ('Decision on Armed Conflict Nexus Requirement').
[1243] **E95/8/1/1**, 'IENG Sary's Appeal Against the Trial Chamber's Decision on Co-Prosecutor's Request for the Trial Chamber to Exclude Armed Conflict Nexus Requirement From the Definition Of Crimes Against Humanity ', 25 Nov 2011 ('Ieng Sary's Appeal against Decision on Armed Conflict Nexus Requirement').
[1244] **E95/8/1/4**, 'Decision on IENG Sary's Appeal Against Trial Chamber's Decision on Co-Prosecutor's Request for the Trial Chamber to Exclude Armed Conflict Nexus Requirement From the Definition Of Crimes Against Humanity', 19 Mar 2012.
[1245] *Prosecutor v. Nahimana et al.*, 'Partly Dissenting Opinion of Judge Meron', annexed to the 'Judgement', ICTR-99-52-A, 28 Nov 2007, p. 376, para. 5.

proceeding is to refer the Chamber to its substantive submissions before the Trial Chamber.[1246] As the Ieng Sary defence also filed an immediate appeal alleging the Trial Chamber's specific errors of law, the Defence additionally refers to those arguments, with which it concurs.[1247]

469. The Defence supplements those submissions with the following comments. The Trial Chamber erred in relying repeatedly on judicial decisions and scholarly writings as direct evidence of customary international law. Such sources can serve only 'as subsidiary means for the determination of rules of law',[1248] and not as *evidence* of customary international law.[1249] As rightly held by the International Court of Justice, '[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the *actual* practice and *opinio juris* of States'.[1250] In seeking assistance from subsidiary sources, a Chamber should therefore consider their underlying reasoning and evidence, not their conclusions. The Trial Chamber erred in treating these sources as direct evidence of custom.

470. First, the Trial Chamber cited a decision of the ICTY Appeals Chamber in *Tadić* which states that 'the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal'.[1251] However, the ICTY Appeals Chamber supported this statement with no authority or reasoning and it is accordingly of no assistance. Next, the Chamber cited the ECtHR *Korbely* judgment which asserts that 'a link or nexus with an armed conflict […] *may* no longer have been relevant by 1956'.[1252] This conclusion was left deliberately inconclusive by use of the word 'may', and was supported only by reference to scholarly writings. The ECtHR itself stated the reason for this incomplete analysis: its task was only to assess if the member state had violated the principle of legality, not 'to seek to establish authoritatively the meaning of the concept of 'crime against humanity' as it stood in 1956.'[1253]

471. Next, the Trial Chamber relied on certain decisions of the NMT. As a domestic court,[1254] decisions of the NMT may in principle constitute evidence of state practice. However, such decisions must be treated with caution where they are 'taken […] without the court's having opportunity to hear

[1246] **E95/5**, Response on Armed Conflict Nexus Requirement.
[1247] **E95/8/1/1**, Ieng Sary's Appeal against Decision on Armed Conflict Nexus Requirement, paras. 20-61.
[1248] ICJ Statute, Art. 38 (1) (d).
[1249] UN Doc A/CN.4/16, 'Article 24 of the Statute of the International Law Commission: working paper by Manley O. Hudson, Special Rapporteur', ILC Yearbook 1950, Vol. II ('Hudson ILC Statute Art. 24 Paper'), p. 25, para. 9; the Special Rapporteur pointed out that "including reports of judicial decisions on questions of international law among the evidences of customary international law" would seem to "depart from the classification in Article 38 of the Statute of the Court". The indication is clear that based on Art. 38 of ICJ Statute judicial decisions (same as academic teachings) could not be considered "evidence" of customary international law.
[1250] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, 'Judgement', (1986) ICJ Report 14, para. 183, citing *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 'Judgement', (1985) ICJ Report 13, para. 27 (emphasis added).
[1251] **E95/8**, Decision on Armed Conflict Nexus Requirement, para. 20, fn. 54.
[1252] *Korbely v. Hungary*, 'Judgement', ECtHR, App. No. 9174/02, 19 Sep 2008, para. 82 (emphasis added).
[1253] *Korbely v. Hungary*, 'Judgement', ECtHR, App. No. 9174/02, 19 Sep 2008, para. 78 (emphasis added).
[1254] Although incorporating international law, Control Council Law No. 10 was by nature a domestic legislation. *See* **D427/1/30**, Ieng Sary Closing Order Appeal Decision, para. 309.

the views of any Government'[1255] and hence may not reflect the *opinio juris* of any state. In fact, contrary to some decisions of the NMT, the United States *supported* an armed conflict nexus. In reply to Chief of Counsel Telford Taylor's letter expressing his concern that in the absence of a nexus with an armed conflict those 'departures from democratic systems […] should not even, in these enlightened times, constitute crimes at international law', the US State Department stated that despite Control Council Law No. 10, 'the United States should not prosecute a crime against humanity alone but only in conjunction with a crime against peace or war crimes'.[1256] This statement, and not any NMT judgment, is the essential indicum of custom.

472. The Trial Chamber also relied on the Draft Code of Offences created by the International Law Commission. As ILC members act in their personal capacity and not on behalf of states, their work product constitutes scholarly opinion and not state practice.[1257] Such sources must be assessed cautiously: 'care must always be taken to ensure that the statements relied on are accurate statements of the law as it stands, rather than a statement of how the author would like the law to be'.[1258] Yet, the ILC itself clarified that the Draft Code was 'a matter of 'progressive development of international law'[1259] which was 'to a large extent, of a *speculative* nature' and not an effort to 'codify existing rules of international law'.[1260] It is clear that the purpose of the ILC's work on the Draft Code was not to identify *lex lata*, but to propose a draft for states to approve.[1261] The draft was never approved.[1262]

473. No proof of the existence of a nexus between an armed conflict and the crimes charged was led in the Case 002/01 trial. Nor was the Defence on notice during the trial that it was obliged to contest the existence of this nexus. Accordingly, the chapeau elements of crimes against humanity are not proven. Every conviction in the Judgment is invalid.

B. Ground 46: The Trial Chamber erred in law in finding that crimes against humanity do not require proof of a state policy

474. The Trial Chamber held that the definition of crimes against humanity in 1975 did not include the requirement of a state plan or policy. The Trial Chamber held:

> In the *KAING Guek Eav* Trial Judgement, this Chamber found that […] the existence of a policy or plan […] 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

[1255] Hudson ILC Statute Art. 24 Paper, p. 28, paras. 36-38.
[1256] *See*, Heller, *Nuremberg Military Tribunals*, p. 235, quoting memos between Taylor and the State Department.
[1257] Hugh Thirlway, 'The Law and Procedure of the International Court of Justice: Part Two', [1990] 61 (1) British Yearbook of Int'l L., pp. 59-60 ('the work of the ILC, where members participate in a personal capacity, cannot be equated with State practice, or evidence of *opinio juris*.')
[1258] Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (2007), p. 9.
[1259] UN Doc **A/CN.4/25**, 'Report by J. Spiropoulos, Special Rapporteur', ILC Yearbook 1950, Vol. II ('Spiropoulos Report'), p. 257, para. 20.
[1260] Spiropoulos Report, p. 255, para. 2 (emphasis added).
[1261] Spiropoulos Report, p. 255, paras. 1-2.
[1262] This same reasoning applies to the Report of the Group of Experts for Cambodia. *See* **E95/8/1/1**, Ieng Sary's Appeal against Decision on Armed Conflict Nexus Requirement, para. 36, fn. 76.

> 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 or organisational plan or policy requirement. As no error has been demonstrated, the Chamber dismisses both challenges.[1263]

The primary basis for the Chamber's conclusion – that the sources cited by the Defence in Case 002/01 were not more persuasive than the sources cited by the Chamber in Case 001 – was manifestly irrelevant. The Defence has no obligation to prove the Trial Chamber in Case 001 wrong. Instead, the Chamber's conclusion that there are 'contrasting views' on the subject leads inexorably to the conclusion that the state of the law in 1975 was unclear, and therefore that the more restrictive definition of the offence must be applied pursuant to the principle of *in dubio pro reo*. Accordingly, and in light of the page limits on the instant Appeal, the Defence incorporates by reference its submissions concerning the state policy requirement from its Closing Brief and submits that the Trial Chamber erred in law in excluding it.[1264]

C. Ground 47: The Trial Chamber erred in law and fact in finding that a widespread and systematic attack on discriminatory grounds existed

475. Pursuant to Article 5 of the ECCC Law, acts charged as crimes against humanity must have a nexus with 'a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds'. The Defence recalls that, pursuant to well-established jurisprudence, an 'attack' is comprised of 'acts of violence'.[1265] Crimes against humanity accordingly require proof of widespread and systematic acts of violence. Those acts of violence must furthermore be directed against a civilian population and perpetrated on political or other, discriminatory grounds.

476. The Trial Chamber held that a widespread or systematic attack existed which targeted 'the feudalist and capitalist classes', 'New People', and 'any who opposed, or were perceived to oppose, the revolution and the collective system'.[1266] The Trial Chamber erred in law and fact in all three respects, invalidating every conviction in the Judgment.

477. With regard to 'feudalist and capitalist classes' and 'New People', the Defence refers the Chamber to its submissions concerning political persecution of these groups, *supra*.[1267] Specifically, there is no evidence that New People constituted a political group and no evidence that capitalist and feudalists classes were treated in a discriminatory fashion. Accordingly, no attack existed on political grounds against either group.

[1263] Judgment, para. 181 (emphasis added).
[1264] **E295/6/3**, Closing Brief, paras. 210-3.
[1265] Brđanin Trial Judgment, para. 131; Galić Appeal Judgment, fn. 316.
[1266] Judgment, para. 195.
[1267] *See* paras. 373-383, *supra*.

478. Regarding opponents of the revolution, no evidence was led in Case 002/01 that widespread or systematic acts of violence against political opponents were committed with a nexus to the crimes charged.[1268] In the pre-April 1975 period, the primary evidence concerns the existence of M-13 prison, at which evidence was adduced of 200 detainees over five years during a civil war. The Trial Chamber held that M-13 was 'tasked with receiving people who had been arrested from the battlefield'.[1269] Any detainees at M-13 who had been Khmer Republic soldiers captured in battle would be soldiers *hors de combat* and accordingly not members of a civilian population.[1270] The Chamber additionally held that Kraing Ta Chan security center existed, but heard no evidence and made no findings of any acts of violence.[1271] It further found, erroneously, that a few hundred people were killed in 1973, two full years before the evacuation of Phnom Penh.[1272] The Chamber made no further findings concerning acts of violence directed at a civilian population prior to April 1975.

479. On 17 April 1975, the CPK liberated Phnom Penh and evacuated the city. Even if, for argument's sake, the evacuation itself might be considered to constitute a widespread and systematic attack, it was (in addition to being lawful[1273]) by definition indiscriminate. It was not directed at any particular group, such as political opponents. Accordingly, it does not constitute an act of violence committed on political grounds.

480. The only findings in the Judgment concerning 'acts of violence' against political opponents concern Khmer Republic soldiers. Yet the Chamber rightly declined to characterize these individuals as civilians, acknowledging their potential status as soldiers *hors de combat.*[1274] The Chamber deliberately avoided resting its assessment of the chapeau elements on the CPK's alleged treatment of Khmer Republic soldiers for precisely this reason.[1275] This was correct: Khmer Republic soldiers not taking direct part in hostilities remain soldiers *hors de combat*, not civilians.[1276]

481. The Defence notes in this regard that Article 6 of the Fourth Geneva Convention states that the Convention shall continue to apply until the 'general close of military operations.' The ICRC Commentary clarifies that the close of military operation is 'when the last shot has been fired.'[1277] Accordingly, a 'ceasefire' does not terminate the state of war as such.[1278] In this case, the Chamber

[1268] *See* paras. 273-283, *supra* (analyzing errors concerning the alleged policy to 'smash enemies').
[1269] Judgment, para. 117.
[1270] Judgment, para. 186.
[1271] Judgment, para. 117.
[1272] *See* paras. 278-279, *supra.*
[1273] *See* paras. 433-441, *supra.*
[1274] Judgment, para. 194.
[1275] Judgment, para. 194.
[1276] Mrkšić Trial Judgment, paras. 454 (civilians do not include persons 'not taking an active or direct part or who have ceased to take part in hostillities'), 460 (crimes committed against such a population do not constitute crimes against humanity); Galić Appeal Judgment, fn. 437 (civilians do not include 'members of armed forces who have laid down their arms').
[1277] ICRC Commentary to the Fourth Geneva Convention: Commentary: Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War ICRC (ICRC, Jean S. Pictet, ed., 1958) ('ICRC GCIV Commentary'), pp. 61-62.
[1278] Dieter Fleck, *Handbook of International Humanitarian Law*, 2009, para. 233.

explicitly found that fighting against the Khmer Republic army continued in Phnom Penh for at least several days after 17 April 1975.[1279] Other witnesses have described fighting extending into May.

482. In any event, international humanitarian contemplates the arrest of soldiers in the aftermath of a conflict, even if that conflict has technically terminated. During World War II, 'the Allied Authorities took the view that unconditional surrender amounted to giving a free hand to the Detaining Powers as to the treatment they might give to military personnel who *fell into their hands following the capitulation*'[1280] These men, who often 'had never even gone into action against the enemy', 'had no legal status and were at the entire mercy of the victor.'[1281] While the enactment of the Geneva Conventions in 1949 extended legal protections to those who 'fall into the hands of the adversary following surrender or mass capitulation',[1282] persons so captured are considered lawfully detained as prisoners of war. Likewise, a report submitted to the UN Security Council by the Secretary-General on 22 September 1989 in the aftermath of the Iran-Iraq war characterized soldiers captured after the conclusion of a ceasefire as prisoners of war.[1283] Julia Grignon observes: '*Il apparaît donc que ces personnes, non pas simplement détenues au-delà de la cessation des hostilités, mais même capturées après que le conflit ait été supposé terminé, sont néanmoins coniderées comme ayant droit au statut de prisonnier de guerre et donc au bénéfice des protections accordées de ce fait par le droit international humanitaire.*'[1284] Accordingly, the Khmer Republic soldiers arrested immediately following the termination of the war – certainly those arrested in the first hours and days, as the Judgment found – are soldiers *hors de combat*, and accordingly may not be the target of a widespread and systematic attack directed against a civilian population.

483. The only other finding in the Judgment concerning political opponents was that the CPK adopted a 'policy' of smashing enemies.[1285] As the Defence has already argued, this finding was vague and unsupported by the evidence.[1286] In any event, a 'policy' against enemies does not satisfy the requisite standard, the commission of 'acts of violence'. It does not establish the existence of a widespread and systematic attack. Accordingly, no such attack has been proven.[1287]

[1279] Judgment, paras. 510, 554.
[1280] ICRC Commentary on the Third Geneva Conventions, 'Commentary: Geneva Convention III Relative to the Treatment of Prisoners of War' (ICRC, Jean S. Pictet, ed., ICRC, 1960) ('ICRC GCIII Commentary'), p. 75 (emphasis added).
[1281] ICRC GCIII Commentary, p. 76.
[1282] ICRC GCIII Commentary, p. 76.
[1283] Julia Grignon, *L'applicabilité temporelle du droit international humanitaire*, 2014, fn. 802.
[1284] Julia Grignon, *L'applicabilité temporelle du droit international humanitaire*, 2014, fn. 802 (emphasis added).
[1285] Judgment, para. 117.
[1286] *See* paras. 273-283, *supra*.
[1287] The Defence notes that in the Duch Trial Judgment, the Trial Chamber found that a widespread or systematic attack was directed at a civilian population through the evacuation of Phnom Penh, enforced labour in cooperatives and 'the construction of institutions and structures designed to consolidate and reinforce total control of the country by the CPK'. *See* Duch Trial Judgment, paras. 326-7. However, the Chamber did not find that any of these alleged acts of violence satisfied the additional requirement of having been perpetrated on political grounds. The Chamber's only finding concerning the discriminatory nature of the attack concerned the CPK's supposed persecution of political opponents at S-21, which was founded in Aug 1975, four months after the evacuation of Phnom Penh and the events at Tuol Po Chrey. *See* Duch Trial Judgment, paras. 119-

XVI. DEFINITION OF THE JOINT CRIMINAL ENTERPRISE

A. Ground 198: The Trial Chamber erred in law in finding that Joint Criminal Enterprise existed in 1975

484. The Trial Chamber held that 'participation in a joint criminal enterprise ('JCE') amounts to commission within the scope of Article 29 (new) of the ECCC Law',[1288] which sets out the applicable modes of liability at the ECCC. The Chamber cited its own prior decisions, a decision of the Pre-Trial Chamber, and the ICTY Appeals Chamber's judgment in *Tadić* to find that both JCE's basic ('JCE I') and systemic ('JCE II') forms had existed under customary international law between 1975 and 1979[1289] and satisfied the principle of legality to apply at this Tribunal.[1290]

485. However, the Trial Chamber's determination as to the applicability of JCE I and II was built on a fundamentally defective foundation: namely, that between 1975 and 1979, it was customary international law that an accused could incur criminal responsibility by 'participat[ing] in the common purpose [and] making a *significant, but not necessarily indispensable, contribution*',[1291] which is one of the material elements common to all forms of JCE. On the contrary, 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.

486. JCE simply did not exist under customary international law between 1975 and 1979. On the contrary, it was invented 20 years later by an (over-)activist ICTY Appeals Chamber. That Chamber on the one hand believed that its mandate was to bring to justice all serious violators of IHL, '*whatever the manner*' of their perpetration or participation.[1292] On the other hand, it observed that 'many international crimes … do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality … in pursuance of a common design'.[1293] In order to fill this impunity gap, the ICTY Appeals Chamber conjured up a previously unheard of concept, which it called 'joint criminal enterprise' and which it insisted had long since existed. As the ICTY and ICTR wind down operations, JCE has been given its final resting place as an aberrant construction of these *ad hoc*

120, 326-7. The Chamber's only other findings as to the existence of a widespread or systematic attack was substantially identical to its findings as to the supposed 'enemies' policy in the Case 002/01 Judgment. The only acts of violence prior to the establishment of S-21 identified by the Chamber in the Duch Trial Judgment concern the 200 individuals held at M-13. *See* Duch Trial Judgment, para. 327 (citing section 2.2.5.2, asserting the existence of a 'policy' of smashing enemies, the only supposed manifestation of which prior to 17 Apr 1975 was at M-13). The Chamber failed to substantiate the existence of any other attack on discriminatory grounds prior to the advent of S-21.

[1288] Judgment, para. 690.

[1289] Judgment, para. 691, *citing* **E100/6**, 'Decision on the Applicability of Joint Criminal Enterprise', 12 Sep 2011, para. 22 ('Trial Chamber JCE Decision'); **D97/15/9**, 'Decision on Appeals against the Co-Investigating Judges' Order on Joint Criminal Enterprise (PTC)', 20 May 2010, paras. 57-69, 72 ('Pre-Trial Chamber JCE Decision'); Duch Trial Judgement, 26 Jul 2010, para. 512; Tadić Appeal Judgment, paras. 220, 226.

[1290] Judgment, paras. 689, 691.

[1291] Judgment, para. 692.

[1292] Tadić Appeal Judgment, para. 189 (emphasis added).

[1293] Tadić Appeal Judgment, para. 191.

tribunals by the ICC, which rejects JCE in favor of a more limited form of joint perpetration liability.[1294]

487. The Defence agrees that between 1975 and 1979, it was possible to prosecute joint perpetration of a criminal act as a mode of liability. What it contests is *how* such liability was defined under customary international law *at that time*. In particular, the Defence challenges the Trial and Pre-Trial Chambers' erroneous conclusion that joint perpetration liability from 1975 and 1979 included what is now commonly referred to as JCE I and JCE II, although the Defence agrees with the Chambers' decision to rule that JCE III did not fall within the Tribunal's jurisdiction.[1295] Since both Chambers relied on the ICTY Appeals Chamber's construction of JCE in *Tadić* to establish the existence of JCE I and II,[1296] the analysis that follows focuses on a critique of that construction.[1297]

488. In *Tadić*, the ICTY Appeals Chamber stitched together JCE I and II largely by relying on eight post-World War II ('WWII') cases.[1298] However, in all six cases relied on for JCE I, it is not even clear what mode of liability is applied to hold the accused persons responsible.[1299] In the two remaining cases, which are relied on for JCE II, it appears that the relevant military courts held the accused responsible under a form of command responsibility, placing great emphasis on the high-ranking status of the accused persons.[1300] Therefore, none of these cases are a sufficient basis upon which to properly construe the existence of JCE I and II.

489. The cases also offer little or no insight into the specific elements of JCE, and particularly whether an accused must make a '*significant, but not necessarily indispensable, contribution*'[1301] to the common purpose to be held responsible. In four cases, the accused persons were all *present* at locations at which murders were committed and either carried out some of the murders or provided assistance, such as preventing the crime from being disturbed,[1302] taking the victim to the location,[1303] associating themselves with the murderers,[1304] or searching the location at which the victims were discovered and

[1294] *See* ICC Statute, Art. 25(3); Lubanga Appeal Judgment, paras. 471-3 (affirming a 'control of the crime' theory of joint perpetration liability and rejecting the approach of the ad hoc tribunals at the ICC).
[1295] As the Judgment addresses only JCE I and II liability, the Defence's analysis herein will refer only to these two forms of JCE liability. However, the Defence refers the Chamber to its forthcoming response to the OCP appeal against the Judgment in respect of its position as to JCE III.
[1296] Judgment, para. 691, *citing* **E100/6**, Trial Chamber JCE Decision, para. 22; Duch Trial Judgment, para. 512; **D97/15/9**, Pre-Trial Chamber JCE Decision, paras. 57-69, 72.
[1297] The Defence will also make detailed submissions with respect to JCE generally in its forthcoming response to the OCP appeal against the Judgment, incorporates those submissions by reference, and summarizes the key points herein. The Defence also refers the Chamber to the forthcoming *amicus curiae* brief that a defence team for a named suspect in Case 004 will submit in response to the OCP appeal.
[1298] Tadić Appeal Judgment, paras. 195-203.
[1299] Almelo Judgment; Hölzer Judgment; Jepsen Judgment; Schonfeld Judgment; Ponzano Judgment; Einsatzgruppen Judgment.
[1300] Dachau Concentration Camp Judgment; Belsen Judgment.
[1301] Judgment, para. 692.
[1302] Almelo Judgment.
[1303] Hölzer Judgment.
[1304] Jepsen Judgment.

then killed.[1305] Such direct participation differs fundamentally from JCE, which establishes responsibility for indirect participation as well. The Defence also notes that the factual circumstances of these cases differ *dramatically* from the instant case. In this case, Nuon Chea was held to be criminally responsible on the basis of his participation in an overarching revolution. This is about as far away as possible from standing by or assisting at a murder scene.

490. Only one of the eight cases cited by the ICTY Appeals Chamber, Ponzano, discussed indirect contribution. In that case, the British Judge Advocate opined that a person could be held responsible 'who, without being present at the place where the offence was being committed took such a part in the preparation for this offence as to further its object; in other words, he must be the cog in the wheel of events leading up to the result which in fact occurred'.[1306] However, the case did not establish the threshold for criminal participation – that is, the degree of participation required. The Pre-Trial Chamber cited two additional cases to strengthen the legal basis for JCE (the Justice and RuSHA cases). However, these, too, were similarly vague: in the Justice Judgment, the court discussed the need for 'conscious' participation,[1307] while the discussion in the RuSHA Judgment focused on 'active participation'.[1308] This does not even come close to the 'significant, but not necessarily indispensable, contribution' that the Trial Chamber held to be one of JCE's material elements. Therefore, the cases relied on by both the ICTY Appeals Chamber and the Pre-Trial Chamber also fail to establish the specific elements of JCE and especially the degree of contribution required.

491. The Pre-Trial Chamber and Trial Chamber also referred to Article 6 of the Nuremberg Charter[1309] and Article II(2) of Control Council Law No. 10[1310] as precursors to JCE and additional evidence of its customary international law credentials. However, these articles offer only general definitions of conspiracy or common plan liability. Moreover, neither identify the applicable material or mental elements of JCE. Therefore, neither can serve as a sufficient basis on which to find that JCE I or II were established under customary international law at the relevant time. In addition, the post-WWII cases, the Nuremberg Charter and Control Council Law No. 10 fail to identify JCE I or II with sufficient legal certainty[1311] so as to constitute customary international law, especially to the

[1305] Schonfeld Judgment.
[1306] Ponzano Judgment, p. 7.
[1307] Justice Judgment, pp. 1123, 1156.
[1308] RuSHA Judgment, pp. 88-178.
[1309] Art. 6 of the Nuremberg Charter provides, in relevant part, that '[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit [crimes against peace, war crimes or crimes against humanity] are responsible for all acts performed by any persons in execution of such plan'.
[1310] Control Council Law No. 10 Art. II(2) provides that '[a]ny person without regard to nationality or the capacity in which he acted, is deemed to have committed [crimes against peace, war crimes, crimes against humanity or the crime of membership in criminal groups or organizations] if he was […] connected with plans or enterprises involving its commission'.
[1311] *See*, *Sunday Times v. United Kingdom*, ECtHR, 'Judgement', App. No. 6538/74, 26 Apr 1979, para. 49.

heightened, express degree necessary for civil law jurisdictions.[1312]

492. Alongside the post-WWII cases, the ICTY Appeals Chamber also discovered JCE lurking in two additional sources of law: a few unpublished Italian cases[1313] and two treaties.[1314] Both sources of law are irrelevant at this Tribunal. The Pre-Trial Chamber already held that the Italian cases should be disregarded since they demonstrate 'domestic courts [applying] domestic case law [and thus] do not amount to international case law'.[1315] The Trial Chamber and Pre-Trial Chamber also correctly avoided consideration of the two treaties – the Rome Statute and the International Convention for the Suppression of Terrorist Bombings – since they entered into force decades after the period in question[1316] and are therefore patently irrelevant. Thus, it could not have been sufficiently 'foreseeable and accessible' to Nuon Chea in 1975 that he could be prosecuted for making a 'significant, but not necessarily indispensable, contribution' rather than a substantial contribution to a common purpose which *either* 'amounts to or involves the commission of a crime'.[1317]

493. The Defence finally notes that JCE has been widely criticized since its first appearance in Tadić. Its detractors have not been limited to disgruntled accused but have also included international judges and academics.[1318] According to Judge Schomburg of the ICTY Appeals Chamber:

> [T]he doctrine of JCE in its entirety is an unnecessary and even dangerous attempt to describe a mode of liability not foreseen in the Statutes of today's international tribunals, […] however invested and applied by the Appeals Chamber of both Tribunals. This artefact still has the potential of violating in part the fundamental right not to be punished without law (*nullum crimen, nulla poena, sine lege*).[1319]

JCE was also criticized by Professors Schabas (describing it as a '*prosecutor's magic bullet*' intended to achieve 'discounted convictions'),[1320] Van der Wilt (calling it a 'concept [that] degenerates into a smokescreen that obscures the *possible frail connection* between the accused and the specific crimes for which they stand trial'),[1321] and Laughland (opining that JCE had originally been designed 'to deal with acts of small-scale mob violence where there is physical proximity between the perpetrators and a short-time scale [… but] has now been expanded to encompass the very opposite – *huge JCEs where the link between the various members of it, and between the commanders and perpetrators, is extremely*

[1312] *See, e.g.* Antonio Cassese, *International Criminal Law*, 2003, pp. 141-42.
[1313] Tadić Appeal Judgment, paras. 214-219.
[1314] Tadić Appeal Judgment, paras. 221-223.
[1315] **D97/15/9**, Pre-Trial Chamber JCE Decision, para. 82.
[1316] These treaties entered into force in 2002 and 1997, respectively.
[1317] Judgment, para. 398.
[1318] *See, e.g.*, **D97**, 'Ieng Sary's Motion against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise' ('Ieng Sary's Motion against JCE'), 28 Jul 2008, para. 5.
[1319] Wolfgang Schomburg, 'Jurisprudence on JCE: Revisiting a never ending story', 2010, available at http://www.cambodiatribunal.org/sites/default/files/resources/ctm_blog_6_1_2010.pdf, p. 2.
[1320] William A. Schabas, *Mens Rea and the International Tribunal for the Former Yugoslavia*, 37 New. Eng. L. Rev. 1025, 1032-34 (2003) (emphasis added), *cited in* **D97**, Ieng Sary's Motion against JCE, para. 5.
[1321] Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. Int'l. Crim. Just. 1 (2007), p. 101 (emphasis added).

tenuous').[1322] JCE, in short, is a judicial activist construction that allows the seemingly noble end of eliminating impunity to erode the fair trial means, creating the perfect environment for judicial bias to flourish and the rule of law to decline. For these reasons, the Trial Chamber erred in law in finding that JCE applies at this Tribunal.

B. Ground 200: The Trial Chamber erred in fact in defining the CPK's Joint Criminal Enterprise

494. The Trial Chamber following the Closing Order found that a plurality of persons, including Nuon Chea, '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"'[1323] and that this common purpose 'was not in itself necessarily or entirely criminal.'[1324] The Defence concurs that Nuon Chea participated in a common purpose with other CPK leaders to implement a rapid socialist revolution and to defend that revolution. However, the Chamber erred in law and fact in finding that the common purpose involved defence of the Party 'by any means necessary'. It failed to explain the content of this finding, the ordinary meaning of which is that no measure of any kind was beyond the scope of Party policy.

495. JCE involves an agreement for the 'commission of a crime provided for' in the applicable law.[1325] Even where a non-criminal common purpose is alleged, the accused must intend that such purpose 'be implemented through' the commission of such a crime.[1326] The *Brđanin* Appeals Chamber accordingly held that a court must 'specify the common criminal purpose in 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).'[1327]

496. By incorporating the phase 'any means necessary' within the definition of the common purpose, the Chamber effectively circumvented the requirement that the alleged criminal objectives be defined with specificity. If each member of the JCE agreed that 'any means necessary' would be used to defend the Party, it follows that they agreed in advance to any criminal act which might turn out to be an aspect of national defence. The accused is accordingly deemed 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.

497. This finding was especially inappropriate given the limitations on the scope of the Case 002/01

[1322] John Laughland, Conspiracy, Joint Criminal Enterprise and Command Responsibility in International Criminal Law, speech given to the International Law Defence Conference, the Hague, 14 Nov 2009, available at http://www.idc-europe.org/en/Criminal-liability-in-international-tribunals (emphasis added).
[1323] Judgment, para. 777.
[1324] Judgment, para. 778.
[1325] Tadić Appeal Judgment, para. 227.
[1326] RUF Trial Judgment, para. 1979.
[1327] Brđanin Appeal Judgment, para. 431.

trial. The Chamber's findings concerning the concrete policy through which defence of the country is alleged to have been implemented – re-education of bad elements and killing of enemies – were highly circumscribed.[1328] The Chamber found that a limited number of specific killings occurred and cited evidence purporting to describe certain purges.[1329] Indeed, the Chamber held that the 'extent' of this policy 'will be the subject of Case 002/02.'[1330] No reasonable trier of fact could find that the CPK employed 'all means necessary' while also holding that the extent to which those 'means' were used was yet to be decided. The Defence accordingly submits that the phrase 'any means necessary' – which comes originally from the Closing Order – was not a factually meaningful conclusion based on evidence, but a manifestation of the CIJs' and the Chamber's vague sense that 'these guys would do anything'. Reminiscent of Judge Cartwright's description of the CPK leaders as 'tyrants' to be 'humiliated',[1331] it reflects bias and has no place in a proper judgment.

498. Although the effect of this error on the outcome of the Judgment is difficult to discern with specificity, the common purpose constitutes the foundation of Nuon Chea's liability for nearly all the crimes charged and is accordingly of vital importance. As already noted, the Chamber's conclusion that Khmer Republic officials were targeted for execution as enemies of the Party was part of the basis of Nuon Chea's liability for crimes allegedly committed at Tuol Po Chrey.[1332] The definition of the common purpose, especially as to the Party's alleged treatment of enemies, is furthermore of obvious importance to Case 002/02. This error is accordingly subject to review.

XVII. JCE POLICY OF POPULATION MOVEMENTS

A. Ground 199: The Trial Chamber erred in law in applying an erroneous standard to determining that crimes were committed through a JCE during population movements

499. The Trial Chamber found that the common purpose of socialist revolution involved a policy of population movement which in turn 'resulted in and/or involved the commission of crimes, including forced transfer, murder, attacks against human dignity and political persecution.'[1333] As the Chamber held, however, the applicable legal standard is different: the common purpose must 'amount to or involve' the commission of the crimes charged.[1334] The Chamber accordingly made no finding of fact beyond a reasonable doubt that the applicable legal standard was satisfied.[1335]

[1328] *See* paras. 278-279, *supra*.
[1329] Judgment, paras. 117-118, fns. 330, 333, 338, 340.
[1330] Judgment, para. 118.
[1331] **F2/1**, Second Appeal Evidence Request , para. 4.
[1332] Judgment, paras. 117-118, 815.
[1333] Judgment, para. 804 (emphasis added).
[1334] Judgment, para. 692 (emphasis added).
[1335] The Defence notes the Trial Chamber subsequently found that both population movements 'followed a consistent pattern of conduct in each case including and involving the commission of crimes'. *See* Judgment, para. 804. While the Defence disputes this finding, the notion that there was a pattern of criminal conduct falls short of a finding that such criminal conduct was an aspect of CPK policy. Moreover, since the Trial Chamber (erroneously) held that the population movements

500. The law in this regard is uniform and unambiguous: as the Trial Chamber held, the common purpose must *amount to or involve* the crimes charged.[1336] A common purpose 'amounts to' criminal conduct where the members of the JCE agree to commit acts which constitute the *actus reus* of the offence. A common purpose 'results in' criminal conduct when it leads to acts or omissions to which the members of the JCE did not agree. No legal standard permits the attribution of criminal liability pursuant to JCE I for the participation of an accused in a common purpose which merely *results in* the commission of crimes. This includes the Judgment in the *RUF* case at the SCSL, on which the Trial Chamber relied in upholding the non-criminal common purpose pled in the Closing Order.[1337] The 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.[1338]

501. The Defence notes that the Co-Prosecutors chose not to appeal the Chamber's finding that the CPK population movement policy merely 'resulted in and/or involved' the commission of crimes. Instead, they seek to change the applicable law: they argue that JCE III constitutes good law before this Tribunal.[1339] This Chamber accordingly has no jurisdiction to reverse the relevant finding of fact: that the evidence does not establish beyond a reasonable doubt that CPK policy 'involved' the commission of the crimes charged. Subject to the Co-Prosecutors' appeal on JCE III, every conviction for crimes allegedly committed through a JCE during either population movement must be reversed.

502. In the alternative, as the Chamber made no finding that the JCE amounts to or involves the commission of murder, persecution or attacks against human dignity during the Phase I and II population movements, no deference to any such finding is due. Accordingly, should the Supreme Court Chamber decide to assess whether the JCE *involved* the commission of criminal acts, it must conduct that review *de novo*.[1340]

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themselves constituted crimes, its finding that the 'policies were criminal' has no bearing on whether the commission of other crimes which were allegedly committed during population movements (including murder, persecution and attacks against human dignity) were included in the relevant JCE policy. The Chamber's only clear holding concerning murder, persecution and other inhumane acts during population movements was that the JCE 'resulted in and/or involved' the commission of these crimes.

[1336] Tadić Appeal Judgment, para. 227; Krnolejac Appeal Judgment, para. 31; Vasiljević Appeal Judgment, para. 100; Brđanin Appeal Judgment, paras. 364, 418; Simić Appeal Judgment, para. 19; Šainović Appeal Judgment, paras. 604, 609, 611; Mugenzi Appeal Judgment, para. 1907.

[1337] *See* RUF Judgment, paras. 258, 376, 1977; **E100/6**, Trial Chamber JCE Decision, para. 17. While the Chamber actually cited an earlier decision in the AFRC case, that case did not actually apply JCE I. The standards set out in the AFRC Judgment were accordingly applied in the RUF case. *See* **E163/5/11**, Applicable Law Submissions, para. 35.

[1338] Allen O'Rourke, *Joint Criminal Enterprise and Brdanin: Misguided Overcorrection*, 47:1 Harv. Int'l L. J., 307 (2006), p. 312 ('The third category, extended JCE, is to prosecute crimes that occurred outside the JCE's objective but nonetheless resulted from the JCE execution'); Simon Meisenberg, 'Joint Criminal Enterprise at the Special Court for Sierra Leone' in Charles Chernor Jalloh (ed.), *The Sierra Leone Special Court and its Legacy: The impact for Africa and International Criminal Law*, 2013, pp. 86 ('the jurisprudence is clear that the common plan must itself be criminal or at least involve crimes'), 90 ('the limits of JCE are reached where the common purpose does not involve or amount to an international crime').

[1339] **F11**, 'Co-Prosecutors Appeal Against the Judgment of the Trial Chamber in Case 002/01', 28 Nov 2014.

[1340] The Defence submits that any such conclusion would furthermore be unreasonable and accordingly submits in the further alternative that if the Chamber determines that the Trial Chamber did find that the JCE involved the crimes charged, it was a conclusion beyond the discretion of any reasonable trier of fact.

B. Ground 201: The Trial Chamber erred in law and fact in finding that crimes were committed through a JCE during the evacuation of Phnom Penh

503. As stated above, Nuon Chea does not contest that he agreed to the evacuation of Phnom Penh. He denies that this agreement amounted to, involved or included murder, persecution or other inhumane acts through attacks against human dignity.

504. The Chamber found that the evacuation of Phnom Penh was decided upon in June 1974 at a meeting of certain members of the Standing and Central Committees.[1341] The Chamber further found that several of these leaders gathered at B-5 in early April 1975 to direct the final assault on Phnom Penh.[1342] No evidence establishes that the content of the agreement among members of the Standing Committee to evacuate Phnom Penh involved the commission of murder, persecution or attacks against human dignity. Indeed, the Chamber's findings make no reference to the elements of any of these crimes.[1343] This is precisely why the Chamber was able to hold only that the alleged JCE 'resulted in and/or involved' the commission of crimes.

505. The Defence argued at trial that any crimes committed in the course of the evacuation of Phnom Penh were committed under the authority of zone leaders, not the 'Party Center'.[1344] The Chamber rejected this argument, finding that the role of zone secretaries during the evacuation of Phnom Penh was limited to the implementation of instructions from 'the Party Center', including Nuon Chea.[1345] This conclusion is directly contrary to the Chamber's own findings. The Chamber found that the June 1974 meeting was attended by Pol Pot, Nuon Chea, Sao Phim, Ta Mok, Koy Thuon, Vorn Vet, Son Sen and Ruos Nhim.[1346] According to Phy Phuon, those present at B-5 in April 1975 included Pol Pot, Nuon Chea, Sao Phim, Ta Mok, Vorn Vet, Son Sen and Ke Pauk.[1347] The Chamber further held that, pursuant to the principle of democratic centralism, all attendees at the June 1974 meeting agreed to the evacuation following a collective consultation.[1348] In April 1975, Sao Phim, Ta Mok, Vorn Vet and Koy Thuon were the secretaries in charge of the East, Southwest, Special and North Zones,[1349] the four CPNLAF zone-forces which implemented the evacuation.[1350]

506. The Chamber's findings accordingly establish that Pol Pot and Nuon Chea agreed to the evacuation of Phnom Penh together with the secretaries of the four zones which implemented it, and that this agreement did not include or involve murder, persecution or attacks against human dignity.

[1341] Judgment, para. 133.
[1342] Judgment, paras. 144-146.
[1343] Judgment, paras. 133-146.
[1344] **E295/6/3**, Closing Brief, paras. 306-315.
[1345] Judgment, para. 859.
[1346] Judgment, para. 133.
[1347] **E3/24**, 'Written Record of Interview of Rochoem Ton', 5 Dec 2007 ('Phy Phuon WRI'), ERN 00223581.
[1348] Judgment, paras. 223-8.
[1349] Judgment, paras. 219-220.
[1350] Judgment, fns. 1357.

The Trial Chamber also properly recognized that prior to July 1975, all CPNLAF forces were 'under the direct control of the Zones, not the Party center.'[1351] Any further instruction concerning the implementation of the evacuation originated with zone-based officials. Not only did the 'Party Center' exercise limited control over these zone leaders, by April 1975 half of them were already engaged in a (simmering) power struggle with this same 'Party Center'.[1352]

507. These conclusions are corroborated by evidence adduced by the Defence at trial proving that the zones acted under sharply distinct and competing lines of authority. While the Trial Chamber correctly held that the forces of each respective zone took control of a defined sector of Phnom Penh,[1353] it unreasonably failed to acknowledge numerous other key facts, including that: soldiers were not permitted to travel outside the physical territory controlled by the forces of their zone; soldiers from different zones wore different uniforms; and active turf battles ensued between the zones within Phnom Penh in the first few days after liberation.[1354] According to Heng Samrin's statement to Ben Kiernan (which the Trial Chamber improperly prevented the Defence from exploring), these inter-zonal conflicts extended to at least 1973, and accordingly reflect deeply rooted rivalries.[1355] No 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.

i – Attacks against human dignity and murder

508. The Trial Chamber's findings in this case, that murder was committed in the course of a forcible transfer which constituted part of a common purpose, were specifically characterized by the ICTY Appeals Chamber in *Tadić* as an illustration of JCE III liability. As a means of elucidating what conduct might satisfy the requirements of JCE III, the Appeals Chamber held:

> An example of this would be a common, shared intention on the part of a group to forcible remove members of one ethnicity from their town, village or region […] with the consequence that, in the course of doing so, one or more victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.[1356]

This hypothetical, which might well have been copied from the findings in the Judgment in this case, is accordingly limited to JCE III and insufficient to impute liability pursuant to JCE I.

509. The Defence notes that the Trial Chamber also found that CPK population movements followed

[1351] Judgment, para. 240.
[1352] *See* paras. 239-241, *supra*.
[1353] Judgment, para. 460.
[1354] **E295/6/3**, Closing Brief, paras. 306-309.
[1355] *See* para. 59, *supra*.
[1356] Tadić Appeal Judgment, para. 204.

a 'pattern'. The Chamber held that this supposed pattern involved people being 'beaten or shot',[1357] death from illness, starvation, exhaustion or execution,[1358] and consistently 'inhumane' conditions.[1359] However, the Defence has already shown that these findings were erroneous and unreasonable.

510. The Defence notes the Trial Chamber's finding that the evacuation was carried out 'using any means', which included killings. The Chamber placed the phrase 'using any means' in quotation marks and devoted an entire section of the Judgment to it.[1360] Having failed to summons Heng Samrin to give evidence concerning the content of orders given during the evacuation – including the National Judges' assessment that his evidence was just not that important – the Chamber based this entire section of the Judgment on the evidence of a single ordinary soldier named Sum Chea. To the Chamber's credit, it correctly chose not to refer to this evidence in its analysis of JCE policy.[1361] However, the Defence notes that, in any event, this evidence does not exist.

511. While the English language translation of this testimony indicates that there were 'groups who were designated to force the people', and who 'had to resort to whatever means possible to ensure that they left the city', Sum's actual testimony was that he heard that in other units, 'one or two' people who resisted the evacuation were killed.[1362] His testimony says nothing of 'designated units' or 'using any means' to secure the evacuation. It links no killings to any orders. It is nothing more than hearsay evidence of one or two isolated killings.

ii – Persecution

512. With regard to persecution, there is no evidence at all that the alleged JCE involved the persecution of New People. While the Trial Chamber found that prior to the evacuation, the CPK 'indoctrinated cadres and people in the bases to be hostile towards, and suspicious of, city people',[1363] the Defence has already shown that this finding was unreasonable.[1364] The Chamber's other findings concerning the purpose of the evacuation demonstrate that persecution was *not* included within the scope of the alleged JCE: that the evacuation was *inter alia* intended to allocate a workforce to focus on agriculture and infrastructure, and that the Party expected that some very small number *among* the New People would turn out to be enemies.[1365]

513. The Defence notes that the Trial Chamber also found that the 'suffering and sacrifice' allegedly

[1357] Judgment, para. 792.
[1358] Judgment, para. 803.
[1359] Judgment, para. 805.
[1360] *See* Judgment, Section 10.2.6.
[1361] See Judgment, paras. 782-794.
[1362] T. 5 Nov 2012 (Sum Chea, **E1/140.1**), p. 12 (referring to Khmer version).
[1363] Judgment, para. 787.
[1364] In particular, the only evidence cited was given by François Ponchaud and Philip Short, in addition to a CPK soldier who gave exactly the opposite testimony, that civilians in the city were not enemies. *See* paras. 375-376, *supra*.
[1365] Judgment, para. 788. In support of this latter proposition, the Chamber cited to paragraphs 576-577 and 770, all of which concern Phase II, and paragraph 772, which is irrelevant. The Defence refers to its earlier submissions that, at a minimum, the overwhelming majority of people in the city were not seen as enemies.

endured by evacuees was intended to 're-educate the "New People" and attack the class system.'[1366] This was absurd: not a shred of evidence exists that the CPK believed that suffering endured *during* the evacuation was part of the re-education of New People. Whatever evidence the Chamber likely did have in mind (which is unknown as nothing was cited) concerned the suffering New People would endure by being treated *the same as* base people in the cooperatives.[1367] For reasons already stated, equal treatment is not persecution even if one group dislikes that treatment more than another.

C. Ground 202: The Trial Chamber erred in law and fact in finding that crimes were committed through a JCE during the Phase II Movement

514. As already noted, the Trial Chamber failed to hold that the supposed JCE population movement policy 'amounted to and/or involved' the commission of crimes during the Phase II movement, as the applicable legal standard requires. The reason is clear: no evidence exists to support that conclusion. Accordingly, all of the convictions entered against Nuon Chea for crimes committed during the Phase II movement through a JCE must be reversed.

i – Other inhumane acts through forced transfer

515. The Chamber found that the Phase II population movement was described in CPK publications as an aspect of CPK policy.[1368] It further found that the Standing Committee decided to initiate population movements between rural areas in August 1975 and that the Central Committee subsequently confirmed this decision in September 1975.[1369] The Chamber found that Nuon Chea participated in these decisions.[1370] Each of these findings constitutes an error of law or fact.

516. With regard to Party policy as it was reflected in CPK publications, the Trial Chamber held that movements of population 'was one of the topics frequently addressed during propaganda campaigns, education sessions and in Party publications to ensure strict and effective implementation.'[1371] Not only was this finding clearly erroneous, in reality the evidence cited by the Chamber describes every key policy and objective adopted by the CPK beginning in April 1975 *other than* movement of population between rural areas.[1372] These include: building and defending the country,[1373] the elimination of private property,[1374] the construction of canals,[1375] improvement of food production,[1376] the evacuation

[1366] Judgment, para. 805.
[1367] *See e.g.,* Judgment, para. 784 ('class divisions could be erased, while all worked to achieve the Party's production targets'; New People experienced struggle by 'learning how to farm and work').
[1368] Judgment, fn. 2531 (citing Judgment, para. 576).
[1369] Judgment, para. 796 (citing Judgment, paras. 586-7).
[1370] Judgment, paras. 746, 749.
[1371] Judgment, paras. 576-7.
[1372] Judgment, paras. 576-577, fns. 1712-1719.
[1373] Judgment, fn. 1712.
[1374] Judgment, fn. 1713.
[1375] Judgment, fns. 1716, 1718.
[1376] Judgment, fn. 1718.

of Phnom Penh,[1377] the establishment and strengthening of cooperatives,[1378] and efforts to defend against internal and external enemies.[1379]

517. The failure of any CPK publication to make any reference to the acts underlying the Phase II movement could only have led a reasonable trier of fact to conclude that the Phase II movement, to whatever extent it took place, was *not* part of any alleged JCE policy. The Phase II movement was not a secret: the Chamber found that it affected at least 300,000-400,000 people and nearly every province in the country. Had it been part of Party policy and a component of the Party's efforts to build the country and the socialist revolution, reference to it would surely have appeared somewhere in the CPK's regularly issued publications, just as the evacuation of Phnom Penh, the establishment of cooperatives and the defence of the country frequently did. The Chamber chose to avoid this uncomfortable problem and continue on its relentless march towards conviction of Nuon Chea by simply making a baseless finding that the Party advertised the Phase II movement when in reality it did no such thing. This finding was erroneous and unreasonable.

518. With regard to the alleged September 1975 meeting of the Central Committee, the evidence on which the Chamber itself relied establishes that even if the meeting occurred, the Phase II movement was not discussed. While the Chamber relied on Stephen Heder's interview with Ieng Sary to establish that the meeting took place,[1380] it neglected to mention that in these same notes Ieng Sary denies that this meeting concerned the Phase II movement:

> **SH:** I would like to return to that September 1975 meeting that I asked about, because I see that there was a situation in the countryside at that time and it is my understanding that evacuations began, the evacuations of the people who had already been evacuated from the cities and towns, evacuating them from number of the Zones, such as from the Southwest to the Northwest Zone. In that meeting in September 1978,[1381] was that also spoken about, that plan, or just the decision about using money?
>
> **IS:** No 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.[1382]

As already noted, the Chamber relied extensively on this document solely for inculpatory purposes, and was obligated to give compelling reasons justifying its arbitrary and selective decision to disregard all

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[1377] Judgment, fn. 1714 (citing Nuon Chea's testimony about the evacuation of Phnom Penh and a telegram from the French Ministry of Foreign describing the evacuation of towns and cities). Note that while the latter document refers to evacuations from towns and cities 'immediately after the fall of Phnom Penh and in the autumn of 1975', it is obvious that it concerns only the Phase I movements. The statement is limited to 'evacuations from towns and cities', and in any case is merely a second hand description of a well-known speech by Pol Pot about which considerable other evidence exists on the case file. The Chamber's apparent effort to characterize the phrase 'the autumn of 1975' as a reference to Phase II is a clear misapprehension of the evidence. Had the Chamber genuinely believed this to be a reference to Phase II, this document would have been given much greater prominence.

[1378] Judgment, fn. 1713.

[1379] This particular policy is not reflected in any of the documents cited in this paragraph but was of course described in numerous CPK publications.

[1380] Judgment, para. 749.

[1381] Presumably, this is an error that was meant to read '1975'.

[1382] **E3/89**, 'IENG Sary Interview by Stephen HEDER', 17 December 1996, ERN 00417603 (emphasis added).

of Ieng Sary's exculpatory statements.[1383] This error was especially blatant in this case because it relied on Ieng Sary's evidence of *this very meeting*. The Chamber's failure to do so is an error of law.

519. No other evidence exists on which any reasonable trier of fact could have relied to conclude that a meeting of the Central Committee occurred, let alone that the Phase II movement was discussed. The Chamber cited a so-called 'policy document' which it acknowledged 'does not name its authors',[1384] does not identify who was 'responsible for the plans and policies it sets out',[1385] and does not indicate when those supposed 'plans and policies were decided'.[1386] The Chamber cited the October-November 1975 issue of *Revolutionary Flag*, which states that the three tonnes per hectare rice production goal had been agreed to prior to November 1975.[1387] It cited David Chandler's testimony that the 'overall economic plan' was a collective decision of the Center and subsequently 'led to' movements between rural areas.[1388] It also cited a claim in Philip Short's book that in September 1975 the Central Committee met to discuss agriculture, social affairs and defence, acknowledging that 'his source for this statement is unclear'.[1389] None of this evidence credibly establishes even that a meeting of the Party leadership took place. There is not a single word about the Phase II movement.

520. As to the alleged decision of the Standing Committee in August 1975, the Chamber relied on a single document which purports to describe a 'visit' of the Standing Committee to the Northwest Zone in August 1975.[1390] Yet the Chamber explicitly found that 'there is no evidence that NUON Chea travelled with other members of the Standing Committee to the Northwest Zone in August 1975.'[1391] The Chamber then claimed to be 'satisfied', without providing any reasons or identifying any evidence, that Nuon Chea participated in deciding upon the policies reflected in the summary of this visit which it was unable to determine Nuon Chea attended. No reasonable trier of fact could conclude on the strength of this evidence that the Party leadership agreed to initiate the Phase II movement.

ii– Other inhumane acts through attacks against human dignity and political persecution

521. The evidence is even more inadequate to establish that the common purpose of socialist revolution amounted to and/or involved other inhumane acts through attacks against human dignity or political persecution. With regard to attacks against human dignity, no evidence at all establishes that Nuon Chea was involved in any way in the implementation of the Phase II movement. Indeed, there is

[1383] *See* para. 573, *supra*.
[1384] Judgment, para. 748.
[1385] Judgment, para. 748.
[1386] Judgment, para. 748.
[1387] Judgment, para. 749.
[1388] Judgment, para. 749.
[1389] Judgment, para. 749.
[1390] Judgment, paras. 745-746.
[1391] Judgment, paras. 746.

no evidence of the details of any purported agreement among CPK leaders in that regard.[1392] In light of the Chamber's conclusion that zones were responsible for implementation of policy,[1393] no reasonable trier of fact could conclude beyond a reasonable doubt that CPK leaders agreed to subject transferees during the Phase II movement to conditions amounting to attacks against human dignity.

522. With regard to persecution, the Trial Chamber held that the JCE contemplated the Phase II movement in part in order to 're-educate the "New People" [and] identify enemies among the ranks of the "New People".'[1394] The Defence has already addressed all of the evidence cited by the Chamber in support of this conclusion and shown that none of it is relevant to persecution of New People.[1395] To the contrary, the evidence shows that Party policy never characterized New People as enemies of the Party or subjected them to persecutory acts on the basis of this status.[1396]

523. The Chamber's finding that the Party sought to persecute New People specifically *during* the Phase II movement is yet one step further removed from reality. Its key finding was as follows:

> Other 'New People' were moved from their home areas and thereby separated from their property and their former capitalist and feudalist lives. While they were moved and once at their destination, the 'New People' could be refashioned into peasants. By moving and purging the capitalist classes and eliminating private ownership, these "enemies" would have no power to oppose the Party.[1397]

Yet, by late 1975 'New People' had already been separated from their former capitalist and feudalist lives, had already been separated from their property, and already lived in cooperatives where, the Chamber held, they were already being refashioned into peasants. This had been one of the purposes, and the effect of, the Phase I movement.[1398] Indeed, this same Chamber held that after the evacuation of Phnom Penh, these very New People were 'viewed with suspicion as capitalists or feudalists', 'shunned', 'treated as a lower social class', 'chased to the outskirts' of villages and forced to 'build their own shelters'.[1399] These were the places from which, the Chamber then held, New People had to be moved as part of the Phase II movement in order to be separated from their (rather uncomfortable) capitalist and feudalist lives and refashioned into peasants.

524. The Chamber accordingly failed to even attempt a coherent explanation as to how displacing New People for a second time would serve to 're-educate' them or 'identify enemies'. The Chamber

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[1392] *See* paras. 517-520, *supra*.
[1393] Judgment, para. 859.
[1394] Judgment, para. 795.
[1395] The Chamber referred to paragraphs 585-586, 602, 604 and 613 to establish that the Phase II movement had a variety of purposes, among them persecution of New People. Only paragraphs 613 contains any such findings. Those findings and the evidence cited in support of them are addressed in para. 374-383, *supra*. *See also*, Judgment, para. 796 (finding that 'New People had to be moved and separated as enemy agents were still mixed among them', citing again to paragraph 613).
[1396] *See* paras. 377-379, *supra*.
[1397] Judgment, para. 613.
[1398] For the purpose of this analysis, the Defence makes use of the Chamber's false equivalence of New People with 'capitalists and feudalists'. The purpose is to demonstrate is that even laboring under this premise, the Chamber's analysis of the CPK's treatment of this group was incoherent. However, the Defence continues to deny the premise of this argument, that New People were opponents of the Party.
[1399] Judgment, para. 517.

did not find that cooperatives in the Northwest Zone were better tools of re-education than those in the Southwest, West and East Zones. New People who were allegedly removed from their locations in base villages and grouped together in new cooperatives in the Northwest Zone were furthermore isolated from the ideological influence and watchful eyes of the Base People, and handed a golden opportunity to conspire to revolt. How this process facilitated re-education and the identification of 'enemies' is a mystery.

525. This logical disconnect between the persecution of New People and the Phase II movement is reflected clearly in the evidence on which the Chamber relied.[1400] Not a word links the Party's view of New People (which in any case does not constitute persecution) to the Phase II movement, explicitly or otherwise. The Chamber's confused and contradictory analysis is not a product of poor drafting, but of its contrived effort to find its way to a conviction in the face of all of the evidence.

XVIII. JCE POLICY OF TARGETING KHMER REPUBLIC OFFICIALS

526. The Trial Chamber found that the CPK had a policy to target Khmer Republic soldiers and officials beginning before 1975, which continued throughout the DK era.[1401] The Trial Chamber found that this policy involved the targeting 'for arrest, execution and/or disappearance of all elements of the former Khmer Republic.'[1402]

527. The Defence submits that this characterization is deliberately vague. By formulating a policy to target 'for arrest, execution and/or disappearance', the Chamber was able to leverage evidence of *arrests* into criminal responsibility for *killings*. The Defence submits that Nuon Chea's criminal responsibility for the crimes allegedly committed at Tuol Po Chrey by commission through a JCE requires proof of a CPK policy to target Khmer Republic soldiers and officials *for execution*. This much narrower factual dispute is continually obscured by the Chamber's analysis of a vaguely defined policy of 'targeting', without specifying with any clarity whether the execution of Khmer Republic soldiers and officials was contemplated.[1403]

528. Accordingly, the Defence approaches the Chamber's findings concerning the 'targeting' policy in two distinct steps. First, the Defence submits that, to whatever extent the Chamber found that CPK policy contemplated the execution of Khmer Republic soldiers and officials, it erred in fact. In order to track the manner in which findings were presented in the Judgment, this part of the analysis proceeds in three sub-parts: (i) no policy to kill Khmer Republic soldiers and officials existed prior to 17 April 1975; (ii) no policy to kill Khmer Republic soldiers and officials came into existence on or after 17

[1400] *See* Judgment, fns. 1928-9. *See also*, Judgment, paras. 613-6 (more generally citing no evidence linking the Phase II movement to the persecution of New People).
[1401] Judgment, paras. 119-127, 814.
[1402] Judgment, para. 829.
[1403] *See* paras. 529-599, *infra*.

April 1975; (iii) no pattern of killing Khmer Republic soliders and officials existed at any time. Second, in section XVIII, *infra*, the Defence establishes that neither the Chamber's findings concerning CPK policy nor the underlying evidence supports the finding that CPK policy included or involved the commission of crimes at Tuol Po Chrey.

A. Ground 206: The Trial Chamber erred in law and fact to the extent it found that a policy to kill Khmer Republic soldiers and officials existed prior to 17 April 1975

529. The Trial Chamber made a series of egregious factual errors in its assessment of the facts concerning the CPK's alleged policy of targeting Khmer Republic soldiers and officials prior to April 1975. These findings clearly fall beyond the scope of discretion of the reasonable fact finder. Indeed, these findings are so consistently untenable they are indicative of the Chamber's predetermination of the issues and its bias against the Accused.[1404] No other explanation accounts for this analysis.

i –Alleged killings at Oudong

530. The Trial Chamber concluded that 'Khmer Republic soldiers, likely numbering in the thousands, were executed en masse immediately after the seizure of Oudong'.[1405] This finding was of critical importance to the Trial Chamber's ultimate conclusion that Nuon Chea is criminally liable for alleged executions at Tuol Po Chrey. The Chamber repeated this finding nine times through the course of the Judgment.[1406] On five different occasions, the Chamber described the killings of soldiers at Oudong 'en masse'.[1407] The Chamber's final analysis of the evidence allegedly proving a JCE policy of targeting Khmer Republic officials comprises only three paragraphs,[1408] one of which is given over in full to the supposed executions at Oudong.[1409] Oudong was a critical stepping stone in the Chamber's analysis, as it constituted the only evidence of an event under the control of the Party center supposedly comparable to Tuol Po Chrey.

531. However, the evidence fails completely to support this conclusion. The Trial Chamber based its finding that 'likely […] thousands' of killings occurred exclusively on the evidence of Philip Short, whose conclusion in that regard was supposedly 'based on interviews with several villagers and other sources'.[1410] In a simple abuse of the evidence, the Trial Chamber declined to attempt any assessment of the reliability of Short's sources. No mention is made of the manner in which 'thousands' of soldiers were supposedly gathered and killed; the circumstances under which Short's interviews were taken; or

[1404] *See* paras. 41-42, *supra*.
[1405] Judgment, para. 127.
[1406] Judgment, paras. 127, 816, 830, 843, 879, 918, 948, 999, 1039.
[1407] Judgment, paras. 127, 816, 830, 918, 1039. The Defence submits that this finding constituted a deliberate response to the submission of the Nuon Chea defence that no evidence exists that the Party center intended to execute soldiers *en masse*, as the Chamber concluded took place at Tuol Po Chrey. *See* T. 30 Oct 2013 (OCP Final Submissions Reply, **E1/236.1**), pp. 56:13-57:24.
[1408] Judgment, paras. 815-817.
[1409] Judgment, para. 816.
[1410] Judgment, para. 124.

how these 'villagers' came to witness these killings. No assessment of the probative value of this anonymous hearsay evidence is attempted *at all*.[1411]

532. The Trial Chamber's claim that Short testified to having been informed of the executions through 'interviews with several villagers' is in any event inconsistent with the unambiguous record: Short simply did not say it. Short's actual testimony was that a lengthy passage in his book which described *both* the evacuation of Oudong *and* the alleged execution of soldiers was based on a number of sources, of which 'conversations with villagers' was one.[1412] This testimony was not derived from Short's independent memory but from his review of the endnote concerning the passage in question. The Chamber then failed to cite the one portion of Short's testimony which actually concerned the execution of Khmer Republic soldiers in Oudong. Short testified:

> Now, which one of those sources specifically refers to the execution of the Lon Nol soldiers which is what you're interested in? At this, you know, 12 years afterwards, I'm afraid I can't be very helpful. Phy Phuon certainly talked. We discussed, at some length, the policy of executing captured soldiers, so I would feel fairly certain that at least some of that information came from him.[1413]

The Chamber's primary evidence that executions occurred – Short's hearsay account of interviews with villagers – accordingly does not exist.[1414]

533. The Trial Chamber also referred ominously to Short's 'other sources' concerning the alleged executions, an obvious veiled reference to the one source Short actually relied on: Phy Phuon. The reason for the Chamber's reluctance to openly acknowledge Phy Phuon is transparent: the same witness testified twice before the ECCC, once during the investigation and once before the Trial Chamber, that explicit instructions existed from Pol Pot *not* to harm Khmer Republic soldiers.[1415] Only a Chamber seeking to engineer a conclusion it had long already decided, while simultaneously hiding from public view the flaws in the evidence, could decline to acknowledge so direct a contradiction on so important a

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[1411] *See* paras. 166-169, *supra*.
[1412] T. 7 May 2013 (Philip Short, **E1/190.1**), pp. 71:9-72:13. Short added that 'certainly one or two' villagers spoke about Oudong. *See* T. 7 May 2013 (Philip Short, **E1/190.1**), p. 72:24-25.
[1413] T. 8 May 2013 (Philip Short, **E1/191.1**), pp. 96:24-97:5. The Defence relied on this testimony explicitly at trial. *See* **E295/6/3**, Closing Brief, para. 402; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), p. 10. The Defence notes further that this same endnote which referred to 'conversations with villagers' and Short's interview with Phy Phuon also described two secondary sources: an issue of *Réalité Cambodgiennes* and a book by Wilfrid Deac called *Road to the Killing Fields*. The latter document is on the case file and does not describe the execution of Lon Nol soldiers in Oudong. *See* **E3/3328**, Wilfrid Deac, 'Road to the Killing Fields' ('Deac, *Road to the Killing Fields*'), ERN 00430777-78 (describing in considerable detail the battle for Oudong, including the number of Khmer Republic soldiers involved, the brigades they came from and their fate). It is accordingly clear that the sources listed in the endnote did not support the full statement in the book, including the proposition that such executions occurred.
[1414] The Defence notes that the question which prompted this answer concerned whether executions were carried out in Oudong pursuant to a Party policy of the CPK. It is nevertheless crystal clear that Short's answer concerns which sources described 'the execution of the Lon Nol soldiers' in Oudong. Indeed, Short would have had no difficulty recalling whether any villagers he spoke to described CPK 'policy'; the answer would obviously have been 'no'. Any lingering ambiguity was furthermore decisively resolved by Short just a few minutes later. After being asked how he knew a policy existed, he replied: 'Unless I'm mistaken, I didn't say there was a policy that had been laid down from the top. I - I may be mistaken. What I said was it happened. In the case of Udong, they were executed after they left.' *See* T. 8 May 2013 (Philip Short, **E1/191.1**), pp. 98:25-99:3.
[1415] **E3/24,** Phy Phuon WRI, ERN 00223582; T. 30 Jul 2012 (Phy Phuon, **E1/98.1**), p. 88:2-10.

point from so critical a witness. This is especially true since the Chamber relied on Phy Phuon *ninety-one times* for overwhelmingly inculpatory purposes.[1416] No wonder it sought to maintain the appearance of its faith in his credibility.

534. The dishonesty of the Chamber's analysis continues to escalate with its treatment of the one and only witness who had any basis to express a view on the treatment of Khmer Republic soldiers in Oudong. That witness, Stephen Heder, testified that he was present in Oudong shortly after its capture by the CPK, that he interviewed eyewitnesses, and that he could not recall hearing anyone describe any such executions or seeing any dead bodies of Khmer Republic soldiers.[1417] Faced with dangerously exculpatory testimony from the only reliable witness, the Chamber skillfully evaded this threat by diverting attention away from the events actually at issue and toward the puzzling observation that Heder 'personally saw half a dozen bodies of Buddhist nuns on a hillside near a Pagoda'.[1418] The Trial Chamber's analysis accordingly presumes that Heder was astute enough to observe and remember six dead nuns, yet obtuse enough to miss entirely, or forget about, the execution of 'likely […] thousands' of soldiers in a city numbering around 15,000 people.[1419]

535. Brief mention should also be made of the Chamber's various other obfuscations in regard to Oudong. The Chamber noted that witnesses who testified in Case 001 stated that children were temporarily detained at M-13 shortly after the capture of Oudong.[1420] The Chamber noted that witness Nou Mao testified to attending a commune meeting where he was told that Oudong had been evacuated without any reference to the execution of Khmer Republic soldiers.[1421] The Chamber noted that Khieu Samphan said in a speech in North Korea that 5,000 enemies were eliminated in Oudong, but that it was unable to decide whether his speech referred to killings in battle or afterwards.[1422] The Chamber noted that *Nouvelles du Cambodge* described the capture of Oudong without reference to the execution of Khmer Republic soldiers.[1423] Had any actual evidence of executing Khmer Republic soldiers existed, the Chamber would not have sought to bolster the appearance of evidence with this bewildering sequence of disconnected, irrelevant factual observations.

ii – June 1974 meeting of the Central Committee

536. Having made this absurd conclusion that Khmer Republic soldiers were executed following the

[1416] *See e.g.*, Judgment, paras. 111-2, 118, 135 (and *passim*).
[1417] T. 10 Jul 2013 (Stephen Heder, **E1/221.1**), pp. 86:22-87:3.
[1418] Judgment, para. 124.
[1419] Judgment, para. 113. One of the people interviewed by Stephen Heder at the Thai border in 1980 furthermore describes his participation in the attack on Oudong before immediately indicating that 'at that time', enemy soldiers were captured as prisoners of war and 'forgiven'. *See* **E3/1714**, Heder Refugee Interviews, ERN 00170732.
[1420] Judgment, para. 124.
[1421] Judgment, para. 125.
[1422] Judgment, para. 125. In this regard, Wilfrid Deac's book, which describes considerable Khmer Republic losses in a perimeter base outside Oudong which had been isolated from the main forces during battle, is again relevant. *See* **E3/3328**, Deac, *Road to the Killing Fields*, ERN 00430777-78.
[1423] Judgment, para. 126.

capture of Oudong, the Chamber drastically amplified the effect of that error by wrongly finding that in June 1974 the Central Committee discussed those supposed executions and decided to emulate them following future evacuations.[1424] There is simply no more judicious way to describe this finding than as a pure fabrication.

537. The Trial Chamber correctly found that in June 1974, the Central Committee met and decided that the population of Phnom Penh would be evacuated once the city was captured.[1425] Nuon Chea testified that this meeting occurred, that he attended, that the decision to evacuate Phnom Penh was made, and that he participated in it.[1426] No dispute exists as to any of these facts.

538. The Defence notes that the Trial Chamber's conclusion that the execution of Khmer Republic soldiers was discussed in June 1974 is set forth twice in the Judgment: at paragraph 127, at the conclusion of the Chamber's analysis of the CPK's alleged policy of targeting Khmer Republic soldiers and officials; and at paragraph 816, a critical juncture in which the Chamber made findings concerning the existence and nature of the JCE policy to target Khmer Republic soldiers and officials. Both paragraphs refer to the same section of the Judgment in support of this conclusion: a lengthy, 16-paragraph discussion of a series of meetings between June 1974 and April 1975 concerning the decision to liberate the country and evacuate Phnom Penh.[1427] The problem is this: nowhere in this analysis is there a single reference to Khmer Republic soldiers or any decision to execute them, let alone any evidence in that regard.

539. The fact that *literally no* evidence exists for this conclusion does not however capture the full extent of the incoherence of the analysis. As the Chamber noted, multiple sources do indicate that the ease with which the *evacuation* of Oudong was carried out was one part of the CPK's rationale in deciding to *evacuate* Phnom Penh. Yet, both CPK insiders who described the Party's discussion of the evacuation of Oudong in June 1974 – Phy Phuon[1428] and, according to Stephen Heder's interview notes, Ieng Sary[1429] – simultaneously state that no CPK policy of executing Khmer Republic soldiers existed prior to April 1975. No reasonable trier of fact could rely on these sources to establish that Oudong was discussed in June 1974 and then ignore their evidence that no policy of executing Khmer Republic soldiers existed at that time.

540. The Chamber's selective use of evidence is especially disingenuous as to Ieng Sary, because it subsequently relied on the claim in his interview with Stephen Heder that the Party decided for the first time *on 20 April 1975* to execute senior Khmer Republic officials after finding a weapons store in

[1424] Judgment, paras. 127, 816.
[1425] Judgment, paras. 133-4.
[1426] T. 14 Dec 2011 (Nuon Chea, **E1/22.1**), p. 2; T 13 Dec 2011 (Nuon Chea, **E1/21.1**), pp. 26-27.
[1427] *See* Judgment, paras. 132-147.
[1428] T. 26 Jul 2012 (Phy Phuon, **E1/97.1**), pp. 14-15, 31-32.
[1429] Judgment, para. 134.

Phnom Penh.[1430] Needless to say, the Defence rejects this evidence.[1431] Yet, in relying on it, the Chamber found both that an execution policy came into existence for the first time on 20 April 1975 and – on the basis of the exact same source – that this policy was discussed in relation to the evacuation of Oudong in June 1974. None of these contradictions appear anywhere in the Chamber's analysis. Indeed, no evidence of a discussion on Khmer Republic soldiers at the June 1974 meeting is presented at all. Instead, the Chamber opportunistically inserted citations to free-floating evidentiary excerpts without considering whether the narrative it presented was even superficially logical.

iii – FUNK broadcasts in early 1975

541. At paragraph 120, the Trial Chamber held:

> In the months leading to the final assault on Phnom Penh, the FUNK struck a conciliatory tone in radio broadcasts directed at Khmer Republic officials and soldiers, informing them that they could join the Khmer Rouge should they defect. These messages were a calculated attempt to reduce opposition to the Khmer Rouge advance and lull the Khmer Republic officials into a false sense of security […] The messages invited the Khmer Republic soldiers and civil servants to join the revolution, but warned implicitly that if they delayed in doing so, they would be in the same category as the supertraitors.

542. Like the Trial Chamber's findings concerning Khmer Republic soldiers at Oudong and the June 1974 meeting of the Central Committee, these findings are first of all unsupported by any compelling evidence, and furthermore internally incoherent. The Chamber's first conclusion, that the announcements were a calculated attempt to 'lull the Khmer Republic officials into a false sense of security' was supported only by the conclusion of fact witness Stephen Heder, who, as the Chamber repeatedly reminded the parties, was not called to give expert testimony.[1432] Even if Heder had been called to give expert testimony, the Chamber's reliance on the opinion of a researcher as the *sole evidence* to determine the intent of Party leaders in regard to a specific event was a blatantly inappropriate use of such evidence.[1433] Similarly, it relied only on the evidence of 'expert' Philip Short to conclude that FUNK announcements warned implicitly that if soldiers delayed in surrendering, 'they would be in the same category as the supertraitors'. While this use of expert testimony is again improper, the Chamber's reliance on the opinion of a non-Khmer speaker as the sole evidence to interpret the 'implicit' meaning of a Khmer-language FUNK broadcast is especially so.[1434]

543. These two characterizations of the FUNK broadcasts are furthermore directly inconsistent. The Trial Chamber held on the one hand that the threat to Khmer Republic soldiers who failed to surrender immediately is so apparent on the face of the broadcast that it could reliably cite to the forty-year after-

[1430] Judgment, para. 817.
[1431] *See* paras 562, 566, *infra*.
[1432] *See* para. 182, *supra*.
[1433] *See* paras. 207-208, *supra*.
[1434] *See* paras. 207-208, *supra*.

the-fact interpretation of a British journalist to justify it; yet that this same message would have been lost on the Khmer Republic soldiers to whom it was directed, who would have somehow found in this implied threat to their lives reason to be lulled into security. Again, the Trial Chamber's findings reflect a total failure to consider the evidence in any meaningful way. Instead they reflect an arbitrary use of soundbytes as part of a confused jumble of vaguely inculpatory-sounding evidence.

iv – Consistent evidence of radicalisation

544. The Trial Chamber held that '[t]here is consistent evidence of a radicalisation of the policy regarding captured Khmer Republic soldiers and officials from 1970 until 1975.'[1435] Again, the same pattern in the Chamber's analysis emerges: a near-total absence of evidence complemented by a series of illogical and contradictory findings.

545. After noting that in the early years of the war, captured soldiers were 'often re-educated and forgiven', the Chamber held that 'around 1972 or 1973, Khmer Republic soldiers were less likely to be forgiven and more likely to be executed if captured by CPK forces.'[1436] In support of this conclusion, the Chamber cited a public statement by Khieu Samphan, Hou Yun and Hu Nim describing the number of soldiers killed during the war which had just ended.[1437] Despite also finding that another very similar statement may well refer to killings in battle[1438] – as any reasonable trier of fact would find that it certainly did – the Chamber failed to even consider this possibility. The Trial Chamber then relied on two anonymous out of court refugee statements given to Heder and Matsushita which describe: (i) the capture of an unknown number of Lon Nol soldiers under unknown circumstances, 'some [of whom] were forgiven'[1439]; and (ii) a description of a single instance in 1972 in which 500 Khmer Republic soldiers were supposedly killed.[1440] The Chamber characterized this evidence *alone* as demonstrating a radicalization of 'policy' concerning the execution of Khmer Republic soldiers. Yet it is obviously both inadequate on its face to support the general nature of the Chamber's conclusion, and, as anonymous out-of-court statements not subject to cross-examination, entitled to very low or no probative value.[1441]

546. Once again, only superficial analysis is required to recognize that, in addition to these weaknesses in the evidence, the Chamber's conclusions are illogical on their face. First, the Chamber itself held that the reason why Khmer Republic soldiers were executed more frequently beginning in 1973 was because 'American bombings […] had made people very angry and suspicious of outsiders,

[1435] Judgment, para. 121.
[1436] Judgment, para. 121.
[1437] Judgment, fn. 351.
[1438] Judgment, para. 125.
[1439] **E3/1714**, Heder Refugee Interviews, ERN 00170742.
[1440] Judgment, para. 121.
[1441] *See* paras. 166-169, *supra*.

some of whom were accused of being agents from LON Nol camps and executed.'[1442] Even this understates the issue: Lon Nol soldiers were the on-the-ground manifestation of that very bombing campaign. If soldiers were executed because the people were 'very angry' it demonstrates that any such executions were *not* due to CPK policy, as the Chamber apparently found.[1443] Second, the Chamber recognized that evidence exists showing that Khmer Republic soldiers were not executed in this period but dismissed it on the grounds that it came 'mainly from post-1979 interviews of refugees outside of Cambodia, many of whom were former Khmer Rouge cadre who would have an incentive to minimise evidence of mistreatment.'[1444] Yet these accounts were given by anonymous sources about whom the Chamber had no information other than that they had previously been 'Khmer Rouge cadres'. These accounts were furthermore derived from the *same* document the Chamber relied on *one paragraph earlier* as the *only evidence* in support of its conclusion that some Khmer Republic soldiers were killed.[1445] This holding shows in its rawest form the Chamber's deeply rooted bias; the fact that these sources were formerly CPK cadres and gave exculpatory evidence was enough by itself to render it unreliable.[1446] This is especially so as virtually no evidence exists to contradict them.[1447]

547. The Defence notes the Chamber's characterization of the evidence of radicalization as 'consistent'. There is only on one indisputable fact about this evidence, and that fact is that it is not consistent: indeed, the Chamber began the very next paragraph with the sentence, 'There was some evidence of the uneven application of this policy.'[1448] The Chamber then proceeded to dismiss (without any good reasons, as shown above) the exculpatory evidence.[1449] The use of the word 'consistent' to characterize this body of evidence was grossly unreasonable. It reflects the tone of the Judgment as spin and argument rather than neutral fact-finding.

v – Executions in Kampong Cham and Battambang

548. Although the Chamber made no findings on or reference to executions in Kampong Cham or Battambang in the course of its discussion of the pre-1975 targeting policy, near the end of the

[1442] Judgment, para.121.
[1443] As the Defence has already noted, the Chamber's precise finding as to the extent to which CPK policy contemplated executions of Khmer Republic soldiers was deliberately vague (*see* paras. 527, *supra*). Dismissal of all charges is required for that reason alone (*see* paras 601-605, *infra*). The point here is simply that, whatever the Chamber's view, CPK policy did not contemplate the execution of Khmer Republic soldiers and officials.
[1444] Judgment, para. 122.
[1445] *See* Judgment, fns. 352, 353; *cf.* Judgment, fn. 356; *see also* **E295/6/3**, Closing Brief, para. 401.
[1446] The Chamber's sudden caution here also stands in stark contrast with its carefree reliance on – needless to say, inculpatory – evidence without hesitation, even when produced under unknown circumstances, even when anonymous, even when a witness has consistently proven himself to be unreliable. *See e.g.,* paras. 164-165, 170, 175-176, 179, *supra.* In this Judgment, reliability is determined by the consistency of the evidence with the Chamber's preconceptions.
[1447] *See* para. 545, *supra.*
[1448] Judgment, para. 122.
[1449] The Chamber also held that 'even these [exculpatory] accounts support the conclusion that there was an increasing use of revolutionary violence. Yet the one refugee statement it cites describes the execution of spies and the release of POWs in 1974. *See* Judgment, fn. 356. This is exactly the same as the Chamber's characterization of policy at the beginning of the war. *See* Judgment, para. 121.

Judgment the Chamber held that executions occurred in Kampong Cham in September 1973 and in Battambang in July 1974.[1450] Without having engaged in any prior discussion of either allegation, the Chamber devoted a single sentence to each finding. With regard to Kampong Cham, the Chamber's only evidence was from Stephen Heder, who took interviews following the capture of the city by CPNLAF forces, as he did in Oudong. The Defence made detailed submissions concerning this evidence during closing submissions, which showed, *inter alia*, that (i) Heder's recollection was lacking in any detail and was shaky even as to whether he was in fact told of any executions; and (ii) the Khmer Republic government itself released figures concerning the death toll in the battle for Kampong Cham and made no mention of executions.[1451] The Chamber's decision not to analyze any of the relevant facts or consider these submissions before holding in one sentence at the end of the judgment that the executions occurred, was again outrageous. As to Battambang, the only evidence relied on by the Chamber is two unauthenticated US government national security council memoranda describing a single prior US embassy report.[1452] The evidence is, at a minimum, triple hearsay, anonymous at all three levels, and, notwithstanding the fact that it concerns hundreds of executions in Cambodia's second largest city, not corroborated by a single live witness, WRI, civil party application, refugee account or any other evidence such as newspaper reports. No reasonable trier of fact would have concluded beyond a reasonable doubt that executions in either city took place.

vi – Khmer Republic soldiers were the CPK's primary enemy from before 1975

549. The Trial Chamber held that '[s]tarting before 1975, former soldiers and officials of the LON Nol regime were also identified as the key enemies'.[1453] Insofar as this conclusion concerns the period prior to 17 April 1975, the Defence submits it is true in the limited sense that Khmer Republic soldiers were the legitimate military target of CPNLAF forces during the civil war. However, to the extent the Chamber relied on this fact as support for a policy of execution of soldiers not actively engaged in hostilities, it erred in fact.[1454]

550. The Defence notes that the evidence cited by the Chamber all concerns either: (i) the Chamber's own erroneous findings concerning events prior to 17 April 1975;[1455] (ii) events after 17 April 1975;[1456] or (iii) the military conflict.[1457] Accordingly, no evidence exists that soldiers not engaged in hostilities were viewed as enemies prior to 17 April 1975.

[1450] Judgment, para. 830.
[1451] **E295/6/3**, Closing Brief, para. 401; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), pp. 10-12.
[1452] Judgment, fn. 2622.
[1453] Judgment, para. 118.
[1454] Judgment, para. 815.
[1455] *See* Judgment, fn. 2568, referring to paragraphs 121-123 of the Judgment.
[1456] *See* Judgment, fn. 2568, referring to paragraph 613 of the Judgment; **E3/925**, 'Notebook entitled Ministry of Foreign Affairs Branch Committee Notes' ('MFA Committee Notebook'). *See* Judgment, fn. 336, referring to testimony of Duch.
[1457] *See* Judgment, fn. 336 (referring to testimony of Pean Khean).

B. Ground 207: The Trial Chamber erred in law and fact to the extent it found that a policy to kill Khmer Republic soldiers and officials existed on or after 17 April 1975

551. The Judgment concludes in paragraphs 815 through 817 that a Party policy of targeting Khmer Republic officials (which it had erroneously concluded existed prior to April 1975) 'continued throughout the DK era'. Paragraph 815 concerns Party philosophy and attitude toward Khmer Republic officials, paragraph 816 concerns the Chamber's erroneous conclusions concerning executions in Oudong and the June 1974 meeting of the Central Committee, addressed *supra*,[1458] and paragraph 817 is a collection of supposed evidence of Party center instructions on or after 17 April 1975. All of these findings are either erroneous or irrelevant to the charges at issue. The Defence will consider first the Chamber's characterization of CPK philosophy in paragraph 815 and next, the supposed orders of the Party center in paragraph 817.

552. As a preliminary matter, however, the Defence notes that the evidence cited by the Trial Chamber in paragraph 817 concerning the supposed orders of the Party Center stretches across the DK period and largely concerns a timeframe long after the events at Tuol Po Chrey. Given that the evidence so clearly fails to establish the existence of a policy to target or kill Khmer Republic officials prior to 17 April 1975, criminal responsibility for alleged executions at Tuol Po Chrey on or around 24 April 1975 requires decisive proof of a specific decision to execute Khmer Republic soldiers and officials around the time of liberation. At a minimum, any evidence of Party policy after 1975 is irrelevant. For these reasons, the Defence submits that no reasonable trier of fact could have relied on evidence concerning events after 1975 to make any findings relevant to the crimes allegedly committed at Tuol Po Chrey.

553. Nevertheless, the evidence concerning events after 1975 is deeply flawed on its own terms. No reasonable trier of fact could have found that it proves that any coherent policy to target Khmer Republic officials for 'arrest, execution and/or disappearance' came into existence at all. Accordingly, the Defence considers the Chamber's treatment of that evidence in detail, separately, herein.

i – Party philosophy as to Khmer Republic officials

554. The Defence notes first that the Trial Chamber began its discussion of CPK policy in paragraph 815 with the following statement: 'According to Nuon Chea, Communism mandates the elimination of those who pose threats to the country and those who cannot be educated.'[1459] Yet, in the very passage cited by the Chamber, Nuon Chea explained that these people who could not be reformed, would not be killed, but 'sacked from the Party'.[1460] He later indicated that killings occurred only in 'exceptional'

[1458] *See* paras. 530-540, *supra*.
[1459] Judgment, para. 815.
[1460] T. 13 Dec 2011 (Nuon Chea, **E1/21.1**), p. 42:1-15. Elsewhere in the Judgment, the Trial Chamber cited a refugee interview taken by Heder and Matsushita from an East Zone cadres who claims to have been called to Phnom Penh, accused of being a member of a CIA network, interrogated, and then 'expelled from the Party'. *See* **E3/1714**, Heder Refugee Interviews, ERN 00170737.

cases.[1461] While the Chamber is entitled to make assessments of credibility – and it obviously has in Nuon Chea's case – it is not entitled to misrepresent his testimony. Nuon Chea did not effectively confess to acquiescing in the execution of every person who could not be re-educated, and it was an error of fact to hold that he did.

555. Even more troubling is that the Chamber mischaracterized this testimony even while it ignored Nuon Chea's much more straightforward, unrehearsed, videotaped statement that he did not know about and did not sanction the crimes allegedly committed at Tuol Po Chrey:

> At that time, I did not know about these killings. And if I had known, we would have taken preventive measures to stop that kind of killing. They had done nothing wrong, they were normal people, no different from ordinary people.[1462]

As the Defence has already shown, the Chamber's failure to refer to this evidence anywhere in its analysis of CPK policy concerning Khmer Republic soldiers and officials – even while it cited an inculpatory portion ending 19 seconds earlier and swallowed whole the testimony of every civil party to appear before the Chamber – was an error of law. The Chamber was required to assess this evidence and give reasons for rejecting it.

556. The remainder of the Chamber's discussion of Party philosophy in paragraph 815 again recycles broad platitudes about CPK class theory. As the Defence has already shown as regards the CPK's supposed enemy policy[1463] and its attitudes toward 'New People',[1464] neither the emphasis on class contradictions, nor the acknowledgment of the obvious reality that the Party faced internal and external threats, amounted to a tangible policy to execute broad categories of people. On the contrary, there is substantial evidence, cited at trial and systematically ignored in the Judgment, that the Party believed that the overwhelming majority of all classes of Cambodians were allies of the revolution;[1465] that the CPK sought to treat people from all classes equally;[1466] and that the primary method of achieving socialist revolution was education, not violence.[1467] Indeed, even sources who seek to characterize groups such as Khmer Republic officials as the key or primary enemies explain that the manner in which these 'enemies' were treated varied dramatically between cases.[1468] No reasonable trier of fact could have held that this abstract class theory was indicative of the existence of a JCE policy which amounted to or involved mass murder.

557. The Defence notes further that much of the evidence cited by the Chamber concerns the need to

[1461] T. 13 Dec 2011 (Nuon Chea, **E1/21.1**), p. 45:21-23.
[1462] **E186/1R**, 'One Day at Po Chrey', 22:30-24:00.
[1463] *See* paras. 268-283, *supra*.
[1464] *See* paras. 370-383, *supra*.
[1465] *See* paras 665-668, *supra*; **E295/6/3**, Closing Brief, paras 162-163.
[1466] *See* paras. 383, *supra*; **E295/6/3**, Closing Brief, para. 164.
[1467] **E295/6/3**, Closing Brief, paras 156-157.
[1468] *See* para. 274, *supra*.

eliminate 'remnants' or 'lackeys' of the feudalists, capitalists and/or imperialists. Other documents characterize the feudalist or petty bourgeoisie class as including groups such as civil servants and other Khmer Republic officials.[1469] Yet no allegation exists that the CPK systematically 'targeted for arrest, execution and/or disappearance' capitalists or the petty bourgeoisie. No reasonable trier of fact could conclude that the CPK's stated desire to eliminate the capitalist and feudalist classes amounted to a policy of systematically targeting the 'lackeys' of the feudalists, capitalists and petty bourgeoisie, but not the feudalists, capitalists and petty bourgeoisie themselves.

558. The Defence notes finally that the exculpatory evidence which the Chamber chose not to refer to or discuss – demonstrating for instance the absence of persecutory intent and the emphasis on political education in place of violence[1470] – is derived from the very same CPK publications (or others of indistinguishable reliability and probative value) on which the Chamber relied for inculpatory purposes. The Chamber's flagrantly selective use of these documents and its failure to respond to or acknowledge the Defence's extensive submissions in that regard again demonstrate that it actively searched for inculpatory evidence instead of seeking to impartially ascertain the truth. The Chamber accordingly erred in law and fact in failing to make reasonable inferences consistent with the innocence of Nuon Chea; in particular, that class theory and class contradictions do not necessarily equate with or amount to an intent or policy to target, much less execute.

ii – Evidence that a targeting policy was ordered by the CPK around the time of liberation

559. The Trial Chamber held that 'there is overwhelming evidence that the policy to target former Khmer Republic officials was expressly ordered and affirmed by the Party leadership during the final offensive to "liberate the country" and then throughout the DK era'.[1471] Contrary to this grossly misleading characterization, the Trial Chamber cited only five documents concerning any events at any time during 1975, most of which are irrelevant. The Trial Chamber furthermore omitted to discuss substantial exculpatory evidence of considerably greater importance than the arbitrary selection of documents it did cite. No reasonable trier of fact could have concluded that any such policy was ordered by the 'Party leadership' around the time of liberation.

560. The first document was the WRI of CPNLAF soldier Khoem Samhuon. According to the Chamber, Khoem claimed to have received an order originating from Son Sen to arrest high-ranking Khmer Republic civil servants.[1472] Yet, as the Defence noted in its closing submissions,[1473] and the

[1469] *See* Judgment, fn. 2567 (citing **E3/925**, MFA Committee Notebook; **E3/647**, 'Far Eastern Economic Review: "A closer look at the Mayaguez"', 3 Oct 1975).
[1470] *See* **E295/6/3,** Closing Brief, paras 156-164, 275 *supra*.
[1471] Judgment, para. 817.
[1472] Judgment, fn. 2574.
[1473] **E295/6/3**, Closing Brief, para. 303.

Chamber correctly indicated elsewhere in the Judgment,[1474] the audio recording of his interview establishes that he did not know where the order had come from. Khoem furthermore stated only that he was ordered in May 1975 – long after Phnom Penh had been evacuated – 'to arrest those who were high ranking civil servants of LON Nol regime who denied leaving Phnom Penh city'.[1475] Accordingly, Khoem's statement fails to establish that he received any orders from the Party center whatsoever or instructions from anyone to arrest Khmer Republic officials other than those who refused to evacuate. It is completely irrelevant to any alleged orders, from anybody, to kill.

561. The second document, the WRI of CPNLAF soldier Ieng Phan, contains no reference to any orders from the Party leadership or orders of any kind to kill Khmer Republic officials. Instead, Ieng was fed information by an OCIJ investigator who encouraged him to state that the evacuation's purpose was to 'look for' Khmer Republic soldiers. Ieng's response even to this inoffensive proposition put to him improperly was inconsistent, and he ultimately stated that CPNLAF soldiers in fact did not seek out Khmer Republic soldiers. The exchange with the investigator was as follows:

> LIM Sokuntha: So, the main purpose of evacuating the people was to look for LON Nol soldiers?
>
> IENG Phan: Yes, they instructed me like that; in particular, they instructed checking like that. And people, despite huge shells, kept on gathering en masses. No one checked them. Even our soldiers did not check them. But their direction was to carry out the evacuations because it was normal.[1476]

Despite relying on this irrelevant testimony before the CIJs, the Chamber declined to mention that this same witness testified before the Chamber, that this witness told the Chamber that 'there was a policy directed from the Upper Echelon that a prisoner of war shall not be mistreated during the battlefield',[1477] and that this witness testified that this policy was 'disseminated to all the Khmer Rouge military' through 'telegrams and through the chain of command,' which 'we would disseminate to those under our supervision.'[1478] This policy existed both before and after 1975.[1479] The witness added that he never heard Ta Mok or Son Sen speak of the execution of soldiers and that he received no orders to, or heard other CPK soldiers talk about, executing Khmer Republic soldiers.[1480] Ieng Phan reiterated this testimony over and over in response to repeated questioning.[1481] Incredibly, the Chamber cited this testimony elsewhere in the Judgment but failed to return to it in characterizing Ieng Phan's WRI as 'overwhelming' evidence of a policy to target for 'arrest, execution and/or disappearance'.[1482] Whether the Chamber is biased or incompetent remains an open question.

[1474] Judgment, fn. 1530.
[1475] **E3/3962**, 'Written Record of Interview of KHOEM Samhuon' ('Khoem Samhuon WRI'), ERN 00293365.
[1476] **E3/419.1**, 'Partial Transcription of Audio file D234/19R', ERN 00912383.
[1477] T. 20 May 2013 (Ieng Phan, **E1/193.1**), p. 66.
[1478] T. 20 May 2013 (Ieng Phan, **E1/193.1**), p. 66.
[1479] T. 20 May 2013 (Ieng Phan, **E1/193.1**), p. 67.
[1480] T. 20 May 2013 (Ieng Phan, **E1/193.1**), pp. 68-72.
[1481] T. 20 May 2013 (Ieng Phan, **E1/193.1**), pp. 66-72.
[1482] Judgment, fn. 1516.

562. The third document cited by the Trial Chamber is the only one of any relevance to the charges: Ieng Sary's alleged claim reflected in interview notes taken by Stephen Heder that on or around 20 April 1975, the Party discovered 'all kinds of weapons' in the homes of military officers and decided at that stage to kill them.[1483] However, significant contradictions appear in Heder's notes. When first asked about the supposed decision 'to kill the LON Nol military officers, civil servants, and others including what they called the power-holding class', Ieng Sary responded as follows:

> On this, I knew nothing at all. I did not attend any decision-making meetings. When I arrived, they had all already completely disappeared. I asked, for instance, about the group they called intellectuals who were helping us in the group, what had happened to them. They said that had not yet been given any consideration; they had been evacuated for the time being. Then in 1976, late 1975, some of them were allowed to come back.[1484]

Although the Co-Prosecutors questioned Stephen Heder for over two full days, they asked him no questions about what would appear to be a critical piece of evidence in the Case 002/01 trial. Nor did the Chamber exercise its discretion to ask any such questions. This excerpt accordingly remains an unauthenticated paragraph of Heder's notebook, and the question of how Ieng Sary could speak to a policy he 'knew nothing at all' about remains unanswered. Of course, the Defence has never had the opportunity to cross-examine Ieng Sary, a critical fact given not only that this is an out of court statement of central importance to the charges,[1485] but also because this interview was given in the very first months after Ieng Sary defected from the CPK to the RGC, and while Nuon Chea and Hun Sen were still direct political and military rivals.[1486] None of these considerations factor in the Chamber's analysis of this document. The Defence notes, however, that as demonstrated in greater detail *infra*, even on its face this statement is limited to a small cross-section of senior officials and expressly excludes the ordinary soldiers allegedly executed at Tuol Po Chrey.[1487] This is almost certainly the reason for the Co-Prosecutors' striking hesitance to seek to elicit any corroboration: ultimately, this document is *exculpatory*. The Trial Chamber's reliance on this document while ignoring the Defence's submissions in this regard was yet another highly selective and grossly improper use of the evidence.

563. The fourth document is the so-called 'execution order' dated June 1975 purportedly concerning the killing of 17 high-ranking former Khmer Republic military officers.[1488] Yet, as the Defence argued during closing submissions, the evidence fails to establish where this alleged 'order' originated.[1489] Even more important is that on its face, this document indicates that each person listed was asked to write a biography, which was subsequently 'examined', on the basis of which allegedly 17 specific

[1483] Judgment, para. 817 (citing **E3/89**, Heder Interview with Ieng Sary, ERN 00417606).
[1484] **E3/89**, Heder Interview with Ieng Sary, ERN 00417604.
[1485] *See* paras 159-162, *supra*.
[1486] *See* **E295/6/3**, Closing Brief, para. 122 (making these submissions at trial about another document produced by Ieng Sary).
[1487] *See* para. 607, *infra*; **E295/6/3**, Closing Brief, paras 197, 200.
[1488] Judgment, para. 817 (citing **E3/832**, 'Execution Order', 4 Jun 1975).
[1489] T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), pp. 41-42.

high-ranking officers were singled out for execution -- two months *after* the alleged events at Tuol Po Chrey.[1490] Accordingly, even if this document were relevant to Party policy, it too would be exculpatory: it would prove that in April 1975, that policy entailed the (lawful) arrest, detention and interrogation of Khmer Republic military officers. This is the *opposite* of what the Chamber found took place at Tuol Po Chrey. The Chamber failed to make reference to these submissions either, instead stating that the document reflects Party 'policy' without specifying what that 'policy' entailed.

564. The Defence notes further that even on its face, there are obvious reasons to question the reliability and authenticity of this document. Although the original appears to be only one page long, the version on the case file is 51 pages, with a sequence of repetitive copies alternating between the Khmer original and unofficial English translations.[1491] The various English versions are not identical and feature a so-called 'translator's note' purporting to describe Pin's CPK position. These facts raise numerous questions about the provenance of this document, and should have caused the Chamber to review the original prior to relying on it. Accordingly, the Defence hereby requests that this Chamber seek to obtain the original and verify the authenticity of the document.

565. The fifth document is a statement from an anonymous witness submitted to the UN Commission on Human Rights by the International Commission of Jurists.[1492] Even on the face of the statement it fails to indicate where the witness, a district chief, obtained his orders. Uncontroverted evidence before the Chamber (which it unreasonably failed to consider) establishes that the large majority of killings did not originate in the Party center, and indeed rarely went as high as the zone.[1493] Nor does the statement explain when in 1975 the supposed orders to kill Khmer Republic soldiers were given. The witness was not cross-examined, his statement is anonymous, his statement was not taken by any judicial authority, and no audio recording exists. Not only is it uncorroborated, it is inconsistent with other evidence cited *in the same paragraph*, notably the notes of Heder's interview with Ieng Sary, which suggests the existence of a much narrower policy.[1494] Nor does the Chamber explain why the evidence of a CPK cadre is suddenly reliable,[1495] undoubtedly because the real reason – this particular evidence happens to be inculpatory – is too embarrassing even for this Chamber.

566. Directly contradicting Ieng Sary's inconsistent out of court statement to Stephen Heder and the unauthenticated anonymous alleged statement of a single district chief is substantially more compelling

[1490] T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), pp. 41-42.
[1491] The document appears to have been produced to the CIJs with the English translation incorporated, and is classified on Zylab as a 'KH-EN' document – in other words, a document which exists on the case file in both Khmer and English simultaneously.
[1492] Judgment, fn. 2574 (citing **E3/3327**, 'Further Submission from the International Commission of Jurists under Commission on Human Rights Resolution 8 (XXIII)', 25 Jan 1979).
[1493] *See* para. 247, *supra*.
[1494] *See* para. 607, *supra*
[1495] *See* para. 546 *supra* (discussing the Chamber's rejection of evidence because it came from CPK cadres).

evidence – relied on by the Defence at trial and ignored in the Judgment – that no policy of targeting Khmer Republic soldiers and officials for execution existed.[1496] Once again, the most important evidence was given by Phy Phuon, who testified twice, unambiguously and without ever having been contradicted, that the explicit instructions of the Party center were not to 'touch' Khmer Republic soldiers.[1497] As noted supra ith the exception of Duch and Philip Short, the Chamber cited Phy Phuon's evidence more than any single other witness. Under these circumstances, the Chamber's failure to explicitly consider this portion of Phy Phuon's testimony showed a brazen disregard for the evidence and constituted a flagrant error of law and fact.

567. [redacted] states he personally attended a meeting in Takeo city at which cadres were instructed that 'soldiers with the ranks from Second Lieutenant to Colonel' – in other words, all officers below the rank of General – 'were not to be harmed.'[1498] This announcement was made by a member of the Sector 13 Committee in the presence of Standing Committee member and Southwest Zone secretary Ta Mok.[1499] The Defence notes that [redacted]. Despite the directly exculpatory nature of the evidence, the Co-Prosecutors waited more than three months before alerting the Trial Chamber of its existence [redacted] The Chamber then waited six more weeks before reclassifying [redacted] as confidential and notifying it to the parties.[1501] This notification was provided on 23 September 2013, *72 hours* before closing briefs in Case 002/01 were due.[1502] Although the Chamber expressly declared its familiarity with the document and that it 'may suggest the innocence or mitigate the guilt of the Accused',[1503] it failed to even acknowledge its existence in the Judgment. Instead, it desperately scoured the case file to cite witnesses such as Khoem Samhuon and Ieng Phan who gave no evidence relevant to killing or the intent of senior Party officials. Like Phy Phuon's testimony, the Defence has no doubt that had [redacted]'s statement been inculpatory, it would have featured prominently in the Judgment. This is inexcusable proof of bias in a Chamber indifferent to the evidence in the face of its total certainty as to the Accused's guilt. The Defence hereby requests that this Chamber summons [redacted] to testify before

[1496] **E295/6/3**, Closing Brief, paras. 384-387; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), pp. 3-8.
[1497] **E3/24,** Phy Phuon WRI, ERN 00223582; T. 30 Jul 2012 (Phy Phuon, **E1/98.1**), p. 88:2-10.
[1498] [redacted].
[1499] [redacted].
[1500] [redacted].
[1501] [redacted].
[1502] On 26 Sep 2014, the Defence then received the Co-Prosecutors' Closing Brief. The three-week period between 26 Sep 2013 and 16 Oct 2013, when final arguments before the Chamber began, required review of the 2916 footnotes in the Co-Prosecutors' brief and the drafting of two full days of oral submissions. By contrast, the Chamber took six weeks to review the material before notifying it to the parties in a period during which no hearings were ongoing and it had not yet received the submissions of the parties.
[1503] [redacted].

it pursuant to its *de novo* appellate jurisdiction over errors of fact.

568. [redacted] statement is corroborated by considerable evidence from Tram Kak district and Kraing Ta Chan prison, both located in Takeo province, demonstrating that no policy to kill even senior Khmer Republic military officers existed. The Co-Prosecutors have previously observed that cadres in Tram Kak kept records of who was a former Khmer Republic officer, and sought to convey the impression that these individuals were killed once 'identified'.[1504] The evidence is plainly to the contrary: it shows that cadres in Tram Kak were well aware throughout the DK period that former Khmer Republic soldiers and officers were present in the district and sought for years to re-educate them.[1505] Indeed, these same documents show that only in the case of alleged crimes, such as theft and treason were these soldiers arrested. This evidence definitively shows that no ongoing policy to seek out and execute even senior Khmer Republic military officers existed.

569. It is in light of this very limited and contradictory evidence of Party policy that the violation of Nuon Chea's right to a fair trial caused by the Chamber's failure to summons Heng Samrin comes into its sharpest focus. Aside from Phy Phuon and Ieng Sary, Heng Samrin's alleged statement to Ben Kiernan is the only existing direct evidence of the intentions of the Party center. It is *the* only direct evidence of Nuon Chea's intentions. As already discussed,[1506] Heng Samrin attended a meeting on 20 May 1975 with Nuon Chea at which Nuon Chea stated that the leaders of the Khmer Republic should not be killed but 'removed from the framework'. Heng Samrin specifically stated that Nuon Chea 'didn't say kill' and that the words he used 'do not mean "smash"'.[1507] As also already discussed, the fact that the National Judges dispute Kiernan's unambiguous account of Samrin's own understanding

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[1504] T. 26 Jun 2013 (OCP Document Presentation, **E1/213.1**), pp. 6-9.

[1505] **E3/2441**, 'Tram Kak Reports', 1977, ERN 00368469 (a secret agent in the LON Nol cabinet whose brother was a Lieutenant Colonel 'does not work hard enough', 'is quite slow and he verbally attacks our Angkar', thus, 'please […] further clarify'), 00368470 (describing a first lieutenant who is not working hard, a second lieutenant who was very cruel, and a sergeant who was lazy and stole from the commune), 00369473 (describing a Second Lieutenant who was 'in conflict with every work – slow, inactive' but who was assigned to help in a workshop, and offering more information if desired), 00369477 (describing a pilot, a First Lieutenant, a Second Lieutenant and a teacher who are lazy to do work and inactive, and suggesting that 'Brother further examine these four men'), 00369478 (describing three former soldiers and a First Lieutenant, who are not working hard, often get sick and have 'had quarrels many times'), 00369483 (describing cadre's knowledge of the presence of a second lieutenant and a 'second lieutenant spy', no mention of any action taken in that regard); **E3/2453**, 'Report', 13 Oct 1977, ERN 00388578 (former Khmer Republic adjutant chief has carried out activities to wreck the cooperative by discarding food and stealing 'without end, no matter how he is reeducated'); **E3/4092**, 'Mar 1978 Responses', ERN 00834828 (lieutenant colonel was a thief who stole numerous times and was educated by the cooperative representative 'on several occasions'); **E3/2107**, 'Tram Kak Reports', ERN 00290229 (Angkar held a meeting to reeducate a Khmer Republic military medic studying medicine in Phnom Penh prior to 17 Apr 1975), 00290246 (Khmer Republic NCO committed violations and unit chairman 'reeducated him often'); **E3/4164**, 'Brief Biographies of Prisoners at Tram Kak District Education Office', ERN 00973149 (former Master Sergeant 'had been educated for three years'); **D157.7**, 'Tram Kak Reports', ERN 00866430-2 (noting several 1st and 2nd Lieutenants living in various communes), 00866451-2 (Khmer Republic army corporal who attempted to rape a girl was arrested, sent to work and then reeducated), 00866452-3 (describing complaints of former second lieutenant without describing or suggesting any reaction, after 17 Apr 1975 'he came to […] Sre Ronong commune where he has lived until nowadays'), 00866453 (1st lieutenant who came to commune after 17 Apr 1975 'where he has lived until nowadays'), 00866456 (army warrant officer who has committed stealing activities again and again and again repeatedly and has been reeducated subsequently).

[1506] *See* paras. 59, 67-68, *supra*.

[1507] **E3/1568,** Chea Sim-Heng Samrin Interview, ERN 00651884.

of Nuon Chea's words aggravates that violation further.[1508] The inexplicable decision of the International Judges not to consider the fair trial issue at all is an independent violation of Nuon Chea's right to a fair trial.[1509]

570. As described above, and in the Defence's closing submissions, Heng Samrin's testimony would have been relevant on this point for reasons other than the precise meaning of his statement to Ben Kiernan.[1510] In particular, there is no indication on the face of Kiernan's notes that Heng Samrin had any knowledge of any CPK policy concerning Khmer Republic officials prior to the 20 May 1975 meeting. Numerous critical questions follow: Was Samrin in fact aware of any such policy prior to May 1975? Did that policy change in any way in the weeks or months after liberation? Could a policy to execute Khmer Republic soldiers have existed in the East Zone military without Samrin's knowledge? If yes, did Samrin later learn that any such policy existed during or before liberation? Did he have any discussions with Chan Chakrei about the treatment of Khmer Republic officials? With Sao Phim? Did either one relay any other information about orders from Nuon Chea, Pol Pot or anyone else in the Party center?

571. Similar difficulties exist with the Chamber's failure to summons Ouk Bunchhoen.[1511] As the Defence argued in closing submissions, Ouk's interview with Stephen Heder hints strongly that no Party center policy of killing Khmer Republic soldiers or officials existed at any time.[1512] Aside from the evidence given by Phy Phuon and the out-of-court statements of Ieng Sary and Heng Samrin, Ouk's statement is among the most direct evidence of Party policy. Once again, the failure of the Chamber to summons him or to address the substance of his statement in the body of its analysis were all independent violations of Nuon Chea's right to a fair trial.

572. In light of this confused, contradictory evidence, the Chamber's failure to even attempt to obtain evidence in Thet Sambath and Rob Lemkin's possession after Lemkin advised that such information existed and was exculpatory was yet another violation of Nuon Chea's right to a fair trial.[1513] In light of Thet Sambath's recent public statements, there is no longer any doubt that exculpatory evidence concerning the role of lower level cadres in the execution of Khmer Republic officials exists off the record.[1514] Given the Chamber's repeated reliance on general conclusions from witnesses such as François Ponchaud and Stephen Heder summarizing the evidence of anonymous witnesses,[1515] Thet's description of the directly exculpatory evidence in his possession by itself gives rise to a reasonable

[1508] *See* para. 69, *supra*.
[1509] *See* paras 70-73, *supra*.
[1510] **E295/6/3**, Closing Brief, para. 419; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), pp. 48-50.
[1511] *See* para. 82, *supra*.
[1512] **E295/6/3**, Closing Brief, para. 385.
[1513] *See* para. 83, *supra*.
[1514] **F2**, First Appeal Evidence Request, paras. 6, 14.
[1515] *See* paras. 180-182, *supra*.

doubt as to Nuon Chea's criminal responsibility for killing of Khmer Republic officials.

573. In *Perisic*, the ICTY Appeals Chamber addressed a situation in which a trial chamber 'noted' and 'summarized' exculpatory evidence from two witnesses but failed to return to and 'discount[]' or 'address[]' that testimony in the course of its analysis of criminal responsibility.[1516] The Appeals Chamber noted that the trial chamber relied on those witnesses repeatedly, often without corroboration. Under these circumstances, the trial chamber's 'failure to address the exculpatory testimony constituted a failure to provide a reasoned opinion, an error of law' requiring review of the evidence *de novo*.[1517] The Trial Chamber's treatment of the evidence in this case is far, far worse. In this case, the Trial Chamber failed to even *acknowledge* that *any* of the exculpatory evidence exists, even when that evidence was given by sources on which the Chamber relied extensively in the Judgment. This evidence includes Phy Phuon's testimony before the Chamber, [redacted] Heng Samrin's out of court statement, Ouk Bunchhoen's out of court statement, and Rob Lemkin's claim, now corroborated by Thet Sambath, to be in possession of exculpatory evidence which the Chamber declined to make any effort to obtain. The failure to consider any of this evidence constitutes a flagrant error of law and clear evidence of bias. A *de novo* review of the evidence is accordingly required.

iii – Evidence that a targeting policy was ordered by the CPK in 1976 or later

574. The Trial Chamber cited limited evidence of a CPK policy to target Khmer Republic officials in 1976 or later.[1518] No reasonable trier of fact would have concluded that this evidence is probative of CPK policy on or around 17 April 1975, nor that it establishes that a policy of targeting Khmer Republic soldiers for execution existed at any point thereafter.

575. The first document cited by the Trial Chamber is a US government national security council memorandum concerning events in 1976. The document can do no better than cite an article from *Time* magazine suggesting that 'a Khmer Rouge order' went out to kill all army officers and civilian officials.[1519] Neither the author of the memorandum nor of the *Time* article testified, the *Time* article is not even in evidence, and there is no hint at all as to how an anonymous, presumably American reporter, discovered a 'Khmer Rouge order' of this magnitude even while this Tribunal and the many researchers who have examined the CPK failed to do so.[1520] Indeed, there is not even an indication on the face of the document as to where the 'Khmer Rouge order' came from, nor an explanation from the

[1516] Perišić Appeal Judgment, paras. 91-96.
[1517] Perišić Appeal Judgment, paras. 95-96.
[1518] *See* Judgment, fns. 2574 (citing **E3/3472,** 'EAP Country Files-Southeast Asia-US Security Council Report on Southeast Asia'; T. 11 Jul 2013 (Stephen Heder, **E1/222.1**)), 2578-9.
[1519] **E3/3472**, 'EAP Country Files-Southeast Asia-US Security Council Report on Southeast Asia', ERN 00443170.
[1520] For instance, Philip Short testified that 'there was no written document instructing people to execute former Lon Nol officers and – and high officials.' After being pressed on cross-examination as to why he believed that such a policy existed, Short was able only to claim that to his knowledge, it it 'happened everywhere'. T. 8 May 2013 (Philip Short, **E1/191.1**), pp. 98-101. His claim in that regard was clearly erroneous. *See* paras. 581-596, *infra*.

Chamber as to how it was able to deduce that the mysterious 'order' implicated the Party center.

576. The Chamber cited the opinion evidence of fact witness Stephen Heder that beginning in the second half of 1976 the Party leadership sent signals concerning the need to augment efforts to identify former Khmer Republic officials who had escaped.[1521] This evidence should have been excluded for multiple reasons, including the Chamber's repeated violations of Nuon Chea's right to confront Heder's evidence, Heder's longtime association with the Co-Prosecutors and CIJs, and the fact that he was not called to give expert evidence.[1522] Indeed, the Chamber partially sustained an objection to this question precisely because Heder's testimony had veered into expert territory.[1523]

577. The remaining documents, which are all contemporaneous CPK meeting minutes and communications, consistently fail to establish the existence of a policy of targeting Khmer Republic soldiers or officials for 'arrest, execution and/or disappearance'. Indeed, not a single document cited by the Trial Chamber which involves anyone in the Party Center describes or implies the execution of a single soldier or official. Only one describes arrests. By contrast, multiple documents state that measures to be taken regarding Khmer Republic officials involve farming;[1524] in other words, being sent to a cooperative to assist in farm work. Accordingly, no reasonable trier of fact could infer that a policy of 'arrest, execution and/or disappearance' is proven beyond a reasonable doubt.

578. The Trial Chamber cited a telegram dated April 1976 from Ke Pauk to Pol Pot, Nuon Chea and Son Sen describing the activities of former soldiers actively advocating in favor of the Lon Nol regime.[1525] The telegram does not describe Khmer Republic soldiers as enemies as such, does not describe any killings or arrests of anyone, and was not produced by the Party center. No reasonable trier of fact would consider that it is probative of Party policy to target 'all' Khmer Republic elements for 'arrest, execution and/or disappearance'.

579. The Trial Chamber held that, according to minutes of a military meeting involving Son Sen in September 1976, orders were issued to 'continue collecting biographies and rounding up "soldier elements"'.[1526] Yet the minutes state, in the very paragraph upon which the Chamber relied, that those who are 'rounded up' should be sent to 'work in the food production.'[1527] Furthermore, the context of the document shows that the phrase 'soldier elements' concerns RAK defectors, not Khmer Republic soldiers.[1528] Indeed, the portion of the document which concerns the collection of biographies – which

[1521] Judgment, fn. 2574.
[1522] *See* para. 182, *supra*.
[1523] T. 11 Jul 2013 (Stephen Heder, **E1/222.1**), p. 63:16-25.
[1524] *See* para. 580, *infra*.
[1525] *See* Judgment, fn. 2579 (citing E3/511).
[1526] Judgment, fn. 2578 (citing E3/813).
[1527] **E3/813**, 'Minutes of the Meeting of 164 Comrades', 2 Sep 1976, ERN 00657356.
[1528] Judgment, fn. 2578 (citing E3/813); T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), p. 44.

the Chamber linked to 'soldier elements' – refers unambiguously to RAK defectors.[1529] This document is therefore completely irrelevant, as the Chamber would have been forced to conclude had it adhered to its duty to make reasonable inferences consistent with the innocence of the Accused.

580. The remaining documents all date from April 1977 or later. The Trial Chamber cited document E3/1144, which explicitly states that the 'measures' taken against members of the former regime are 'hard work tactics […] especially in farming.'[1530] The Trial Chamber misrepresented the substance of documents E3/995 and E3/996 (alternate translations of the same telegram), which do not describe police and soldiers as 'enemy remnants' but rather claims that other unspecified 'enemy remnants' have made contact with police and soldiers.[1531] This latter document, dated March 1978, is the only evidence which refers to any arrests of any kind. The remaining documents are communications at the district level or lower, which no reasonable trier of fact would find was probative of Party policy.[1532] The Defence would prefer to analyze these documents in detail in order to demonstrate more clearly that they are irrelevant, but is limited by space constraints.

C. Ground 208: The Trial Chamber erred in law and fact to the extent it found that a pattern of killing Khmer Republic soldiers and officials existed on or after 17 April 1975

i – Alleged killings across the country: April and May 1975

581. The Trial Chamber erred in fact in holding that 'arrests, killings and disappearances continued in late April and May 1975, before, during or after evacuations, including in Battambang, Kampong Thom, Pursat, Kampong Chhnang, Kandal, Takeo and Siem Reap.'[1533]

582. The Defence notes firstly that these supposed executions took place in an arbitrary selection of the locations which the Chamber concluded were evacuated in this same period. According to the Trial Chamber, on or after 17 April 1975, people were forcibly displaced from 'Kampong Speu, Takeo, Kampot, Sihanoukville (previously, Kampong Som), Kampong Thom, Pailin, Kampong Cham, Kampong Chhnang, Siem Reap, Poipet, Battambang and Pursat.'[1534] It follows that the Chamber found that several urban centers were evacuated on or around 17 April 1975 without any 'arrests, killings [or] disappearances' taking place. These include provincial capitals in Kampong Speu, Kampot, Sihanoukville, Pailin and Kampong Cham, as well as Poipet and a series of other locations along National Roads 5 and 6.[1535] The Chamber did not acknowledge this discrepancy, nor explain how the CPK targeted 'all' former elements of the Khmer Republic while leaving out approximately half of the

[1529] **E3/813**, 'Minutes of the Meeting of 164 Comrades', 2 Sep 1976, ERN 00657356.
[1530] **E3/1144,** 'Telegram 60', 6 Sep 1977, ERN 00517923-4.
[1531] Judgment, fn. 2579 (citing E3/995).
[1532] Judgment, fn. 2579 (citing E3/4141, E3/2450, E3/2048, E3/4103).
[1533] Judgment, para. 832.
[1534] Judgment, para. 793.
[1535] Judgment, para. 793.

country.

583. The evidence that executions occurred is, in any event, unreliable and inadequate. Not a single live witness or civil party cited by the Chamber described having witnessed a single execution. Only two described having seen any arrests. One of these individuals, civil party Toeng Sokha, testified that she saw Khmer Republic soldiers separated from a larger group, after which (in a passage apparently deliberately omitted by the Chamber) 'they were brought to live together with another group of villagers in Krang Leav.'[1536] The second person, witness Hun Chhunly, testified that he saw officers and ordinary soldiers gathered in two different locations in Battambang, but that he did not see what happened to either group; indeed, he testified that he never witnessed any executions of any Khmer Republic soldiers.[1537] Three other live witnesses gave hearsay evidence of arrests or executions. Two of these witnesses failed to identify their source with specificity.[1538] The third said that her husband saw one group of soldiers being arrested and that one of her in-laws, a colonel, responded to an announcement to return to Phnom Penh.[1539]

584. This small selection of contradictory hearsay testimony is complemented by a slightly larger collection of contradictory out-of-court statements. Importantly, the evidence cited by the Chamber in this regard, and addressed in the coming paragraphs, is from precisely the same set of witnesses whose appearance the Defence sought at trial for the purpose of challenging the existence of a policy of targeting Khmer Republic soldiers and officials.[1540] Having refused that request in a one-sentence oral decision, the Trial Chamber was precluded from relying on this evidence in the Judgment. Its decision to do so constitutes an error of law.

585. This evidence was in any event consistently mischaracterized by the Trial Chamber: a substantial part of is actually *exculpatory*. Kung Samat indicated to the CIJs that she saw Khmer Republic soldiers separated from a larger group, and (in a passage apparently deliberately omitted by the Chamber) that both groups were then brought 'to go to live in different cooperatives.'[1541] Yuos Phal indicated to the CIJs that he witnessed senior military officers separated from the rest of the people and (in a passage apparently deliberately omitted by the Chamber) that when he told CPNLAF soldiers that he was a 'reserve government agent/(staff)' they wrote that he was a private and allowed him to continue with the rest of the movement.[1542] Pov Sinuon told the CIJs that his father, a Khmer Republic soldier, was

[1536] T. 4 Dec 2012 (Toeng Sokha, **E1/147.1**), p. 78:12-19.
[1537] T. 7 Dec 2012 (Hun Chhunly, **E1/150.1**), p. 57.
[1538] T. 10 Apr 2013 (François Ponchaud, **E1/179.1**), pp. 13:20-14:4 (describing a 'man about 50 years of age'); T. 14 Nov 2012 (Pechuy Chipse, **E1/144.1**), pp. 25-31 (describing having been told of executions by an unspecified number of villagers whose names he could not remember from a village he was not familiar with). *See* paras. 166-169, *supra* (concerning probative value of anonymous hearsay).
[1539] T. 24 Oct 2012 (Lay Bony, **E1/138.1**), pp. 27-28.
[1540] *See* para. 85, *supra*.
[1541] Judgment, fn. 2638; **E3/5232**, 'Written Record of Interview of Kung Samat', ERN 00279257.
[1542] Judgment, fn. 2638; **E3/4611**, 'Written Record of Civil Party Yos Phal' ERN 00455376-7.

shot dead in his military barracks in Pursat on 17 April 1975[1543] – *prior* to the termination of hostilities, according to the Trial Chamber's own findings.[1544] The Trial Chamber badly misrepresented the evidence given by Chuch Punlork, who did not tell the CIJs that Lon Nol soldiers were killed in Phnom Sampeou but rather that they were disarmed and sent to Banan district to 'work the rice fields'.[1545] Chhea Leanghorn did not simply tell the CIJs that 'his younger brother had joined the LON Nol side and was therefore killed', as the Chamber described it, but that his brother was brought to a different commune and, according to information provided by Chhea's uncle, killed at some unspecified future time at this other location for having been a Lon Nol soldier.[1546] Prum Sarun told the CIJs that he witnessed the killing of a single ranking Khmer Republic officer but did not explain the circumstances surrounding the killing or why it took place.[1547] He furthermore told the CIJs (in a passage apparently deliberately omitted by the Trial Chamber) that CPK cadres looked only for high-ranking soldiers and that he himself was not arrested despite the fact that his own background as an ordinary soldier was known to the local CPK cadres.[1548] This evidence cited by the Chamber corroborates a considerable body of evidence not cited by the Chamber showing that former Khmer Republic soldiers were known to CPK officials throughout the country, yet unharmed.[1549] The only other evidence cited by the Chamber is a US State Department telegram, a UK government report, a letter from the French embassy, the research notes of Henri Locard, and a single victim complaint.[1550] Even this evidence frequently indicates that Khmer Republic soldiers were not executed or disappeared.[1551] Again, the Defence will not elaborate in detail for lack of space.

ii – Alleged killings around the country: 1976 onwards

586. The Chamber held 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, Takeo, Siem Reap/Oddar Meanchey, Kampong Thom, Kampong Cham, Pursat, Svay Rieng and Prey Veng.'[1552] The Defence notes that, aside from two documents

[1543] Judgment, fn. 2637; **E3/5545**, 'Written Record of Civil Party Puov Sinuon', ERN 00387500.
[1544] *See* Judgment, para. 662 ('Although the exact date is uncertain, the Khmer Rouge captured and took control of Pursat Province shortly *after* Phnom Penh was seized on 17 Apr 1975.') (emphasis added).
[1545] Judgment, fn. 2635, **E3/5211**, 'Written Record of Interview of CHUCH Punlork' ('CHUCH Punlork WRI'), 21 Jan 2009, ERN 00275399. The witness also heard that a small group of Khmer Republic officials was killed but did not see the alleged executions. *See* **E3/5211,** CHUCH Punlork WRI, ERN 00275399.
[1546] **E3/5329**, 'Complaint of CHHEA Leang Horn', 15 Dec 2009, ERN 00883920-1.
[1547] Judgment, fn. 2635, **E3/5187,** 'Written Record of Interview of PRUM Sarun' ('PRUM Sarun WRI'), ERN 00274179.
[1548] Judgment, fn. 2635, **E3/5187**, PRUM Sarun WRI, ERN 00274179.
[1549] *See* para. 568, *supra* (describing re-education of Khmer Republic officers in Tram Kak district); **E3/1714**, Heder Refugee Interviews, ERN 00170758 ('As a former Lon Nol soldier I was kept careful track of and had to attend meetings to shed old society ideas, but otherwise lived as a regular citizen.').
[1550] Judgment, fn. 2635, **E3/2071**, 'Compilation of Statement notes related to Prisons in the Northwest Zone'; **E3/4966**, 'Civil Party Application of THACH Saly', 15 Oct 2007; **E3/3559**, 'Airgram entitled life in Cambodia', 31 Mar 1976.
[1551] Judgment, fn. 2635, **E3/2071**, 'Compilation of Statement notes related to Prisons in the Northwest Zone', ERN 00087305 (ordinary soldiers taken for hard labour to Pailin).
[1552] Judgment, para. 833.

purporting to describe events in November 1975,[1553] all evidence cited by the Chamber is dated 1976 or later. No reasonable trier of fact could have relied on this evidence to establish Party policy as at liberation.[1554] Thus, a detailed review of this evidence is not warranted or necessary.

587. The Defence notes, however, that only a superficial review reveals the striking limits of this evidence. Although the Chamber's conclusion concerns the entire country for a period of more than three years, it was apparently able to identify only: a single live witness describing two alleged arrests and one alleged execution;[1555] four witnesses interviewed by the CIJs, describing zero executions;[1556] one witness interviewed by the Co-Prosecutors;[1557] and a victim complaint.[1558] The balance of the evidence is derived entirely from foreign states and independent researchers, of whom only François Ponchaud has authenticated their work or described the circumstances under which it was carried out, including how translation was addressed, if recordings were made, and if witnesses reviewed their statements for accuracy.[1559] As these factors were supposedly considered in the Chamber's assessment of reliability,[1560] this evidence should have been accorded very low probative value.

iii – Alleged killings in Phnom Penh

588. The Trial Chamber concluded that 'there was a deliberate, organized, large-scale operation to kill former officials of the Khmer Republic [during the evacuation of Phnom Penh], even if not all such officials shared this fate.'[1561] Most striking about this conclusion is that it misrepresents the Trial Chamber's own analysis, which describes an arbitrary sequence of disconnected and inconsistent interactions with Khmer Republic officials. Indeed, the Chamber's findings do not even establish that Khmer Republic officials were consistently *targeted*, let alone that they were consistently *killed*. Even this substantial deficiency in the Trial Chamber's reasoning is only the starting point. A more searching analysis establishes that the Chamber's findings concerning individual instances of alleged killings were based on evidence that was both misrepresented and of very limited probative value.

The Trial Chamber's findings of fact fail to support its overarching conclusions

589. The Trial Chamber found that civilian officials of the Khmer Republic and soldiers who surrendered within Phnom Penh and not then arrested 'were in fact evacuated alongside the civilian

[1553] Judgment, fns. 2644-5, **E3/2071**, 'Compilation of Statement notes related to Prisons in the Northwest Zone' ERN 00087306, 00087325.
[1554] *See* paras 552, *supra*.
[1555] Judgment, fn. 2650.
[1556] Judgment, fns. 2645 (citing **E3/5541**, 'Written Record of Civil Party CHAK Toeurng', 25 Nov 2009), 2647 (citing **E3/5215**, 'Written Record of Civil Party of HENG Chuy', 20 Jan 2009), 2649 (citing **E3/1692**, 'Written Record of Civil Party of SENG Srun', 1st Jun 2009), 2651 (citing **E3/5169**, 'Written Record of Civil Party of CHAN Sokeat', 20 Jan 2009).
[1557] Judgment, fn. 2649, **E3/4649**, 'OCP Interview of SOENG Leum', 17 Nov 2006.
[1558] Judgment, fn. 2648, **E3/5355**, 'Complaint of SIM Hip', 18 Dec 2012.
[1559] *See* paras. 156, 158, 164, *supra*.
[1560] *See* Judgment, para. 34.
[1561] Judgment, para. 561.

population' following which they were 'sent to villages for work or re-education'.[1562] Among those soldiers and officials who were arrested, 'some accounts reported' that they were taken to be executed, while 'another stated that [they] were imprisoned'. The Trial Chamber found that fighting between CPNLAF forces and Khmer Republic soldiers continued until at least 'a few days after 17 April', and accordingly that many of the killings which did occur within the city were not proven to have been unlawful.[1563] The Chamber did not assess what proportion of soldiers and officials within the city were arrested, what proportion of those who were arrested were killed, or how many soldiers (whom, it found, may still have been engaged in hostilities) were killed within the city. The Chamber declined to make these findings because no evidence at all exists on which to base them.

590. The Chamber also found that Khmer Republic soldiers and officials were identified using loudspeakers and checkpoints in areas around Phnom Penh in the days following the evacuation.[1564] It held that 'there is evidence that' Khmer Republic soldiers who responded to loudspeaker announcements were executed 'or disappeared', but that it was unable to assess how many were killed as 'there is evidence that numerous Khmer Republic soldiers and civilian officials were also sent to work for re-education.'[1565] As to soldiers identified at checkpoints, the Chamber held that, while 'one account describes how [they] were executed on the spot, more often than not they were placed aside, arrested or tied up, and then taken away'.[1566] These logical and lawful arrests by a victorious army at the conclusion of a bloody, seven-year war, correspond to standard state practice in that regard.[1567] The Chamber was again unable to make any further findings as to the fate of these soldiers.[1568]

591. The Chamber accordingly found that an unspecified number of soldiers were evacuated with the rest of the population, an unspecified number were (lawfully) arrested, an unspecified number were killed lawfully and an unspecified number were killed unlawfully. The Chamber furthermore found that an unspecified number of soldiers and officials were identified at checkpoints or using loudspeakers, of which an unspecified number were (lawfully) arrested, an unspecified number were re-educated and an unspecified number were killed. No reasonable trier of fact could have determined on the basis of this sequence of contradictory non-findings that a 'deliberate, organized, large-scale' killing operation was in place.

The evidence fails to support the Trial Chamber's findings of fact

592. The underlying evidence furthermore fails to support even the Chamber's tentative conclusions.

[1562] Judgment, para. 506.
[1563] Judgment, paras. 510, 554.
[1564] Judgment, paras. 511-514.
[1565] Judgment, para. 555.
[1566] Judgment, para. 513.
[1567] *See* para. 482, *supra*.
[1568] Judgment, para. 555.

Of the 19 witnesses who appeared before the Chamber to testify to the evacuation of Phnom Penh, the Judgment failed to identify a single one who witnessed a single killing of a single Khmer Republic soldier.[1569] Of the hundreds of witnesses interviewed by the CIJs in connection with the evacuation of Phnom Penh,[1570] the Chamber identified two who claimed to have witnessed a single execution.[1571] It is on the basis of this evidence that the Chamber found that the CPK killed Khmer Republic soldiers on a 'deliberate, organized, large-scale' basis.

593. No live testimony cited by the Chamber was probative of a pattern of killing. One witness testified that he was inside his house when an unknown sequence of events led to a gunshot being fired, following which he found his uncle, a Khmer Republic colonel in uniform, dead outside the house. According to the witness, this alleged killing occurred at 6 am on 17 April 1975, nearly four hours before the formal termination of hostilities, while his uncle was aboard a jeep driven by American soldiers.[1572] A second witness did not testify that anyone was killed, but that her uncle responded to a loudspeaker announcement and returned to Phnom Penh, 'so we concluded that he was killed.'[1573] A third witness testified that he was told by unnamed women upon their arrival at his commune from Phnom Penh that the military 'took out' their husbands during the evacuation and that 'took out' meant disappearance.[1574] Because he was relocated a few months later, the witness never spoke to these women again or found out what had happened to their husbands. The witness was not acquainted with these women and could not remember their names or how many there were.[1575] The Trial Chamber found that a fourth witness, a CPK soldier, was instructed to look for Khmer Republic soldiers in Phnom Penh using loudspeakers a few days after liberation, during which time hostilities were still ongoing.[1576] This same witness then gave hearsay evidence that soldiers who were found were killed, even though he also testified that no soldiers remained in the city.[1577] The Chamber unreasonably relied on this uncorroborated hearsay without considering this inconsistency. A fifth witness testified that he was told by an unnamed '50-year old man' inside the French embassy that 'military officers [and] high-ranking officials' were separated and killed in Kien Svay on 22 or 23 April 1975. The evidence does not establish if this anonymous source witnessed any part of this sequence – and indeed, the Chamber failed to consider how this '50-year old man' might have witnessed an event on April 23 in Kien Svay, then return to Phnom Penh and enter the French embassy at least three days after CPNLAF forces had

[1569] *See* para. 593, *infra*.
[1570] *See* annexes attached to **E208**, 'Co-Prosecutors' Request to Admit Witness Statements Relevant to Phase 1 of the Population Movement', 15 Jun 2012.
[1571] *See* paras. 594-595, *infra*.
[1572] T. 5 Dec 2012 (Kim Vanndy, **E1/148.1**), p. 83:11-18; **E3/118**, 'Foreign Broadcast Information Sevice Collection of Reports for Apr 1975', ERN 00166974.
[1573] T. 24 Oct 2012 (Lay Bony, **E1/138.1**), p. 28:4-7.
[1574] T. 1 Jul 2013 (Pech Chim, **E1/215.1**), pp. 32-33.
[1575] T. 1 Jul 2013 (Pech Chim, **E1/215.1**), pp. 55:4-58:24.
[1576] Judgment, paras. 511, 554.
[1577] T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), p. 38.

supposedly forced all Cambodians to leave.[1578] The Chamber's disinterest in this contradiction is especially striking given it relied on this evidence to find that everyone who returned to Phnom Penh in the same period was systematically executed.[1579]

594. The evidence given before the CIJs is equally irrelevant. Khen Sok allegedly saw the killing of a single soldier who (in a passage apparently deliberately omitted by the Chamber) refused to evacuate Phnom Penh – indicating that CPNLAF forces wanted him to leave with the rest of the population.[1580] Koy Mon told the CIJs that his East Zone unit 'did not cause any harm' to Khmer Republic soldiers, but that troops from the Southwest Zone placed Khmer Republic soldiers on trucks. He believed that these soldiers were 'probably' killed but did not offer any reason why.[1581] How this statement relates to the evidence of Southwest Zone cadre [redacted] that express orders that military officers were 'not to be harmed' of course remains unclear.[1582] Seang Chan did not describe the arrest, execution or mistreatment of any Khmer Republic soldiers; to the contrary, the witness, himself a Khmer Republic soldier, was let pass by the 'merciless' CPNLAF forces because he was transporting a woman in a pedicab who had just given birth.[1583] The event Seang did allegedly witness was the separation and arrest of all the men in a particular group, without distinction for who was a Khmer Republic soldier.[1584] Seang claims to have later heard from another source that these individuals were killed.[1585] Other WRIs cited by the Chamber include the evidence of a witness who saw executions of two people he believed were 'probably' Lon Nol soldiers, without explaining why he believed that;[1586] a witness who had no information concerning his father's fate after his father returned to Phnom Penh during the evacuation;[1587] and two other witnesses who gave hearsay evidence of alleged killings.[1588] Needless to say, none of these witnesses were subject to cross-examination.

595. The only WRI which contains any evidence of any significance is the interview of Sam Sithy, who supposedly describes in detail being led off during the evacuation with other families connected to the Khmer Republic, being shot at, surviving by playing dead and escaping.[1589] In a remarkable coincidence, the audio recording of this interview cuts out at the exact moment that the witness supposedly begins to describe this tale, then begins again at the beginning of the very next question and answer, skipping all of and only this portion of the interview. When the recording begins again, the

[1578] Judgment, para. 479, fn. 1425.
[1579] Judgment, para. 511.
[1580] Judgment, fn. 1518; **E3/5556**, KHEN Sok WRI, ERN 00377358.
[1581] Judgment, fn. 1530; **E3/369**, 'Written Record of Civil Party of KOY Mon', ERN 00272719.
[1582] *See* para. 567, *supra*.
[1583] Judgment, fn. 1521; **E3/5505**, SEANG Chan WRI, ERN 00399168.
[1584] **E3/5505**, SEANG Chan WRI, ERN 00399168.
[1585] **E3/5505**, SEANG Chan WRI, ERN 00399168.
[1586] Judgment, fn. 1518; **E3/5267**, UT Seng WRI, ERN 00282352.
[1587] Judgment, fn. 1530; **E3/5613**, 'Written Record of Witness SENG Mardi', 11 May 2010, ERN 00494399.
[1588] Judgment, fn. 1537 (citing E3/5788); Judgment, fn. 1530 (citing **E3/3962**, Khoem Samhuon WRI).
[1589] **E3/5201**, 'Written Record of Interview of Sâm Sithy', ERN 00275139-40.

investigator, Lim Sokuntha, is heard to say that the batteries of the recording device had died.[1590] The Defence has previously shown that this same investigator was involved in producing highly inculpatory statements without audio recordings of another witness, Chhouk Rin, which were subsequently shown to have been completely erroneous following the appearance of the witness for cross-examination.[1591] It is accordingly striking that although hundreds of witnesses testified before the Chamber and the CIJs and dozens were cited by the Chamber without finding a single one who described witnessing a single killing of a single soldier in 1975 in any kind of detail, it is *this* portion of *this* WRI which mysteriously vanished from the record. The Defence is certain that, had the Trial Chamber summonsed the witness for testimony – as the Defence requested[1592] – his testimony would have proven as irrelevant as Chhouk Rin's. Accordingly, the Defence requests that this Chamber summons Sam Sithy acting pursuant to its *de novo* jurisdiction over errors of fact.[1593] If the witness is not summonsed, the Trial Chamber's reliance on his WRI notwithstanding its refusal to summons him constitutes an error of both law and fact.

596. The remaining evidence cited by the Chamber is all in the form of civil party applications, victim complaints and statements taken by organizations outside the framework of the Tribunal. The Defence submits that the live testimony and interviews taken by the CIJs reflect such limited and sporadic evidence of killing that these unsworn statements given either by interested parties or under unknown circumstances without any form of authentication or corroboration should have been rejected altogether. The Defence notes, however, that many of these documents also exculpate Nuon Chea. Khat Khe told a DC-Cam interviewer that Khmer Republic soldiers who surrendered were 'indoctrinated politically', 'allowed to survive' and 'not sent out'.[1594] The Chamber cited a summary of Khat Khe's interview created by DC-Cam to conclude that 'most of those who were found two or three days after 17 April were executed, although some were merely re-educated.'[1595] However, the full transcript shows that this statement concerned only Khmer Republic soldiers who had 'locked

[1590] **E3/5201.1**, 'Partial Transcript of Interview of Sâm Sithy', p. 1. Also noteworthy on the transcript is the interviewer's explicit instruction to the witness that the purpose of the interview was to describe 'facts that lead to the characterization of offenses'. *See* **E3/5201.1**, 'Partial Transcript of Interview of Sâm Sithy', p. 1. The witness was accordingly interrupted while explaining the broader narrative of his experience during the evacuation (which may well have included exculpatory information), and directed instead to talk about what happened '[a]fter you told them that your parents were shot to death.' This is precisely the approach to questioning that could have been averted had defence counsel been present.
[1591] *See* **E142**, 'Request for Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews', 17 Nov 2011, paras. 6-7 (describing problems with interviews of Chhouk Rin and Khun Kim); **E3/361**, 'Written Record of Interview of CHHOUK Rin' (witness supposedly making repeated highly inculpatory claims about Nuon Chea's supposed participation in meetings concerning purges and orders given in that regard); T. 23 Apr 2013 (CHHOUK Rin, **E1/182.1**), pp. 56-76 (witness disclaiming almost his entire WRI during cross-examination).
[1592] **E291/2.1**, 'Annex A: Witnesses Cited by CIJ and Co-Prosecutors in Connection with Alleged Policy to Target Lon Nol Soldiers and Officials for Execution'.
[1593] *See* paras. 2-11, *supra*.
[1594] **E3/5598**, 'DC-CAM Statement of KHAT Khe', 15 Jan 2005, ERN 00874736.
[1595] **E3/5598**, 'DC-CAM Statement of KHAT Khe'15 Jan 2005, ERN 00526857; Judgment, fn. 1518.

themselves up in the house or hidden in the drains'[1596] in Phnom Penh – in a period during which the Chamber concluded hostilities were still ongoing.[1597] The civil party application of Eam Tres indicates that of 500 detained Khmer Republic soldiers, 6 were killed and the rest – himself included – were sent for reeducation.[1598] The civil party application of Both Soth indicates that her husband, a member of the Khmer Republic navy, came home from his barracks and was evacuated with the rest of her family. Other soldiers in his barracks were arrested, and while she saw a number of Khmer Republic soldiers detained during the evacuation, only one of them was killed – for reasons she did not specify.[1599] The civil party application of Pal Rattanak similarly describes a large group of detained Khmer Republic soldiers, among whom a small number were killed when they tried to escape.[1600] Mey Nary's family was evacuated from their village in Kratie province to 'a worksite for former government officials', where they remained. Mey claims to have known that other members of his family were killed 'near the train station' in Phnom Penh, yet does not explain how he came to know that fact from hundreds of kilometers away in Kratie.[1601] Other documents do not purport to describe any killings even on their face,[1602] contain no detail of any kind concerning the circumstances of the alleged killings they describe (including why it occurred and how the 'witness' came to know of it),[1603] or expressly indicate that the speaker did not witness the alleged killing or know why it occurred.[1604] The Defence will not consider each of these documents in more detail due to the space constraints on the instant Appeal.

iv – Alleged pattern in the way Khmer Republic officials were identified

597. The Defence notes that the Co-Prosecutors repeatedly alleged in its closing submissions that Khmer Republic soldiers and officials were identified in a consistent manner by CPK forces. In a systematic, witness-by-witness deconstruction, the Defence demonstrated that the Co-Prosecutors' allegation is a myth: not a single witness or civil party identified by the Co-Prosecutors gave credible evidence that Khmer Republic soldiers and officials were targeted according to the pattern formulated by the Co-Prosecutors in closing argument.[1605]

598. Nevertheless, the Judgment makes a similar conclusion: that 'the Khmer Rouge used deception

[1596] **E3/5598**, 'DC-CAM Statement of KHAT Khe'15 Jan 2005, ERN 00874736.
[1597] Judgment, para. 554.
[1598] Judgment, fn. 1518.
[1599] Judgment, fn. 1518; **E3/4823**, 'Civil party application of BOTH Sot', 3 Aug 2009, ERN 00840000
[1600] **E3/4839**, 'Civil party application of PAL Rattanak', 14 Mar 2013, ERN 00893371; Judgment, fn. 1518.
[1601] **E3/5397**, 'Complaint of MEY Navy', 14 Aug 2012, ERN 00834021.
[1602] Judgment, fns. 1518 (**E3/5392**, 'Complaint of PRUM Sokha', 26 Dec 2012, ERN 00873794), 1521 (**E3/5424**, 'Complaint of PHANN Yim', 26 Dec 2012, ERN 00873875).
[1603] Judgment, fns. 1518 (**E3/3209**, 'Report by Henri LOCARD entitled 'Bophea region: Dambon 20 to 24'', ERN 00403143, 00403157), 1521 (**E3/5435**, 'Complaint of KIM Sarou', 21 May 2012, ERN 00810026; **E3/5436**, 'Complaint of SAO Chheun', 26 Dec 2012, ERN 00873857), 1537 (**E3/4719**, 'Civil party application of Mr. Beng Boeun', 27 Jan 2010, ERN 00436830).
[1604] Judgment, fns. 1521 (**E3/5372**, 'Complaint of SAU Sary', 18 Dec 2012, ERN 00870324; **E3/4694**, 'Civil party application of Mr. ROU Ren', 28 Oct 2009, ERN 00398344; **E3/4664**, 'Civil party application of CHHOR Dana', 26 Oct 2007, ERN 00156847-8), 1537 (**E3/5402**, 'Complaint of TIENG Sokhom', 18 Dec 2012 ERN 00870347).
[1605] T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), pp. 22-33.

to lure former Khmer Republic officials and soldiers into revealing their identities by telling them they would be taken to meet NORODOM Sihanouk, educated or re-integrated into the new armed forces', following which they were 'arrested, executed or disappeared'.[1606] In support of this finding, the Trial Chamber identified the testimony of a single civil party, Chum Sokha. According to the Trial Chamber, Chum testified that '[t]hose people who had a connection with the previous LON Nol regime, including military officers, agents, or intelligence officers, or high-ranking officers, were detained.'[1607] Accordingly, this civil party – the one person specifically identified by the Chamber to establish that Khmer Republic soldiers were consistently identified and then executed on the pretext of going to 'meet Norodom Sihanouk, [be] educated or re-integrated' – fails to mention Norodom Sihanouk, education, re-integration, or execution. The Trial Chamber cited no other live witnesses, WRIs, civil party applications or victim complaints.[1608]

599. Other evidence cited by the Trial Chamber includes the assessment of the UK government, a refugee statement from an anonymous 'Customs Official' taken by François Ponchaud, and a refugee account taken by Heder and Matsushita.[1609] All three are out of court statements taken outside the framework of the ECCC with no judicial oversight. None were subject to cross-examination.[1610] The UK government report and the Ponchaud interview both describe the same incident, which supposedly occurred outside Battambang in the Northwest Zone. No reasonable trier of fact could conclude that this evidence establishes a consistent countrywide pattern.

D. Ground 209: The Trial Chamber erred in law and fact in finding that the JCE amounted to or involved the crimes committed at Tuol Po Chrey

600. The Trial Chamber found that the CPK's policy to target former Khmer Republic officials 'involved the murder and extermination of former Khmer Republic officials at Tuol Po Chrey.'[1611] In so doing, the Trial Chamber committed three independent errors of law and fact.

i – Findings as to CPK policy and Tuol Po Chrey

601. After considering the substantial limitations in the evidence of CPK policy, the Trial Chamber held that CPK leaders implemented the common purpose through a JCE policy of targeting for 'arrest, execution and/or disappearance *all elements* of the former Khmer Republic'. This deliberately vague description of CPK 'policy' establishes that the Trial Chamber was unable to find beyond a reasonable

[1606] Judgment, para. 834.
[1607] *See* fn. 2655.
[1608] The Defence notes that the Chamber also cited the testimony of Philip Short, David Chandler and François Ponchaud. *See* para. 834, fns. 2653, 2657-9. Aside from being of no probative value in relation to these conclusions (*see* paras. 207-209, *supra*), the Defence notes that this testimony concerns the alleged existence of the CPK's policy, not the supposed pattern of executions.
[1609] *See* Judgment, fns. 2654-5.
[1610] *See* paras. 155-162, *supra*.
[1611] Judgment, para. 835.

doubt that the CPK targeted Khmer Republic soldiers and officials for execution. This is another way of saying that the Chamber does not know which Khmer Republic soldiers, if any, the members of the JCE agreed to execute. Yet the Chamber also found that Nuon Chea did not even know that the execution of Khmer Republic officials at Tuol Po Chrey had taken place.[1612] The Chamber accordingly did not find that the JCE necessarily involved the execution of Khmer Republic soldiers and officials in general or that the JCE necessarily involved the execution of Khmer Republic soldiers and officials at Tuol Po Chrey in particular. Accordingly, the Chamber made no findings sufficient to impute the crimes charged to the JCE. This difficulty – an uncomfortable one for a Chamber which has already decided to convict – is buried under convoluted constructs irrelevant to Nuon Chea's criminal liability. The Trial Chamber chose not to confront this question because it knew that its finding was fundamentally illogical. It chose an analysis *designed* to achieve guilt.

602. In more concrete terms, the supposed JCE policy to 'arrest, execute and/or disappear' Khmer Republic 'elements' does not lead inevitably to the conclusion that the JCE involved or amounted to the execution of soldiers and officials at Tuol Po Chrey. Rather, the policy as framed is consistent with a wide range of underlying facts which do not support a conviction for the crimes charged. A CPK policy to merely arrest all ordinary Khmer Republic soldiers and execute only the senior officers would be consistent with a policy to target for 'arrest, execution and/or disappearance'. A CPK policy to arrest and detain all military personnel, send them for a period of reeducation, execute those who could not be re-educated and release the rest into ordinary cooperatives would be consistent with a policy to target for 'arrest, execution and/or disappearance'. A CPK policy to separate all Khmer Republic military personnel from the general population and send them for hard labour in specialized cooperatives would be consistent with a policy of targeting for 'arrest, execution and/or disappearance'. None of these hypothetical policies would amount to or involve the indiscriminate execution of every soldier, officer and civil servant under the control of CPK forces.

603. Even the Co-Prosecutors acknowledge this fact. During their final submissions before the Trial Chamber, the Co-Prosecutors characterized their 'principal' submission concerning Nuon Chea's criminal liability for crimes allegedly committed at Tuol Po Chrey as being that CPK leaders adopted a policy to execute high-ranking Khmer Republic soldiers and officials 'which led to the mass killings' at Tuol Po Chrey.[1613] Yet, a JCE which 'leads to' – or results in – the commission of crimes does not satisfy the requirements of JCE I.[1614] It is fundamentally a claim for JCE III liability, which is not a recognized mode of liability before this Tribunal.

[1612] Judgment, para. 938.
[1613] T. 30 Oct 2013 (OCP Final Submissions Response, **E1/236.1**), p. 102.
[1614] *See* paras. 500-501, *supra*.

604. The Defence submits that the only tangible policy which could be fairly described as involving the 'arrest, execution and/or disappearance' of all former elements of the Khmer Republic and still 'involve' the crimes allegedly committed at Tuol Po Chrey would be one which specified that all so-called former 'elements' be eliminated by any means necessary. This reasoning was familiar to the Trial Chamber, which (wrongly) concluded that Nuon Chea was liable for murders committed in the course of the evacuation of Phnom Penh for precisely this reason.[1615] It would appear that the Trial Chamber declined to make this finding in relation to Khmer Republic soldiers and officials because it is so directly contradicted by all of the evidence.[1616]

605. The Trial Chamber accordingly erred in law and fact in concluding that the alleged policy of targeting all former elements of the Khmer Republic for 'arrest, execution and/or disappearance' involved the crimes committed at Tuol Po Chrey.

ii – Alleged victims were ordinary soldiers and officials

CPK targeting policy concerned only officers and senior officials

606. The evidence is uncontroverted that ordinary Khmer Republic soldiers and officials were not targeted for execution by the Party center. Indeed, virtually all of the evidence relied on by the Chamber reflects this limitation, even if the Chamber chose strategically to misrepresent the evidence in order to hide this fact from public view. Although the Defence pressed this point during closing submissions,[1617] the Chamber failed to consider it in the Judgment. Instead, the Chamber found that CPK policy targeted 'all Khmer Republic elements' for arrest, execution and/or disappearance.[1618] No reasonable trier of fact could have made this conclusion.

607. All of the evidence identified by the Chamber in support of its conclusion that a policy of targeting Khmer Republic soldiers and officials was 'expressly ordered and affirmed by the Party leadership' around April 1975 confirms that ordinary soldiers and officials were not included in this alleged policy.[1619] Stephen Heder's interview notes with Ieng Sary include the following exchange:

> Heder: The documentation does not make it clear when the decision was made, although I hypothesize that it may have been at the same time as the decision to evacuate Phnom Penh. In any case, the documentation does make it clear that those to be executed included military officers, senior officials, "secret agents," and a number of other categories, but there is nothing about ordinary soldiers and lower-ranking civil servants like schoolteachers.
>
> Ieng Sary: There is nothing. (emphasis added)[1620]

The alleged 'execution order' from Comrade Pin concerns 17 military officers, most of whom held the

[1615] Judgment, paras. 471-5.
[1616] *See* paras. 559-599, *supra*.
[1617] T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), pp. 50-52, 65-66; **E295/6/3**, Closing Brief, paras. 418, 422-426.
[1618] Judgment, para. 829.
[1619] *See* Judgment, para. 817.
[1620] **E3/89**, Heder Interview with Ieng Sary, ERN 00417605.

rank of Major or above.[1621] According to Khoem Samhuon's WRI, he was ordered to arrest 'high-ranking' Khmer Republic civil servants who refused to evacuate Phnom Penh.[1622] No other evidence of Party center instructions as of 17 April 1975 was cited by the Chamber.[1623]

608. The same is true of the expert and 'quasi-expert' evidence relied upon by the Trial Chamber.[1624] Philip Short did not testify that there was a 'policy of executing Khmer Republic officials', but that there was a pattern of killing military officers and 'former Lon Nol government officials above a certain level.'[1625] David Chandler testified that 'the extent to which Lon Nol officials […] were executed has never been entirely clear.'[1626] The worst misrepresentation arises from the Chamber's treatment of François Ponchaud's evidence. Although Ponchaud testified before the Trial Chamber for three full days, the Chamber chose instead to cite to his evidence before the CIJs, which it characterized as follows: '[b]ased on credible refugee accounts, PONCHAUD concluded that executions of former Khmer Republic officials occurred nation-wide'.[1627] In fact, Ponchaud's WRI indicates that he considered a small selection of refugee accounts to be credible because they confirmed 'what was said about' the execution of Khmer Republic officials throughout the country.[1628] When Ponchaud did appear before the Chamber, he acknowledged later discovering that events actually varied widely across the country.[1629]

609. The small selection of supposed 'pattern' evidence cited by the Chamber consistently distinguishes between officers and high-ranking civil servants on the one hand and ordinary soldiers on the other. Hun Chhunly testified that officers were separated from ordinary soldiers.[1630] Yuos Phal stated that CPNLAF soldiers screened for ranking officers while he, an ordinary reservist, was allowed to pass.[1631] Prum Sarun stated that he witnessed an execution of an officer, that CPK forces searched for high-ranking officials, and that he lived as an ordinary soldier among CPK cadres who knew his background.[1632] François Ponchaud's hearsay testimony concerning events in Kien Svay was that

[1621] **E3/832**, 'Execution Order', 4 Jun 1975, ERN 00068915.
[1622] **E3/3962**, Khoem Samhuon WRI, ERN 00293365. As noted above, the other two documents identified by the Chamber in connection with alleged Party orders as to the treatment of Khmer Republic officials are irrelevant. *See* paras. 559-565, *supra*.
[1623] *See* paras. 559-565, *supra*. As the Defence demonstrated, the only two other documents cited by the Chamber were the WRI of Ieng Phan, which describes no orders from the Party center or any orders to kill from any level in the hierarchy, and a submission to the UN Commission on Human Rights, which claims to reflect the experience of an anonymous district chief who describes receiving no orders from the Party center about anything.
[1624] Judgment, para. 834. The Defence reiterates that this was in any case an inappropriate use of the evidence. Nevertheless, the Trial Chamber additionally misrepresented of what that evidence states.
[1625] T. 7 May 2013 (Philip Short, **E1/190.1**), p. 87:18-22; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), p. 51.
[1626] T. 20 Jul 2012 (David Chandler, **E1/93.1**), p. 91:9-14.
[1627] Judgment, fn. 2657.
[1628] **E3/370**, 'Written record of interview of François PONCHAUD by CIJ', 25 May 2009, ERN 00333955.
[1629] T. 11 Apr 2013 (François Ponchaud, **E1/180.1**), pp. 43-44; T. 9 Apr 2013 (François Ponchaud, **E1/178.1**), pp. 100-101; T. 22 Oct 2013 (Final Submissions Day 1, **E1/232.1**), p. 8.
[1630] T. 7 Dec 2012 (Hun Chhunly, **E1/150.1**), pp. 52-53.
[1631] **E3/4611**, 'Written Record of Civil Party Yos Phal', ERN 00455365-7.
[1632] **E3/5187**, PRUM Sarun WRI, ERN 00274179.

'military officers [and] high-ranking officials' were separated and killed.[1633] Henri Locard's research notes describe two instances in which officers were allegedly killed and ordinary soldiers were detained or released.[1634] Kim Vanndy and Lay Bony each described the alleged disappearance of a Khmer Republic colonel.[1635] Considerable evidence establishes that loudspeaker announcements used to gather Khmer Republic officials were limited to military officers and high-ranking civil servants.[1636] All of this evidence was relied on by the Trial Chamber, yet almost none of these specific facts are referred to in the Judgment.

610. The Trial Chamber's failure to summons Heng Samrin and Chea Sim violates Nuon Chea's right to a fair trial against for this reason as well. According to Ben Kiernan's interview notes, Chea Sim was instructed at a 20 May 1975 meeting to 'Kill leaders of LN govt'.[1637] According to Kiernan's interview notes, Heng Samrin was instructed at that same meeting that 'the Lon Nol leaders' should not be allowed to 'remain in the framework' of the new government.[1638] Although both documents were in evidence, the Chamber declined to refer to them. Had these witnesses appeared at trial, they would have confirmed that in May 1975, the instructions they received were to target – in Heng Samrin's view, *without killing* – only the senior-most leaders of the Khmer Republic government.

Alleged victims at Tuol Po Chrey were ordinary soldiers

611. Although the evidence shows unequivocally that no policy of targeting ordinary soldiers and officials existed, the evidence shows clearly that this was precisely the composition of the victims allegedly targeted at Tuol Po Chrey. The Defence notes that, although it advanced detailed submissions demonstrating that the overwhelming majority of attendees at the Pursat town hall were ordinary soldiers and civilians[1639] – which the Co-Prosecutors did not contest – the Trial Chamber declined to address this argument or make any explicit findings in this regard.[1640] Multiple possible explanations exist as to why this haphazard collection of low-level Khmer Republic officials might have been targeted by officials in either the Northwest Zone or potentially by CPK cadres much lower in the hierarchy. These explanations are canvassed in the next section. In any case, the evidence is clear in at least one respect: Pol Pot and Nuon Chea were not on a mission to murder every one of these 'normal,

[1633] T. 10 Apr 2013 (François Ponchaud, **E1/179.1**), pp. 13:20-14:4; *cf.* Judgment, fn. 2639 (Khmer Rouge gathered and killed 'the Khmer Republic officials').
[1634] **E3/2071**, 'Compilation of Statement notes related to Prisons in the Northwest Zone', ERN 00087304, 00087305.
[1635] T. 6 Dec 2012 (Kim Vanndy, **E1/149.1**), p, 23; T. 23 Oct 2012 (Lay Bony, **E1/137.1**), p. 97.
[1636] *See* Judgment, fn. 1528 (citing **E3/1805**, 'United Nations Economic and Social Council', 18 Aug 1978, **E3/5453,** 'Complaint of THUOM Sameth', 16 Nov 2009; **E3/4664**, 'Civil party application of CHHOR Dana', 26 Oct 2007; **E3/4590**, Ponchaud Refugee Interviews, ERN 00820487, 00820570).
[1637] **E3/1568**, Chea Sim-Heng Samrin Interview, ERN 00651867; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), p. 51.
[1638] **E3/1568**, Chea Sim-Heng Samrin Interview, ERN 00651884; T. 24 Oct 2013 (Final Submissions Day 2, **E1/233.1**), p. 51.
[1639] **E295/6/3**, Closing Brief, paras. 422-6.
[1640] Judgment, para. 643.

[…] ordinary people.'[1641]

iii -- The Trial Chamber failed to consider reasonable alternative inferences

612. Having failed to consider these considerable limitations in the evidence of the alleged JCE policy, the Trial Chamber failed to adequately consider either of the alternative inferences put forward by the Nuon Chea defence concerning the events at Tuol Po Chrey: that they were orchestrated by Ruos Nhim acting contrary to the Party Center,[1642] or that they were put into effect by district or sector level officials in Pursat.[1643]

613. For reasons already articulated in regard to the Chamber's analysis of CPK structure, the Trial Chamber erred in law and fact in failing to adequately consider Ruos Nhim's ability and willingness to act independently of or contrary to 'the Party Center'.[1644] The Trial Chamber dismissed this possibility with little to no analysis in two paragraphs without reference to the events at Tuol Po Chrey.[1645] The Chamber's only basis for rejecting this submission was that '[p]arty directives concerning enemies and targeting of Khmer Republic officials were […] disseminated from the Party Center to lower-level cadres via trainings, propaganda and *Revolutionary Flag* publications for implementation.'[1646] Given that none of this material contains any reference to the targeting or execution of Khmer Republic soldiers,[1647] the uncontroverted evidence that the CPK never adopted a policy of targeting *ordinary* soldiers and officials for execution,[1648] the contradictory evidence of CPK policy concerning soldiers and officials in general,[1649] and the lack of any clear pattern of executions,[1650] this conclusory observation was manifestly insufficient to support the Chamber's apparent finding that every one of Ruos Nhim's decisions was necessarily in furtherance of Party policy.

614. Good reason also exists to believe that local cadres had both the motive and opportunity to kill the soldiers and officials over whom they had just won a lengthy and bloody victory. The Chamber itself held that CPNLAF soldiers were 'very angry' against 'outsiders' as a consequence of the US bombing campaign, waged against them and their families on behalf of these same soldiers.[1651] Yet the Trial Chamber ignored the evidence cited by the Defence in its Closing Brief that the cadres who allegedly committed murder at Tuol Po Chrey acted out of vengeance:

> In the film *One Day at Po Chrey*, one of the two former cadres who claimed to have been involved in killings described how commander Pel and his deputy, Run, were decapitated, their heads placed

[1641] *See* para. 184, *supra* (quoting Nuon Chea in *One Day at Po Chrey*).
[1642] **E295/6/3**, Closing Brief, paras. 427-433.
[1643] **E295/6/3**, Closing Brief, paras. 434-438.
[1644] *See* paras. 229-245, *supra*.
[1645] *See* Judgment, paras. 859-60.
[1646] Judgment, para. 860.
[1647] *See* paras. 554-558, *supra*.
[1648] *See* paras. 607-610, *supra*.
[1649] *See* paras. 566-572, *supra*.
[1650] *See* paras. 581-599 *supra*.
[1651] Judgment, para. 121.

> on sticks and dug into the ground at either end of the field in which the executions allegedly took place. That behavior is strikingly similar to Lon Nol's treatment of RAK soldiers, who were suddenly in a position in April 1975 to react in kind.[1652]

The Trial Chamber's effort to portray the events at Tuol Po Chrey as orderly and organized was furthermore erroneous: the evidence shows instead that the sequence of events is impossible to ascertain with any precision, that attendance at the town hall was voluntary, that no effort was made by CPK cadres to assess the background or identity of any those who attended the meeting, and that cadres failed to take simple measures to ensure that systematic executions took place.[1653] The only evidence given before the Chamber which links any of the events at Tuol Po Chrey to any officials above the sector level is Lim Sat's testimony before the Chamber that *no order* was forthcoming from the zone committee to kill those gathered at the town hall.[1654]

615. The Chamber nevertheless decided to rest the conclusion that an order to execute soldiers and officials was given by the zone committee solely on Lim Sat's evidence before the CIJs that he was told of such an order by his commanding officer. This hearsay evidence given out of court and then retracted in live testimony was plainly insufficient to impute criminal liability to the alleged JCE in which Nuon Chea allegedly participated.[1655] No reasonable trier of fact could have excluded beyond any reasonable doubt the plausible scenario postulated by Nuon Chea.

XIX. COMMISSION THROUGH A JOINT CRIMINAL ENTERPRISE

A. Ground 210: Nuon Chea's substantial contribution to the crimes charged

616. The Trial Chamber's findings concerning Nuon Chea's supposed substantial contribution amount to nothing more than yet another restatement of his (admitted) participation in developing the political lines of the party.[1656] They concern Nuon Chea's role in developing Party policy as to armed struggle, self-reliance and independence, the liberation and subsequent evacuation of Phnom Penh, and the creation of cooperatives,[1657] and in training cadres in regard to 'the organization of cooperatives, eliminaton of private property, prohibition of currency and markets, and the building of dams.'[1658] Aside from the acts of forced transfer which comprise the Phase I and II population movements, notably absent is a single reference to a single alleged crime. These are findings that Nuon Chea substantially contributed to a socialist revolution, not that he contributed to the commission of criminal acts.

[1652] **E295/6/3**, Closing Brief, para. 433.
[1653] *See* paras 454-458., *supra*.
[1654] *See* para. 459-462, *supra*.
[1655] *See* paras. 166-169, *supra*.
[1656] Judgment, paras. 861-874.
[1657] Judgment, paras. 863-868.
[1658] Judgment, para. 871.

617. These findings do not amount to criminal liability pursuant to the legal standards applicable before this Tribunal. Joint perpetration liability existed in 1975 under much narrower conditions than JCE, and required, *inter alia*, joint contribution to specific criminal conduct.[1659] With the exception of forced transfer, the Trial Chamber did not find that Nuon Chea contributed to *any* criminal conduct.[1660] As an essential element of joint perpetration liability is not satisfied, every conviction for commission through a JCE, other than other inhumane acts through forced transfer, is invalid.

B. Grounds 211 & 212: The Trial Chamber erred in law and fact in finding that Nuon Chea had the requisite intent for commission of the crimes charged through a JCE

618. In a single paragraph's discussion, the Chamber held that Nuon Chea had the necessary intent in regards to all crimes charged through a JCE.[1661] Its findings were so cursory that the Chamber could not have given the question of Nuon Chea's intent any serious consideration. While true that the key findings of fact had already been made in the course of the Judgment, some analysis of those findings in light of the relevant *mens rea* standards was necessary. The Chamber made no such analysis.

619. An error in the Judgment gives this away: the Chamber held that Nuon Chea had the requisite intent in regard to 'murder committed during population movements (phase one and two)'.[1662] Murder, however, was not charged in relation to the Phase II movement and the Chamber did not find that any murders were committed. As the Defence shows in its analysis, *infra*, the various crimes charged each raise different issues as to Nuon Chea's intent. The evidence of Nuon Chea's role, knowledge and intent in regard to Phase I is furthermore considerably different from Phase II.[1663] Had the Chamber engaged in a careful assessment of Nuon Chea's intent in relation to each set of crimes, it would not have been possible to accidentally hold that Nuon Chea intended the commission of crimes which were not even charged. This error accordingly shows that these were not genuine judicial findings but, like much of the Judgment, an exercise in checking boxes.[1664] It is yet another example of the Chamber's abdication of its basic judicial responsibilities and of its failure to seek to assess Nuon Chea's criminal liability. Needless to say, the Chamber erred in law.

620. In view of the Chamber's failure to substantiate its findings in any way, 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.

[1659] *See* paras. 484-493, *supra*.
[1660] The Trial Chamber also found that Nuon Chea argued that 'urban people were corrupt' and indoctrinated followers 'with a hatred for city-people': *see* Judgment, para. 873. While in any case insufficient to constitute substantial contribution to criminal conduct, as already established in considerable detail, these findings were erroneous. *See* paras. 372-381, 666-668, *infra*.
[1661] Judgment, para. 876.
[1662] Judgment, para. 876.
[1663] *See* paras. 503-507, *supra* ; *cf.*. paras 515-520, *supra*.
[1664] The Defence notes that the Chamber's analogous findings as to Khieu Samphan's liability is correctly limited to 'murder during phase one of the population movements'. This further proves that the erroneous finding in connection with Nuon Chea's liability was not intentional, but rather a product of the Chamber's failure to turn its mind to the issues.

i – Murder during the Phase I movement

621. With regard to the alleged murder of civilians who refused to evacuate Phnom Penh or who otherwise disobeyed orders of CPNLAF forces, there is no evidence at all of Nuon Chea's intent. CPNLAF soldiers testified that they were ordered not to use force,[1665] and the Trial Chamber failed to summons the witness best-placed to describe the content of those orders as they were delivered from the Party center, Heng Samrin.[1666] The actual evidence of willful killings is limited, sporadic and unreliable.[1667] The evidence furthermore shows, and the Chamber found, that troops used other means, including by warning of an imminent bombing attack, to ensure the evacuation of the city.[1668] No reasonable trier of fact could have concluded beyond a reasonable doubt that Nuon Chea intended the use of deadly force in the course of the evacuation.

622. With regard to the alleged murder of civilians during the evacuation for other reasons, there is no evidence anywhere in the Judgment or otherwise that Nuon Chea intended to cause death or serious bodily harm to this arbitrary group of civilians allegedly killed for no apparent purpose by CPNLAF forces. With regard to civilians who allegedly died due to conditions imposed during the evacuation, there is no evidence that Nuon Chea intended to cause serious bodily harm to civilians. Even if it could be said that Nuon Chea did, could or should have foreseen these deaths (and it cannot), this is not the standard. The standard, as the Chamber articulated it, is the intention to 'cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death.'[1669] As set out above, there is not a shred of evidence that Nuon Chea acted with intent to cause serious bodily harm. Nuon Chea believed that the 'overwhelming majority' of people in Phnom Penh. were good.[1670] Nuon Chea's goal – *according to the Trial Chamber* – was to increase the population of these very Cambodians.[1671] Had the Chamber turned its mind to the relevant question, it could not possibly have found that Nuon Chea intended to cause these people serious bodily harm.

623. The Defence notes further that the Chamber made findings concerning Nuon Chea's knowledge of the crimes as they were committed.[1672] To the extent these findings were considered relevant to Nuon Chea's intent in regard to murder (although no such express connection is drawn by the Chamber), the Chamber erred in fact. Relevant findings in the Judgment are as follows:

> [Nuon Chea] said that, immediately following the evacuation of Phnom Penh, he witnessed evacuees walking on the road from Phnom Penh and acknowledged that it was difficult for them to travel. He admitted that he subsequently he saw dead bodies in houses in Phnom Penh. NUON Chea

[1665] **E295/6/3**, Closing Brief, paras. 290, 302.
[1666] *See* paras. 58-73, *supra.*
[1667] *See* paras. 287-320, *supra.*
[1668] Judgment, para. 468; **E295/6/3**, Closing Brief, para. 290.
[1669] Judgment, para. 412.
[1670] *See* para. 377, *supra.*
[1671] Judgment, para. 128.
[1672] Judgment, para. 849.

> also acknowledged that there were deaths of many kinds during the DK period, including those due to illness and starvation both during evacuations and thereafter.[1673]

Nuon Chea's having seen an unspecified number of unspecified people's bodies is obviously irrelevant to his knowledge or intent as to unlawful deaths during the evacuation, particularly in the immediate aftermath of a bloody civil war. The only relevant proposition in this paragraph – that he acknowledged that there were deaths 'including those due to illness and starvation both during evacuations and thereafter' – is outright incorrect. The only evidence cited by the Chamber is a 2006 interview in which Nuon Chea supposedly admits knowledge of some deaths due to illness, starvation and smashing 'by bad groups', which he says were 'unintentional'.[1674] The evacuation is not mentioned.

ii – Persecution and other inhumane acts during both population movements

624. On political persecution during both population movements, the evidence unambiguously establishes that Nuon Chea had no persecutory intent as to New People.[1675] With regard to persecution of Khmer Republic officials during the Phase I movement, the evidence – and even the Chamber's findings – at most establish that Nuon Chea intended to arrest Khmer Republic soldiers and officials. Yet, as the Defence has shown, these arrests were lawful and consistent with state practice.[1676] Such conduct cannot manifest discriminatory intent. With regard to other inhumane acts, as discussed *supra*, there is no evidence that Nuon Chea intended to cause evacuees serious bodily harm.[1677]

625. The Defence has already demonstrated that the Chamber's findings concerning Nuon Chea's knowledge of the crimes charged in relation to the Phase I movement were erroneous.[1678] The Chamber's findings concerning Nuon Chea's knowledge of the crimes committed during the Phase II movement were also erroneous and unreasonable. The Chamber's finding that Nuon Chea acknowledged that there were deaths during the evacuation is, once again, incorrect and based on no evidence.[1679] The Chamber's conclusion that there was an 'ongoing pattern' of discrimination against New People, deaths due to conditions and terror-inducing acts was erroneous and unreasonable.[1680] None of the Chamber's other findings concerning Nuon Chea's alleged knowledge as to the Phase II movement establish his knowledge of persecution against New People or attacks against human dignity

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[1673] Judgment, para. 849.
[1674] Judgment, fn. 2706 (citing Judgment, para. 785); Judgment, para. 785, fn. 2490 (citing only **E3/26**, 'Interview Between NUON Chea and Japanese Journalist', ERN 00329513 as to Nuon Chea).
[1675] *See* paras. 370-381, *supra*.
[1676] *See* paras. 482, *supra*.
[1677] Judgment, para. 437.
[1678] *See* para. 623, *supra ; see also*, paras 695-696, *infra* (demonstrating that the Chamber erred in fact in finding that Nuon Chea knew or had reason to know that crimes would be or had been committed during the evacuation of Phnom Penh for the purposes of superior responsibility).
[1679] Judgment, para. 850; *see* para. 623, *supra*.
[1680] Judgment, para. 851 ; *see* paras 430-432, *supra* (demonstrating that the Chamber erred in finding that any such pattern existed).

during the Phase II movement.[1681]

iii – Alleged executions at Tuol Po Chrey

626. The Defence's analysis of the Chamber's unreasonable findings concerning the CPK's treatment of Khmer Republic soldiers and officials apply equally to Nuon Chea's intent.[1682] Its finding that Nuon Chea knew that 'some of those found in Pursat were executed at the time the executions at Tuol Po Chrey occurred' was also erroneous and unreasonable for the same reasons.[1683] The Defence notes, however, that even this clearly erroneous finding does not establish Nuon Chea's knowledge of the crimes allegedly committed at Tuol Po Chrey because the evidence is uncontroverted that Nuon Chea did not know of or intend the alleged execution of low-level officials at Tuol Po Chrey.

XX. PLANNING, ORDERING, INSTIGATING AND AIDING AND ABETTING

A. Ground 23: The Trial Chamber erred in law in relying on facts outside the temporal jurisdiction and the Closing Order in establishing the actus reus for planning, ordering, instigating and aiding and abetting

627. The Trial Chamber found Nuon Chea legally responsible for planning, ordering, instigating, and aiding and abetting crimes committed during population movement Phases I[1684] and II[1685] and at Tuol Po Chrey.[1686] In respect of the Phase I movement and Tuol Po Chrey, the Chamber relied almost *entirely* on facts outside the temporal jurisdiction of this Tribunal. Equally, the findings that Nuon Chea planned, instigated, and aided and abetted crimes committed during Phase II relied (in a more limited way) on facts outside the temporal jurisdiction. The Trial Chamber erred in law in that regard, invalidating all convictions entered pursuant to each of these modes of liability. Finally, the Chamber's findings in respect of Tuol Po Chrey additionally erred by relying on facts that were not simply outside the temporal jurisdiction but also outside the Closing Order.

i – Facts outside the temporal jurisdiction

628. As the Trial Chamber rightly noted in the Judgment (citing the ICTR Appeals Chamber in Nahimana), facts outside its temporal jurisdiction may be referred to for the purpose of:

> establishing the *historical and factual context* of events within the temporal jurisdiction of the ECCC [... by] clarifying a given context, establishing by inference the elements of conduct within the temporal jurisdiction of the ECCC, or demonstrating a deliberate pattern of conduct.[1687]

What the Trial Chamber failed to mention was that the ICTR Appeals Chamber in fact presented this as

[1681] Nuon Chea's supposed awareness of living conditions and his visits to construction and agricultural projects do not establish any facts relevant to the implementation of the Phase II movement. Neither does the evidence of reporting 'to the Centre concerning population movements during Phase two' cited by the Chamber. *See* Judgment, para. 851, fns. 2711, 2542.
[1682] *See* paras. 529-610, *supra*.
[1683] Judgment, para. 854.
[1684] Judgment, paras. 883, 886, 888, 891.
[1685] Judgment, paras. 904, 907, 909, 912.
[1686] Judgment, paras. 922, 925, 927, 931.
[1687] Judgment, fn. 195 (citing Nahimana Appeal Judgment, para. 315) (emphasis added).

an *exception* to a general principle. That principle is that the act or omission of an accused that establishes their responsibility for a crime within the ICTR's subject matter jurisdiction must have occurred within the ICTR's temporal jurisdiction – the year 1994.[1688] As Nahimana and subsequent ICTR cases confirm, facts outside the temporal jurisdiction 'are not themselves material facts on which a conviction can be based'.[1689] Accordingly, in Nahimana, the Chamber held that the Accused Ngeze, the Editor-in-Chief of *Kangura* newspaper, could not be convicted for genocide and incitement to genocide on the basis of statements in issues of *Kangura* which pre-dated the temporal jurisdiction of the Tribunal.[1690]

629. The ICTR Appeals Chamber established the general principle in Nahimana on the basis of its preliminary finding that the ICTR Statute's framers had deliberately intended to limit criminal responsibility to acts that occurred in 1994.[1691] At the ECCC, it is likewise clear that criminal responsibility was deliberately intended to be limited to crimes committed between 17 April 1975 and 6 January 1979.[1692] Indeed, this period was defined so specifically precisely in order to prevent other actors – such as representatives of foreign powers or ex-CPK members who are now senior Cambodian government leaders – being prosecuted for their actions before and after the DK period.[1693] As the ECCC and the ICTR share the same underlying intent as to temporal jurisdiction, the general principle in Nahimana applies in the same way at this Tribunal. Thus, facts prior to 17 April 1975 and after 6 January 1979 cannot serve as material facts upon which a conviction is based.

Planning and ordering crimes committed during Phase I and at Tuol Po Chrey

630. In finding Nuon Chea responsible for planning and ordering crimes committed during the Phase I movement and at Tuol Po Chrey, the Trial Chamber relied almost entirely[1694] on Nuon Chea's attendance at two meetings: a Central Committee meeting in June 1974[1695] and a senior leaders' meeting in 'early April 1975'.[1696] (The Chamber's flawed analysis of what transpired at these two events is discussed *infra*;[1697] for present purposes, they are discussed solely in terms of their temporal

[1688] Nahimana Appeal Judgment, para. 313.
[1689] Bagosora Trial Judgment, para. 358. *See, also*, Bikindi Trial Judgment, para. 26; Nyiramasuhuko Trial Judgment, para. 166.
[1690] Nahimana Appeal Judgment, para. 407.
[1691] Judgment, fn. 195 (citing Nahimana Appeal Judgment, paras. 310-313).
[1692] *See, e.g.*, ECCC Agreement, preambular para. 3, Art. 1; ECCC Law, Art. 2 *new*; Internal Rules, preambular para. 3; Judgment, para. 232.
[1693] *See, e.g.*, Rebecca Gidley, *The Extraordinary Chambers in the Courts of Cambodia and the Responsibility to Protect*, Working Paper No. 1, Responsibility to Protect in Southeast Asia Program, 2010, p. 13; John D. Ciorciari, 'History and Politics Behind the Khmer Rouge Trials', in John D. Ciorciari & Anne Heindel (eds.), *On Trial: The Khmer Rouge Accountability Process*, 2009, p. 73; and John D. Ciorciari, *The Khmer Rouge Tribunal*, 2006, pp. 19.
[1694] On planning, the Chamber also mentioned that the plan to transfer the population of Phnom Penh was 'consistent with a pattern of conduct before and after 17 Apr 1975' (Judgment, para. 881). This is an acceptable use of facts outside the temporal jurisdiction. Nevertheless, the Chamber clearly focused on the June 1974 and early April 1975 meetings in order to hold Nuon Chea responsible for planning crimes in Phase I.
[1695] Judgment, paras. 879, 884, 918, 920.
[1696] Judgment, paras. 880, 884, 918, 920.
[1697] *See*, paras. 641-657, *supra*.

features.) At these meetings, the Chamber held that Nuon Chea and others made plans – later disseminated through orders – to liberate the country[1698] and to arrest, execute and/or cause the disappearance of Khmer Republic officials.[1699] The Chamber held that these plans and orders 'substantially contributed to the crimes perpetrated', and thus established Nuon Chea's responsibility for planning and ordering crimes committed during both the Phase I movement and at Tuol Po Chrey.[1700] Based on these material facts, the Chamber found Nuon Chea responsible for planning and ordering crimes committed during Phase I and at Tuol Po Chrey. However, both meetings took place prior to 17 April 1975; that is, outside the Tribunal's temporal jurisdiction. Therefore, they cannot properly serve as material facts to find Nuon Chea responsible in respect of these crimes. Accordingly, all findings in this regard amount to clear errors of law.

Instigation of crimes committed during Phase I and Tuol Po Chrey

631. The Trial Chamber held that Nuon Chea instigated crimes committed during Phase I and at Tuol Po Chrey through his 'leading role' in indoctrinating cadres and soldiers 'on maintaining vigilance against enemies, and in the strict indoctrination of peasants on class struggle which included the identification of all 'New People' and former Khmer Republic officials as enemies'.[1701] This instigation, it found, '*preceded* and substantially contributed to the crimes which were committed' in each instance.[1702] Given that Phase I began on 17 April 1975, or the start date of this Tribunal's temporal jurisdiction, it follows that the Chamber could only have relied on (unspecified) facts outside the temporal jurisdiction – and therefore did so erroneously. Likewise, the alleged crimes at Tuol Po Chrey were committed around one week later. No evidence exists that Nuon Chea instigated crimes between 17 April 1975 and the date of the alleged crimes at Tuol Po Chrey. All convictions for instigating crimes committed during the Phase I movement or at Tuol Po Chrey are thus invalid.

Aiding and abetting crimes committed during Phase I and at Tuol Po Chrey

632. The Chamber did not identify with any specificity the underlying events establishing Nuon Chea's aiding and abetting liability for crimes committed during the Phase I movement or at Tuol Po Chrey. It merely held that Nuon Chea 'provided encouragement and moral support to the perpetrators […] through his role, *before and after the crimes*, in propaganda and training of cadre advocating the class struggle, justifying urban evacuations, and praising past crimes'.[1703] The Chamber's reliance on events prior to 17 April 1975 ('before […] the crimes') again constituted an error of law. The Chamber failed to find – for good reason – that events after the crimes were sufficient by themselves to constitute

[1698] Judgment, paras. 878-882, 884-885.
[1699] Judgment, paras. 918-920, 923.
[1700] Judgment, paras. 881-882, 885-886, 920-921, 924-925.
[1701] Judgment, para. 887, 926.
[1702] Judgment, paras. 887, 926 (emphasis added).
[1703] Judgment, paras. 889, 928 (emphasis added).

aiding and abetting. Excluding all facts prior to 17 April 1975 from the analysis, no reasonable trier of fact could establish that aiding and abetting liability was established. Accordingly, all convictions entered for aiding and abetting crimes committed during the Phase I movement and the crimes allegedly committed at Tuol Po Chrey are invalid.

Planning, instigating, and aiding and abetting crimes committed during Phase II

633. The Trial Chamber also relied on facts outside the Tribunal's temporal jurisdiction in order to establish Nuon Chea's responsibility for planning, instigating, and aiding and abetting crimes committed during Phase II. The Chamber erred to the extent that it relied on such facts as material, and not just relevant historical and factual context.

634. In order to establish Nuon Chea's responsibility for planning, one fact the Chamber cited was its finding that 'Party policy mandated that enemies, namely city-people or 'New People', as well as Khmer Republic officials, were to be re-educated or smashed', and that such policy was implemented through population movements and collectivization.[1704] However, this finding was based on the Chamber's analysis of events between 1970 and 1975[1705] and thus focused overwhelmingly on facts outside the Tribunal's temporal jurisdiction. The Chamber erred in law in this regard.

635. The Chamber established Nuon Chea's responsibility for instigating and aiding and abetting the crimes committed during Phase II in the same manner as the crimes committed during the Phase I movement and at Tuol Po Chrey: with reference to Nuon Chea's 'leading role' in indoctrinating CPK cadres and soldiers as to the Party's 'enemies' policy[1706] for instigation, and his role in providing 'encouragement and moral support to the perpetrators of the crimes' for aiding and abetting.[1707] Again, the Chamber did not specify when Nuon Chea undertook these actions, and especially if they were before or during the DK period. As the Chamber failed to hold that Nuon Chea's conduct after 17 April 1975 was sufficient to constitute planning, instigating or aiding and abetting, convictions entered pursuant to all three modes of liability in relation to the Phase II movement are invalid.

ii – Facts outside the Closing Order

636. An indictment 'is pleaded with sufficient particularity only if it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him or her so that he or she may prepare his or her defence'.[1708] An example from Nahimana illustrates well the level of particularity required. One of the accused in that case, Hassan Ngeze, had been editor-in-chief of the

[1704] Judgment, para. 903.
[1705] Judgment, para. 903 (referring to Judgment, paras. 117-118 (discussing the evolution of this so-called 'policy' from 1970 onwards).
[1706] Judgment, para. 908.
[1707] Judgment, para. 910.
[1708] Nahimana Appeal Judgment, para. 322; Simić Appeal Judgment, para. 20; Ntagerura Appeal Judgment, para. 22; Blaškić Appeal Judgment, para. 209; Kupreškić Appeal Judgment', para. 88.

Kangura newspaper, which was said to have incited violence against Tutsis. The ICTR Trial Chamber convicted Ngeze of genocide and direct and public incitement to commit genocide on the basis of the content of pre-1994 *Kangura* issues, even though they were outside the tribunal's temporal jurisdiction. It based its convictions on pre-1994 issues by relying on a competition organised by *Kangura* and the RTLM radio station in March 1994 – *i.e.* within the temporal jurisdiction – to test *Kangura* readers' knowledge on the content of all past issues. The Trial Chamber held that this competition 'effectively and purposely brought those [pre-1994] issues back into circulation'.[1709] The *indictment*, however, had not explained how pre-1994 *Kangura* issues could serve as material facts. Indeed, while pre-1994 *Kangura* issues were mentioned in the indictment, the March 1994 competition was not expressly mentioned at all. This led the ICTR Appeals Chamber to reverse Ngeze's convictions on the basis of the pre-1994 issues, since 'the Prosecutor failed in his duty to state a material fact on which the charges against the Accused were based' and since Ngeze 'could legitimately understand that the statements in the pre-1994 issues of *Kangura* … could not be regarded as material facts supporting his criminal responsibility' given that they fell outside the ICTR's temporal jurisdiction.[1710]

637. In the instant case, Nuon Chea was convicted of planning and ordering crimes committed at Tuol Po Chrey on the basis of meetings in June 1974 and early April 1975, at which plans were allegedly made and orders disseminated to liberate the country and in the process, arrest, execute and disappear Khmer Republic officials.[1711] However, the Closing Order does not mention at all a plan to arrest, execute and disappear Khmer Republic officials in connection with either of these two meetings. In fact, there are exactly two mentions of the June 1974 meeting in the Closing Order: its outcome was described as a resolution 'to mount the entire offensive to liberate Phnom Penh and the entire country',[1712] and it was postulated as the venue in which Ieng Sary had, by his own admission, discussed past population movements with Pol Pot in June 1974.[1713] The meeting was specifically mentioned in the Closing Order only once: where its purpose was described as focusing 'on the plan to move the population of Phnom Penh'.[1714] This description relied on the testimony of none other than Phy Phuon. However, not only do neither of Phy Phuon's cited WRIs mention a plan to target Khmer Republic officials, in one of them Phy Phuon actually testified that he had received orders to the complete contrary during the evacuation of Phnom Penh, being told to 'be careful of forces hiding in

[1709] Nahimana Appeal Judgment, para. 257.
[1710] Nahimana Appeal Judgment, para. 405.
[1711] Judgment, paras. 918, 920, 923.
[1712] **D427**, Closing Order, para. 32.
[1713] **D427**, Closing Order, para. 1019.
[1714] **D427**, Closing Order, para. 252. The early April 1975 meeting may have been implied in other vague statements in the Closing Order, such that the plan to move the entire Phnom Penh population was cemented by 'members of the Party Centre […] during meetings in late Mar or early Apr 1975'. *See* **D427**, Closing Order, paras. 164, 260, 899, 1154; *see also*, **D427**, Closing Order, para. 258. However, no details are specified, and certainly there is no allegation concerning the execution of Khmer Republic officials.

the houses' and that '[n]ow they had surrendered to us [...] we need not touch them'.[1715]

638. In other words, in the Closing Order, the two material facts on which Nuon Chea was held responsible for planning and ordering crimes committed at Tuol Po Chrey against Khmer Republic officials – the June 1974 and early April 1975 meetings – are not in fact mentioned in connection with Khmer Republic officials at all. This situation is exactly analogous to that of Ngeze in Nahimana. Here, as in Nahimana, Nuon Chea was convicted on the basis of material facts which were not sufficiently particularized in the underlying indictment, and which were furthermore outside the temporal jurisdiction of the Tribunal, entitling Nuon Chea to understand that they could not be relied on as material facts on which to base a conviction against him. Accordingly, the Chamber erred in law in relying on this evidence to establish Nuon Chea's responsibility for planning and ordering crimes at Tuol Po Chrey. Convictions entered on that basis are accordingly invalid.

B. Ground 215: The Trial Chamber erred in law and fact in finding that the a*ctus reus* of ordering was satisfied

i – Evacuation of Phnom Penh

639. The Trial Chamber held Nuon Chea legally responsible for ordering crimes committed during the evacuation of Phnom Penh on two grounds: (i) allegedly issuing orders to zone secretaries and military commanders at the June 1974 meeting and at B-5 in April 1975;[1716] and (ii) because 'the decisions and instructions of the Party Center, which included Nuon Chea, amounted to orders which were implemented'.[1717] Both findings constituted errors in the application of the law to the facts.

640. The Defence reiterates again that Nuon Chea participated in and supported the decision to evacuate Phnom Penh together with other Party leaders. There is no dispute that this decision was disseminated to CPNLAF troops who carried out the evacuation. However, Nuon Chea's role in that regard did not involve issuing instructions to subordinates, the essence of legal responsibility for ordering crimes. Instead, his individual responsibility turns on the nature of the shared agreement among the leadership and is properly assessed within the framework of JCE liability.

Zone secretaries and military commanders

641. As the Trial Chamber rightly found, ordering 'requires that an accused is in fact or in law in a position of authority to instruct another person to commit a crime.'[1718] In this case, the Trial Chamber found that the attendees at the June 1974 meeting collectively decided to evacuate Phnom Penh pursuant to the principle of 'democratic centralism' and that all were entitled to refuse to participate. The Chamber explicitly found that 'KHIEU Samphan could have opposed the evacuation of Phnom

[1715] **E3/24**, Phy Phuon WRI, ERN 00223582.
[1716] Judgment, para. 884.
[1717] Judgment, paras. 884-5.
[1718] Judgment, para. 884.

Penh, but chose not to.'[1719] The Trial Chamber further relied on Khieu Samphan's testimony that 'if there had been a single voice against the evacuations, there could have been no evacuations'.[1720]

642. The Defence notes again that according to the Chamber, the June 1974 meeting was attended by Pol Pot, Nuon Chea, Sao Phim, Koy Thuon, Ta Mok, Vorn Vet, Ruos Nhim, Son Sen, Ieng Sary and Khieu Samphan.[1721] With the exception of Khieu Samphan, this was the CPK's core leadership. Most were Standing Committee members and all were Central Committee members. The list of attendees is almost identical to that of the Second Party Congress in 1963.[1722] The composition of the April 1975 gathering at B-5 was substantially the same.[1723] Moreover, it was precisely the most senior and most powerful members of this group – Ta Mok in the Southwest Zone, Sao Phim in the East Zone and Vorn Vet in the Special Zone – who commanded the zone-based forces who liberated Phnom Penh and instructed cadres in that regard.[1724] These key Party leaders were not 'ordered' to evacuate but rather agreed to do so pursuant to a collective decision which the Chamber explicitly found they were free to reject. Nuon Chea is therefore not legally responsible for issuing orders to other senior leaders concerning the evacuation of Phnom Penh.[1725]

Decisions and instructions of the Party Center

643. The Chamber's conclusion that 'the decisions and instructions of the Party Center [...] amounted to orders which were implemented' also constituted an error of law and fact.[1726] The Chamber rightly held that ordering occurs where 'an accused issues, passes down or transmits an order, including through intermediaries.'[1727] The case law similarly establishes that ordering 'cannot be established in

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[1719] Judgment, para. 142.
[1720] Judgment, para. 225 (describing Khieu Samphan's evidence), 228 (relying on Khieu Samphan's evidence).
[1721] Judgment, paras. 133, 142. The Chamber's finding that Khieu Samphan and Ieng Sary were in attendance was erroneous.
[1722] *See* para. 230, *supra*; Judgment, para. 89.
[1723] *See* para. 505, *supra*.
[1724] *See* Judgment, para. 807. The role of zone secretaries and not the Standing Committee as a whole or Pol Pot in exercising direct control over the forces who evacuated Phnom Penh is discussed further at paras 645-646, *infra* (concerning the Chamber's erroneous finding that 'decisions and instructions of the Party Center' amounted to orders and paras. 685-686, *infra* (concerning superior responsibility). As discussed therein, no evidence exists that Pol Pot issued any direct orders to zone forces in connection with the evacuation of Phnom Penh, including from B-5 in Apr 1975.
[1725] The Defence notes that the Chamber repeatedly supported its finding that Nuon Chea 'ordered' zone secretaries in regard to the evacuation by reference to the following sentence from his testimony before the Chamber: after the June 1974 meeting, 'members of the Standing Committee and the Central Committee were instructed to disseminate information in their respective zone regarding the decision'. *See* Judgment, paras. 884, 923 (both citing Judgment, para. 141 (citing in turn, T. 14 Dec 2011 (Nuon Chea, **E1/22.1**), p. 3)). However, just one day earlier – in an excerpt also cited by the Chamber for a different purpose – Nuon Chea similarly testified that in January 1975, the 'Party Central Committee instructed the CPK delegation, including Pol Pot [and] Nuon Chea' to negotiate with the Vietnamese for weapons needed for the final offensive on Phnom Penh. *See* T. 13 Dec 2011 (Nuon Chea, **E1/21.1**), pp. 27-28. In both cases, this turn of phrase obviously signifies only that the Central Committee decided on a course of action. The Defence is certain that the Trial Chamber would not have held that the Central Committee issued 'orders' to Pol Pot.
[1726] Judgment, para. 885.
[1727] Judgment, para. 702. The fact that an order may pass 'through intermediaries' does not alter this analysis. It means only that when the accused issues an order, he may issue it to a subordinate who subsequently relays the order through the hierarchy. *See* Milutinović Trial Judgment, para. 87 ('the accused need not give the order directly to the physical perpetrator, and an intermediary lower down than the accused on the chain of command who passes the order on to the physical perpetrator may also be held responsible as an orderer for the perpetrated crime or underlying offence'). The requirement that the accused issue an order *to somebody* remains the *sine qua non* of the mode of liability. The Chamber failed to even state to whom Nuon Chea issued his supposed orders.

the absence of a prior positive act because the very notion of "instructing", pivotal to the understanding of the question of "ordering", requires a "positive action by the person in a position of authority".'[1728] That is, an 'order' is therefore not a *thing* (such as, 'decisions and instructions' of the Party Center) but an *act*: the act of issuing, transmitting or passing down the order concerned. Liability for ordering can therefore be attributed to 'the Party Center' only if 'the Party Center' issued an order. Decisions made secretly by the Party leadership and then implemented in part through orders passed down by some of its members do not amount to orders issued by the Party Center.

644. The jurisprudence shows that the members of a governing collective bear liability for ordering if the group issues decisions *in its own name* which are recognized by subordinates as *instructions of that collective*. In Brđanin, the ICTY Trial Chamber held that the ARK Crisis Staff 'formulated orders, decisions and other regulations' which were 'directed to' subordinate authorities.[1729] Most enactments of the ARK Crisis Staff 'were "conclusions" which "appear to be the verbatim summary of the deliberations of the Crisis staff."'[1730] Some instructions were given 'through public announcements, orders and decisions'.[1731] Others were disseminated to the Security Services subordinated to the ARK,[1732] and in turn 'forwarded' for immediate implementation.[1733] ARK Crisis Staff decisions were maintained in the ARK Official Gazette.[1734] Similarly, in Stakic, the ICTY Trial Chamber held that 'decisions, conclusions and orders of the Crisis Staff' were implemented by subordinates who acknowledged the Crisis Staff's authority. One municipal body issued a document entitled 'Report on Implementation of the Conclusions of the Prijedor Municipal Crisis Staff.'[1735] Subordinates expressly described having been 'instructed by the Crisis Staff to draft a report on the implementation of the conclusions (orders, decisions, rulings, conclusions) adopted at its meetings.'[1736]

645. In this case, the Chamber held that the CPK was 'shrouded in secrecy'.[1737] Party members, or any other observer for that matter, did not even know that the Standing Committee existed.[1738] Standing Committee meeting minutes were not circulated beyond the Party leadership. No formal documentation of any kind was issued by the Standing Committee. Indeed, as the Chamber found, neither Pol Pot nor the CPK publicly existed as such until September 1977.[1739] Beginning in April 1975, the mechanisms

[1728] Dragomir Milošević Appeal Judgment, para. 267; Milutinović Trial Judgment, para. 87; Dordević Trial Judgment, para. 1871.
[1729] Brđanin Trial Judgment, paras. 231.
[1730] Brđanin Trial Judgment, fn. 631.
[1731] Brđanin Trial Judgment, paras. 237.
[1732] Brđanin Trial Judgment, para. 175.
[1733] Brđanin Trial Judgment, para. 236; *see, also*, Brđanin Trial Judgment, fn. 628 (describing dispatches attaching and disseminating orders of the Crisis Staff).
[1734] BrđaninTrial Judgment, fns. 634-5.
[1735] Stakić Trial Judgment, para. 369.
[1736] Stakić Trial Judgment, para. 369.
[1737] Judgment, para. 199.
[1738] Judgment, para. 199.
[1739] Judgment, para. 775.

of central government only began to develop: Democratic Kampuchea did not even exist until January 1976,[1740] and most importantly, the entire military structure was under control of the zones until divisions reporting to Son Sen were first established in July 1975.[1741] In April 1975, orders could per definition only be given through the zone structure by the zone leaders.

646. Accordingly, the Standing Committee did not 'issue orders' in April 1975. Instead, the Committee deliberated, following which orders were formulated and disseminated by its members to cadres under their authority. The scope of Nuon Chea's criminal liability is accordingly not determined by the instructions delivered by Ta Mok, Sao Phim, Vorn Vet and Koy Thuon – which he did not directly control – but by the nature of their collective agreement. It is best understood through the lens of joint perpetration.

647. Again, the Chamber's findings as to Khieu Samphan's criminal liability reinforce this conclusion. The Trial Chamber held that Khieu Samphan did not have the authority to issue orders and accordingly declined to enter any convictions against him on that basis.[1742] Yet, the Trial Chamber found that the relevant 'decisions and instructions of the Party Center' were just as much the product of Khieu Samphan's agreement as they were Nuon Chea's: both men supposedly attended meetings of Party leaders at which they and others chose to concur in the evacuation rather than exercise their automatic veto to avert it.[1743] It was therefore internally inconsistent to hold that 'decisions and instructions' of the Party Center were enough to constitute the *actus reus*, yet to distinguish Khieu Samphan's liability for ordering from Nuon Chea's.[1744]

648. The Defence emphasizes that the foregoing analysis concerns only Nuon Chea's liability for ordering the evacuation of Phnom Penh itself. The Chamber's findings as to crimes committed in the course of the evacuation are not supported by any evidence at all. The Chamber first baldly asserts that Nuon Chea instructed lower-level cadres and soldiers 'to commit crimes of murder, extermination, political persecution and the other inhumane acts of forced transfer and attacks against human dignity.'[1745] Needless to say, the totality of the evidence of these orders was zero, even though the Chamber simultaneously declined to summons Heng Samrin, the person most responsible for

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[1740] Judgment, para. 233.
[1741] Judgment, para. 240.
[1742] Judgment, para. 1007.
[1743] *See* paras. 228-230, 503-504, *supra*.
[1744] The Trial Chamber sought to reason away this inconsistency by finding that Khieu Samphan did not have 'sufficient authority to give orders collectively with the other members of these meetings'. *See* Judgment, paras. 1006-7. However, the Chamber failed to explain what this meant or to reconcile it with its finding that Khieu Samphan also had a *de facto* veto over the 'decision' of the Party Center to evacuate Phnom Penh. The tension in the Chamber's analysis is palpable as it suddenly downgrades Khieu Samphan's role in the decision to evacuate Phnom Penh to a 'capacity to influence the decision-making process' (Judgment, para. 1006); a marked departure from the Chamber's analysis of Khieu Samphan's JCE liability. The only conclusion consistent with the Chamber's (correct) finding that Khieu Samphan did not have the authority to issue orders is that the 'decisions' of the Party Center did not amount as such to 'orders' for the purposes of legal liability.
[1745] Judgment, para. 884.

implementing those alleged orders as to East Zone troops and who could have offered uniquely relevant evidence in that regard. Even more significant is that two paragraphs later, the Chamber made exactly the opposite conclusion: 'in ordering the evacuation of Phnom Penh and subsequent population movements, Nuon Chea intended, or at a minimum was aware of the substantial likelihood, that crimes would be committed in execution of the Party's instructions.'[1746] These findings are directly inconsistent: were Nuon Chea's 'orders' confined to the evacuation, or were 'subordinates' instructed to commit crimes such as murder and attacks against human dignity? The Chamber's inconsistent findings in this regard establish that it was unable to make findings beyond a reasonable doubt. In fact, the decision of the Party leadership concerned only the evacuation.

ii – Crimes allegedly committed at Tuol Po Chrey

649. The Chamber found that Nuon Chea issued orders to commit the crimes charged at Tuol Po Chrey at the same time as he supposedly ordered the evacuation of Phnom Penh: at the June 1974 meeting of the Central Committee and in April 1975 as part of the plan for the final offensive to liberate the country.[1747] The Chamber erred in law and fact in both respects.

650. First, the Chamber's findings that Nuon Chea issued these orders again constitute bald assertions unsupported by any evidence. For the most part, the Chamber fails to even describe the content of those alleged orders. The reason is shown in the Defence's analysis of the alleged JCE policy of targeting Khmer Republic soldiers and officials: the evidence fails to establish the conduct of the Party leadership in that regard at all.[1748] It is instructive and unsurprising that the Chamber's one foray into concrete fact-finding in this regard – that executions at Oudong were discussed in June 1974 – was so patently false.[1749]

651. Second, the Chamber found that Ruos Nhim ordered the execution of Khmer Republic officials '[a]s part of the dissemination of orders through the ranks'.[1750] Even supposing this conclusion were correct, and the Defence vehemently denies it, it would follow from the Chamber's analysis that Ruos Nhim ordered those executions after agreeing with Nuon Chea to a policy he was free to reject.[1751] This finding would establish Ruos Nhim's liability for ordering, not Nuon Chea's.

iii – Phase II movement

652. The Chamber's findings concerning the Phase II movement revolve around a different set of

[1746] Judgment, para. 886. As set out in further detail *infra*, this finding constituted the application of an erroneous standard for *mens rea*: even if Nuon Chea incurred legal responsibility for ordering the evacuation of Phnom Penh, he cannot be held legally responsible for ordering murder, extermination, persecution or attacks against human dignity absent proof of his direct intent in that regard. *See* paras. 674-679, *infra*.
[1747] Judgment, para. 923.
[1748] *See* paras. 529-580, *supra*.
[1749] *See* paras. 530-535, *supra*.
[1750] Judgment, para. 923.
[1751] *See* paras. 228-230, 503-505, *supra*.

meetings but are fundamentally similar. They are erroneous in precisely the same ways.

653. The Chamber found that beginning in April 1975, Nuon Chea acted together with other senior leaders to adopt a variety of policies designed to achieve socialist revolution. In August 1975 the Standing Committee decided to re-allocate labour to the Northwest Zone and Preah Vihear, a decision subsequently adopted by the Central Committee. The Chamber found that policies to re-educate or smash New People and Khmer Republic officials were to be implemented in part through population movements.[1752] The Chamber then found that 'Nuon Chea played a key role in the formulation of decisions of the Party leadership and that these decisions were conveyed through the administrative and military hierarchy and then implemented by Khmer Rouge forces.'[1753] The Defence recalls that ordering consists in the act of 'issu[ing], pass[ing] down or transmit[ting]' an order.[1754] The Chamber failed to hold that Nuon Chea issued, passed down or transmitted any orders. The Chamber accordingly erred in law in holding that Nuon Chea is criminally responsible for ordering the Phase II movement. The Chamber's subsequent finding that the fact that 'lower-level cadres accepted the *de facto* authority and decisions of Nuon Chea through the Party Center and implemented Party policy both to move populations and identify enemies demonstrates that the decisions amounted to orders' is insufficient for reasons the Defence has already described: orders were not issued by the Party Center as such.[1755]

C. Ground 214: The Trial Chamber erred in law and fact in finding that the a*ctus reus* of planning was satisfied

i – Evacuation of Phnom Penh and Tuol Po Chrey

654. The Chamber held that a plan for the evacuation of Phnom Penh and the 'arrest, execution and disappearance' of Khmer Republic officials was formulated at the June 1974 Central Committee meeting.[1756] It then held that these plans were confirmed at B-5 in early April 1975.[1757]

655. As the Defence has already noted, the only concrete fact the Chamber identifies about the supposed plan at the June 1974 meeting – the execution of Khmer Republic officials – is unambiguously untrue.[1758] Although the Chamber does not appear to have noticed the irony, the only other observation it made about this meeting concerns something which did *not* happen: that no 'measures providing for the consent, health or well-being of those being transferred' were adopted.[1759] This is true, and Nuon Chea admits it. But the Chamber misses the bigger point: it is true because at that level, no detailed plans *at all* were formulated.

[1752] Judgment, paras. 902-903.
[1753] Judgment, para. 905 (emphasis added).
[1754] Judgment, para. 702.
[1755] *See* paras 645-647, *supra*.
[1756] Judgment, paras. 879, 918.
[1757] Judgment, paras. 880, 918.
[1758] *See* paras. 536-540, *supra*.
[1759] Judgment, paras. 879-880.

656. The only evidence of what occurred in either the June 1974 or April 1975 meeting was accordingly that a collective decision was made to evacuate Phnom Penh and that Nuon Chea agreed to it. Planning liability requires more: *substantial involvement* 'at the preparatory stage of that crime in the concrete form it took.'[1760] Neither presence at a meeting nor agreement to a decision satisfies this standard. In *Brdanin*, the ICTY Trial Chamber held that although the accused 'espoused' the common plan and 'participated in its implementation by virtue of his authority as President of the ARK Crisis Staff and through his public utterances', the evidence was insufficient to establish 'that the Accused was involved in the immediate preparation of the *concrete crimes*.'[1761] In the SCSL's CDF Trial Judgment, the defendant Fofana was the Director of War and, according to the Prosecution, had express responsibility for planning operations. Fofana was acquitted for planning despite concrete evidence of his participation in a meeting at which plans to commit crimes were discussed:

> The Chamber further finds that Fofana was present and contributed to the discussion at the subsequent commanders' meeting in December 1997 at Base Zero where plans to attack Tongo were discussed. At this meeting Norman further reiterated, clarified and expanded his unlawful orders, which now included looting, to the Kamajor commanders from Tongo. In the absence of any evidence showing how Fofana contributed to the discussion and decision at this meeting the Chamber finds that in the circumstances there is no evidence to prove beyond reasonable doubt that Fofana either planned the commission of this additional crime of looting or that he aided and abetted in the planning, preparation or execution of this additional crime in Tongo. (emphasis added) [1762]

This finding was upheld on appeal.[1763]

657. Numerous concrete facts on the case file furthermore affirmatively disprove the Trial Chamber's finding. According to the notes of Stephen Heder's interview with Ieng Sary, the details of the evacuation were not set until shortly before it took place.[1764] Even the question of who was to be evacuated had not yet been decided.[1765] The Chamber relied on this evidence in the Judgment.[1766] The Chamber then found that after deciding to evacuate Phnom Penh in June 1974, the Party leadership appointed from amongst themselves a 'committee chaired by Son Sen and including Koy Thuon and other zone members […] to manage the evacuation of Phnom Penh.'[1767] The evidence accordingly not only fails to establish that Nuon Chea made any contribution of any kind to the planning of the evacuation or to any crimes, it shows that no concrete plans were discussed at the meetings he attended, and that a group to which he did not belong was subsequently established for the purpose of making those plans. The Trial Chamber failed to refer to any of this evidence.

[1760] Brđanin Trial Judgment, para. 357.
[1761] Brđanin Trial Judgment, para. 358.
[1762] CDF Trial Judgment, para. 34.
[1763] CDF Appeal Judgment, para. 61.
[1764] **E3/89**, Heder Interview with Ieng Sary, ERN 00003663.
[1765] **E3/89**, Heder Interview with Ieng Sary, ERN 00003663.
[1766] *See* Judgment, fn. 382.
[1767] Judgment, para. 141.

658. Other findings the Chamber did make further corroborate this analysis. The Chamber correctly cited the testimony of numerous soldiers, including Meas Voeun, Chuon Thi, Ung Ren, Saut Toeung, Pean Khean and Suon Kanil, all of whom 'knew nothing about plans to evacuate Phnom Penh' until they 'saw a lot of people walking out of the city' on 17 April 1975.[1768] Meas Voeun was a regiment commander, likely the seniormost officer to testify in Case 002/01, whereas Saut Toeung was Nuon Chea's own bodyguard and messenger. The Chamber attempted to characterize the evidence of other soldiers, included Chea Say, Sum Chea and Kung Kim, as consistent with a well-stuctured plan, but as the Chamber itself admitted, all three testified to receiving orders about the evacuation upon arrival in Phnom Penh, or even later.[1769] All of this evidence is consistent with the uncontroverted evidence that no 'concrete form' for the evacuation existed until the last moment. The Chamber's conclusion that Nuon Chea planned the evacuation of Phnom Penh and the crimes allegedly committed at Tuol Po Chrey was accordingly erroneous and unreasonable.

ii – Phase II movement

659. As to Phase II, the issue is even simpler: the Chamber's conclusion that Nuon Chea helped 'design' a plan of criminal conduct is not supported by any evidence of any kind. This finding was unreasonable and erroneous.

The Chamber found that Nuon Chea participated in elaborating a series of economic policies in April and May 1975, none of which involved population movement.[1770] It then found that in August 1975, on a trip to the Northwest Zone which Nuon Chea did not attend, the Standing Committee decided to reallocate labour to the Northwest Zone,[1771] and that '[i]n September 1975, the Central Committee, including NUON Chea as a full-rights member, endorsed the August 1975 decision.'[1772] This is the only finding that even purports to connect Nuon Chea to the Phase II movement. Yet, as the Defence has already shown, there is no credible evidence that this meeting took place and that the Phase II movement was discussed.[1773]

660. As the September 1975 meeting constituted the Chamber's only finding concerning Nuon Chea's role in planning the Phase II movement, these errors are determinative of his liability for planning. However, even if Nuon Chea had been present at a meeting at which some reference to the Phase II movement had been made, there would still be no evidence that 'plans' were discussed or that Nuon Chea participated in that discussion. Once again, mere presence is insufficient to establish planning, regardless of the position of the Accused.

[1768] Judgment, para. 150.
[1769] Judgment, para. 149.
[1770] Judgment, paras. 900-901.
[1771] Judgment, para. 902.
[1772] Judgment, para. 902 (citing Judgment, para. 749).
[1773] *See* para. 518, *supra*.

D. Ground 216: The Trial Chamber erred in law and fact in finding that the a*ctus reus* of instigating was satisfied

i – Evacuation of Phnom Penh and Tuol Po Chrey

661. With regard to the evacuation of Phnom Penh, the Chamber held:

> NUON Chea played a leading role in the indoctrination of Khmer Rouge cadres and soldiers particularly regarding training cadre on maintaining vigilance against enemies, and in the strict indoctrination of peasants on class struggle which included the identification of all 'New People' and former Khmer Republic officials as enemies. The Chamber is satisfied that NUON Chea's involvement, alongside other leaders, in formulating the policies to forcibly transfer the population and to target certain groups, preceded and substantially contributed to the crimes which were committed in the course of movement of population (phase one). Further, in view of NUON Chea's positions of authority at the time of the evacuation of Phnom Penh, the Chamber is satisfied his trainings, statements and involvement in issuing *Revolutionary Flag* were understood by lower-level Khmer Rouge cadres and soldiers prompting them to commit crimes against those considered enemies.[1774]

The Chamber made a very similar finding as to crimes allegedly committed at Tuol Po Chrey.[1775]

662. As the Defence has already shown, the very documents the Chamber relies on – Revolutionary Flag magazines – consistently and repeatedly assert that New People are important participants in the revolution, and should be treated equally and provided for in base villages.[1776] The 'overwhelming majority' of 'New People' are good.[1777] No-good elements which do exist comprise two percent of the population.[1778] Base cadres are instructed to provide food, shelter and clothing for New People arriving from the cities.[1779] Yet, according to the Trial Chamber, these are the same documents which supposedly prompted cadres across the country to abuse, starve and murder New People.

663. These submissions apply with particular force to the evacuation of Phnom Penh and crimes allegedly committed at Tuol Po Chrey because only Nuon Chea's conduct prior to 17 April 1975 is at issue. The Defence reiterates that the Chamber erred in law in relying on these facts because they are outside the temporal jurisdiction of the Tribunal, requiring dismissal of all charges for instigation.[1780] However, the Chamber also erred in fact because there are also almost no relevant facts in evidence. The Chamber's analysis of the pre-1975 enemies policy includes no findings on the 'indoctrination', 'training' and 'statements' through which Nuon Chea supposedly instigated the commission of

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[1774] Judgment, para. 887.
[1775] *See* Judgment, para. 926. The Chamber added the following sentence in the middle of the paragraph: 'As discussed above, the leadership, including NUON Chea designed policies which enabled 'enemies' to be identified and re-educated, or to disappear and continuously stressed the importance of the principle of secrecy.' The only other findings the Chamber made concerning instigation were duplicative of its findings as to planning and ordering. *See* Judgment, paras. 887, 926.
[1776] *See* paras. 372-381, *supra*; **E295/6/3**, Closing Brief, paras 160-164.
[1777] **E3/216**, 'Standing Committee Report', 20-24 Aug 1975, ERN 00850976.
[1778] **E3/798**, 'Minutes of Meeting of Secretaries and Deputy Secretaries of Divisions and Independent Regiments', 30 Aug 1976, ERN 00183968.
[1779] *See* para. 380, *supra*; **E295/6/3**, Closing Brief, paras 163, 280.
[1780] *See* paras. 627-638, *supra*.

crimes.[1781] It cites only two CPK publications, both of them issues of Revolutionary Flag magazine dated long after April 1975.[1782] While the Chamber asserted in the course of its discussion of Nuon Chea's role in the CPK that he 'appeared as the chairman, trainer or speaker' at events 'held before and during the DK period', none of the evidence it cited describes any political education prior to April 1975.[1783] Only three CPK publications dated earlier than April 1975 were put into evidence.[1784] None were cited in connection with the Chamber's analysis of instigation.

664. Had the Trial Chamber had any actual interest in fact-finding, an obligatory first step would have surely involved determining which conduct pre-dated the crimes before finding beyond a reasonable doubt that this conduct substantially contributed to those crimes having been committed. Instead, the Chamber made a generalized reference to Nuon Chea's 'leading role in [...] indoctrination' without any acknowledgment that nearly all of the underlying acts took place after the crimes were allegedly committed. This fleeting, almost disinterested analysis shows once again that the Chamber's findings were based not on facts or evidence but on its vague prejudice that Nuon Chea's conduct was saturated with hate. Here again, Judge Cartwright's revenge against the 'tyrants' of the world spills off the page.

665. Had the Chamber actually sought to assess the evidence of CPK propaganda prior to April 1975, it would have seen that of the three Revolutionary Flags in evidence, two make no reference at all to cities, city-dwellers or Phnom Penh.[1785] The one document which contains any analysis of class structure or the state of the cities is the August-September 1974 issue of Revolutionary Youth.[1786] This is a document about which both the Defence and the Co-Prosecutors have made extensive submissions.[1787] The Chamber should have paid particular attention to this document and considered explicitly the parties' competing arguments. The Chamber would then have been required to conclude that this document did not and was not intended to prompt cadres to commit crimes.

666. The key feature of this document – and one on which the Co-Prosecutors have previously relied[1788] – is its extensive analysis of the five classes in Cambodian society. The document states that the class at the very top is the feudalist class, which is further subdivided into the feudalist-aristocrat and feudalist-landowner. Cadres are advised that their attitude toward the feudalist-aristocrat should be

> to persuade them to join the Front, and then fight to eliminate their political stance and their old ideology by educating them continuously. But, it is important that we redistribute land to them and

[1781] *See* Judgment, paras. 117-118.
[1782] Judgment, fns. 326, 329.
[1783] *See* Judgment, fns. 996, 997.
[1784] *See* **E9/31.2**, 'Annex 2: CPK Publications and Directives'; **E3/785**, 'Revolutionary Flag', Jul 1973; **E3/783**, 'Revolutionary Flag', Sep-Oct 1972; **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974.
[1785] *See* **E3/783**, 'Revolutionary Flag', Sep-Oct 1972; **E3/785**, 'Revolutionary Flag', Jul 1973.
[1786] *See* **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974.
[1787] T. 25 Jun 2013 (OCP Document Presentation, **E1/212.1**), pp. 98-99; T. 8 Jul 2013 (Nuon Chea Document Presentation Response, **E1/219.1**), pp. 54-57; **E295/6/3**, Closing Brief, paras. 157-158, 162, 164.
[1788] T. 25 Jun 2013 (OCP Document Presentation, **E1/212.1**), pp. 98-99.

> have them do labor work to produce food to support them selves.[1789]

As to the feudalist-landowner,

> We should not attack them constantly. We must know how to persuade them to join in the Front rank, but we have to be always cautious with them. We should struggle with them to diminish their influence by "reducing their rice paddy to as little as what the other peasants have".[1790]

This was the Party's view of the feudalists, the tiny group at the very top of Cambodian society whose interests were most inconsistent with the revolution. The second group is the capitalist class. The capitalist class was composed of the Comprador capitalists and the national capitalists. While Comprador capitalists are 'big capitalists' who collect raw materials and export them to foreign countries and are therefore 'with the imperialists',[1791] 'National capitalists' are the 'strategic supporting force of the Democratic National Revolution'.[1792] The National capitalists 'will be on our side' if 'we are the winner', which the CPK was at the time the crimes charged were committed.[1793] The third class is the 'second capitalist class', also referred to as the 'middle class'. The members of this class 'do not oppress anyone'. They 'love revolution because they, to some extend (sic), are oppressed by the enemy.' The second capitalists are 'the allied forces of the worker-peasant' even though they are 'not as sharp'.[1794]

667. The fourth class is composed of the peasants, who live largely in the liberated zones.[1795] Among the peasants are three sub-classes, the rich, the middle and the poor. Rich peasants conflict with the feudalists and imperialists but 'also oppress people'. They are comparable to the national capitalists, and the CPK's 'objective is to transform the rich peasant into the middle peasant.'[1796] The economic and political traits of the middle peasant – the Party's model for the rich peasant – 'are similar to that of the second capitalist class. So, the middle peasant is the worker-peasant ally'.[1797]

668. Most revealing about this document is its discussion of the fifth class, the workers. According to the document, the workers are divided in three sub-classes: factory workers, workers at the seaport and rubber plantation, and 'pell-mell workers' including Remauk drivers, cyclo drivers and housing construction workers. The workers with 'the best nature' are the factory workers. They 'have the

[1789] **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974, ERN 00538747.
[1790] **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974, ERN 00538747.
[1791] **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974, ERN 00538748. Comprador capitalism is explained by philosopher David Schweikart as an economic structure which emerges 'in the wake of formal decolonization': 'A local elite takes the reins of political power and opens their country to transnational penetration. A regime of "comprador capitalism" is established. The local elite form domestic monopolies and connect to transnational capital. The country serves primarily as a market for First World goods and as a source of raw materials and exotic foodstuffs for First World buyers.' *See* David Schweickart, *After Capitalism* (2002), p. 238. The CPK's policy toward this tiny group of comprador capitalists is to 'have a high revolutionary vigilance'. No crimes are contemplated or implied.
[1792] **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974, ERN 00538748.
[1793] **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974, ERN 00538748.
[1794] **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974, ERN 00538749.
[1795] **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974, ERN 00538749-50.
[1796] **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974, ERN 00538750.
[1797] **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974, ERN 00538750.

collective trait, social trait, Angkar-discipline trait [...] the nature of attack in continuing the Democratic National Revolution, socialism and communism.'[1798] While the second and third class of workers were found in the liberated zones, these industrial workers – the heart of the CPK's revolution, according to the one CPK publication in evidence which predates the evacuation of Phnom Penh – all lived in cities.[1799]

669. The actual content of this document can now be contrasted with the ridiculous conclusion in the Judgment: that Nuon Chea played a leading role in 'the strict indoctrination of peasants on class struggle which included the identification of all "New People" and former Khmer Republic officials as enemies.'[1800] This finding, too, was grossly unreasonable.

ii – Phase II movement

670. The Trial Chamber's findings as to the Phase II movement were essentially the same.[1801] Although a larger body of evidence is at issue – Nuon Chea's alleged conduct through 1975 and 1976 is relevant to these charges – the fact remains that this conduct did not 'prompt' cadres to commit crimes.[1802] In any case, the Trial Chamber's cursory treatment of the evidence in regard to the evacuation of Phnom Penh and the crimes committed at Tuol Po Chrey taints its assessment of the evidence in regard to the Phase II movement. It is so clear that the Chamber failed to make any substantive assessment of the effect of Nuon Chea's conduct on the commission of crimes in April 1975 that its identically worded, *pro forma* findings as to Phase II are entitled to no deference. The Chamber's findings were unreasonable and constitute errors of law and fact.

E. Ground 217: The Trial Chamber erred in law and fact in finding that the *actus reus* of aiding and abetting was satisfied

671. The Chamber's findings as to the *actus reus* of aiding and abetting essentially replicated its analysis of instigating. With regard to the evacuation of Phnom Penh, the Chamber found that Nuon Chea gave encouragement and moral support to commit crimes 'through his role, before and after the crimes, in propaganda and training of cadre advocating the class struggle, justifying urban evacuations, and praising past crimes.'[1803] The Chamber's findings as to Tuol Po Chrey were substantively identical, adding that Nuon Chea participated in the decision to liberate the country, which 'involved the arrest,

[1798] **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974, ERN 00538751.
[1799] The document states that 'in our liberated zones, there are only workers of types 2 and 3'. *See* **E3/146**, 'Revolutionary Youth', Special Issue Aug-Sep 1974, ERN 00538751. Industrial workers were described as type 1. Accordingly, all factory workers were located in areas under the control of the Khmer Republic as of September 1974, the date of the document. These were overwhelmingly large cities.
[1800] Judgment, para. 887.
[1801] Judgment, para. 908.
[1802] *See* paras. 374-380, *supra* ; **E295/6/3**, Closing Brief, paras 160-164.
[1803] Judgment, para. 889.

execution and disappearance of Khmer Republic officials'.[1804]

672. The Chamber erred in law and fact in holding that Nuon Chea's role in propaganda and training constituted encouragement and moral support to commit crimes during the evacuation of Phnom Penh and at Tuol Po Chrey. In this regard, the Defence's analysis of instigating applies.[1805] For reasons also set out above, the Chamber's further finding that the 'decision concerning the final offensive to liberate the country' contemplated and involved the 'arrest, execution and disappearance' of Khmer Republic officials constituted an error of fact.[1806]

673. With regard to Phase II, the relevant findings, that Nuon Chea 'praised and encouraged the Party's economic policies providing for the strategic allocation of labour and class struggle', are again the same.[1807] For the same reasons,[1808] the Chamber erred in law and fact.

F. Ground 218: The Trial Chamber erred in law in defining the *mens rea* of planning, ordering and instigating

674. The Trial Chamber held that the *mens rea* for planning, ordering and instigating is that the Accused must 'intend, or be aware of a substantial likelihood of, the commission of a crime upon the execution of' the plan or order.[1809] The Trial Chamber then applied this standard to conduct not within the ambit of the plan, order or instigation. The Chamber accordingly held that, having planned, ordered and instigated the evacuation of Phnom Penh and the Phase II movement, Nuon Chea was criminally responsible for planning, ordering and instigating murder, extermination, persecution and other inhumane acts through forced transfer, attacks against human dignity and (in connection with the Phase II movement) enforced disappearances.[1810] The Chamber (i) erred in law in adopting an erroneous standard for the *mens rea* of planning, ordering and instigating; and (ii) in the alternative, erred in fact in finding that Nuon Chea was aware of a substantial likelihood that the crimes would be committed. In each case, the Chamber erroneously entered convictions for planning, ordering and instigating the crimes charged.

[1804] Judgment, para. 928. The Chamber's formulation of the basis of Nuon Chea's liability for aiding and abetting the crimes allegedly committed at Tuol Po Chrey through propaganda and education diverged slightly from its description his liability for the evacuation of Phnom Penh; however, its only citation was to its own analysis of aiding and abetting the crimes allegedly committed during the evacuation. *See* Judgment, fn. 2853.
[1805] The Defence notes that, unlike its analysis of instigating, in this case the Chamber cited to other findings in the Judgment. *See* Judgment, fn. 2791. Its primary citations, to paragraphs 324 and 329, contain the same findings analyzed in relation to instigating. *See* paras. 661-669, *supra*. The Chamber also cited to paragraph 347, which cites no evidence at all, and paragraph 818, which cites no evidence prior to August 1975 and focuses primarily on evidence in April 1977 or later. As with instigating, the Defence emphasizes that *none* of the evidence establishes that Nuon Chea provided encouragement or moral support to commit crimes irrespective of its date; however, evidence of facts after April 1975 could not possibly have substantially contributed to the crimes charged and is therefore irrelevant entirely.
[1806] *See* paras. 559-580, *supra*.
[1807] Judgment, para. 910.
[1808] *See* para. 670 (concerning instigating the Phase II movement), 671-672 (concerning aiding and abetting the Phase I movement and the crimes allegedly committed at Tuol Po Chrey).
[1809] Judgment, paras. 698, 702.
[1810] Judgment, paras. 882, 886, 904, 906.

i – Standard for *mens rea*

675. The Trial Chamber held that planning, ordering and instigating all existed as modes of liability prior to 1975, citing the IMT Judgment, Ministries Judgment, High Command Judgment, RuSHA Judgment, Justice Judgment, and other World War II-era instruments. However, in identifying the applicable *mens rea* standard, the Chamber cited primarily to legal sources which post-date the crimes charged. In regard to planning, the Chamber cited the Duch Trial Judgment and the Kordić and Cerkež Appeals Judgment at the ICTY.[1811] In regard to ordering, the Chamber cited the Duch Trial Judgment, the Blaskic Appeals Judgment and the NMT High Command Judgment.[1812] In regard to instigating, the Chamber cited the Duch Trial Judgment, the IMT Judgment and the Kordić and Cerkež Appeals Judgment.[1813] The relevant authority cited in the Duch Trial Judgment similarly post-dates the crimes charged.[1814]

676. The High Command Judgment does not support the *mens rea* standard adopted by the Trial Chamber. While the judgment clearly contemplates a form of ordering liability, there is no indication that *mens rea* short of direct intent (dolus directus) is sufficient. To the contrary, it states that a military commander is not liable for transmitting orders from a superior unless the order 'is criminal upon its face, or one which he is shown to have known was criminal.'[1815] Nor does the IMT Judgment support the Chamber's conclusion. The portion cited concerns the defendant Streicher, whom the Tribunal found 'was widely known as Jew-Baiter Number One' for his '25 years of speaking, writing and preaching hatred of the Jews'.[1816] Streicher had personally written in a published article that '[a] punitive expedition must come against the Jews in Russia […] which will provide the same fate for them that every murderer and criminal must expect: Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch.'[1817] There is no doubt that the Tribunal found that Streicher shared the intent of the final solution.

677. While the jurisprudence of the *ad hoc* tribunals evolved to contemplate criminal liability for acts which an accused did not intend and which were not directly within the ambit of the plan or order, considerable jurisprudence at those tribunals nevertheless excludes liability for such remote conduct. These cases consistently describe the *actus reus* of the accused as planning, ordering and instigating *the crime charged*, not some other act which leads to the commission of a crime. In *Akayesu*, for instance, the ICTR Trial Chamber described liability for 'planning of a crime', defined as 'designing the

[1811] Judgment, fn. 2177.
[1812] Judgment, fn. 2192.
[1813] Judgment, fn. 2185.
[1814] Duch Judgment, fns. 913, 927.
[1815] High Command Judgment, p. 511.
[1816] IMT Judgment, p. 302.
[1817] IMT Judgment, p. 303.

commission of a crime at both the preparatory and execution phases.'[1818] That Chamber similarly held that by 'ordering the commission of one of the crimes referred to in Articles 2 to 4 of the Statute, a person also incurs criminal responsibility.'[1819] In *Semanza*, the ICTR Trial Chamber held that liability for planning, ordering, instigating and aiding and abetting requires that the accused act 'intentionally and with the awareness that he is influencing or assisting the principal perpetrator to commit the crime.'[1820] In *Stakić*, the ICTY Trial Chamber found that the 'person ordering must have the required *mens rea* for the crime with which he is charged and must have been aware of the substantial likelihood that the crime committed would be the consequence when executing or otherwise furthering the implementation of that order.'[1821] The *Orić* Trial Judgment, which post-dates and explicitly considers both the *Blaškić* and *Kordić* Appeals Judgments – the two authorities on which the Trial Chamber relied – insists that the *mens rea* for instigating requires direct intent 'with respect to both the participant's own conduct and the principal crime he is participating in'.[1822] The accused must accordingly be 'aware of his influencing effect on the principal perpetrator to commit the crime' and 'be both aware of, and agree to, the intentional completion of the principal crime.'[1823]

678. The Chamber's contrary view that a person who orders an act or omission 'with the substantial awareness' that a crime will be committed can be held liable for ordering is derived primarily from the Blaskić Appeal Judgment. The Blaskić Appeal Judgment based its analysis entirely on a selection of domestic case law from five countries, and therefore recognized that no applicable pre-1975 international jurisprudence exists.[1824] Moreover, the primary purpose of the Appeals Chamber's analysis in Blaskić was to establish that accessory liability requires a *mens rea* standard higher than negligence. For that purpose, the Appeals Chamber distinguished liability for ordering from JCE III, which permits the attribution of liability for consequences that are merely foreseeable to the accused:

> In relation to the responsibility for a crime other than that which was part of the common design, the lower standard of foreseeability — that is, an awareness that such a crime was a possible consequence of the execution of the enterprise — was applied by the Appeals Chamber. However, the extended form of joint criminal enterprise is a situation where the actor already possesses the intent to participate and further the common criminal purpose of a group. Hence, criminal responsibility may be imposed upon an actor for a crime falling outside the originally contemplated enterprise, even where he only knew that the perpetration of such a crime was merely a possible consequence, rather than substantially likely to occur, and nevertheless participated in the enterprise.[1825]

This reasoning accords with which establishing that the act of commission through a JCE is considered

[1818] Akayesu Trial Judgment, para. 480.
[1819] Akayesu Trial Judgment, para. 483.
[1820] Semanza Trial Judgment, para. 388.
[1821] Stakić Trial Judgment, para. 445.
[1822] Orić Trial Judgment, para. 279.
[1823] Orić Trial Judgment, para. 279.
[1824] Blaškić Appeal Judgment, paras. 34-39.
[1825] Blaškić Appeal Judgment, para. 33.

a more severe form of responsibility than the act of ordering or planning,[1826] thus requiring a less stringent mental element to impose criminal liability. The very authority which formulated the intent standard on which the Trial Chamber now relies accordingly held that the *mens rea* applicable to planning, ordering, instigating and aiding and abetting should be higher than the standard applicable to commission through a JCE.

679. At this Tribunal, both the Trial Chamber and the Pre-Trial Chamber have held that JCE III is not applicable.[1827] These decisions were correct, as the Defence will show in its forthcoming response to the Co-Prosecutors' appeal against the Trial Chamber's decision. It would be contrary to those decisions and the reasoning of the *Blaskić* Appeals Judgment to hold that an accused who willingly participates in a common criminal enterprise is only liable for crimes he directly intends, but that an accused who plans, orders or instigates *any* act is liable for crimes which are 'likely' to occur, but which he does not intend. Accordingly, it follows from *Blaskić* itself that accessory liability before this Tribunal requires direct intent, the same standard applicable to joint criminal enterprise.

ii – Awareness of a substantial likelihood that crimes would be committed

680. In the alternative, the Chamber's findings that Nuon Chea was aware of a substantial likelihood that crimes would be committed in the course of the Phase I and II movement were erroneous and unreasonable. The Defence refers the Supreme Court Chamber to its arguments herein establishing that Nuon Chea did not know or have reason to know that CPK troops and cadres would commit such crimes for the purposes of superior responsibility.[1828] The Defence additionally refers the Chamber to its arguments concerning Nuon Chea's knowledge and intent for the purpose of JCE liability.[1829]

XXI. SUPERIOR REPSONSIBILITY

681. The Trial Chamber erred in law in finding 'that NUON Chea is both directly responsible and responsible as a superior for all crimes committed in the course of movement of population (phases one and two) and at Tuol Po Chrey'.[1830] As a preliminary matter, this finding was in error even if the Chamber chose not to enter a conviction against Nuon Chea on this basis. This is because it is well-established that it is 'generally not possible' for a person to be held both directly responsible and responsible as a superior for the same acts,[1831] because '[i]t would be illogical to hold a commander criminally responsible for planning, instigating or ordering the commission of crimes and, *at the same*

[1826] *See* Brđanin Appeal Judgment, Concurring Opinion of Judge Meron, para. 6 (describing commission through a JCE as a 'higher mode of liability' than ordering).
[1827] **E100/6**, Trial Chamber JCE Decision; **D97/15/9**, Pre-Trial Chamber JCE Decision.
[1828] *See* paras. 694-698, *infra*.
[1829] *See* para. 623, *supra*.
[1830] Judgment, para. 941.
[1831] Stakić Trial Judgment, para. 464.

time, reproach him for not preventing or punishing them'.[1832] Even if it does not invalidate the Judgment, this is a legal issue of general importance to the jurisprudence of the ECCC.

A. Grounds 219 & 220: The Trial Chamber erred in law and fact in finding that Nuon Chea exercised effective control over persons responsible for the crimes committed

i – *De facto* authority v. effective control

682. Responsibility by omission in general requires a duty to act, an ability to act and a failure to so act. As a specific form of responsibility for omission, superior responsibility specifically requires (i) a superior-subordinate relationship, *de jure* or *de facto* (duty to act); (ii) effective control (ability to act); and (iii) failure to prevent or punish (failure to act). A *de facto* superior-subordinate relationship (*de facto* authority) is not the same as effective control. As the ICTY Appeals Chamber held in *Delalić*, *de facto* authority refers to the '*actual* exercise of authority in the absence of a formal appointment'.[1833] '[A] *de facto* superior must be found to wield *substantially similar* powers of control over subordinates' to a *de jure* superior.[1834] It follows that effective control 'in the sense of having the *material ability* to prevent and punish' crimes[1835]' is *not* any more guaranteed in *de facto* superior-subordinate relationships than in *de jure* ones. Hence, to establish superior responsibility, effective control must be demonstrated for both *de jure* and *de facto* superiors.[1836] In other words, effective control is a distinct and additional element to be assessed if and after a chamber is first satisfied that either *de jure* or *de facto* authority exists.

683. The Trial Chamber correctly established that the legal standard for effective control is 'exercis[ing] effective control, in the sense of possessing the material ability to prevent or punish the crimes'.[1837] However, instead of applying this standard in the evaluation of Nuon Chea's superior responsibility, in paragraph 892 of the Judgment, the Chamber held that '[s]uperior responsibility depends upon an accused's ability to exercise *effective control* over subordinates, that is the *actual power* to take reasonable and necessary measures to prevent or punish the crimes'. In doing so, the Chamber confused de facto authority and effective control and erroneously applied the 'actual power' standard which applies to the determination of the existence of *de facto* authority,[1838] *not* effective control. This is not merely a question of semantics. In evaluating Nuon Chea's superior responsibility, the Trial Chamber simply stopped after establishing that there a 'superior-subordinate relationship' existed. That is, it completely failed to take the necessary further step of finding whether, as a superior,

[1832] Stakić Trial Judgment, para. 464 (citing Blaškić Trial Judgment, para. 337) (emphasis added).
[1833] Delalić Appeal Judgment, para. 206.
[1834] Delalić Appeal Judgment, para. 197 (emphasis added).
[1835] Delalić Appeal Judgment, para. 197 (emphasis added), citing approvingly the findings of the Trial Chamber.
[1836] Delalić Appeal Judgment, para. 196; *Hadžihasanović* Appeal Judgment, para. 190.
[1837] Judgment, para. 715.
[1838] Delalić Appeal Judgment, para. 206.

Nuon Chea enjoyed effective control.[1839] However, the *de facto* and *de jure* 'authority' to discipline which the Chamber found that Nuon Chea possessed[1840] is completely distinct to his possessing the 'material ability' to punish. This conflation of two concepts amounts to an error of law in thereby effectively failing to address all the elements of superior responsibility.

ii – Erroneous definition and application as to *de facto* authority

684. As the ICTY Appeals Chamber observed in *Delalić*, although the law accepts *de facto* authority as a basis for superior responsibility in addition to *de jure* authority, 'there is a threshold at which persons cease to possess the necessary powers of control' for them to be properly considered 'superiors' within the meaning of superior responsibility[1841]. Accordingly, 'great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations *where the link of control is absent or too remote*'.[1842] Where the 'link of control is absent or too remote', that is, a superior's *de facto* power would be so weak that even if he is still technically a *de facto* superior due to a *de facto* chain of authority, it would be an injustice to hold him responsible as a superior for crimes committed by those remote subordinates given the factual lack of control. This is precisely what the Trial Chamber did by holding that Nuon Chea was responsible as a *de facto* superior of all CPK cadres and thus, by mere virtue of that relationship, responsible for all their crimes.

685. Similarly, the established jurisprudence provides that 'the doctrine of superior responsibility extends to *civilian* superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.'[1843] Yet, the Trial Chamber did not even attempt to find how Nuon Chea, as a civilian leader, exercised control over the armed forces similar to that of military commanders. Thus, it erred in law and fact this respect as well.

iii – Evacuation of Phnom Penh

686. The Chamber's underlying findings of fact were furthermore insufficient to establish effective control. The Chamber held that 'a *de facto* superior-subordinate relationship existed between NUON Chea and both the Zone secretaries and military commanders in April 1975.'[1844] It subsequently held that 'NUON Chea possessed both *de jure* and *de facto* authority to discipline insubordinate members of the Party and military'.[1845] However, the Chamber failed to establish Nuon Chea's effective control over either Zone secretaries and 'military commanders' or 'insubordinate members of the Party and military'.

[1839] *See* Judgment, paras. 894-896.
[1840] Judgment, para. 896.
[1841] Delalić Appeal Judgment, para. 197, citing approvingly the findings of the Trial Chamber.
[1842] Delalić Appeal Judgment, para. 197 (emphasis added), citing approvingly the findings of the Trial Chamber.
[1843] Delalić Appeal Judgment, para. 197, citing approvingly the findings of the Trial Chamber.
[1844] Judgment, para. 894.
[1845] Judgment, para. 896.

687. With regard to 'Zone secretaries and military commanders', the Chamber relied primarily on Nuon Chea's role as Deputy Secretary of the CPK and his position as a member of the Standing and Central Committees.[1846] As the Chamber rightly held, however, the existence of a superior-subordinate relationship requires proof that the superior was in a position to exercise 'effective control' over the subordinate.[1847] The relevant criterion is whether the accused has the 'material ability to prevent a subordinate's crimes or punish the subordinate after the crime has been committed.'[1848] *De jure* authority is neither necessary nor sufficient for this purpose.[1849] As the Defence has previously shown, the Chamber's finding that Nuon Chea 'exercised ultimate decision-making power' is little more than a reiteration of the seniority of his position in the Party and his role in designing policy objectives.[1850]

688. The Chamber also held as follows:

> Although Khmer Rouge forces attacking Phnom Penh were under the direct control of the Zones, not the Party Center, in the lead up to 1975, Khmer Rouge forces executed a number of orders from the CPK leadership, including from NUON Chea, to attack and forcibly transfer the inhabitants of the cities upon their capture. Further, in early-April 1975, immediately prior to the attack on Phnom Penh, Zone secretaries and military commanders were present at B-5 and reported to NUON Chea and to other senior leaders on the progress of Khmer Rouge advances on Phnom Penh.[1851]

These findings largely replicated the Chamber's analysis of ordering, which the Defence has already shown was erroneous. As the Chamber cited to a slightly different body of evidence, however, the Defence analyzes its findings in detail herein.

689. In support of the proposition that 'in the lead up to 1975, Khmer Rouge forces executed a number of orders from the CPK leadership, including Nuon Chea', the Chamber provided a generalized citation to 'Section 14' of the Judgment, a 79-page analysis which covers the entire Joint Criminal Enterprise. The reason for the Chamber's reluctance to point to any specific facts is not difficult to discern: the only findings of any relevance assert, once again, that Pol Pot and Nuon Chea agreed collectively with the very zone secretaries who were supposedly their subordinates concerning the final military offensive and the evacuation of the cities. The Chamber held that '[i]n October 1970, the Central Committee, including POL Pot, NUON Chea, IENG Sary, Ta Mok, SAO Phim, KOY Thuon and other Zone secretaries, discussed a plan to liberate Cambodia from the American imperialists and Khmer Republic'.[1852] The Chamber held that, between October 1970 and 1975, Khieu Samphan, Nuon Chea, Pol Pot and other 'Party leaders' – whom the footnote shows referred to Ta Mok, Vorn Vet, Ruos Nhim and Sao Phim – 'met regularly concerning the ongoing revolution and administration of the

[1846] Judgment, para. 893.
[1847] Judgment, para. 715.
[1848] AFRC Appeal Judgment, para.257.
[1849] CDF Appeal Judgment, para. 214; Muvunyi Appeal Judgment, para. 475; Nahimana Appeal Judgment, para. 635.
[1850] *See* paras. 260-265, *supra*.
[1851] Judgment, para. 893.
[1852] Judgment, para. 732.

liberated zones.'[1853] Most importantly, the Chamber held that '[i]n June 1974, the Central Committee, including members and candidate members POL Pot, NUON Chea, KHIEU Samphan, SAO Phim, KOY Thuon, Ta Mok, VORN Vet, ROS Nhim and SON Sen, pursuant to the principle of democratic centralism, planned the final offensive to liberate the country and evacuate the population of the cities to rural areas.'[1854] Hence, while technically true that 'Khmer Rouge forces' executed orders from 'the Party leadership', the individuals whom the Chamber designated as Nuon Chea's 'subordinates' were members of the 'leadership' who gave the instructions, not the 'forces' who followed them.

690. The Chamber's finding that 'Zone secretaries and military commanders were present at B-5 and reported to NUON Chea and to other senior leaders' again deliberately obfuscates the fact the 'Zone secretaries' *were* the Party leadership. Even if Party leaders with designated responsibility for particular zones reported on military progress to the leadership group, this fact would be irrelevant to effective control. Moreover, the only evidence on which the Chamber relied was the testimony of Phy Phuon,[1855] who 'was located on the other side of [a] small hill' during the meeting.[1856] He was not in a position to describe the details of this so-called 'reporting' and did not in fact provide any such detail in his testimony.

691. The best indication that no compelling evidence exists is the Chamber's reliance on Philip Short's view that 'it would not have been possible for Zone commanders to act against or outside the broad policy consensus which had been laid down by the Center'.[1857] The Defence first notes, again, that Short's opinion on this key question of fact central to criminal liability is completely irrelevant and far beyond the proper scope of expert testimony.[1858] Short was in any event not called as a military expert, and accordingly these findings are beyond the scope of his expertise. The Defence furthermore reiterates that this opinion is so directly at odds with all of the evidence – including, among other things, the fact these so-called 'zone commanders' were members of the Standing Committee and soon after led an open armed struggle against Pol Pot[1859] – that no reasonable trier of fact could have given it any credence. The Chamber's reliance on this glib summary of such complex events was plainly unreasonable.

692. The Defence notes, however, that even on its face Short's conclusion is of no relevance to the legal issue. The Defence does not claim that Sao Phim and Ta Mok initiated the final offensive to

[1853] Judgment, para. 732.
[1854] Judgment, para. 735. It is noteworthy that the phrase 'candidate members' in this last holding was necessary only because of Khieu Samphan, who is the only person on this list who was not a full-rights member of the Central Committee. Together with Koy Thuon, he is also the only person never to be a member of the Standing Committee. *See* para. 230, *supra*.
[1855] Judgment, para. 893 (citing Judgment, paras. 144-146); Judgment, fn. 421.
[1856] T. 26 Jul 2012 (Phy Phuon, **E1/97.1**), p. 23.
[1857] Judgment, para. 894.
[1858] *See* paras. 207-209, *supra*.
[1859] *See* paras. 229-231, 238-243, *supra*.

liberate the county or evacuated Phnom Penh on their own. This was the 'broad policy consensus' within which Pol Pot, Nuon Chea and the rest of the Standing Committee agreed to operate. It has no bearing at all on Nuon Chea's 'material ability' to enforce sanctions against fellow members of the Standing Committee for crimes they may have committed in the course of their implementation of the evacuation. Instead, the only evidence in this regard remains Ieng Sary's vivid, first-hand account: 'Pol Pot and Nuon Chea, when they were in SAO Phim's Zone, the East Zone, they were afraid of Ta Phim […] That is, Pol Pot himself did not dare go down below [because] he was afraid of Ta Phim'.[1860] For Ieng Sary, no speculation was required in this regard: 'I went with them once, and I knew that and saw that'.[1861]

693. Finally, the Chamber's generalized finding that Nuon Chea possessed 'both *de jure* and *de facto* authority to discipline insubordinate members of the Party and military' was vague and supported by insufficient evidence.[1862] The provision in the CPK Statute that Party members could be subject to sanctions and discipline is irrelevant to Nuon Chea's material ability to impose sanctions.[1863] The only other supposed evidence – that Nuon Chea was 'assigned responsibility for discipline'[1864] – was erroneous and unreasonable.

iv – Tuol Po Chrey

694. The Chamber held that its analysis of Nuon Chea's superior-subordinate relationship with 'Khmer Rouge forces and Zone secretaries' in connection with the evacuation of Phnom Penh 'applies equally to the events at Tuol Po Chrey which unfolded in the Northwest Zone under the authority of its Secretary, MUOL Sambath *alias* ROS Nhim.'[1865] The Defence notes first that the Chamber made no further effort to substantiate its apparent finding that Nuon Chea had effective control over 'Khmer Rouge forces' throughout the Northwest Zone. Its conclusion was ultimately that a superior-subordinate relationship existed between 'ROS Nhim, in his capacity as Northwest Zone Secretary, and the members of the Party Center, including Nuon Chea.'[1866] The Defence thus submits that the only relevant 'subordinate' identified by the Chamber for the purposes of Nuon Chea's superior responsibility for crimes allegedly committed at Tuol Po Chrey is Ruos Nhim himself.

695. For the reasons articulated above, the evidence shows clearly that Ruos Nhim, like Ta Mok, Sao Phim, Son Sen and Vorn Vet, were not Nuon Chea's subordinates for the purposes of superior responsibility. With regard to Ruos Nhim specifically, the Chamber simply listed a series of occasions

[1860] *See* para. 238, *supra*.
[1861] *See* para. 238, *supra*.
[1862] Judgment, para. 895.
[1863] Judgment, para. 895.
[1864] Judgment, para. 895.
[1865] Judgment, para. 933.
[1866] Judgment, para. 934.

on which Nuon Chea and Ruos Nhim met, sometimes in Phnom Penh, sometimes in the Northwest Zone.[1867] It also noted the seniority of Ruos Nhim's positions within the Party.[1868] None of these banal facts are relevant to superior responsibility; to the contrary, they prove Ruos Nhim's power and authority. The totality of the evidence the Chamber cited to establish Nuon Chea's effective control over Ruos Nhim is a collection of three telegrams which the Chamber itself admitted 'date from well after the events at Tuol Po Chrey'[1869] – between 32 and 37 months later, to be precise. Yet, according to Ben Kiernan, only after April 1975 did control of the Party Center over the Northwest Zone begin 'gradually increase[ing]'.[1870] Most absurd about these telegrams is that they concern a period in which the evidence is uncontroverted that Ruos Nhim was literally involved in an armed conflict against Pol Pot.[1871] Whatever facts the Chamber thinks these telegrams prove, effective control is most certainly not one of them.

iii – Phase II movement

696. The Trial Chamber also made a generalized finding that Nuon Chea 'exercised de facto authority over all Khmer Rouge cadres.'[1872] Yet its analysis was manifestly insufficient to establish that Nuon Chea had the 'material ability' to enforce sanctions against every cadre in every province of the country at all levels of the Party. The 'strict reporting line' through which cadres sent reports to upper levels proves that Nuon Chea had no contact with the vast majority of Party cadres, since he interacted almost exclusively with senior leaders such as zone and autonomous sector secretaries.[1873] Evidence of reporting upwards is furthermore insufficient to establish effective control. Evidence that cadres sought guidance from Party leaders is extremely limited, while evidence that Party leaders responded is non-existent.[1874]

697. The only evidence of Nuon Chea's 'control' over RAK troops was that the Standing Committee as a whole received updates from fellow Committee member Son Sen, who had designated authority for military affairs in a specialized sub-committee to which Nuon Chea did not belong.[1875] This evidence fails to show, or even hint, that Nuon Chea ever once issued a single instruction to, or sought to discipline, a single soldier. Even if such evidence existed, it would *still* be insufficient to establish

[1867] Judgment, paras. 933-4.
[1868] Judgment, para. 934.
[1869] Judgment, para. 934. *See* Judgment, fns. 2863-4, 2439; *see also*, paras. 235-236, *supra*.
[1870] **E3/1593**, Kiernan, *The Pol Pot Regime*, ERN 00678613.
[1871] **F2/4**, Third Appeal Evidence Request, para. 11. *See Hadžihasanović,* Appeal Judgment, para. 230 (given that the 'only way to control the *El Mujahedin* detachment was to attack them as if they were a distinct enemy force', there was no effective control over this detachment).
[1872] Judgment, para. 913.
[1873] **E295/6/3**, Closing Brief, para. 203.
[1874] *See* paras. 232-236, *supra*. *See also, Hadžihasanović* Appeal Judgment, paras 207-209 (evidence that the *El Mujahedin* detachment under certain circumstances sought 'orders' from the 3rd Corps 'does not in itself necessarily provide sufficient support for the conclusion that Hadžihasanović had effective control over the *El Mujahedin* detachment in the sense of having the material ability to prevent or punish its members should they commit crimes.').
[1875] Judgment, paras. 333, 914.

effective control.[1876] The Chamber's finding that Nuon Chea exercised 'influence' over DK military policy and implementation, while patently untrue,[1877] is irrelevant to the Chamber's remarkable finding that he exercised effective control over every soldier in the country. These extremely broad declarations of effective control are supported by virtually no evidence and patently unreasonable.

B. Ground 221: The Trial Chamber erred in law and fact in finding that Nuon Chea knew that crimes had been or would be committed

698. The Trial Chamber held that Nuon Chea 'knew or had reason to know that Khmer Rouge forces would commit the crimes during the evacuation of Phnom Penh.'[1878] The Trial Chamber's primary support for that assertion was its claim that 'consistent patterns of forced urban evacuation' emerged, 'accompanied by ill-treatment, discrimination against people taken from enemy territory and against Khmer Republic officials and deaths resulting from acts of terror, the conditions of transfer and the use of force.'[1879] These conclusory findings are supported by no citations to relevant evidence prior to the evacuation of Phnom Penh.[1880]

699. The only actual analysis of the evidence of pre-1975 population movements is in the early stages of the Judgment. This analysis contains almost no findings as to the conditions of these evacuations and no evidence of death *at all*.[1881] Instead, it asserts that the purpose of those population movements was to 'seize the people' – bring them under the control of CPNLAF forces in liberated zones – an objective which would have been rather difficult to achieve had those people been killed.[1882] The nine-paragraph analysis is punctuated by two quotes from Philip Short's book and François Ponchaud's testimony claiming that residents' homes were burned down once the cities were evacuated.[1883] Aside from the minor detail that neither one of these authors describes any deaths,[1884] these accounts were based (in one case) on anonymous hearsay evidence and (in the other) on no apparent sources at all. They certainly provide no evidence of a pattern of murder, extermination, persecution and other inhumane acts over a period of years during numerous evacuations.

700. The Chamber found that the July 1973 issue of Revolutionary Flag shows that despite being aware of shortages in the countryside, the Party 'was committed to continue forced evacuations leaving

[1876] Hadžihasanović Appeal Judgment, para. 200.
[1877] *See* paras. 251-253, *supra*.
[1878] Judgment, para. 897.
[1879] Judgment, para. 842 (cited in Judgment, fns. 2802-3).
[1880] *See* Judgment, fn. 2676 (citing Judgment, paras. 791-794, 800-803). The Chamber discusses pre-April 1975 population movements in paras. 791 through 794. Although in para. 792 the Chamber made a variety of broad claims about the nature of those population movements and the crimes committed, it cited no evidence in that regard. The only footnote, number 2525, concerns the treatment of Khmer Republic officials during the evacuation of Phnom Penh. Those findings were erroneous for reasons set out elsewhere. *See* paras. 588-596, *supra*. However, even if true they would not establish a 'pattern' of conduct, especially prior to the evacuation.
[1881] *See* Judgment, paras. 104-112.
[1882] Judgment, paras. 108-110.
[1883] Judgment, paras. 105, 107.
[1884] The one exception is François Ponchaud's claim based on anonymous hearsay evidence that unnamed commune chiefs in unspecified places 'would be executed'. *See* Judgment, para. 107.

it to the people to resolve their own problems'. This finding was both erroneous and irrelevant.[1885] In fact, the document states that the Party's experience of past evacuations was that 'people could resolve the problems'.[1886] Although not clearly stated in the wrongly translated English, the original Khmer version also states that the Party would not have carried out the evacuations had it not been confident that base people would be able to provide adequate assistance to new arrivals.[1887] The Defence notes in any case that even the Chamber's erroneous interpretation is irrelevant to crimes allegedly committed during the evacuation: it says nothing about the conditions of the transfers, as opposed to conditions in cooperatives at the base, and still less about the use of violence or death.

701. The Chamber also held that Nuon Chea knew or had reason to know that crimes would be committed due to his involvement in setting CPK policy targeting Khmer Republic officials, New People and enemies generally, and that the CPK's 'plan' for the evacuation of Phnom Penh 'contemplated and/or involved the crimes against humanity of murder, extermination, political persecution, and other inhumane acts.'[1888] As the Defence has already shown, these findings were erroneous and unreasonable.[1889] Finally, the Chamber made generalized findings concerning Nuon Chea's supposed knowledge of 'patterns of conduct' based on his 'access to reports and information concerning living conditions in the countryside and the implementation of the common purpose and policies.'[1890] This finding fails to specify that the information reported to Nuon Chea concerns a pattern of conduct similar to the crimes charged and is accordingly irrelevant to Nuon Chea's knowledge in that regard.

702. The Chamber relied on the same evidence to establish that Nuon Chea knew or had reason to know that crimes would be or were committed in the course of the Phase II movement.[1891] For the same reasons, these findings constituted errors of law and fact.

C. Ground 222: The Trial Chamber erred in law and fact in finding that Nuon Chea failed to prevent or punish crimes during population movements

703. The Trial Chamber held that Nuon Chea failed to take action to prevent or punish deaths and killings during population movements notwithstanding 'evidence of deaths resulting from movements of the population prior to April 1975', 'personally witnessing dead bodies in Phnom Penh' and being aware that 'Khmer Republic officials continued to be targeted, and even killed in subsequent years'.[1892] As already indicated, the Trial Chamber failed to substantiate its claim that evidence exists of 'deaths

[1885] Judgment, para. 842.
[1886] **E3/785**, 'Revolutionary Flag', Jul 1973, ERN 00713996.
[1887] **E3/785**, 'Revolutionary Flag', Jul 1973, ERN 00713996.
[1888] Judgment, paras. 843-5.
[1889] *See* paras. 504-513, *supra*.
[1890] Judgment, para. 846.
[1891] Judgment, para. 915 (citing Judgment, paras. 842-846).
[1892] Judgment, para. 898.

resulting from movements of the population prior to April 1975',[1893] while its finding that Nuon Chea 'witness[ed] dead bodies in Phnom Penh' is irrelevant because the mere presence of dead bodies, absent indicia of the nature and cause of death, does not constitute 'sufficiently alarming information' to alter Nuon Chea to the risk of the *specific* crimes charged..[1894]

D. Ground 223: The Trial Chamber erred in law and fact in finding that Nuon Chea failed to prevent alleged executions at Tuol Po Chrey

704. The Chamber found that Nuon Chea's knowledge of the executions at Tuol Po Chrey had not been established and therefore declined to consider his failure to punish them.[1895] Nevertheless, it held that he failed to prevent the alleged executions through his supposed: (i) 'role in developing the Targeting Policy'; and (ii) failure to take measure to prevent persecution 'despite evidence of killings and persecution of Khmer Republic officials during the prior evacuation of cities.'[1896]

705. These factual findings on which the Chamber based its analysis of superior responsibility merely replicate the factual findings on which the Chamber based its conclusion that Nuon Chea is liable for commission though a JCE. These factual findings have already been shown to be clearly erroneous. Neither Nuon Chea nor any other CPK leaders designed any policy which contemplated the execution of any Khmer Republic soldiers and officials, least of all those allegedly killed at Tuol Po Chrey.[1897] The Chamber's only findings concerning killings 'during the prior evacuation of cities' in Kampong Cham and Oudong, were flagrantly unfounded.[1898] Nuon Chea's responsibility as a superior is completely unsubstantiated.

XXII. EXCLUSION OF TORTURE-TAINTED EVIDENCE

706. The Chamber held over the course of the trial that, pursuant to Article 15 of the 1984 Convention Against Torture ('CAT'), evidence produced by torture was inadmissible under all circumstances for the truth of its contents.[1899] This decision was replicated in the Judgment.[1900] The Trial Chamber erred in law. Article 15 of the CAT is only intended to govern the use of torture-tainted evidence *against* an accused, not its use in his defence. In the latter scenario, the admission of the torture-tainted statement is governed by the regular rules of evidence. Torture-tainted statements may satisfy those rules under

[1893] *See* paras. 695-696, *supra*.
[1894] *See* paras. 623, *supra*. *See* Krnojelac Appeal Judgment, para. 155 (Accused has reason to know for the purpose of superior responsibility where he has 'sufficiently alarming information' to alter him to the risk of a specific type of crime; as an example, 'information about beatings inflicted by his subordinates' would be insufficient to establish knowledge of torture)..
[1895] Judgment, para. 938.
[1896] Judgment, para. 938.
[1897] *See* section XVIII, *supra*.
[1898] *See* paras. 530-540, 548, *supra*.
[1899] **E74**, 'Trial Chamber Response to Motion E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 Following Trial Management Meeting of 5 Apr 2011', 8 Apr 2011, p. 3.
[1900] Judgment, para. 35.

certain conditions.[1901]

707. While this error does not invalidate the Judgment, it is of general importance to the jurisprudence of the Tribunal. Facts contained in confessions allegedly produced by torture will be of considerable importance to Nuon Chea's defence in Case 002/02.[1902] In particular, those confessions establish the existence of an internal conflict within the CPK which constitutes the foundation of Nuon Chea's defence in Case 002/01, and especially Case 002/02. Given that the Trial Chamber has already erred in law, that this Chamber's jurisdiction over immediate appeals is very limited, and that it will not be possible to remedy the prejudice of this error in connection with the appeal against the Case 002/02 judgment (since it concerns, *inter alia*, the use of such evidence during the examination of witnesses), it is essential that this Chamber address it now.

A. Article 15 of CAT does not apply to the defence

708. Article 15 of the CAT states:

> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

709. As discussed above, Article 31 of the VCLT requires that a treaty be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The 'context' consists of the text (including the preamble and annexes) of the treaty, as well as any agreement or instrument made by one or more parties in connection with the conclusion of the treaty and accepted by other parties.[1903] Consideration may also be given to any subsequent agreement between, or practice among, the states parties regarding the interpretation or application of its provisions.[1904]

[1901] The Defence notes that during trial it supported the exclusionary rule adopted by the Chamber. For reasons elaborated herein, the Defence continues to maintain that torture-tainted evidence is inadmissible *against* Nuon Chea. The importance of S-21 confessions to Nuon Chea's defence became more clear only later and accordingly the Defence now seeks to rely on that material as evidence for that purpose.

[1902] The Defence emphasizes that the evidence has not established that any particular confession was produced by torture and intends to litigate this question of fact in Case 002/02. However, given the likelihood that the Trial Chamber will rule that some relevant evidence on which the Defence will seek to rely was produced by torture, the appeal on this question of law remains critical.

[1903] VCLT, Art. 31(2).

[1904] VCLT, Art. 31(3). The Defence notes that CAT Article 15 is sometimes described as having three rationales: i) torture-tainted statement is inherently unreliable and not suitable for evidentiary purposes, ii) the use of such a statement is unfair and jeopardises the integrity of judicial proceedings/the administration of justice, and iii) the exclusion of such a statement as evidence would take away a major incentive for people to use torture. This 'multi-rationale theory' appears to have originated from the 1988 Burgers & Danelius's Commentary on CAT, which in making this particular comment on Article 15 did not refer as its basis to any official document or any opinions expressed by state delegates during the drafting of CAT. In fact, Burgers & Danelius itself had made it clear that this 'multi-rationale theory' was merely the authors' opinion and speculation by using the expression 'would seem to be'. *See* Burgers & Danelius, 'The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment' (1988), p. 148. Such academic opinion is not direct evidence of the interpretation of a treaty. *See* para. 469, *supra*. Since the 'multi-rationale theory', as the mere speculation of scholars, does not constitute the 'context' of the treaty or any subsequent agreement or practice among the parties, it does not constitute a primary mode of interpretation of Article 15. The Defence further notes that the work of the Committee against Torture, which sometimes refers to the 'multi-rationale theory', similarly has no bearing on the interpretation of CAT. This is because the Committee is composed of independent experts who act in

i – Object and purpose of CAT

710. CAT's preamble provides a clear description of its object and purpose, in particular paragraph 6, which expresses the states parties' desire 'to make more effective the struggle against torture and other inhuman or degrading treatment or punishment throughout the world'. This object and purpose is reflected throughout CAT, which focuses on formulating measures designed for the prevention and punishment of torture and other ill-treatment – in other words, measures that would 'make more effective the struggle' against such ill-treatment. Article 15 serves this object and purpose by removing a major incentive for law enforcement to use torture, with a view to contributing to its prevention.

711. Nothing in the preamble suggests that rules of evidence and the right to a fair trial form part of CAT's concern. On the contrary, the fact that the preamble refers only to Article 5 of the UDHR and Article 7 of the ICCPR (both of which concern the principle that no one shall be subjected to ill-treatment) while refraining from referring to any other provisions, including those relating to fair trial rights, clearly evidences that such issues do not constitute CAT's object and purpose.

ii – Interpretation of Article 15 in light of the object and purpose of CAT

712. In light of the object and purpose of CAT, the only reasonable interpretation of Article 15's exclusionary rule is that it applies only to the use of the content of torture-tainted statements by state authorities *against* individuals, rather than *by* individuals *for* their defence. This interpretation is consistent with the language of Article 15.

713. Article 32 of the VCLT permits recourse to 'the preparatory work of the treaty and the circumstances of its conclusion' where a provision remains ambiguous following the application of Article 31. The preparatory work and drafting history of CAT[1905] shows that Article 15 originated from Article 12 of the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This provision reads:

> Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment may not be invoked as evidence *against* the person concerned or *against* any other person in any proceedings. (emphasis added)

The use of the term 'against' has the effect of limiting the scope of the application of this article. However, as rightly observed by the New Zealand High Court in *R v. Vagaia*, when a defendant uses a statement in support of his or her defence, the use was 'for' that person and 'by' that person, rather than

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their personal capacity and whose work does not represent opinions of any state party. *See* para. 472, *infra* (citing Thirlway). Moreover, according to CAT Article 30, disputes concerning the 'interpretation or application' of CAT is to be settled by negotiation, arbitration or decisions of the ICJ, not the Committee. The Committee's role in relation to the settlement of disputes between state parties is explicitly limited by Article 21 to 'good offices' or 'conciliation'. Accordingly, the Committee is not entrusted with any power to give authoritative interpretation of CAT.

[1905] UN Economic and Social Council, Commission of Human Rights, 'Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in particular Torture and Other Cruel Inhumane or Degrading Treatment or Punishment', 35th Session, UN Doc. No. E/CN.4/1314, 19 Dec 1978., p. 18; Nowak & McArther, 'The United Nations Convention Against Torture: A Commentary' (2008), pp. 506-507.

'against' anyone.[1906] Thus, the High Court concluded that a rule prohibiting the use of certain evidence 'against' a person does not prohibit a person to use that evidence 'for' him/herself.[1907] Similarly, the term 'against' in Article 12 of the 1975 Declaration clearly indicates that the article was not intended to be applied to the use of torture-tainted statements *by* and *for* a person.[1908]

iii – Subsequent state practice

714. Article 31(3) of the VCLT permits reference to subsequent agreement between or practice among state parties in the interpretation of a treaty. State practice confirms that Article 15 of CAT is intended only to exclude the use of evidence by the prosecution against a defendant. Most significantly, the Constitution of the Kingdom of Cambodia prohibits the use of confessions obtained by physical or mental force 'as evidence of guilt'.[1909] In New Zealand, the only exclusionary rules relevant to CAT Article 15 are those formulated in Sections 28-30 of the 2006 Act, which regulate the exclusion of a defendant's out-of-court statements on the grounds of being unreliable, influenced by oppression (including ill-treatment), or improperly obtained. All three sections explicitly limit their application to situations where it is the prosecution who offers or proposes to offer the evidence (against an accused). In its 2013 Review of the 2006 Act, the New Zealand Law Commission expressly explained that '[t]he applicable rules that determine whether a defendant's statement is admissible depend on who is seeking to adduce the statement: the defendant, the prosecution, or a co-defendant',[1910] and that when it is a co-defendant, rather than the prosecution, who proposes to use the confession of a defendant as evidence, the admissibility of the statement will be governed by the 'general admissibility rules' such as hearsay, rather than by the exclusionary rules set out in Sections 28-30.[1911] In the German Code of Criminal Procedure, exclusionary rules relevant to CAT Article 15 can be found in Sections 136a and 69a, which provide for the exclusion of statements obtained in a manner that impairs the accused's or a witness's 'freedom to make up his mind and to manifest his will'. Both sections are specifically designed to govern the admission of statements obtained through the 'examination' (similar to interview) process, during which the accused and witnesses are examined by the state authorities for the purpose of a particular trial. Therefore, these rules do not apply to statements that are not produced by the state authorities' 'examination' for the need of the present trial, for example, contemporaneous statements

[1906] *R v. Vagaia*, HC AK CRI 2006-092-16228 [2008] NZHC 306, 11 Mar 2008, para. 9. The issue in question was whether a co-defendant was allowed to use of the confession of another defendant in the same case. The NZ law stipulates that the confession of one defendant may not be used "against" another defendant (co-defendant) tried in the same case.
[1907] *R v. Vagaia*, HC AK CRI 2006-092-16228 [2008] NZHC 306, 11 Mar 2008, para. 9.
[1908] While the final language of Article 15 removed the word 'against', the reason for this decision was *not* to prohibit the use of torture-tainted evidence by or for the accused, but to ensure that such evidence *could* be used against the torturer. *See*, Nowak & McArther, 'The United Nations Convention Against Torture: A Commentary' (2008), pp. 505-507. Accordingly, the purpose was not to expand Article 15, but to restrict it.
[1909] Constitution of the Kingdom of Cambodia, Art. 38.
[1910] 'The 2013 Review of the Evidence Act 2006', New Zealand Law Commission, 11 Mar 2013, para. 3.38.
[1911] 'The 2013 Review of the Evidence Act 2006', New Zealand Law Commission, 11 Mar 2013, para. 3.44.

produced before the state even started to pursue the case. Accordingly, both New Zealand and Germany continue to follow the original intent interpretation of CAT Article 15: that it is limited to the use of the statement by the prosecution as evidence *against* an individual.

715. In the United Kingdon, the 1984 Police & Criminal Evidence Act similarly provided only for the exclusion of confessions of the accused proposed for admission by the prosecution (s76). The 2003 Criminal Justice Act subsequently extended the exclusionary rule to the use of a torture-tainted confession by a co-accused person charged in the *same trial*. The limited nature of this extension reflects the same underlying rationale as the prohibition on the use of such evidence by the prosecution: it is concerned with the potential prejudice to one defendant which may be caused by the use of such evidence by another defendant in the same trial. This rule, which does not apply to separate trials, establishes that the UK legislature consciously chose to continue to permit the use of torture-tainted evidence by an accused in all other scenarios.

716. These considerations establish that CAT Article 15 was not and is not intended to cover the use of a statement by an accused in defence of his innocence, rather than against him (let alone a scenario where the person who made the statement is not charged in the same proceeding as the person who proposes to use the statement).

B. Torture-tainted evidence adduced by the Accused may be admitted

717. In the absence of applicable *lex specialis*, the admission of torture-tainted statements in the scenarios not covered by CAT Article 15 is governed by the general rules concerning the admissibility of evidence.[1912] As a general rule, any evidence that is relevant and probative is admissible, no matter how it is obtained.[1913] At the admission stage, only *prima facie* relevance and probative value is required.[1914] Factors that may affect the reliability of an out-of-court statement include the circumstances in which it was made, whether it is corroborated by other evidence, and whether there are manifest inconsistencies in it.[1915] The Chamber retains the discretion to admit the evidence '[e]ven if one or more of these indicia of reliability are absent'.[1916] Accordingly, a torture-tainted statement may still prove *prima facie* reliable in view of other relevant factors, such as corroboration and internal consistency. As remarked by Lord Bingham in *A & Ors*, 'there can ordinarily be no surer proof of the

[1912] *See, e.g.*, 'The 2013 Review of the Evidence Act 2006', New Zealand Law Commission, 11 Mar 2013, para. 3.44.
[1913] Mark Klamberg, 'Evidence in International Criminal Trials' (2013), p. 397; *A & Ors v. Secretary of State for Home Department*, UK House of Lords, [2005] UKHL 71, paras. 85, 138.
[1914] *Prosecutor v. Karadžić*, 'Decision on Accused's Motion for Admission of Evidence of Radislav Krstić pursuant to Rule 92 *Quater*', IT-95-5/18-T, 26 Nov 2013, para. 25.
[1915] *Prosecutor v. Karadžić*, 'Decision on Accused's Motion for Admission of Evidence of Radislav Krstić pursuant to Rule 92 *Quater*', IT-95-5/18-T, 26 Nov 2013, para. 12.
[1916] *Prosecutor v. Karadžić*, 'Decision on Accused's Motion for Admission of Evidence of Radislav Krstić pursuant to Rule 92 *Quater*', IT-95-5/18-T, 26 Nov 2013, para. 12.

reliability of an involuntary statement than the finding of real evidence as a direct result of it'.[1917] The involuntary nature of a statement is not decisive for reliability.

718. Admission of evidence is a discretionary decision of the Chamber. At the ECCC, this discretion is reflected in Rule 87(3). Exercising that discretion involves striking a balance between conflicting values. It is crucial to determine first and foremost what values are at stake, so that a chamber would be able to avoid abusing its discretionary power by '[giving] weight to 'extraneous or irrelevant considerations' or 'fail[ing] to give weight or sufficient weight to relevant considerations'.[1918]

719. When the prosecution seeks to use a torture-tainted statement against an individual (the scenario covered by CAT Article 15), the value of crime control (the public interest in convicting the guilty) conflicts with the need to ensure proper behaviour by the authorities, the struggle against torture, and the moral concerns over the brutality of torture. Judicial decisions and academic work on the topic of the exclusion of evidence under CAT Article 15 accordingly focus their analysis on these values. This is exemplified by *A & Ors* and the extensive sources referred to therein, in which the court emphasized that the core concern is ensuring that '*conviction*' may not be obtained at 'too high a price'; that is to say, in prosecuting crimes, the state is not allowed to disregard 'certain decencies of civilised conduct' or act in such a manner that 'shocks the community', as such conduct 'would compromise the integrity of the judicial process, dishonour the administration of justice'.[1919]

720. By contrast, when a defendant seeks to use torture-tainted evidence in support of his or her defence, the value of crime control is replaced by the value of ensuring that the innocent must not be convicted. Ensuring that the innocent is not convicted is the *overriding* concern of a criminal proceeding.[1920] As Judge Van den Wyngaert stated in her dissenting opinion in *Katanga*, 'the trial must be first and foremost fair towards the accused. […] *After all*, when all is said and done, *it is the accused - and only the accused – who stands trial and risks losing his freedom* and property'.[1921] ICTY jurisprudence has also repeatedly emphasised that 'an *over-riding* principle in matters of admissibility of evidence' is that '[t]he Trial Chamber is […] the guardian and guarantor of the procedural and

[1917] *A & Ors v. Secretary of State for Home Department*, UK House of Lords, [2005] UKHL 71, para. 16.
[1918] Duch Appeal Judgment, para. 354 (citing Dragomir Milošević Appeal Judgment, para. 297); *see*, *also*, Lukić & Lukić Appeal Judgment, para. 17.
[1919] *A & Ors v. Secretary of State for Home Department*, UK House of Lords, [2005] UKHL 71, *see*, e.g., paras. 17, 20 ('*executive* misconduct', 'amount to an affront to the public conscience'), 21 ('The need to discourage such conduct *on the part of those who are responsible for criminal prosecutions* is a matter of public policy'), 22 ('every court has an inherent power and duty to prevent abuse of its process. […] By recourse to this principle courts ensure that *executive agents* of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state'), 87, 88 ('necessary balance between preserving the integrity of the judicial process and the *public interest in convicting the guilty*'), 112 ('the denial of the use of such methods to *the executive*'), 113 ('once judicial approval is given to such conduct, it lies about like a loaded weapon ready for the hand of *any authority* that can bring forward a plausible claim of an urgent need') (emphasis added)
[1920] *See*, e.g., *Queen v. Oickle*, Canada, [2000] 2 SCR 3, pp. 6, 27, 42.
[1921] *Prosecution v. Katanga*, 'Minority Opinion of Judge Christine Van den Wyngaert', ICC-01/04-01/07, 7 Mar 2014, para. 311 (emphasis added).

substantive rights of the accused'.[1922]

721. In line with this common understanding, many domestic legal systems give leeway to the accused in terms of admission of evidence when innocence is at stake. The NMTs adopted a largely liberal approach towards evidence admission, in particular when it comes to defence evidence. In the *Einsatzgruppen* case, the Tribunal II considered some of the defendants' evidence 'strictly irrelevant and might well be regarded as the red herring drawn across the trial', but it nevertheless admitted all of them on the ground that 'the Tribunal's policy throughout the trial has been to admit everything which might conceivably elucidate the reasoning of the defence'.[1923] In Canada, the rule of confidentiality of the identity of police informants, which is based on public policy, is subject to only one exception, i.e. 'innocence at stake' exception.[1924] The rationale is that when these two public policies are conflicting, '*that an innocent man is not to be condemned when his innocence can be proved* is the policy that *must prevail*'.[1925] In Denmark's national law, one of the general positions towards illegally obtained evidence is that if the unlawfully obtained evidence is favourable to the defendant, the evidence 'must as a main rule be admitted'.[1926] In Greece, the jurisprudence is that the Constitution does not preclude the use of illegally obtained information as evidence for the purpose of establishing the innocence of the accused.[1927] Austrian courts also indicate that illegally obtained evidence is not automatically excluded, especially when the admission of evidence by the Accused appears to be imperative in the interest of fair proceedings.[1928]

722. Where a torture-tainted statement is sought as evidence by a defendant and may prove his innocence or materially assist in so proving, a court should admit the evidence and assess its weight later. This is particularly so in regard to the very serious charges at issue in Case 002. As rightly remarked by the ECtHR, 'the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures'.[1929] Nuon Chea's interest in adducing evidence critical to his defence against crimes against humanity, war crimes and genocide implicating *millions* of alleged victims is the overriding consideration.

XXIII. CONCLUSION AND RELIEF SOUGHT

723. Nuon Chea has never tried to deny the jurisdiction of the ECCC to try him in respect of crimes

[1922] *See*, e.g., *Prosecutor v. Martić*, 'Decision on Adopting Guidelines on the Standards Governing the Admission of Evidence', IT-95-11-T19 Jan 2006, para. 11 (emphasis added).
[1923] *Cited in* Heller, *Nuremberg Military Tribunals*, p. 140.
[1924] *See*, e.g., *R v. Mills* Canada, [1999] 3 SCR 668, p. 720; *Bisaillon v. Keable*, Canada, [1983] 2 SCR 60, pp. 62, 90, 93.
[1925] *Bisaillon v. Keable*, Canada, [1983] 2 SCR 60, p. 90 (emphasis added).
[1926] E.U. Network of Independent Experts on Fundamental Rights, 'Opinion on the status of illegally obtained evidence in criminal procedures in the Member States of the European Union', CFR-CDF.opinion3-2003, 30 Nov 2003 ('EU Opinion on Illegally-Obtained Evidence'), p. 13.
[1927] EU Opinion on Illegally-Obtained Evidence, pp. 17-18.
[1928] EU Opinion on Illegally-Obtained Evidence, pp. 9-10.
[1929] *P. C. & S. v. UK*, 'Judgement', ECtHR, App. No. 56547/00, 16 Oct 2002, para. 91.

committed during the DK period. This is because Nuon Chea has never denied having been a senior leader of the CPK. He has never denied that serious crimes were committed in DK. He has long accepted his moral responsibility for such crimes, and he has repeatedly expressed his sincere remorse for the suffering endured by the people of Cambodia as a result. He has not accepted criminal responsibility, but that is different and legitimate – and in any case, notwithstanding this position, Nuon Chea has nevertheless been happy to have the opportunity, after all this time, to explain to the Cambodian people what truly happened, and *why*.

724. However, as the investigation and trial against him has unfolded and the limited edifice of a tribunal searching for the truth and committed to justice has crumbled away, Nuon Chea has repeatedly expressed his disappointment and frustration at how the Tribunal has conducted itself and, in particular, how it has interpreted its jurisdictional mandate. In his first remarks to the Trial Chamber in the Case 002/01 trial, Nuon Chea articulated this frustration as follows:

> I am of the opinion that this Court is unfair to me since the beginning because *only certain facts* are to be adjudicated by this Court. I must say *only the body of the crocodile is to be discussed, not its head or the tail which are the important parts of its daily activities*. All it means, the root cause and its consequence are those that happened pre-1975 and post-1979 are ignored by this Court.[1930]

725. Nuon Chea's prediction was proved astute on every single day of trial and on every page of the Judgment that has ultimately been handed down against him. The Tribunal that has emerged is precisely the one he anticipated. It is one interested only in presenting a narrative that had been approved before the negotiations for the Tribunal's establishment even began. That narrative lays any and all blame for what happened in the DK squarely at the feet of Nuon Chea and a tiny group of CPK leaders, while simultaneously curing those who occupy the highest offices of the Cambodian government of the taint of their dark past as senior CPK military officers critically responsible for implementing CPK policies. Most importantly, the Tribunal has proven to be a diligent servant of the victors of the overall conflict that raged in Southeast Asia for three decades by ensuring that the head and the tail of the crocodile – namely all that happened before and after the DK – remain conspicuously missing from the final narrative.

726. Thus, the Judgment fails to mention, for instance, that the war crimes committed by the US in carpet bombing Cambodia resulted in at least ten times as many deaths as the forced evacuation of Phnom Penh. It say nothing about the fact that many CPK actions were in direct response not simply to that bombing campaign but also to the violence perpetrated by the US-sponsored Khmer Republic forces that bitterly opposed the CPK in a protracted civil war. Neither does the Judgment acknowledge that the Vietnamese invasion of Cambodia in January 1979, carried out under the flimsy guise of humanitarian intervention, was in reality anything but; that it was in fact intended to fulfil Vietnam's

[1930] T. 22 Nov 2011 (Nuon Chea, **E1/14.1**), p. 77:16-22.

longheld expansionist ambitions and a naked crime of aggression precisely of the type that triggered the establishment of the IMT at Nuremberg and which in turn gave birth to the field of law that this Tribunal now applies. As King Father Norodom Sihanouk remarked at a UN Security Council meeting mere days after the Vietnamese invasion of DK:

> [T]he Socialist Republic of Viet Nam came to the point of launching an all-out attack with all the power of its Hitlerite armed forces for the conquest of Kampuchea. The[ir] irresistible advance […] a veritable German-style blitzkrieg in nature, strangely reminds us of the blitzkrieg of the Hitlerite armed forces to which so many European countries-France and Poland in particular-fell victim at the beginning of the Second World War.[1931]

727. Similarly, the Judgment is silent as to the acts of violence perpetrated by the Vietnamese in Cambodia and southern Vietnam after the DK. It also cursorily dismisses as a mere fantasy the well-evidenced fact that Vietnam had served as a longstanding patron to a competing faction of the CPK who worked to undermine Pol Pot and Nuon Chea and were rewarded with plum posts in the puppet government Vietnam installed thereafter – posts they continue to cling on to today.

728. In its zealous fulfilment of its perceived mandate and in keeping with the approved script, in the Case 002/01 Judgment, the Trial Chamber offered up a Manichean explanation of events in the DK in which the CPK leadership represented all that was dark in the world, regardless of the inconvenient fact that this tale was woefully bereft of the necessary supporting evidence. In so doing, the Chamber committed hundreds of errors of law and fact which the Defence has articulated in the instant Appeal.

729. Had the Trial Chamber taken even small steps to acknowledge Nuon Chea's grievances – even in passing, for example, as a mitigating factor in sentencing – then this would have been better than nothing. It chose not to do that, however. The Judgment it has issued is instead a representation of victor's justice in its purest form; the completion of a sustained Vietnamese propaganda campaign; and a boon to both Nixon and former General-Secretary of the Communist Party of Vietnam Le Duan,, whose 'fond dream' of installing Vietname as the 'overlord' of an Indochinese Federation has, in some in its own limited way, come to pass.[1932] Both men must surely be smiling in their graves. Former UN Legal Counsel Hans Corell had said that no credible justice can be done at this Tribunal. The final verdict in this regard depends on the judgment this Chamber will render in response to this Appeal, but all signs indicate that Corell was right.

730. The Defence hereby requests that the Supreme Court Chamber:

a. acting pursuant to Rule 108(7), summons Heng Samrin, Ouk Bunchhoen, [redacted], Thet Sambath and Rob Lemkin to testify;

[1931] **E307/2.2.2**, 'UN Security Council Official Records 2108th Meeting 11 January 1979', ERN 01001643.
[1932] This description of Le Duan comes not from a political opponent but from Hoang Van Hoang, a former member of the Standing Committee of the Communist Party of Vietnam and Le Duan's senior within that Party. Hoang Van Hoan accused Le Duan of having been responsible for 'having committed genocide in Kampuchea' together with the 'Heng Samrin puppet clique'. *See* Hoang Van Hoan, *A Drop in the Ocean,* 1988, p. 360.

b. acting pursuant to Rule 108(7), seek to obtain material in possession of Thet Sambath and Rob Lemkin relevant to the charges in Case 002/01;
c. acting pursuant to its *de novo* appellate jurisdiction, summons Sam Sithy, [redacted], [redacted] and [redacted] to testify;
d. take steps to investigate and determine the provenance and chain of custody of document E3/832;
e. declare that evidence obtained through torture may be admitted pursuant to the ordinary rules of evidence where tendered by the Accused; and
f. invalidate the Judgment in full and enter acquittals in respect of all charges.

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