ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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

អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

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

Before:	**Judge KONG Srim, President** **Judge Chandra Nihal JAYASINGHE** **Judge SOM Sereyvuth** **Judge Florence Ndepele MWACHANDE-MUMBA** **Judge MONG Monichariya** **Judge Phillip RAPOZA** **Judge YA Narin**
Greffiers:	**Peace MALLENI, SEA Mao, PHAN Theoun**
Date:	**23 December 2022**
Language(s):	**Khmer/English**
Classification:	**PUBLIC**

APPEAL JUDGMENT

Co-Prosecutors
CHEA Leang
Fergal GAYNOR (Reserve)

Accused
KHIEU Samphân

Civil Party Lead Co-Lawyers
PICH Ang
Falguni DEBNATH

Co-Lawyers for KHIEU Samphân
KONG Sam Onn
Anta GUISSÉ

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I. INTRODUCTION

1. The **SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") for the Prosecution of Crimes committed during the Democratic Kampuchea regime between 17 April 1975 and 6 January 1979 hereby renders its judgment on the appeals by the Co-Prosecutors and KHIEU Samphân[1] against the Trial Chamber Judgment pronounced on 16 November 2018 and notified to all parties on 28 March 2019 in Case 002/02 against KHIEU Samphân ("Trial Judgment").[2]

A. FACTUAL BACKGROUND

2. The events giving rise to the appeals in this case occurred between 17 April 1975 and 6 January 1979 when the Communist Party of Kampuchea ("CPK") reinforced, consolidated, and exercised power over the newly named Democratic Kampuchea ("DK", formerly known as the Kampuchea Republic and prior to that as the Kingdom of Cambodia) and its population by dismantling the existing organs of the state and establishing parallel institutions and structures under the CPK's exclusive control.[3] The Trial Chamber found that the CPK enforced policies that, *inter alia*, abolished private ownership and a currency economy.[4] To govern the populace and wage class struggle, projects establishing cooperatives, airstrips, dams, security centres, and worksites were initiated across the country.[5] Throughout the DK period, the civilian population was denied basic fundamental freedoms and was subjected to widespread acts of extreme cruelty including the destruction of family life, and a culture of fear prevailed through killing, torture, physical violence, forced marriage, forced labour, enforced disappearances, and other inhumane treatment where the plight of the people appeared to be a matter of extreme indifference to the CPK leaders.[6] Many of the acts were discriminatory.[7] Thousands of Cambodians were slain or perished as a consequence of the CPK's policies, while hundreds of thousands fled the country.[8]

[1] Co-Prosecutors' Appeal against the Case 002/02 Trial Judgment, 20 August 2019, F50 ("Co-Prosecutors' Appeal (F50)"); Case 002/02 KHIEU Samphân's Appeal Brief, 27 February 2020, F54 ("KHIEU Samphân's Appeal Brief (F54)").
[2] Case 002/02 Judgement, 16 November 2018, E465 ("Trial Judgment (E465)").
[3] Trial Judgment (E465), para. 276.
[4] Trial Judgment (E465), para. 279.
[5] Trial Judgment (E465), para. 279.
[6] Trial Judgment (E465), paras 279, 296.
[7] Trial Judgment (E465), para. 296.
[8] Trial Judgment (E465), paras 296-297.

3. KHIEU Samphân was born on 27 July 1931 in Chek or Rumchek Commune, Rumduol District, Svay Rieng province.[9] He was educated in Cambodia and in France, first as a lawyer, and subsequently he achieved a Doctorate in Economics from the University of Paris in 1959.[10] He had a longstanding and renowned political career in Cambodia.[11] After a spate of anti-leftist persecution by the Sihanouk government in 1960, he fled into the underground.[12] After Prince Sihanouk was overthrown in 1970, KHIEU Samphân joined a pro-royalist Khmer Rouge government in China, where, among other positions, he served as Royal Government of the National Union of Kampuchea ("GRUNK") Deputy Prime Minister and Minister of National Defence.[13] From early 1976, he publicly represented DK as President of the State Presidium.[14] His duties included appearing as State leader, conducting diplomatic relations and generally promoting the CPK party line through speeches and statements.[15] He was seen as a powerful figure within the CPK from the early days of the Khmer Rouge, and the Trial Chamber found that his functions extended deep into the CPK and the State's core operations.[16] His workplace Office 870 was the government's operational hub.[17] He worked and lived in close proximity to the highest figures in the CPK and survived all purges of those luminaries.[18] He was a senior leader and co-conspirator with other CPK leaders.[19] He was a member of the powerful CPK Central Committee, and he attended Standing Committee meetings where critical issues were discussed and crucial decisions were made at the highest level of control.[20]

4. The Trial Chamber convicted KHIEU Samphân of the crimes against humanity of murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political, religious, and racial grounds, and other inhumane acts comprising conduct characterised as enforced disappearances, forcible transfer, forced marriage, and rape in the context of forced marriage.[21] He was also convicted of genocide by killing members of the Vietnamese group[22] and grave breaches of the Geneva Conventions, namely wilful killing,

[9] Trial Judgment (E465), para. 564.
[10] Trial Judgment (E465), paras 564-567.
[11] Trial Judgment (E465), paras 582, 624, Disposition.
[12] Trial Judgment (E465), paras 569, 572.
[13] Trial Judgment (E465), para. 576.
[14] Trial Judgment (E465), paras 576, 582, 591-592, 594, 596-599, 624, 4257, Disposition.
[15] Trial Judgment (E465), paras 597-599, 624, Disposition.
[16] Trial Judgment (E465), paras 607, 619-621, 624, Disposition.
[17] Trial Judgment (E465), paras 608, 616, 619.
[18] Trial Judgment (E465), paras 589, 603-604.
[19] Trial Judgment (E465), paras 4306-4307.
[20] Trial Judgment (E465), paras 574, 600-604, 624, Disposition.
[21] Trial Judgment (E465), paras 4306-4307, 4326-4328, 4331-4332, Disposition.
[22] Trial Judgment (E465), paras 4293-4294, 4330-4336, Disposition.

torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving prisoners of war or civilians the rights of fair and regular trials, and the unlawful confinement of civilians.[23]

5. The Trial Chamber sentenced KHIEU Samphân to life imprisonment.[24] Taking into consideration the life sentence imposed on him in Case 002/01, the Trial Chamber merged the two sentences into a single term of life imprisonment.[25] It also found that the civil parties suffered harm by acts for which KHIEU Samphân was convicted, and consequently granted, in part, their plea for moral and collective reparations, endorsing thirteen specific communal memorial projects.[26]

B. PROCEDURAL HISTORY

6. As a result of their convictions for crimes against humanity, grave breaches of the Geneva Conventions, and genocide, KHIEU Samphân and his co-Accused, the late NUON Chea, were sentenced to life imprisonment by the Trial Chamber on 16 November 2018.[27] On that day, the Trial Chamber issued a summary of its findings, indicating that the authoritative account of its written reasons in full would be made available in due course and its fully reasoned, written judgment was notified in Khmer, English, and French on 28 March 2019.[28] Three days after the Trial Chamber issued the summary of its findings, KHIEU Samphân filed an urgent appeal requesting that the Supreme Court Chamber annul it for lack of form, and declare the subsequent fully reasoned Trial Judgment invalid.[29] The Supreme Court Chamber dismissed the urgent appeal on 13 February 2019.[30] On 20 March 2019, KHIEU Samphân requested this Chamber to annul this decision, citing the Court's unlawful composition.[31] He submitted that the Reserve Judge of the Supreme Court Chamber, Judge RAPOZA, was not properly designated as a sitting judge when the decision was delivered.[32] On 16 August 2019,

[23] Trial Judgment (E465), paras 4291, 4295, 4341, Disposition.
[24] Trial Judgment (E465), paras 4400, 4402, Disposition.
[25] Trial Judgment (E465), para. 4402, Disposition.
[26] Trial Judgment (E465), paras 4454-4467, Disposition.
[27] T. 16 November 2018 ("Pronouncement of Judgment in Case 002/02"), E1/529.1, ERN (EN) 01595987-01595990, pp. 53-56.
[28] T. 16 November 2018 ("Pronouncement of Judgment in Case 002/02"), E1/529.1.
[29] KHIEU Samphân's Urgent Appeal against the Judgement Pronounced on 16 November 2018, 19 November 2018, E463/1 ("KHIEU Samphân's Urgent Appeal (E463/1)").
[30] Decision on KHIEU Samphân's Urgent Appeal against the Summary of Judgement Pronounced on 16 November 2018, 13 February 2019, E463/1/3 ("Decision on KHIEU Samphân's Urgent Appeal (E463/1/3)").
[31] KHIEU Samphân's Request for Annulment of Decision E463/1/3 on his Urgent Appeal against the Judgement of 16 November 2018, 20 March 2019, E463/1/4 ("KHIEU Samphân's Annulment Request (E463/1/4)").
[32] KHIEU Samphân's Annulment Request (E463/1/4).

the Supreme Court Chamber dismissed the request, concluding that at the time the impugned decision was issued, Judge RAPOZA had been validly appointed and sworn in as a Supreme Court Chamber Judge, and thus the chronology of the filing of the Chamber's decision had been mischaracterised in relation to the judge's appointment.[33]

7. On 3 April 2019, NUON Chea and KHIEU Samphân filed requests for extensions of time to file their respective notices of appeal against the Trial Judgment, as well as increased page limits.[34] On 26 April 2019, this Chamber granted these requests.[35] On 3 May 2019, KHIEU Samphân filed a request for reconsideration of this decision, arguing that this Chamber did not consider all his submissions.[36] The Supreme Court Chamber dismissed the request on 7 June 2019, stating that KHIEU Samphân's objection to the impugned decision did not establish an error or circumstances justifying review in order to avert injustice.[37]

8. On 21 June 2019, the Co-Prosecutors filed their notice of appeal against the Trial Judgment, setting forth a single ground of appeal.[38] They submitted that the Trial Chamber erred in law and/or fact by finding that male victims of forced marriage who were coerced to have sexual intercourse without their consent were not victims of the crime against humanity of other inhumane acts.[39] On 1 July 2019, NUON Chea and KHIEU Samphân filed notices of appeal against the Trial Judgment.[40] NUON Chea listed 351 grounds of appeal,[41] while KHIEU Samphân advanced at least 1,824 errors allegedly committed by the Trial Chamber.[42] On 23 July 2019, NUON Chea requested an extension of time and page limits for filing his appeal brief.[43] Twelve days later, NUON Chea passed away at the Khmer-Soviet Friendship Hospital

[33] Decision on KHIEU Samphân's Request for Annulment of Decision E463/1/3 on his Urgent Appeal against the Judgement of 16 November 2018, 16 August 2019, E463/1/5.
[34] NUON Chea's Urgent First Request for an Extension of Time and Page Limits for Filing his Notice of Appeal against the Trial Judgement in Case 002/02, 3 April 2019, F40/1.1; KHIEU Samph[â]n Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 3 April 2019, F39/1.1.
[35] Decision on NUON Chea and KHIEU Samphân's Requests for Extension of Time and Page Limits on Notices of Appeal, 26 April 2019, F43.
[36] KHIEU Samphân's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, 3 May 2019, F44.
[37] Decision on KHIEU Samphân's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, 7 June 2019, F44/1.
[38] Co-Prosecutors' Notice of Appeal of the Trial Judgment in Case 002/02, 21 June 2019, E465/2/1 ("Co-Prosecutors' Notice of Appeal (E465/2/1)").
[39] Co-Prosecutors' Notice of Appeal (E465/2/1), para. 2.
[40] NUON Chea's Notice of Appeal against the Trial Judgement in Case 002/02, 1 July 2019, E465/3/1 ("NUON Chea's Notice of Appeal (E465/3/1)"); KHIEU Samphân's Notice of Appeal (002/02), 1 July 2019, E465/4/1 ("KHIEU Samphân's Notice of Appeal (E465/4/1)").
[41] NUON Chea's Notice of Appeal (E465/3/1), pp. 3-60.
[42] KHIEU Samphân's Notice of Appeal (E465/4/1), paras 15-35.
[43] NUON Chea's First Request for an Extension of Time and Page Limits for Filing his Appeal Brief against the Trial Judgement in Case 002/02, 23 July 2019, F47.

in Phnom Penh.[44] Two days later, the Co-Lawyers for NUON Chea requested this Chamber to either terminate the appellate proceedings concerning NUON Chea or, alternatively, allow the appellate proceedings to continue in the interests of justice.[45] On 13 August 2019, the Supreme Court Chamber terminated all proceedings against NUON Chea, remaining seised of the Defence request concerning, *inter alia*, the impact of NUON Chea's death on the Trial Judgment and the underlying conviction.[46] In a subsequent decision dated 22 November 2019, this Chamber clarified that the termination of proceedings against NUON Chea did not vacate the Trial Judgment and that his death barred any appellate review.[47]

9. The Co-Prosecutors filed their Appeal Brief on 20 August 2019,[48] and KHIEU Samphân responded on 23 September 2019.[49] On 7 October 2019, the Civil Party Lead Co-Lawyers ("Lead Co-Lawyers") filed submissions relating to KHIEU Samphân's Response to the Co-Prosecutors' Appeal Brief.[50] On 11 October 2019, KHIEU Samphân challenged this filing by requesting this Chamber to reject the Lead Co-Lawyers' submissions because procedurally they were not permitted to file their submissions as a reply to his response to the Co-Prosecutors' Appeal Brief.[51] On 29 January 2020, this Chamber granted KHIEU Samphân's request, while finding that "the Lead Co-Lawyers [...] may, in the interests of justice, be invited to make oral submissions at the [...] appeal hearing."[52]

10. On 8 October 2019, KHIEU Samphân filed a motion for admission of the additional evidence of Witnesses EK Hen and CHUON Thy and their corresponding audio recordings.[53] On 24 October 2019, the Co-Prosecutors responded to the motion[54] and on 4 November 2019,

[44] NUON Chea's Death Certificate, 4 August 2019, F46/1.1. See also Co-Prosecutors' Submission on NUON Chea's Death Certificate, 5 August 2019, F46/1.
[45] Urgent Request concerning the Impact on Appeal Proceedings of NUON Chea's Death prior to the Appeal Judgement, 6 August 2019, F46/2.
[46] Decision to Terminate Proceedings against NUON Chea, 13 August 2019, F46/3.
[47] Decision on Urgent Request concerning the Impact on Appeal Proceedings of NUON Chea's Death prior to the Appeal Judgement, 22 November 2019, F46/2/4/2.
[48] Co-Prosecutors' Appeal (F50).
[49] KHIEU Samphân's Response to the Prosecution's Appeal in Case 002/02, 23 September 2019, F50/1 ("KHIEU Samphân's Response (F50/1)").
[50] Civil Party Lead Co-Lawyers' Submissions relating to KHIEU Samphân's Response to the Co-Prosecutors' Appeal, 7 October 2019, F50/1/1.
[51] KHIEU Samphân's Defence Request to Reject the Civil Party "Submissions" (F50/1/1) pursuant to the Practice Direction on the Filing of Documents, 11 October 2019, F50/1/1/1.
[52] Decision on KHIEU Samphân's Request to Reject the Civil Parties Submission, 29 January 2020, F50/1/1/2, para. 13.
[53] KHIEU Samphân's Request for Admission of Additional Evidence, 8 October 2019, F51.
[54] Co-Prosecutors' Response to KHIEU Samphân's Request to Admit Additional Evidence (F51), 24 October 2019, F51/1.

KHIEU Samphân submitted his reply.[55] On 6 January 2020, the Supreme Court Chamber granted KHIEU Samphân's request for admission of additional evidence.[56]

11. On 31 October 2019, KHIEU Samphân filed an application to disqualify the six appeal judges who adjudicated Case 002/01.[57] On 15 November 2019, the Co-Prosecutors and the Lead Co-Lawyers successfully sought extension of time to file their respective responses to KHIEU Samphân's application and subsequently filed them on 25 November 2019.[58] On 14 July 2020, a special panel consisting of Judges PRAK Kimsan (Presiding), Olivier BEAUVALLET, NEY Thol, BAIK Kang Jin, HUOT Vuthy, SIN Rith and Steven BWANA of the ECCC ("Special Panel") dismissed KHIEU Samphân's application in its entirety.[59]

12. On 27 February 2020, KHIEU Samphân filed his Appeal Brief in French.[60] On 20 March 2020, the Co-Prosecutors filed a request to respond to KHIEU Samphân's Appeal Brief, which included additional grounds contained from earlier arguments.[61] On 24 April 2020, the Chamber granted the Co-Prosecutors' request.[62] On 23 April 2020, the English translation of Annex A to KHIEU Samphân's Appeal Brief was filed.[63] KHIEU Samphân's Appeal Brief was notified in English and Khmer on 14 July 2020 and 7 October 2020, respectively.[64] On 12 October 2020, the Co-Prosecutors responded in English, with the Khmer and French versions of their Response filed on 24 and 25 November 2020, respectively.[65] The Lead Co-Lawyers

[55] KHIEU Samphân's Reply to the Prosecution's Response to his Request to Admit Additional Evidence, 4 November 2019, F51/2.
[56] Decision on KHIEU Samphân's Request for Admission of Additional Evidence, 6 January 2020, F51/3 ("Decision on Admission of Additional Evidence (F51/3)").
[57] KHIEU Samphân's Application for Disqualification of the Six Appeal Judges Who Adjudicated in Case 002/01, 31 October 2019, F53 ("KHIEU Samphân's Disqualification Application (F53)").
[58] Co-Prosecutors' Response to KHIEU Samphân's Application to Disqualify the Six Appeal Judges Who Adjudicated Case 002/01, 25 November 2019, F53/4; Civil Party Lead Co-Lawyers' Response to KHIEU Samphân's Application for Disqualification of Six Appeal Judges, 25 November 2019, F53/5.
[59] Decision on KHIEU Samphân's Application for Disqualification of Six Appeal Judges Who Adjudicated in Case 002/01, 14 July 2020, 11 ("Decision on KHIEU Samphân's Disqualification Application (11)").
[60] KHIEU Samphân's Appeal Brief (F54).
[61] Co-Prosecutors' Request for Additional Pages to Respond to KHIEU Samphân's Appeal of the Case 002/02 Judgment, 20 March 2020, F55.
[62] Decision on Co-Prosecutors' Request for Additional Pages to Respond to KHIEU Samphân's Appeal Brief of the Case 002/02 Judgement, 24 April 2020, F55/3 ("Decision on Co-Prosecutors' Request (F55/3)").
[63] Annex A – Summary of Grounds for KHIEU Samphân's Appeal (002/02), 23 April 2020, F54.1.1 ("Annex A to KHIEU Samphân Appeal (F54.1.1)").
[64] KHIEU Samphân's Appeal Brief (F54).
[65] Co-Prosecutors' Response to KHIEU Samphân's Appeal of the Case 002/02 Trial Judgment, 12 October 2020, F54/1 ("Co-Prosecutors' Response (F54/1)").

responded in English on 4 January 2021, with the Khmer and French versions filed on 16 and 23 March 2021, respectively.[66]

13. On 22 January 2021, the Supreme Court Chamber scheduled the appeal hearing to be conducted from 17 to 21 May 2021.[67] However, the COVID-19 pandemic prevented this hearing from going ahead.[68] On 28 April 2021, the hearings were rescheduled for, and held on, 16 to 19 August 2021.[69]

14. On 5 August 2022, the Supreme Court Chamber scheduled the pronouncement of its appeal judgment for 22 September 2022.[70]

C. KHIEU SAMPHÂN'S APPEAL

15. Having raised approximately 1,824 alleged errors in his notice of appeal,[71] KHIEU Samphân proceeded to appeal a substantial portion of the Trial Judgment. His main submission on appeal alleges a procedural challenge to the Trial Chamber's pronouncement of a summary of its judgment without notifying full written reasons on the same day, contending that this action renders the Trial Judgment null and void. Alternatively, he submits that the Trial Chamber made errors that require the conviction and sentence to be overturned.[72] The Co-Prosecutors and Lead Co-Lawyers respond that KHIEU Samphân's appeal should be dismissed, and his conviction and sentence be upheld.

D. THE CO-PROSECUTORS' APPEAL

16. The Co-Prosecutors advance a single ground of appeal. They challenge the Trial Chamber's finding that forced sexual intercourse or forced consummation in the context of forced marriage did not constitute the crime against humanity of other inhumane acts in the instance of male victims. They allege that the Trial Chamber made legal and factual errors in its determination on serious physical and mental suffering or injury, as well as on human dignity. Accordingly, they aver that these errors invalidated the decision and resulted in a

[66] Civil Party Lead Co-Lawyers' Response to KHIEU Samphân's Appeal of the Case 002/02 Trial Judgment, 4 January 2021, F54/2 ("Lead Co-Lawyers' Response (F54/2)").
[67] Interoffice Memorandum, 'Notification of appeal hearing dates in Case 002/02 pursuant to Internal Rule 108(3)', 22 January 2021, F58.
[68] Interoffice Memorandum, 'Notification with regard to appeal hearing in Case 002/02 pursuant to Internal Rule 108(3)', 28 April 2021, F62.
[69] Scheduling Order for the Appeal Hearing in Case 002/02, 16 June 2021, F66, pp. 4-5.
[70] Order Scheduling Pronouncement of Appeal Judgment, 5 August 2022, F72.
[71] KHIEU Samphân's Notice of Appeal (E465/4/1), paras 15-35.
[72] KHIEU Samphân's Appeal Brief (F54), paras 29-79.

miscarriage of justice.[73] The Co-Prosecutors request for this finding to be set aside, and that the conviction for the crime against humanity of other inhumane acts be amended to include sexual violence against male victims.[74] The Co-Prosecutors submit that the requested relief is in accordance with Rule 110(4), because KHIEU Samphân has already been convicted of the crime of other inhumane acts.[75]

17. KHIEU Samphân responds that it was impossible to conclude, as a matter of law and fact, that the suffering experienced by "male victims of domestic sexual violence" was sufficiently serious to amount to the crime against humanity of other inhumane acts, and that, as a result, the Co-Prosecutors' appeal should be dismissed.

II. STANDARD OF APPELLATE REVIEW

A. INTRODUCTION

18. Rule 104(1) allows appeals to the Supreme Court Chamber from Trial Chamber judgments or decisions on two grounds: "an error on a question of law invalidating the judgment […] or an error of fact which has occasioned a miscarriage of justice".[76] Appellants may appeal Trial Chamber decisions made during the trial.[77] The Supreme Court Chamber has well established standards of review applicable to each category of error, and no parties to the present appeals have requested this Chamber to depart from these standards.

19. The appellant must identify the alleged errors, substantiate each basis with arguments and sources, and then demonstrate how the error of law or fact invalidates the judgment or occasions a miscarriage of justice.[78] Appeals shall identify the finding or ruling challenged, with specific reference to the page and paragraph numbers of the decision of the Trial Chamber.[79] A clear, logical and cohesive presentation of the appellant's grounds of appeal is required for the Supreme Court Chamber to examine the appeal.[80] An obscure, contradictory,

[73] Co-Prosecutors' Appeal (F50), para. 2.
[74] Co-Prosecutors' Appeal (F50), paras 3, 40.
[75] Co-Prosecutors' Appeal (F50), para. 40.
[76] Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev.9), as revised 16 January 2015 ("Internal Rules"), Rule 104(1).
[77] Internal Rules, Rule 104(4).
[78] Internal Rules, Rule 105(2), (3).
[79] Internal Rules, Rule 105(4).
[80] See Decision on KHIEU Samphân's Request for Extensions of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, F49 ("Decision on KHIEU Samphân's Extension Request (F49)"), paras 15, 17.

vague or otherwise insufficient submission cannot be expected to be considered in depth by the Supreme Court Chamber.[81]

20. Unless the appellant can demonstrate that rejection of an argument made to the Trial Chamber constituted an error warranting the intervention of the Supreme Court Chamber, they may not re-litigate trial arguments *de novo* or advance claims that a given decision or finding of the Trial Chamber was erroneous.[82] Further, arguments that do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Supreme Court Chamber without consideration of the merits.[83]

21. In determining an appeal, the Supreme Court Chamber may confirm, annul or amend decisions in whole or in part.[84] Decisions are final and shall not be sent back to the Trial Chamber.[85]

22. In this instance, KHIEU Samphân appeals both the Trial Judgment and Trial Chamber's interlocutory decisions based on alleged errors of law and fact. The Supreme Court Chamber shall apply its standard of review in accordance with these categories of errors in turn.

B. ALLEGED ERRORS OF LAW

23. When an appellant alleges an error of law, the Supreme Court Chamber, "as the final arbiter of the law applicable before the ECCC, is bound in principle to determine whether an error of law was in fact committed on a substantive or procedural issue".[86] The Supreme Court Chamber reviews the Trial Chamber's legal findings, applying the standard "to determine whether they are correct, not merely whether they are reasonable".[87] Even where a party's

[81] Case 002/01, Appeal Judgement, 23 November 2016, F36 ("Case 002/01 Appeal Judgment (F36)"), para. 101; Case 001, Appeal Judgement, 3 February 2012, F28 ("Case 001 Appeal Judgment (F28)"), para. 20, citing *Prosecutor v. Stakić,* Appeals Chamber (International Criminal Tribunal for the Former Yugoslavia ("ICTY")), IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgment (ICTY)"), para. 12.
[82] Case 002/01 Appeal Judgment (F36), paras 101-102; Case 001 Appeal Judgment (F28), para. 20, citing *Stakić* Appeal Judgment (ICTY), para. 12.
[83] Case 002/01 Appeal Judgment (F36), paras 101-102; Case 001 Appeal Judgment (F28), para. 20.
[84] Internal Rules, Rule 104(2).
[85] Internal Rules, Rule 104(3).
[86] Case 002/01 Appeal Judgment (F36), para. 85; Case 001 Appeal Judgment (F28), para. 14, citing *Prosecutor v. Krnojelac,* Appeals Chamber (ICTY), IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgment (ICTY)"), para. 10.
[87] Case 002/01 Appeal Judgment (F36), para. 85; Case 001 Appeal Judgment (F28), para. 14, citing *Krnojelac* Appeal Judgment (ICTY), para. 10.

arguments are insufficient, the Supreme Court Chamber may consider other reasons to find that a legal error occurred.[88]

24. Where an error is identified in a trial judgment arising from the application of the wrong legal standard, the Supreme Court Chamber will determine the correct legal standard and review the relevant factual findings of the Trial Chamber.[89] In applying this standard of correctness, the Supreme Court Chamber relies on its earlier decision where it:

> not only corrects the legal error but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced on the relevant standard of proof as to the factual finding challenged by a party before that finding is confirmed on appeal.[90]

25. The standard of review is high, such that the Supreme Court Chamber may amend the Trial Chamber's decision only if the error of law invalidates the judgment or decision.[91] Accordingly, not every error of law identified will lead to a reversal or amendment of a Trial Chamber decision. A judgment is invalidated by a legal error when it is proven that in the absence of such an error, a different verdict – in whole or part – would have been entered.[92] In exceptional circumstances, the Supreme Court Chamber may raise questions *ex proprio motu*[93] or hear appeals where an appellant has raised a legal issue that would not lead to the invalidation of the judgment but is nevertheless of general significance to the ECCC's jurisprudence.[94]

C. ALLEGED ERRORS OF FACT

26. As provided in Rule 104, only those errors of fact that demonstrate a miscarriage of justice may result in the Supreme Court Chamber overturning the Trial Chamber's judgment

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[88] Case 001 Appeal Judgment (F28), para. 15.
[89] Case 002/01 Appeal Judgment (F36), para. 86; Case 001 Appeal Judgment (F28), para. 16.
[90] Case 002/01 Appeal Judgment (F36), para. 86; Case 001 Appeal Judgment (F28), para. 16, citing *Prosecutor v. Blagojević and Jokić*, Appeals Chamber (ICTY), IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević & Jokić* Appeal Judgment (ICTY)"), para. 8.
[91] See Internal Rules, Rules 104(1)(a), 105(2)(a).
[92] Case 002/01 Appeal Judgment (F36), para. 99, citing *Prosecutor v. Popović et al*., Appeals Chamber (ICTY), IT-05-88-A, Judgement, 30 January 2015 ("*Popović et al.* Appeal Judgment (ICTY)"), para. 17; *Prosecutor v. Lubanga*, Appeals Chamber (International Criminal Court ("ICC")), ICC-01/04-01/06, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", 1 December 2014 ("*Lubanga* Appeal Judgment against Sentence Decision (ICC)"), para. 19. See also Case 001 Appeal Judgment (F28), para. 16.
[93] Case 001 Appeal Judgment (F28), para. 15, citing *Krnojelac* Appeal Judgment (ICTY), para. 6; Code of Criminal Procedure of the Kingdom of Cambodia, Khmer-English Translation, 9 September 2008 ("Criminal Procedure Code of Cambodia"), Arts 405-406, 440-441.
[94] See Case 002/01 Appeal Judgment (F36), paras 1138-1142; Case 001 Appeal Judgment (F28), para. 15, citing *Prosecutor v. Galić*, Appeals Chamber (ICTY), IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgment (ICTY)"), para. 6.

in whole or in part.[95] A miscarriage of justice is defined as "[a] grossly unfair outcome in judicial proceedings".[96] To occasion a miscarriage of justice, the error of fact must have been "critical to the verdict reached".[97] Consequently, an appeal against a conviction must demonstrate "that the Trial Chamber's factual errors create doubt as to an accused's guilt".[98]

27. The Supreme Court Chamber applies a high standard in reviewing the Trial Chamber's findings of fact. The standard is whether the Trial Chamber's finding was one that no reasonable trier of fact could have reached. The Supreme Court Chamber "will not lightly disturb findings of fact by a Trial Chamber"[99] and is in agreement with the general approach taken by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") Appeals Chamber of affording a margin of deference to a Trial Chamber's factual findings, where it was found that:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.
>
> […]
>
> The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion […].[100]

[95] See Internal Rules, Rules 104(1)(b), 105(2)(c).
[96] Case 002/01 Appeal Judgment (F36), para. 99, citing *Prosecutor v. Furundžija*, Appeals Chamber (ICTY), IT-95-17/1-A, Judgement, 21 July 2000 (ICTY) ("*Furundžija* Appeal Judgment (ICTY)"), para. 37, citing Black's Law Dictionary, 7th ed., 1999; Case 001 Appeal Judgment (F28), para. 19.
[97] Case 002/01 Appeal Judgment (F36), para. 99, citing *Prosecutor v. Kupreškić et al.*, Appeals Chamber (ICTY), IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgment (ICTY)"), para. 29.
[98] Case 002/01 Appeal Judgment (F36), para. 91; Case 001 Appeal Judgment (F28), para. 1.
[99] Case 002/01 Appeal Judgment (F36), para. 88; Case 001 Appeal Judgment (F28), para. 17, citing *Furundžija* Appeal Judgment (ICTY), para. 37.
[100] Case 002/01 Appeal Judgment (F36), para. 89; Case 001 Appeal Judgment (F28), para. 17, citing *Kupreškić et al*. Appeal Judgment (ICTY), paras 30, 32.

Arguments limited to disagreeing with the conclusions of the Trial Chamber and submissions based on unsubstantiated alternative interpretations of the same evidence are not sufficient to overturn factual findings of the trier of fact.[101]

28. The degree of deference afforded to the Trial Chamber's factual findings is "tempered by [its] duty to provide a reasoned opinion".[102] Consequently, in determining whether its intervention is required to revise the disputed findings, the Supreme Court Chamber will carefully review the reasoning provided in support of the factual findings reached, bearing in mind the general rule that "where the underlying evidence for a factual conclusion appears on its face weak, more reasoning is required than when there is a sound evidentiary basis".[103]

D. CHALLENGES TO INTERLOCUTORY DECISIONS

29. In his present appeal, KHIEU Samphân challenges several decisions made by the Trial Chamber in the course of the trial.

30. Rule 104(4) sets out two instances in which the Supreme Court Chamber can exercise its interlocutory appellate jurisdiction. First, an appellant can raise an immediate appeal against a Trial Chamber decision on the condition that such decision falls into one of four defined categories listed in Rule 104(4).[104] For an immediate appeal to be admissible, each ground of appeal shall:

> a) specify an alleged error on a question of law and demonstrate how it invalidates the decision; or
> b) specify a discernible error in the exercise of the Trial Chamber's discretion which results in prejudice to the appellant; or
> c) specify an alleged error of fact and demonstrate how it occasioned a miscarriage of justice.[105]

31. Second, an appellant can challenge a Trial Chamber decision falling outside the ambit of those categories but this appeal may only be raised "at the same time as an appeal against the judgment on the merits".[106] For such appeals to be admissible, the appellant must also

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[101] Case 002/01 Appeal Judgment (F36), para. 90, citing several ICTY and International Criminal Tribunal for Rwanda ("ICTR") cases.
[102] Case 002/01 Appeal Judgment (F36), para. 89; Case 001 Appeal Judgment (F28), para. 17, citing *Kupreškić et al*. Appeal Judgment (ICTY), para. 32.
[103] Case 002/01 Appeal Judgment (F36), para. 90, citing several ICTY and ICTR cases.
[104] Internal Rules, Rule 104(4): The following decisions of the Trial Chamber are subject to immediate appeal:
a) decisions which have the effect of terminating the proceedings;
b) decisions on detention and bail under Rule 82;
c) decisions on protective measures under Rule 29(4)(c); and
d) decisions on interference with the administration of justice under Rule 35(6).
[105] See Internal Rules, Rule 105(2).
[106] See Internal Rules, Rule 104(4).

demonstrate a *lasting gravamen* on his part in order to establish a clear link between the interlocutory decision that is being challenged and the Trial Judgment itself, which remains the ultimate object of the appeal.[107] In the same manner as immediate appeals, the grounds of appeal may comprise alleged errors of law, errors of fact and/or discernible errors in the exercise of the Trial Chamber's discretion. Alleged errors of law or fact must demonstrate how such an error in the decision invalidates the Trial Judgment or occasions a miscarriage of justice, respectively.[108] Alleged errors committed by the Trial Chamber when exercising its discretion must demonstrate prejudice to the appellant and that such prejudice arises in view of the proceedings as a whole, resulting in a miscarriage of justice. In determining whether such discretionary errors result in a grossly unfair outcome, the Supreme Court Chamber will take into account all phases of the proceedings, including measures taken in the appellate stage.[109]

E. ISSUES OF GENERAL SIGNIFICANCE

32. Rule 104(1) sets out the Supreme Court Chamber's appellate jurisdiction over the Trial Chamber's judgments or decisions where "an error on a question of law invalidating the judgment […] or an error of fact which has occasioned a miscarriage of justice" arises.[110] Although the Supreme Court Chamber's appellate powers are exercised within the limits of the issues appealed, this Chamber and the ICTY Appeals Chamber have held that appellate chambers may exceptionally address issues of general significance to a tribunal's jurisprudence *proprio motu*,[111] even where such issues were not raised on appeal by any party and the verdict may not be affected.

33. Being cognisant that the verdict will not be affected, the Supreme Court Chamber considers it necessary to address an issue of general significance to the ECCC's jurisprudence that arises from the Case 002/02 Trial Judgment but was not advanced on appeal by any party.[112]

F. STANDARD FOR SUMMARY DISMISSAL

[107] Case 002/01 Appeal Judgment (F36), para. 1134; Case 002/01, Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses, 31 October 2014, F9, para. 16.
[108] See Internal Rules, Rules 104(1), 105(3).
[109] Case 002/01 Appeal Judgment (F36), para. 100.
[110] Internal Rules, Rule 104(1).
[111] Case 001 Appeal Judgment (F28), para. 15. See also *Krnojelac* Appeal Judgment (ICTY), para. 6.
[112] See *infra* Section VIII.B.9.

34. An appellate chamber has inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and it may dismiss arguments which are evidently unfounded without providing detailed reasons in writing.[113] In order to demonstrate an appealable error, a party must sufficiently identify the alleged errors and present substantiated arguments as well as precise authorities in support of each of the grounds.[114] Such requirements are aimed at ensuring procedural efficiency and that responding parties know the case they have to meet.[115] In this respect, a party, as a general rule, is expected to present and substantiate the grounds of appeal in a clear, logical, and consolidated manner to the requisite standard.[116] A party may not merely repeat arguments on appeal that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted an error warranting appellate intervention.[117]

35. The Supreme Court Chamber may further dismiss submissions that are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies and that may be declared procedurally defective under Rule 111(2).[118] Using these fundamental principles, the Supreme Court Chamber has identified categories of deficient submissions on appeal that have necessitated summary dismissal.

36. Where the Supreme Court Chamber has identified the following categories of alleged errors, it has summarily dismissed them within the relevant sections of the present Judgment: (1) repetition of unsuccessful trial arguments; (2) arguments that fail to identify the challenged findings, that misrepresent those findings, or that ignore other relevant findings; (3) mere assertions unsupported by evidence, undeveloped assertions, or failure to articulate errors; and

[113] *Prosecutor v. Strugar*, Appeals Chamber (ICTY), IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgment (ICTY)"), para. 16; *Prosecutor v. Orić*, Appeals Chamber (ICTY), IT-03-68-A, Judgement, 3 July 2008, para. 13; *Prosecutor v. Halilović*, Appeals Chamber (ICTY), IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgment (ICTY)"), para. 12; *Prosecutor v. Brđanin*, Appeals Chamber (ICTY), IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgment (ICTY)"), para. 16; *Prosecutor v. Gacumbitsi*, Appeals Chamber (ICTR), ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgment (ICTR)"), para. 10; *Prosecutor v. Kamuhanda*, Appeals Chamber (ICTR), ICTR-99-54A-A, Judgement, 19 September 2005, para. 10.
[114] Internal Rules, Rule 105(2), (3).
[115] Case 001 Appeal Judgment (F28), para. 41.
[116] See Decision on KHIEU Samphân's Extension Request (F49), paras 15, 17.
[117] *Strugar* Appeal Judgment (ICTY), para. 16; *Halilović* Appeal Judgment (ICTY), para. 12; *Brđanin* Appeal Judgment (ICTY), para. 16; *Gacumbitsi* Appeal Judgment (ICTR), para. 9.
[118] Internal Rules, Rule 111(2) ("Where the Chamber finds that an appeal was filed late, or was otherwise procedurally defective, it may declare the appeal inadmissible"). See also Case 002/01 Appeal Judgment (F36), para. 101; Case 001 Appeal Judgment (F28), paras 20, 41; *Galić* Appeal Judgment (ICTY), para. 11.

(4) challenges to factual findings on which a conviction does not rely, and to legal findings that are not capable of invalidating the Judgment.

G. CONCLUSION

37. There is no cause for the Supreme Court Chamber to depart from the aforementioned standards, and the parties have not urged the Chamber to do so. In his Appeal Brief, KHIEU Samphân cites ECCC case law[119] and recent International Criminal Court ("ICC") case law[120] to explain his interpretation of the standards of appellate review. He does not, however, invite the Supreme Court Chamber to alter its respective standards of review, nor does he advance any arguments in support of departing from the established ECCC case law. Accordingly, the Supreme Court Chamber will continue to assess alleged errors against the standards detailed above.

III. PRELIMINARY MATTERS

A. STRUCTURE OF THE APPEAL BRIEFS

38. KHIEU Samphân's 750-page Appeal Brief contains approximately 1,824 errors allegedly committed by the Trial Chamber in its Judgment against him. He simply explains the structure of his Appeal Brief as being due to a "lack of time"; notably, his Appeal Brief is not structured in the same way as his Notice of Appeal.[121] Rather, he chose to present his appeal by "simply follow[ing] the outline of the reasons for Judgment" while also acknowledging that "many of the errors identified in different parts of the reasons for judgment overlap".[122] This approach, particularly when filing such an extensive appeal challenging the bulk of the Trial Judgment, resulted in an Appeal Brief riddled with overlap, duplication, and illogicality.

39. As detailed throughout this Judgment, the Supreme Court Chamber has frequently engaged in a laborious process of deciphering the contents of KHIEU Samphân's arguments, which are sometimes presented piecemeal and/or unsubstantiated, a situation exacerbated by the literalism with which arguments are presented, with no regard for the legal decorum observed by a counsel in the presentation of structured and clearly defined appeal grounds before a court. This Chamber also notes KHIEU Samphân's frequent incorporation of previous

[119] See KHIEU Samphân's Appeal Brief (F54), fns 33-34, 36-38, 40-41, 44.
[120] See KHIEU Samphân's Appeal Brief (F54), fns 34-35, 39, 41-44, referring to *Prosecutor v. Bemba*, Appeals Chamber (ICC), ICC-01/05-01/08 A, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018.
[121] KHIEU Samphân's Appeal Brief (F54), para. 17.
[122] KHIEU Samphân's Appeal Brief (F54), para. 17.

submissions contained in his Case 002/01 Appeal Brief and Case 002/02 Closing Brief. Whilst this Chamber concurs with KHIEU Samphân that this can be a useful means to avoid repetition,[123] it does not follow that such arguments are automatically accepted when no new and substantiated argumentation is presented to demonstrate an appealable error.[124] Despite these concerns, the Supreme Court Chamber has done everything in its power to decipher and respond to arguments in a manner that respects both the standard of appellate review and KHIEU Samphân's right to appeal. When confronted with overlapping arguments, this Chamber has exercised its discretion by responding to them in the sections of this Judgment that it deems most appropriate, taking the relevant subject manner and the structure of this Judgment into account.

40. KHIEU Samphân filed a 75-page Annex to his Appeal Brief[125] to assist this Chamber and the parties navigating his Appeal Brief with reference to his Notice of Appeal.[126] The Annex A contains an outline of the Appeal Brief using its headings, as well as "Summary" boxes, with each box corresponding to a section of the Appeal Brief. The contents of the Annex A seek to identify and particularise the grounds of appeal, the parts of the Trial Judgment under appeal, the alleged errors and violation of rights, and their impact on the Judgment. This Chamber has consulted and relied on this annex as necessary in determining the alleged errors before it, as seen throughout the Judgment.

41. In order to facilitate a methodical response to KHIEU Samphân's alleged errors, the Co-Prosecutors decided to number the grounds of appeal listed in the Annex A, from ground 1 to 256, and provide specific responses to each.[127] This numbered list of appeal grounds can be found in Annex C of the Co-Prosecutors' Response to KHIEU Samphân's Appeal Brief.[128] To address the overlapping appeal grounds, the Co-Prosecutors' Response groups recurring themes raised in KHIEU Samphân's Appeal Brief together. Their response largely mirrors the chapters in KHIEU Samphân's Appeal Brief on Fair Trial Rights, *Saisine* and Scope of Trial, Crimes, Individual Criminal Responsibility, and Sentencing.

[123] Decision on Co-Prosecutors' Request (F55/3), para. 21.
[124] See *supra* Section II.F.
[125] Annex A to KHIEU Samphân Appeal (F54.1.1).
[126] Response from KHIEU Samphân's Defence to the Prosecution's Request for Additional Pages, 26 March 2020, F55/1, paras 4-5; Decision on Co-Prosecutors' Request (F55/3), para. 20.
[127] Co-Prosecutors' Response (F54/1), para. 6.
[128] Annex C to the Co-Prosecutors' Response (F54/1).

42. The Lead Co-Lawyers' Response does not take the Co-Prosecutors' approach of responding to each individual appeal ground, instead providing a limited response on matters pertaining to civil party interests, such as challenges to civil party evidence, the principle of legality, key factual findings pertaining to crimes and their impact on civil parties, and allegations of bias. The Lead Co-Lawyers explain that, for consistency, they adopted the Co-Prosecutors' use of the term "grounds" to refer to the numbered items in the Co-Prosecutors' Annex C.[129] They highlight the absence of defined links between the Appeal Brief and Annex A, which they claim creates confusion about which paragraphs in the Appeal Brief are encompassed by which "ground" in Annex A.[130] To address this ambiguity, the Lead Co-Lawyers included an annex to their Response that contains an index table indicating which paragraphs in the Appeal Brief they believe are covered by which of the "grounds" as numbered in the Co-Prosecutors' Annex C, as well as designations for material in the Appeal Brief that does not appear to be covered by any of the "grounds".[131]

43. The Lead Co-Lawyers have grouped and addressed arguments from KHIEU Samphân's Appeal Brief that appear to be based on a common premise in order to streamline their response to multiple overlapping grounds of appeal.[132] A separate section is devoted to responding to KHIEU Samphân's specific arguments which call into question the evidence and credibility of 14 civil parties. This separate section addresses a variety of issues that do not precisely fall within the scope of a subject covered elsewhere in their Response.[133]

44. Finally, the Co-Prosecutors filed an appeal brief advancing a single ground of appeal, challenging the Trial Chamber's ruling that forced sexual intercourse in the context of forced marriage did not constitute the crime against humanity of other inhumane acts in the case of male victims. Given the nature of this appeal, the Supreme Court Chamber has addressed it in the section of this Judgment dealing with the crime against humanity of other inhumane acts through conduct characterised as forced marriage and rape in the context of forced marriage.[134]

B. THE VALUE OF PRECEDENT AT THE ECCC

[129] Lead Co-Lawyers' Response (F54/2), para. 13.
[130] Lead Co-Lawyers' Response (F54/2), para. 13.
[131] Lead Co-Lawyers' Response (F54/2), para. 13.
[132] Lead Co-Lawyers' Response (F54/2), para. 11.
[133] Lead Co-Lawyers' Response (F54/2), para. 11.
[134] See *infra* Section VII.G.3.c.iii.

45. As a preliminary matter, the Supreme Court Chamber observes that throughout his Appeal Brief, KHIEU Samphân seeks to challenge the Trial Chamber's legal findings that were based on prior Supreme Court Chamber decisions in Case 002/01.[135] When KHIEU Samphân seeks to overturn such findings, he is effectively requesting this Chamber to deviate from its own jurisprudence. This raises the issue of precedent at the ECCC.

46. The Co-Prosecutors argue that KHIEU Samphân's submissions should be rejected because he has not presented any arguments that would demonstrate a change in the impugned jurisprudence or provided any basis for reconsideration or reversal of this Chamber's position.[136]

47. The Supreme Court Chamber observes that in civil law systems such as Cambodia or the ECCC, the doctrine of *stare decisis* or binding precedent does not formally apply.[137] Nevertheless, this Chamber considers that adhering to precedent allows for a uniform application of the law, promotes legal certainty, and ensures an accused's right to equality before the law, as required by Rule 21.[138] As a result, the Supreme Court Chamber has consistently relied on and referred to its prior findings on rules of law and legal principles.[139] International jurisprudence demonstrates a similar general adherence to precedent in pursuit of legal clarity and uniformity of the law.[140] For instance, in *Aleksovski*, the ICTY Appeals Chamber recognised that:

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[135] See, *e.g.*, KHIEU Samphân's Appeal Brief (F54), paras 250, 298-299, 320-322, 550-551.
[136] See, *e.g.*, Co-Prosecutors' Response (F54/1), paras 146, 221, 226, 238.
[137] See, *e.g.*, Case 004/1, Closing Order (Reasons), 10 July 2017, D308/3 ("Case 004/01 Closing Order (D308/3)"), para. 10; Case 003, Decision on MEAS Muth's Request for Clarification concerning Crimes Against Humanity and the Nexus with Armed Conflict, 5 April 2016, D87/2/1.7/1, paras 13, 17; *Prosecutor v. Kupreškić et al.*, Trial Chamber (ICTY), IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al.* Trial Judgment (ICTY)"), para. 540 ("generally speaking, and subject to the binding fore of decisions of the Tribunal's Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries […] Clearly, judicial precedent is not a distinct source of law in international criminal adjudication.").
[138] Internal Rules, Rule 21(1)(b).
[139] See, *e.g.*, Case 002/01 Appeal Judgment (F36), paras 667, 669, 679-680, 690, 744, 761-762, 1107-1108.
[140] See, *e.g.*, *Prosecutor v. Aleksovski*, Appeals Chamber (ICTY), IT-95-14/1-A, Judgment, 24 March 2000 ("*Aleksovski* Appeal Judgment (ICTY)"), paras 93-95 ("Although, in general, civil law jurisdictions do not recognise the principle of stare decisis or binding precedent, as a matter of practice, their highest courts will generally follow their previous decisions. […] while the doctrine of precedent does not operate formally in the European Court of Human Rights system, 'as a matter of general practice and practical necessity, the Commission regards the Court's binding judgments as the final authority on the interpretation of the Convention.' […] Despite the non-operation of the principle of stare decisis in relation to the International Court of Justice, its previous decisions are accorded considerable weight."); *Prosecutor v. Gbagbo & Blé Goudé*, Appeals Chamber (ICC), ICC-02/11-01/15, Reasons for the "Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo's

> the principles which underpin the general trend in both the common law and the civil law systems, whereby the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances, *are the need for consistency, certainty, and predictability.*[141]

However, the same jurisprudence indicates that strict adherence to precedent is unwarranted and that an appeals chamber should be able to depart from its prior determinations on a question of law for cogent reasons in the interest of justice.[142] Such reasons could arise, for instance, if a prior decision was based on an incorrect interpretation of a legal principle or the judges were ill-informed about the applicable law.[143]

48. The Supreme Court Chamber concludes that adhering to precedent is in the interest of legal certainty. This Chamber will, therefore, only depart from its previous findings on rules of law and legal principles after careful review of the law and for compelling reasons in the interest of justice. A deviation from this Chamber's settled jurisprudence is not warranted where KHIEU Samphân merely reiterates arguments that the Supreme Court Chamber has

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detention (ICC-02/11-01/15-134-Red3)'", 31 July 2015 ("*Gbagbo & and Blé Goudé* Appeal Decision (ICC)"), para. 14 ("Article 21 (2) of the Statute provides that '[t]he Court may apply principles and rules of law as interpreted in its previous decisions'. Thus, the Appeals Chamber is not obliged to follow its previous interpretations of principles and rules of law through binding *stare decisis*; rather it is vested with discretion as to whether to do so. In this respect, the Appeals Chamber has previously stated that absent "convincing reasons" it will not depart from its previous decisions. Thus, in principle, while the Appeals Chamber has discretion to depart from its previous jurisprudence, it will not readily do so, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions."); *Prosecutor v. Semanza*, Appeals Chamber (International Residual Mechanism for Criminal Tribunals ("IRMCT")), MICT-13-36-R, Decision on a Request for Access and Review, 9 April 2018 ("*Semanza* Decision on Review Request (IRMCT)"), para. 15 ("Finally, the Appeals Chamber considers that it is bound to interpret the Statute and the Rules in a manner consistent with the jurisprudence of the ICTR and the ICTY. Consequently, while not bound by the jurisprudence of the ICTR or the ICTY, the Appeals Chamber is guided by the principle that, in the interests of legal certainty and predictability, it should follow previous decisions of the ICTR or the ICTY Appeals Chambers and depart from them only for cogent reasons in the interests of justice"). See also *Prosecutor v. Semanza*, Appeals Chamber (ICTR), ICTR-97-23-A, Decision, 31 May 2000, para. 92.

[141] *Aleksovski* Appeal Judgment (ICTY), para. 97 (emphasis added).

[142] See, *e.g.*, *Aleksovski* Appeal Judgment (ICTY), paras 107-111 ("the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. [...] It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts."); *Semanza* Decision on Review Request (IRMCT), para. 15; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, para. 53 ("To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so."); *Gbagbo & Blé Goudé* Appeal Decision (ICC)"), para. 14; *Prosecutor v. Šainović et al.*, Appeals Chamber (ICTY), IT-05-87-A, Judgment, 23 January 2014 ("*Šainović et al.* Appeal Judgment (ICTY)"), para. 1622, fn. 5319, referring to *Aleksovski* Appeal Judgment (ICTY), para. 111.

[143] See, *e.g.*, *Aleksovski* Appeal Judgment (ICTY), paras 101-102, 107-109 ("Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given per incuriam, that is a judicial decision that has been 'wrongly decided, usually because the judge or judges were ill-informed about the applicable law.'").

already examined or argues that this Chamber's prior determination was erroneous, without further elaboration or reference to novel developments in the law.

IV. ALLEGED ERROR IN THE ISSUANCE AND PRONOUNCEMENT OF THE JUDGMENT

49. KHIEU Samphân prefaces his appeal against the Judgment of the Trial Chamber with a preliminary submission, referred to as his main submission, in which he disputes the Trial Chamber's delivery of its Judgment in two parts. The essence of that submission is as follows:

> By failing to issue the Reasons for Judgement on the day the Judgement was announced, the Chamber committed a serious error of law rendering the unlawfully announced Judgement void for procedural defect (I). The subsequent issuance of the Reasons did not cure the defect (II).[144]

He submits that the ECCC procedural framework prohibits this two-step delivery method, which mandates that reasons for a judgment be delivered on the same day the judgment is announced, and the Trial Chamber's failure to comply with this legal requirement occasioned an error of law rendering the Judgment void.[145]

50. KHIEU Samphân further argues that the judges of the Trial Chamber were *functus officio* when the full reasoned Judgment, currently under appeal, was notified, and that the Trial Chamber's action in delivering that reasoned Judgment was arbitrary and *ultra vires.*[146] He contends that if this submission is successful, the rest of his appeal is rendered moot because his guilt or innocence was never lawfully adjudicated.[147]

51. The history of this submission can be found in the Trial Chamber's action on 16 November 2018, when it delivered its verdict in summary form, followed by the extensive reasoned Judgment notified on 28 March 2019. As KHIEU Samphân correctly states, the reasoning determines the Judgment and thus plays an essential role in exercising his appellate rights to seek a remedy against his conviction and sentence.[148] The Trial Chamber issued a Scheduling Order for Pronouncement of the Judgment in Case 002/02 on 26 September 2018, informing the parties and the general public of the intention to deliver the Judgment in two stages, stating:

> Pursuant to Internal Rule 102(1), it will announce a summary of the findings and the disposition

[144] KHIEU Samphân's Appeal Brief (F54), para. 30.
[145] KHIEU Samphân's Appeal Brief (F54), paras 29, 32.
[146] KHIEU Samphân's Appeal Brief (F54), paras 52, 67.
[147] KHIEU Samphân's Appeal Brief (F54), para. 29.
[148] KHIEU Samphân's Appeal Brief (F54), para. 71.

> of the judgment for Case 002/02 concerning the accused, […] KHIEU Samphân, on **Friday, 16 November 2018** in the main courtroom of the ECCC at 9.30am:
>
> **INFORMS** the Parties that the full written reasons for its judgment will be notified in due course.[149]

As a result, all parties were on notice that the reasoned Judgment would not be delivered on 16 November 2018. Despite the nearly eight-week gap between the publication of the notice of intention and the delivery of the summary of the Judgment, no application was filed objecting to the proposed action. KHIEU Samphân, in particular, made no representation that this action would prejudice him in any way.

52. As scheduled, on 16 November 2018, a summary of the Judgment containing 31 pages was read out in open court. The President of the Trial Chamber stated that:

> The Chamber would like to inform the parties and the general public that at this moment, the Chamber pronounces only a summary of the Trial Chamber's Judgment. The only authoritative account of the findings is contained in the full written Judgment which will be made available in Khmer, English, and French in due course.[150]

53. The summary contained the disposition outlining that KHIEU Samphân was convicted of genocide of the Vietnamese, crimes against humanity, and grave breaches of the Geneva Conventions and that he was sentenced to life imprisonment.[151] The summary, referred to throughout as the Judgment, stated:

> This Judgement is appealable by the Parties in accordance with the Internal Rules. In this regard, the Chamber **CLARIFIES** that, in accordance with Internal Rule 107(4) and Article 8.5 of the Practice Direction on the Filing of Documents before the ECCC, the time limit for filing a notice of appeal, if any, will commence on the first calendar day following the day of service of the notification of the fully reasoned, written Judgement in Khmer and one of the other official languages of the ECCC as selected by each Party pursuant to Article 2.2 of the Practice Direction.[152]

54. Three days later, on 19 November 2018, KHIEU Samphân filed an urgent appeal against the pronouncement of the summary Judgment, claiming procedural defects and a lack of reasoning and requesting that the Judgment be annulled.[153] The arguments and relief sought in the urgent appeal are largely the same as those advanced in KHIEU Samphân's current "main submission", namely that "[b]y failing to provide the full written reasons on 16 November 2018

[149] Scheduling Order for Pronouncement of Judgement in Case 002/02, 26 September 2018, E462, p. 2 (which "ORDERS that this decision be notified to the Parties and the Office of Administration and be posted on the official website of the ECCC").
[150] T. 16 November 2018 ("Pronouncement of Judgment in Case 002/02"), E1/529.1, p. 3.
[151] T. 16 November 2018 ("Pronouncement of Judgment in Case 002/02"), E1/529.1, pp. 53-56.
[152] T. 16 November 2018 ("Pronouncement of Judgment in Case 002/02"), E1/529.1, p. 57.
[153] KHIEU Samphân's Urgent Appeal (E463/1), para. 3.

the Chamber violated the Internal Rules (I), created procedural confusion and legal uncertainty (II), committed an error of law which invalidates its decision (III), and infringed KHIEU Samphân's procedural and fundamental rights, thereby causing him serious prejudice (IV)".[154] He sought a declaration that the full written reasons to follow be declared void.[155]

55. In the urgent motion, KHIEU Samphân submitted that the Trial Chamber breached the Internal Rules, specifically Rules 101 and 105(1)(b), 105(2) and 104(4)(a), by failing to provide full written reasons on the day the Judgment was delivered.[156] He also stated that he "cannot be fully certain about the procedural impact of the decision that the Chamber delivered orally on [] 16 November 2018".[157] In the alternative, he requested the Supreme Court Chamber to "defer the commencement of the time limit for appeal until notification of the full written reasons for the Trial Chamber's Judgement in all three official languages of the ECCC or until notification of its own decision should it be rendered at a later date".[158]

56. The Supreme Court Chamber ruled on 13 February 2019 that the appeal was inadmissible.[159] Several reasons were given, including that: (1) the application did not constitute an appeal against the Trial Judgment in the sense of Rule 105(1)(b);[160] (2) when the Trial Chamber pronounced a summary of the judgment on 18 November 2018, it made it abundantly clear that the only authoritative account of the findings was contained in the full written judgment, which would be available in due course;[161] (3) the procedural challenge was premature and could not be raised under Rules 105(1)(b), 105(2) or 104(4)(a) because the pronouncement of the disposition did not have the effect of terminating the proceedings or depriving the accused of his right to have examined the merits of the conviction and sentence;[162] and (4) the Chamber declined to exercise its inherent jurisdiction, finding that where a fully reasoned final written judgment and any anticipated appellate proceedings are still pending, the Chamber is not yet seised of a matter to which its inherent jurisdiction applies.[163]

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[154] KHIEU Samphân's Urgent Appeal (E463/1), para. 4.
[155] KHIEU Samphân's Urgent Appeal (E463/1), para. 73.
[156] KHIEU Samphân's Urgent Appeal (E463/1), paras 6-7, 10-27.
[157] KHIEU Samphân's Urgent Appeal (E463/1), para. 9.
[158] KHIEU Samphân's Urgent Appeal (E463/1), para. 73.
[159] Decision on KHIEU Samphân's Urgent Appeal (E463/1/3), paras 10-18.
[160] Decision on KHIEU Samphân's Urgent Appeal (E463/1/3), paras 10-12.
[161] Decision on KHIEU Samphân's Urgent Appeal (E463/1/3), para. 11.
[162] Decision on KHIEU Samphân's Urgent Appeal (E463/1/3), paras 12-15.
[163] Decision on KHIEU Samphân's Urgent Appeal (E463/1/3), paras 16-18 (the Supreme Court Chamber responded to KHIEU Samphân's argument that the Chamber's inherent jurisdiction is implicated in circumstances

57. On 28 March 2019, the Trial Chamber delivered its fully reasoned Judgment in all three of the Court's official languages. It was, however, dated 16 November 2018, and was signed by the President of the Trial Chamber. It is unnecessary to repeat here the subsequent unsuccessful applications filed by KHIEU Samphân challenging the validity of the decision declaring the urgent appeal inadmissible on grounds impugning the appointment of a judge of the Supreme Court Chamber and later seeking the disqualification of Supreme Court Chamber judges on the basis of their perceived bias.[164]

58. Against that background, KHIEU Samphân now reiterates his prior arguments contained in his urgent appeal in his Appeal Brief and contends before this Chamber that the Trial Chamber's method of announcing its Judgment by delivering only a summary of the Judgment violated Rules 101, 102, and 107, which state that a judgment, as opposed to a decision, must be prepared in writing and pronounced on the same day in order to trigger the commencement period to file an appeal.[165] He submits that the Trial Chamber's failure to follow the Rules was a grave legal error that rendered the later reasoned Judgment null and void, as were all subsequent measures taken after the delivery of the disposition, rendering the imposition of sentence null, void, illegal, and arbitrary.[166] He further argues that the manner in which the Judgment was delivered, particularly the "backdating" of the reasoned Judgment to 16 November 2018, calls the integrity of the judicial decision-making process into question.[167]

59. KHIEU Samphân concludes that his fundamental rights, including his right to be heard by a tribunal established by law, to an effective defence, to legal certainty, to a reasoned decision, and to transparent proceedings, have been violated as a result of the foregoing.[168] As a result, his guilt has not been legally determined.[169]

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in which there is an imperative need to ensure a good and fair administration of justice, it found that the defence failed to demonstrate that pronouncement of the summary and findings before the fully reasoned judgment deprived KHIEU Samphân of his fundamental right to appeal and further that the alleged violation of his procedural rights remained purely hypothetical. The Chamber's intervention was thus not warranted to safeguard the proceedings); KHIEU Samphân's Urgent Appeal (E463/1), paras 28-33 (which emphasised that "the inherent jurisdiction is rendered necessary by the imperative need to ensure a good and fair administration of justice including full respect for human rights" and that "the Supreme Court must intervene in the interests of justice […] to the extent that as discussed below the Chamber has committed an error of law which invalidates its decision and violates KHIEU Samphân's rights'").

[164] KHIEU Samphân's Annulment Request (E463/1/4); KHIEU Samphân's Disqualification Application (F53).
[165] KHIEU Samphân's Appeal Brief (F54), paras 30-32, 48, 51, 55, 68; Internal Rules, Rules 101, 102, 107.
[166] KHIEU Samphân's Appeal Brief (F54), paras 52-56.
[167] KHIEU Samphân's Appeal Brief (F54), paras 69, 70.
[168] KHIEU Samphân's Appeal Brief (F54), paras 55, 79.
[169] KHIEU Samphân's Appeal Brief (F54), paras 52, 57, 66, 70, 79.

60. The Co-Prosecutors respond that this challenge should be rejected summarily since KHIEU Samphân pleaded but failed to prove that the Trial Chamber violated Rule 110 when it deviated from it. They argue that there is no provision in Rules 101, 102, or 107 that renders a judgment void if the reasoned Judgment is not issued on the same day the verdict is pronounced.[170] They contend that the Supreme Court Chamber has already addressed these issues in the urgent appeal, finding that the Trial Chamber had made it abundantly clear that the full written Judgment, which would be delivered in due course, was the only authoritative account of the findings, and that the time limits for filing any notice of appeal would follow from the delivery of that full written Judgment.[171] This action adequately protected KHIEU Samphân's fundamental right to a fair trial.[172]

61. The Co-Prosecutors further contend that ECCC Chambers have deferred issuing written reasons on multiple occasions, and that the Supreme Court Chamber has confirmed that a delay between the issuance of a summary and disposition followed by the issuance of written reasons does not constitute a procedural breach.[173] They further submit that KHIEU Samphân's attacks on the integrity of the Trial Chamber's decision-making process, including the alleged backdating of the Judgment between the pronouncement of the summary of the Judgment and notification of the written reasons, are speculative, particularly given that Rule 96(1) ensures that the Trial Chamber's deliberations are confidential and there is no evidence that its reasoning changed in the interim.[174] Therefore, his claim that the Judgment has no legal basis is without merit.[175]

62. The Co-Prosecutors reject the claim that the Trial Chamber was not "established by law" and that the judges were acting "*functus officio*" or that the written Judgment was "*ultra vires*".[176] They argue that this Chamber's decision in the urgent appeal found that there were no compelling circumstances that would bar the Trial Chamber from issuing a fully reasoned Judgment, demonstrating that the judges of the Trial Chamber were neither *functus officio* nor acting *ultra vires* when they delivered their reasoned Judgment.[177] KHIEU Samphân has not demonstrated that the error resulted in a grossly unfair outcome in judicial proceedings, taking

[170] Co-Prosecutors' Response (F54/1), paras 24-26.
[171] Co-Prosecutors' Response (F54/1), para. 25.
[172] Co-Prosecutors' Response (F54/1), paras 24-26, 28.
[173] Co-Prosecutors' Response (F54/1), para. 26.
[174] Co-Prosecutors' Response (F54/1), para. 26
[175] Co-Prosecutors' Response (F54/1), para. 27.
[176] Co-Prosecutors' Response (F54/1), para. 27.
[177] Co-Prosecutors' Response (F54/1), paras 25, 28.

into account all phases of the proceedings, including the appeal.[178] The only significant ramification of the Trial Chamber's action is that KHIEU Samphân now had *more* time to prepare his appeal.[179]

63. Finally, the Co-Prosecutors argue that the parties were given notice that only a summary of the Judgment with its disposition would be delivered, and that there is no merit in KHIEU Samphân's basic submission that the Trial Chamber's failure to follow the provisions of Rule 102 rendered the subsequent judgment void.[180]

64. The Lead Co-Lawyers support the Co-Prosecutors' Response.[181]

65. There appears to be no doubt that the Trial Chamber deviated from the plain meaning of Rule 102(1), which governs the announcement of the Judgment at a public hearing and requires that:

> All judgments shall be issued and announced during a public hearing. A summary of the findings and the disposition shall be read aloud by the President or any other judge of the Chamber. Any dissenting judge may also read aloud a summary of their dissenting opinion. The Greffier shall provide a copy of the judgment to the parties and ensure that it is published by the Office of Administration by appropriate means.

66. On closer examination, Rule 102(1) is benign and non-mandatory in the language of its implied requirements to deliver a summary and a judgment at the same public hearing. Contrary to KHIEU Samphân's main argument, neither this rule nor any other stipulates that the summary and judgment be delivered on the same day, despite the fact that this has been the common belief up to now, as confirmed by the practice of the Trial Chamber in delivering its two previous judgments in Cases 001 and 002/01 on the same day the summaries of the Judgments were pronounced at a public hearing.[182] Rule 102(1) is one of several procedural rules addressing the content and form of the judgment, its effect, including on the accused and on the civil parties, and the manner in which the judgment is announced at a public hearing. This Rule contains no sanctions for non-observance or deviation. An objective reader would

[178] Co-Prosecutors' Response (F54/1), para. 28.
[179] Co-Prosecutors' Response (F54/1), para. 28.
[180] Co-Prosecutors' Response (F54/1), referring to KHIEU Samphân's Appeal Brief (F54), paras 30-31, 52, 55-57, 79.
[181] Lead Co-Lawyers' Response (F54/2), para. 89.
[182] T. 7 August 2014 (Pronouncement of the Judgement in Case 002/01), E1/241.1, p. 2 (the Trial Chamber delivered a summary of its judgment at the hearing stipulating that "[t]he only authoritative account of the findings is contained in the full written Judgement, which will be made available in Khmer, English and French immediately after this hearing.") In Case 001, the Trial Chamber read out a summary of the Judgment on 26 July 2010, issuing the full written Judgement on the same date.

not anticipate that failing to follow the moderately imprecise rule to the letter would result in the cascade of calamitous consequences or the violation of fundamental rights allegedly suffered by KHIEU Samphân.

67. This Chamber recalls that it was submitted that the failure to provide the summary and the final written reasoned judgment on the same day included, *inter alia*, that KHIEU Samphân's right to appeal to a higher tribunal was removed; that the lack of written form rendered the process a nullity; that the delivery of the summary without the full reasoned Judgment, *inter alia*, rendered the judges *functus officio*; that the action of delivering a summary violated the separation of powers; that the judges acted *ultra vires* and that the judges ignored the rule of law and undermined the legitimacy of the ECCC. KHIEU Samphân vehemently argues that these consequences flowed from the Judgment being delivered in two parts, with a four-month delay between the delivery of the 31-page summary and the Trial Chamber's reasoned Judgment of 3,901 pages in Khmer, 2696 pages in French, and 2,268 pages in English.

68. KHIEU Samphân correctly highlights instances where Chambers within the ECCC have previously issued decisions in two steps. He argues, and this Chamber concurs, that this method of delivery is permissible because those *decisions*, rather than *judgments*, were not subject to immediate interlocutory appeal because they had no direct impact on the course of the proceedings. The issue here is not any interlocutory ruling or decision, but rather whether there was a procedural error that caused such prejudice to KHIEU Samphân to occasion a miscarriage of justice.[183] It should be noted that the Trial Chamber has discretion over procedural matters, and when reviewing discretionary decisions, the Supreme Court Chamber takes a deferential approach, intervening only if the Trial Chamber's exercise of discretion is tainted by a "discernible error […] which resulted in prejudice to the appellant".[184] This Chamber will consider whether such prejudice has arisen during an appeal against a trial judgment and in view of the proceedings as a whole, occasioning a miscarriage of justice, which is defined as a "grossly unfair outcome in judicial proceedings".[185]

69. In response to KHIEU Samphân's submissions that the summary was defective, rendering the subsequent full Judgment an unlawful act, this Chamber has examined both

[183] See *supra* Section II.D.
[184] Case 002/01 Appeal Judgment (F36), paras 96-97, referring to Internal Rules, Rule 104 (1). See also *supra* Section II.C.
[185] Case 002/01 Appeal Judgment (F36), para. 100. See also *supra* Section II.D.

documents and considers that the summary was in fact a very brief outline of the Trial Chamber's key findings. Clearly, it was not the authoritative Judgment by its announcement, title, appearance, or content. In contrast, the reasoned Judgment was a veritable tome of almost 2,268 pages in English, containing a detailed index and approximately 14,446 footnotes, which when delivered, had been fully translated into 3,901 pages in Khmer. The French translation of 2,696 pages followed a short time later. It dealt in detail with the contested issues, as well as its factual findings and conclusions. This was clearly the Judgment, not the summary.

70. This Chamber finds that legalistic opportunism is on display here by KHIEU Samphân. A fabricated sense of outrage that is disproportionate to the undoubted but relatively minor failure by the Trial Chamber to explain this deviation from the Rule is suspected. While the actions of the Trial Chamber may be criticised for not providing reasons, its intention to issue a summary first was well-flagged and transparent, and viewed from this vantage point, was very likely an exercise of discretion for good reasons. The unexplained deviations from Rule 102(1) were not of such consequence or gravity that they rendered the subsequent steps to deliver the reasoned Judgment null and void. This Chamber has previously held that, in determining whether the form of a Trial Chamber decision issued in a memorandum format rendered the decision void due to a procedural defect:

> [u]nless the law would necessarily require a specific form or designation of a judicial act, practices departing from judicial formalism and symbolism do not render the acts void; such acts are rather reviewed in the aspect of fairness, in terms of sufficient clarity as to their existence, content and procedural consequences.[186]

As previously noted, the Trial Chamber's intention to deliver a summary followed later by the fully reasoned judgment was well-signalled and transparent and not, in view of the substantial prior notice, an arbitrary act, as KHIEU Samphân claimed. He had the opportunity to object to the Trial Chamber President's openly-stated intention. If he perceived that the Trial Chamber's intended action was a breach of a substantial rule or affected his interests in any way, he should have objected. By remaining silent for nearly eight weeks, he chose to waive that right and acquiesce to the intended two-step approach to delivering the Judgment. The Trial Chamber then carried out its previously notified plan, delivering only a summary.

[186] Case 002/01, Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, E163/5/1/13 ("First Severance Appeal Decision (E163/5/1/13)"), para. 30.

71. While it is preferable for the Trial Chamber to render its judgments in full on the day of pronouncement at the public hearing, the Supreme Court Chamber does not consider that this minor deviation caused such grave prejudice to KHIEU Samphân so as to result in a grossly unfair outcome in the full proceedings.

72. While neither this Chamber nor the parties know the reasons for the Trial Chamber's action, the Trial Chamber may well have provided its reasons if the parties had asked. From this vantage point, the Trial Chamber's exercise of discretion could have been due to translation issues or even to the late NUON Chea's ill health (the other defendant in the trial), as he had been in poor health for some time and died four months after the reasoned Judgment was delivered. Simply put, it is unknown.

73. This Chamber will now address the Trial Chamber's discretion in delivering the judgment. In the past, the late NUON Chea and KHIEU Samphân had challenged the Trial Chamber's decisions of a procedural nature in Case 002/01. The Supreme Court Chamber held that procedural errors are either errors of law or errors of fact for appeals purposes.[187] The Supreme Court Chamber distinguished between procedural errors and the exercise of discretion in the application of procedural rules. In Case 002/01, it explained:

> CHALLENGES TO DECISIONS OF A PROCEDURAL NATURE
>
> […] 97. The Supreme Court Chamber notes, however, that the Trial Chamber often enjoys discretion with respect to procedural matters. In keeping with the principle set out in the last sentence of Rule 104(1) of the Internal Rules, the Supreme Court Chamber adopts a deferential approach to the review of discretionary decisions and will intervene in the Trial Chamber's exercise of discretion only if it is tainted by a 'discernible error [...] which resulted in prejudice to the appellant'. In this regard, the Supreme Court Chamber notes that the Appeals Chambers of the ICTY, ICTR and the ICC, have each adopted a deferential standard of review as regards discretionary decisions. For example, the Appeals Chamber of the ICC has held:
>
> *80.* [*T*]*he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion* [...]*, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.*

[187] Case 002/01 Appeal Judgment (F36), paras 96-98.

> 98. The Appeals Chambers of the ICTY and ICTR have expressed their respective standards of review for discretionary decisions in similar terms. The Supreme Court Chamber considers that the deferential standard of review adopted by these tribunals is equally appropriate in the context of the ECCC and will assess alleged errors in discretionary decisions of the Trial Chamber against this standard.[188]

74. In deciding this challenge, this Chamber will apply that analysis of the review of discretion by an appeals chamber. Assuming *arguendo* that this Chamber accepts that the Trial Chamber may have erred in exercising its discretion by delivering the Judgment in two stages, then, in the absence of any identified infringement of KHIEU Samphân's right to appeal, this Chamber would still be unable to identify any compelling reasons for negating the exercise of that discretionary power. In other words, this Chamber does not believe that "the decision is so unfair and unreasonable as to constitute an abuse of discretion", in light of the extended notice period provided to the parties prior to the summary being delivered, with the reasoned, definitive, and authoritative Judgment to follow in due course. There would be no rational reason to deviate from the practice of due deference.

75. While much of KHIEU Samphân's argument could have been avoided if the Trial Chamber had provided reasons for its decision to issue a fully reasoned judgment several months later, this must be viewed in context. As previously noted, KHIEU Samphân was fully aware of the intention to deliver the Judgment in two stages. The Trial Chamber publicly provided notice of its intentions and provided ample opportunity to the parties, especially the accused, to raise any objections. The Supreme Court Chamber, therefore, finds no discernible error in the Trial Chamber's exercise of discretion.

76. The Supreme Court Chamber now examines KHIEU Samphân's contention that the Trial Chamber's actions constituted a procedural error that rendered all subsequent actions void: this Chamber finds that this contention is devoid of substance. There is no citation to any jurisprudence or procedural rule that supports the basic premise and its implications. Several claims are made, the first of which is that failing to strictly follow the provisions of Rule 102(1), which govern *how* a judgment is delivered, is a legal error that renders the Judgment null and void. An analysis of the premise that a procedural defect translates to a legal error and that legal error renders subsequent actions void for procedural defect is a circular argument. This is a pointless and risky exercise in semantics and syllogistic deduction. It is without merit. It is insufficient to persuade this Chamber to accept the premise. As examined above, the Internal

[188] Case 002/01 Appeal Judgment (F36), paras 96-98.

Rules identify which breaches of procedural rules have grave consequences.[189] In no case is a failure to provide how a decision is furnished deemed to be a procedural defect of such import as to render a judgment void, nor has KHIEU Samphân demonstrated that he suffered such prejudice in view of the proceedings as a whole to occasion a miscarriage of justice.

77. While KHIEU Samphân's sense of injury and outrage pervades the submission to the point where the Trial Chamber judges are intemperately accused of "procedural anarchy", the fact remains that the somewhat self-serving assertions are just that: their legal legitimacy is unsupported.[190]

78. It has not been established that the Judgment was vitiated in its entirety by the delay in delivering the operative Judgment immediately following the reading out of the summary, as implied by the Rules.

79. Furthermore, this Chamber rejects KHIEU Samphân's claim that the summary delivered in open court, with a fully reasoned judgment to follow, was a judgment under Rule 102(1). Nothing in this rule specifies that such distribution or publication of the fully reasoned judgment must take place on the same day as pronouncement at the public hearing. In fact, it is not uncommon in international criminal cases of such magnitude to issue an oral summary of the judgment with written reasons to follow to allow for the completion of editorial and/or translation processes. This Chamber finds that there is no legal basis to claim that the procedural error influenced the verdict, the judgment, or the decision. There is no evidence of any prejudice against KHIEU Samphân. It follows that a lawful and reasoned judgment capable of appeal was pronounced on 16 November 2018 in summary form, with the full written version distributed and published on 28 March 2019. His right to review the decision underpinning both his convictions and his sentence remained wholly intact, pending the distribution and publication of the full written Judgment, as evidenced by the present adjudication of his appeal against the Trial Judgment.

80. In sum, KHIEU Samphân has not established that the summary delivered in open court was a judgment much less a defective judgment void for a procedural defect. As KHIEU Samphân's main premise is flawed, it is unnecessary to examine his other arguments that are based on it. The Supreme Court Chamber finds that the Trial Chamber's action did not

[189] See *supra* Section II.D.
[190] KHIEU Samphân's Appeal Brief (F54), para. 62.

constitute a grave error of law rendering the judgment null and void due to a procedural defect. Accordingly, KHIEU Samphân's main submission is dismissed.

V. ALLEGED ERRORS IN THE FAIRNESS OF THE PROCEEDINGS

81. KHIEU Samphân submits that the Trial Chamber was deeply biased against him and repeatedly violated his fundamental rights, thereby rendering the entire trial unfair and requiring the Supreme Court Chamber to reverse his conviction and sentence.[191] He argues that the Trial Chamber failed to conduct an impartial scrutiny into the crimes committed 40 years ago during a painful and complicated period of Cambodian history, and it also failed to apply the law that was in effect at the time.[192]

82. In support of the series of challenges impugning the Trial Chamber's ability to conduct the trial in a fair and impartial manner, KHIEU Samphân presents the same premise advanced in his Case 002/01 Appeal Brief that "the Chamber set out with the assumption that Mr KHIEU Samphan is guilty and then sorted and distorted the evidence to confirm its prior determination."[193] He elaborates that, "in order to reach this finding of guilt and conviction, the Chamber's *modus operandi* was the same as in its judgment in Case 002/01" by:

> systematically violating the principle of legality by ignoring the law that was applicable at the relevant time […], particularly in defining the crimes charged, misapplying both the law and procedure even where it had correctly set out the principles and, contrary to its duty of impartiality, interpreting the facts in a manner that was consistently inculpatory.[194]

83. The allegations of bias further extend to the Trial Chamber's severance of Case 002 into two separate trials, including: the Trial Chamber's prior adjudication of Case 002/01 and its alleged failure to address his allegations of bias presented at trial; the lack of notice provided by the Trial Chamber when undertaking a similar re-characterisation of crimes in Case 002/02, violating his right to be informed of the charges against him;[195] the unclear delineation of charges in Case 002/02, resulting in KHIEU Samphân being convicted of the same crimes

[191] KHIEU Samphân's Appeal Brief (F54), paras 97, 332-333.
[192] KHIEU Samphân's Appeal Brief (F54), para. 84.
[193] KHIEU Samphân's Appeal Brief (F54), para. 85, quoting Case 002/01, Mr KHIEU Samphân's Defence Appeal Brief Against the Judgment Pronounced in Case 002/01, 17 August 2015, F17 ("Case 002/01 KHIEU Samphân's Appeal Brief (F17)"), para. 4.
[194] KHIEU Samphân's Appeal Brief (F54), para. 86.
[195] KHIEU Samphân's Appeal Brief (F54), paras 135-157.

twice;[196] the Trial Chamber's importation of findings from Case 002/01 into Case 002/02; and the Trial Chamber's reliance on untested evidence in Case 002/02.[197]

84. Insofar as bias is alleged, the alleging party faces a high burden to displace a judge's presumption of impartiality and must provide convincing evidence that a judge's mind is, or would be, tainted by a predisposition to resolve matters in a prejudiced manner.[198] Such an enquiry is not primarily directed at establishing whether the Trial Chamber erred, but whether its reasoning revealed a lack of impartiality.[199] Throughout his Appeal Brief, KHIEU Samphân advances multiple sweeping allegations of bias which fail to meet the high threshold to displace a judge's presumption of impartiality and fail to contain sufficient substantiation to demonstrate legal, factual, or discretionary errors. Where the required threshold is not met, the Supreme Court Chamber will dismiss such arguments in the context of the claim that the Trial Chamber was biased. It is further observed that several arguments repeat previous submissions alleging partiality of the Trial Chamber in adjudicating Cases 002/01 and 002/02 as well as the Trial Chamber's treatment of evidence common to both trials. These are not novel issues and they have been thoroughly resolved by a specially appointed panel of judges after extensive litigation and final rulings. The standard of appellate review applies to arguments that identify and substantiate appealable errors. Those failing to reach the required standard, including the repetition of previously failed arguments, will be summarily dismissed.

85. KHIEU Samphân argues that the cumulative effect of the alleged violations and errors rendered the trial unfair, and he requests this Chamber's intervention to reverse his convictions and sentence. The Supreme Court Chamber recalls that its primary concern is determining the overall fairness of criminal proceedings. The cumulative effect of fair trial violations must be serious and egregious, and compliance with the requirements of a fair trial must be examined in each case with regard to the development of the proceedings as a whole, rather than an isolated consideration of one particular aspect or one particular incident. Another key consideration for an appellate chamber will be to assess any measures taken by the Trial Chamber to remedy any violations that may have occurred during the proceedings.

[196] KHIEU Samphân's Appeal Brief (F54), para. 134.
[197] KHIEU Samphân's Appeal Brief (F54), paras 158-167.
[198] Case 002/01 Appeal Judgment (F36), para. 112.
[199] Case 002/01 Appeal Judgment (F36), para. 112. See also Reasons for Decision on Applications for Disqualification, 30 January 2015, E314/12/1 ("Disqualification Decision (E314/12/1)"), para. 36; Case 002, Decision on IENG Thirith's Application to Disqualify Judge SOM Sereyvuth for Lack of Independence, 3 June 2011, 1/4, para. 13; Decision on KHIEU Samphân's Disqualification Application (11), para. 101.

A. THE PRINCIPLE OF LEGALITY

86. Legality underpins all valid judgments and the legitimacy of guilty convictions. In accordance with the ECCC's jurisprudence, the Trial Chamber recalled that both the Cambodian and international principles of legality, connected with the general principles of *nulla poena sine lege* (no penalty without law) and *nullum crimen sine lege* (no crimes without law), require that the law governing crimes and modes of criminal liability be clear, ascertainable and non-retrospective.[200] It also emphasised that the specific context of the ECCC requires that the offences and modes of liability charged be recognised under Cambodian law or international law, including customary international law, as it existed during the indictment period and be sufficiently foreseeable and accessible.[201] In this respect, the Trial Chamber echoed the Supreme Court Chamber's statement in Case 002/01 that the crimes and modes of liability must be foreseeable and accessible "in general" based on an "objective analysis".[202] The Trial Chamber rejected KHIEU Samphân's various submissions at trial challenging the Supreme Court Chamber's approach to the principle of legality in Case 002/01.[203]

87. On appeal, KHIEU Samphân submits that, by relying on the Supreme Court Chamber's erroneous approach, the Trial Chamber failed to apply the correct legal criteria that underlie adherence to the principle of legality.[204] He specifically contends that the Trial Chamber: (1) distorted the purpose of the principle, which requires accessibility and foreseeability in terms of the technical definition of the offence at the material time, including the precise manner in which the crime was punishable;[205] (2) inappropriately reasoned in terms of the conduct of the accused rather than the quality of the law, in contradiction to the case law of the European Court of Human Rights ("ECtHR");[206] and (3) carried out only a very cursory review of the

[200] Trial Judgment (E465), para. 21, referring to, *inter alia*, Case 001 Appeal Judgment (F28), para. 91; Case 002/01, Case 002/01 Trial Judgement, 7 August 2014, E313 ("Case 002/01 Trial Judgment (E313)"), para. 16; Case 002/01 Appeal Judgment (F36), para. 761.
[201] Trial Judgment (E465), paras 21, 27.
[202] Trial Judgment (E465), para. 23, referring to Case 002/01 Appeal Judgment (F36), para. 761.
[203] Trial Judgment (E465), paras 22-32.
[204] KHIEU Samphân's Appeal Brief (F54), paras 550-574.
[205] KHIEU Samphân's Appeal Brief (F54), paras 551-557.
[206] KHIEU Samphân's Appeal Brief (F54), paras 551, 558-565, referring to *Vasiliauskas v. Lithuania*, Grand Chamber (ECtHR), Application no. 35343/05, Judgment, 20 October 2015 ("*Vasiliauskas v. Lithuania* Judgment (ECtHR)"), paras 167-186, 191.

requirements of accessibility and foreseeability, which require being considered "in a thorough manner for each defendant individually".[207]

88. In this respect, KHIEU Samphân reiterates that the Cambodian legal system is a dualist system that effectively prevents international norms from being directly applied to domestic law; accordingly, a Cambodian citizen in the 1970s could only expect the 1956 Cambodian Penal Code to be applied, which did not include provisions for genocide, crimes against humanity, or war crimes until 2009.[208] He submits that ascertaining customary international law from 40 years ago is particularly perilous, especially given the divergent interpretations among professional judges of a constantly changing body of law, which makes it impossible to conclude that a Cambodian citizen in the 1970s could have known with sufficient accuracy what acts and omissions would make him criminally liable under customary international law.[209]

89. The Co-Prosecutors contend that KHIEU Samphân shows no error in the Trial Chamber's articulation or application of the requirements of the principle of legality.[210]

90. The Supreme Court Chamber notes that the majority of KHIEU Samphân's arguments were previously advanced and considered in Case 002/01, and were ultimately dismissed by the Trial Chamber and by this Chamber. Among the contentions reiterated by KHIEU Samphân and rejected by this Chamber are that: accessibility and foreseeability require reference to specific provisions setting out the technical definition of the offence and the sentence;[211] the criteria of foreseeability and accessibility cannot be met merely by the fact that a crime or mode of liability existed under customary international law in 1975;[212] the dualist legal system in Cambodia means that, absent domestic implementation, none of the international norms formed part of Cambodian law;[213] and the definitions of the crimes and modes of liability, including the contextual elements of crimes against humanity, adopted by the Trial Chamber were neither accessible nor foreseeable in 1975.[214]

[207] KHIEU Samphân's Appeal Brief (F54), paras 551, 566-574.
[208] KHIEU Samphân's Appeal Brief (F54), para. 568.
[209] KHIEU Samphân's Appeal Brief (F54), paras 569-571.
[210] Co-Prosecutors' Response (F54/1), paras 29-37.
[211] Case 002/01 Appeal Judgment (F36), para. 762.
[212] Case 002/01 Appeal Judgment (F36), para. 762.
[213] Case 002/01 Appeal Judgment (F36), paras 759, 763.
[214] Case 002/01 Appeal Judgment (F36), paras 759, 764.

91. No new arguments have been presented to persuade the Supreme Court Chamber to depart from the well-established jurisprudence on the principle of legality and, accordingly, from the consistent approach at the ECCC, to which the Trial Chamber adhered in the present case. This in itself suffices for the outright dismissal of this appeal challenge. This Chamber recalls the jurisprudence both in Case 001 and in Case 002/01, as well as of other jurisdictions such as the ICTY, that the accused must be able to appreciate that the conduct is criminal in general, without reference to any specific provision.[215] This interpretation of the principle of legality has recently informed the approach at the Kosovo Specialist Chambers ("KSC"), where a Panel of the Court of Appeals Chamber explicitly endorsed the respective findings of the Trial Chamber and of the Supreme Court Chamber in Case 001.[216] Similarly, the Pre-Trial Judge at the KSC, in assessing the principle of legality as regards modes of liability, upon reiterating that the accused must have been able to appreciate that their conduct is criminal without reference to any specific provision, concluded that there is no requirement of identifying provisions using identical terminology when ascertaining the foreseeability and accessibility of the respective mode of liability.[217]

92. The above interpretation does not negate the requirement that a crime be clearly defined in the law. The understanding that "law" comprises both national and international law and extends to written and unwritten law, has been reflected in the jurisprudence of the ECtHR including in the *Vasiliauskas v. Lithuania* case, cited by KHIEU Samphân,[218] and further reinforced by the ICTY, the ECCC, and most recently, the KSC. In the context of international law, for instance, the Court of Appeals Panel at the KSC endorsed the stance taken in Case 001 that an assessment of the foreseeability and accessibility requirements should take into account the unique nature of international law, including its reliance on unwritten custom, and that accessibility can be demonstrated by the existence of an applicable treaty or customary

[215] Case 001 Appeal Judgment (F28), para. 96; Case 002/01 Appeal Judgment (F36), para. 762; *Prosecutor v. Hadžihasanović and Kubura*, Appeals Chamber (ICTY), IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 34.
[216] Panel of the Court of Appeals Chamber (Kosovo Specialist Chambers ("KSC")), KSC-BC-2020-06, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021 ("Decision on Jurisdiction Motions (KSC)"), para. 212, referring to Case 001, Judgement, 26 July 2010, E188 ("Case 001 Trial Judgment (E188)"), para. 31; Case 001 Appeal Judgment (F28), para. 160.
[217] *Prosecutor v. Thaçi et al.*, Pre-Trial Judge (KSC), KSC-BC-2020-06, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021 ("*Thaçi et al.* Decision (KSC)"), para. 193.
[218] *Vasiliauskas v. Lithuania* Judgment (ECtHR), para. 154; *S.W. v. United Kingdom*, ECtHR, Application no. 20166/92, Judgment, 22 November 1995 ("*S.W. v. United Kingdom* Judgment (ECtHR)"), para. 35; *Cantoni v. France*, ECtHR, Application no. 17862/91, Judgment, 11 November 1996, para. 29.

international law during the relevant period.[219] Similarly, the Pre-Trial Judge at the KSC stated that customary law may be represented in unwritten law and case law,[220] recalling the ICTY Appeals Chamber's findings in the *Milutinović et al.* case, which stated that as customary law is not always represented by written law, its accessibility may not be as straightforward as it would be if there were an international criminal code.[221] The ICTY Appeals Chamber acknowledged that rules of customary law may provide sufficient guidance to any individual as to the standard of the violation which could entail his or her criminal liability,[222] especially when the charged crime is of an appalling nature, which may play a role in determining whether the accused knew of the criminal nature of his or her conduct.[223] This understanding has since been adopted by the Supreme Court Chamber in Case 002/01[224] and subsequently articulated by the Pre-Trial Judge at the KSC.[225]

93. This Chamber has consistently held that crimes against humanity were established as an international crime during the ECCC's temporal jurisdiction and that their contextual or *chapeau* elements were enshrined in a range of post-World War II international and domestic legal instruments and also formed part of customary international law in 1975.[226] Cambodia's ratification of the four Geneva Conventions on 8 December 1958 renders the prohibition of grave breaches of the four conventions as well as their *chapeau* elements applicable law, and thus binding on Cambodia. Cambodia's accession to the 1948 Genocide Convention on 14 October 1950 similarly renders the prohibition of genocide applicable to and binding on Cambodia. The crimes of genocide, crimes against humanity, and war crimes along with their elements were therefore sufficiently foreseeable and accessible to KHIEU Samphân as a member of Cambodia's governing authority from 1975 onwards.

94. Based on the foregoing, the Supreme Court Chamber concludes that KHIEU Samphân's appeal challenge concerning the principle of legality is without merit and is rejected in its entirety.

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[219] Decision on Jurisdiction Motions (KSC), para. 212, referring to Case 001 Trial Judgment (E188), para. 31; Case 001 Appeal Judgment (F28), para. 160.
[220] *Thaçi et al.* Decision (KSC), para. 193.
[221] *Prosecutor v. Milutinović et al*., Appeals Chamber (ICTY), IT-00-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 ("*Milutinović et al.* Decision (ICTY)"), para. 41.
[222] *Milutinović et al.* Decision (ICTY), para. 41.
[223] *Milutinović et al.* Decision (ICTY), para. 42.
[224] Case 002/01 Appeal Judgment (F36), para. 762.
[225] *Thaçi et al.* Decision (KSC), para. 192.
[226] Case 002/01 Appeal Judgment (F36), para. 764; Case 001 Appeal Judgment (F28), paras 104, 721.

B. RECHARACTERISATION OF CHARGES

95. The Trial Chamber held that, pursuant to Rule 98(2) and ECCC jurisprudence, it could change the legal characterisation of facts set out in the Closing Order at any time "up to and including in the verdict".[227] This was subject to the requirements of a fair trial, including that the Trial Chamber "remain within the confines of the facts set out in the Closing Order", and that the Accused "be put on notice of a possible re-characterisation".[228] The Trial Chamber specifically considered whether it could legally recharacterise the facts in the Closing Order concerning the deaths of individuals who allegedly died *en masse* at crime sites due to the living and working conditions imposed on them from the crime of extermination to murder, in particular with *dolus eventualis*.[229] The Trial Chamber held that the Supreme Court Chamber's ruling in Case 002/01 that certain facts charged in the Closing Order could be recharacterised from extermination to murder, including with *dolus eventualis*, had "effectively put the Parties on notice as of November 2016" that such a recharacterisation was possible.[230] The Trial Chamber also concluded that such a recharacterisation would not violate KHIEU Samphân's fair trial rights.[231] The Trial Chamber then determined that the deaths resulting from the working and living conditions at the Tram Kak Cooperatives, the 1st January Dam Worksite, the Trapeang Thma Dam Worksite, and the Kampong Chhnang Airfield Construction Site (collectively the "Four Sites") satisfied the *actus reus* and *mens rea* of the crime against humanity of murder with *dolus eventualis* and accordingly recharacterised the charged facts as such.[232]

96. On appeal, KHIEU Samphân submits that the Trial Chamber misapplied the law on recharacterisation.[233] He contends that the legal recharacterisation of facts charged as extermination to the crime of murder with *dolus eventualis* amounts to introducing a new constitutive element in the Closing Order because extermination and murder are separate crimes with different constituent elements.[234] As a result, with only the charge of extermination before him, he was unable to defend himself against "a '*mens rea* of a lesser degree'", especially one that does not exist in the definition of the crime of extermination.[235] According

[227] Trial Judgment (E465), para. 153.
[228] Trial Judgment (E465), para. 153.
[229] Trial Judgment (E465), para. 154.
[230] Trial Judgment (E465), paras 155-157, referring to Case 002/01 Appeal Judgment (F36), para. 562.
[231] Trial Judgment (E465), para. 157.
[232] Trial Judgment (E465), paras 1144-1145, 1388-1390, 1672-1673, 1804-1806.
[233] KHIEU Samphân's Appeal Brief (F54), paras 135-157; T. 16 August 2021, F1/9.1, pp. 31-40.
[234] KHIEU Samphân's Appeal Brief (F54), paras 149-152.
[235] KHIEU Samphân's Appeal Brief (F54), para. 153. See also T. 16 August 2021, F1/9.1, pp. 32-35, 38.

to KHIEU Samphân, he was therefore convicted on charges for which he had not been indicted.[236] He continues by claiming that correcting the prejudice at the appeal stage will be prejudicial to him because the Supreme Court Chamber is the court of last resort.[237]

97. Regarding the alleged lack of notice, KHIEU Samphân submits that the Trial Chamber ignored "the 'fundamental difference between Case 002/01 and Case 002/02 following the severance of the proceedings'."[238] He argues that the recharacterisation made in another case by another chamber could not exempt the Trial Chamber from "its obligation to notify the Accused of its own intention to possibly modify the characterisation" in the current case.[239] In this regard, KHIEU Samphân submits that the accused must be provided with full and detailed information about the charges against him, including the legal characterisation that the court may adopt, as well as the opportunity to prepare his defence to the new charge, effectively and in a timely manner.[240] In KHIEU Samphân's view, this opportunity was not afforded to him at any time before the Trial Judgment was pronounced, thus precluding him from defending himself against the recharacterised charge of murder with *dolus eventualis*.[241] He accordingly requests that his convictions be reversed based on the recharacterisation of extermination as murder with *dolus eventualis*.[242]

98. The Co-Prosecutors respond that KHIEU Samphân has failed to establish that the Trial Chamber erred in recharacterising the facts underlying the charge of extermination as murder with *dolus eventualis*.[243] They submit that, even if the Supreme Court Chamber were to deem its Case 002/01 Appeal Judgment provided insufficient notice of possible recharacterisation, such a "procedural error" would not invalidate the Trial Chamber's decision.[244] The Lead Co-Lawyers support the Co-Prosecutors' Response.[245]

99. In the relevant part, Rule 98(2) states that the "judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced."[246]

[236] KHIEU Samphân's Appeal Brief (F54), paras 155-156.
[237] T. 16 August 2021, F1/9.1, pp. 39-40.
[238] KHIEU Samphân's Appeal Brief (F54), para. 138.
[239] KHIEU Samphân's Appeal Brief (F54), paras 138-139; T. 16 August 2021, F1/9.1, pp. 38-39.
[240] KHIEU Samphân's Appeal Brief (F54), paras 140-141.
[241] KHIEU Samphân's Appeal Brief (F54), paras 142-147, 153-154.
[242] KHIEU Samphân's Appeal Brief (F54), para. 155, fn. 177.
[243] Co-Prosecutors' Response (F54/1), paras 84-91; T. 16 August 2021, F1/9.1, pp. 61-64.
[244] Co-Prosecutors' Response (F54/1), para. 91.
[245] Lead Co-Lawyers' Response (F54/2), paras 88-89.
[246] Internal Rules, Rule 98(2). See also Internal Rules, Rule 110(2).

The Supreme Court Chamber is called upon to determine whether the Trial Chamber applied the law correctly.[247] As part of this inquiry, this Chamber will review whether the Trial Chamber introduced a "new constitutive element" when it recharacterised the facts from extermination to murder with *dolus eventualis*. If it determines that the Trial Chamber erroneously did so, the issue of notice to the parties is rendered moot.

1. Alleged Introduction of a New Constitutive Element

100. KHIEU Samphân submits that the legal recharacterisation of facts charged as extermination as murder with *dolus eventualis* amounts to introducing a new constitutive element in the recharacterisation process because the two crimes are different.[248] He argues that *dolus eventualis* is a "non-intrinsic element" of extermination, that it is "foreign to and even excluded from it."[249] KHIEU Samphân's challenge is thus specifically levelled at the *mens rea* requirement for the recharacterised crime, that is *dolus eventualis* for murder, which he claims is not included in the direct intent required for extermination.[250]

101. The Supreme Court Chamber considers, however, that the Trial Chamber's power to recharacterise under Rule 98(2) is only limited by the facts in the Closing Order and not the elements of the crimes set forth therein.[251] Thus, even if the Closing Order on the charge of extermination is arguably read to allow only for extermination with *dolus directus*, the description of the facts underpinning this legal characterisation may still include the possibility of a finding of *dolus eventualis*.[252] While it is true, as KHIEU Samphân points out, that in the Closing Order and during most of the trial, he only faced a charge of extermination rather than murder in relation to the Four Sites,[253] this does not imply that the Trial Chamber introduced a "new constitutive element" or any new fact in this case. The legal question before this Chamber is whether the facts before the Trial Chamber supported a possible charge of murder with *dolus eventualis* rather than extermination with direct intent. If this Chamber finds that the facts included in the Closing Order supported a finding of murder with *dolus eventualis* as well as extermination, the recharacterisation by the Trial Chamber is lawful. Alternatively, if the Trial

[247] See Case 001 Appeal Judgment (F28), paras 14, 16.
[248] KHIEU Samphân's Appeal Brief (F54), paras 149-154; T. 16 August 2021, F1/9.1, pp. 33-34.
[249] KHIEU Samphân's Appeal Brief (F54), para. 152.
[250] See KHIEU Samphân's Appeal Brief (F54), paras 152-153; T. 16 August 2021, F1/9.1, pp. 33-34, 36-37.
[251] In this respect, the Supreme Court Chamber agrees with the Trial Chamber's statement in Case 001 that "the proviso of Internal Rule 98(2) that no new constitutive elements be introduced is […] that any re-characterisation must not go beyond the facts set out in the charging document." See Case 001 Trial Judgment (E188), para. 494.
[252] See Case 002, Closing Order, 15 September 2010, D427 ("Case 002 Closing Order (D427)"), paras 1388-1389.
[253] KHIEU Samphân's Appeal Brief (F54), paras 146-147.

Chamber included facts which were not found in the Closing Order, the recharacterisation is unlawful.

102. The Closing Order describes the working and living conditions at each of the Four Sites and the knowledge of such conditions, including KHIEU Samphân's purported visits to these Four Sites.[254] It also describes how there was sufficient evidence to prove that KHIEU Samphân, "through [his] acts or omissions, committed (via a joint criminal enterprise ("JCE")), planned, instigated, ordered, or aided and abetted, or was responsible by virtue of superior responsibility," for, *inter alia*, crimes against humanity, including, specifically, murder and extermination.[255]

103. In particular, the Closing Order, and the evidence indicated in it and later adduced at trial, describes how at the Four Sites: (1) people died from malnutrition, overwork, sickness and lack of medical treatment;[256] (2) the CPK's central rationing system, which assigned different rations to various categories of persons and "enemies" with the least quantities allotted to those considered to be reactionary, was implemented;[257] (3) workers were threatened with withholding of food rations if they did not meet their work quotas;[258] and (4) sick people, including in hospitals, were given less food rations because they were not being productive.[259]

104. In addition, evidence was also presented to show that: (1) the systematic vertical reporting structures within the ranks of the CPK meant that the Central Committee, and in particular the Standing Committee, was fully apprised of issues affecting the livelihood of workers and peasants at cooperatives and worksites;[260] (2) KHIEU Samphân's important positions within the CPK meant that he attended the meetings of the Standing Committee where

[254] See Case 002 Closing Order (D427), paras 310-314, 318 (Tram Kak Cooperatives), 359-360, 362-363 (1st January Dam Worksite), 336-343, 347 (Trapeang Thma Dam), 389, 391-392, 395 (Kampong Chhnang Airfield Construction Site).
[255] See Case 002 Closing Order (D427), para. 1613.
[256] See Case 002 Closing Order (D427), paras 311-314 (Tram Kak Cooperatives), 359-363 (1st January Dam Worksite), 336-343 (Trapeang Thma Dam), 389, 391-392 (Kampong Chhnang Airfield Construction Site). See also, *e.g.*, Trial Judgment (E465), paras 1011-1012, 1014, 1017-1020, 1045, 1047 (and underlying evidence in the respective footnotes), 1581-1610, 1624-1629 (and the underlying evidence contained in the respective footnotes), 1270-1274, 1297-1304, 1320-1323, 1325, 1327-1329, 1375-1376, 1384 (and the underlying evidence contained in the respective footnotes), 1747-1758 (and the evidence contained in the respective footnotes).
[257] See Case 002 Closing Order (D427), paras 305-306, 343, 360, 389-390. See also, *e.g.*, Trial Judgment (E465), paras 1009, 1304, 1558 (and evidence referred to therein).
[258] See, *e.g.*, Trial Judgment (E465), paras 1293-1294.
[259] See, *e.g.*, Trial Judgment (E465), paras 1047, 1326.
[260] See Case 002 Closing Order (D427), paras 41-42, 71-72, 307-309. See also, *e.g.*, Trial Judgment (E465), paras 3912-3913.

he would have been informed of the situation on the ground;[261] (3) KHIEU Samphân may have visited some of the Four Sites himself;[262] (4) in spite of widespread starvation across the country, the CPK exported large quantities of rice to generate capital;[263] (5) the CPK's top cadre knew of the living and working conditions at the Four Sites;[264] and (6) they accepted the workers' and peasants' deaths as a consequence of the implementation of the "great leap forward" policy.[265]

105. Based on the foregoing, the Supreme Court Chamber concludes that the facts described in the Closing Order, when assessed cumulatively with the evidence indicated in it and subsequently adduced at trial, included proof of murder with *dolus eventualis* at the Four Sites, rather than just proof of extermination with *dolus directus*. KHIEU Samphân therefore fails to demonstrate that the Trial Chamber introduced new constitutive elements by recharacterising the crime of extermination to murder with *dolus eventualis*.

2. Alleged Lack of Notice

106. The Supreme Court Chamber now turns to the alleged lack of notice of the recharacterisation given to KHIEU Samphân. This Chamber has yet to rule on the issue of notice in cases of judicial recharacterisation. In this regard, it is only the Case 001 Trial Judgment that held that the requirement to give the accused the possibility of exercising defence rights "in a practical and effective manner, and in particular, in good time" means they had to be made aware of the possibility of legal recharacterisation and given a sufficient opportunity to defend themselves.[266]

107. A sideways glance at the decisions of the ECtHR, on which the Trial Chamber and KHIEU Samphân rely, is also instructive. The ECtHR has clearly stated that when changes are made to the charges, including when a legal recharacterisation is being considered by the courts themselves, the parties must be informed of such an eventuality so that they can make timely

[261] See Case 002 Closing Order (D427), paras 41-42, 45, 328, 385, 1132-1152, 1164-1171. See also, *e.g.*, Trial Judgment (E465), paras 624, 4201, 4208.
[262] See Case 002 Closing Order (D427), paras 333, 357, 388. See also, *e.g.*, Trial Judgment (E465), paras 1135-1137.
[263] See, *e.g.*, Trial Judgment (E465), para. 3914.
[264] See, *e.g.*, Trial Judgment (E465), paras 950-951, 955, 1136, 1307, 1323, 1631, 1634, 3912-3913, 3920, 4208.
[265] See Case 002 Closing Order (D427), paras 156-159. See also, *e.g.*, Trial Judgment (E465), paras 3912-3913, 4208, 4212, 4218.
[266] Case 001 Trial Judgment (E188), paras 498, 502 (in the context of the specific possibility of the recharacterisation from individual modes of liability to joint criminal enterprise).

and effective submissions.[267] The right to be informed of the nature and cause of the accusation is an aspect of the accused's right to prepare a defence.[268] The ECtHR has further stated that there are no special formal requirements as to the manner in which the accused is to be informed of the nature and cause of the accusation against him.[269] The information provided must nevertheless be "full" and "detailed", though each factual situation will need to be assessed on a case-by-case basis.[270] Moreover, it is the court's duty to ensure that the accused is provided with such information regarding the facts against him and their legal characterisation.[271]

108. In this case, the Trial Chamber's rulings on legal recharacterisation must be read holistically. While the Trial Chamber considered the Case 002/01 Appeal Judgment on the crime of extermination as notice to the Accused in this case, highlighting the fact that both cases shared the same Closing Order, the same counsel and the same parties, it also invited the parties to make submissions on the impact, if any, of the Case 002/01 Appeal Judgment at the conclusion of *this* case's evidentiary proceedings.[272] In addition, it convened a special trial management meeting to discuss this and other issues.[273] One of the key legal and evidentiary issues of that judgment was the recharacterisation of facts in analogous circumstances to those in this case. It can thus be reasonably inferred that the invitation to make submissions included the issue of recharacterisation of facts from extermination to murder with *dolus eventualis* for the Four Sites. As such, in the context of the identical parties and the same Closing Order, as well as this Chamber's prior recharacterisation of the same crime of extermination, this

[267] See *Pélissier and Sassi v. France*, Grand Chamber (ECtHR), Application no. 25444/94, Judgment, 25 March 1999 ("*Pélissier & Sassi v. France* Judgment (ECtHR)"), paras 51-52; *Miraux v. France*, Second Section (ECtHR), Application no. 73529/01, Judgment, 12 February 2007 ("*Miraux v. France* Judgment (ECtHR)"), para. 32; *Mattei v. France*, Second Section (ECtHR), Application no. 34043/02, Judgment, 19 March 2007 ("*Mattei v. France*, Judgment (ECtHR)"), para. 36; *Mattoccia v. Italy*, First Section (ECtHR), Application no. 23969/94, Judgment, 25 July 2000 ("*Mattoccia v. Italy*, Judgment (ECtHR)"), para. 61.
[268] See *Pélissier & Sassi v. France* Judgment (ECtHR), para. 54; *Miraux v. France* Judgment (ECtHR), para. 31; *Mattei v. France* Judgment (ECtHR), para. 36; *Mattoccia v. Italy* Judgment (ECtHR), para. 61.
[269] *Pélissier & Sassi v. France* Judgment (ECtHR), para. 53; *Miraux v. France* Judgment (ECtHR), para. 32; *Mattei v. France* Judgment (ECtHR), para. 36; *Mattocia v. Italy* Judgment (ECtHR), para. 60.
[270] *Pélissier & Sassi v. France* Judgment (ECtHR), paras 51-53; *Mattoccia v. Italy* Judgment (ECtHR), paras 59-61.
[271] *Miraux v. France* Judgment (ECtHR), para. 34; *Mattei v. France* Judgment (ECtHR), para. 36. The ECtHR has held that "the mere fact" that submissions of the civil party referencing the recharacterised crime were made available at the court registry "could not suffice, by itself, to satisfy the requirements" of Article 6(3)(a) of the Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* 3 September 1953, 213 U.N.T.S. 221 ("ECHR"). *Pélissier & Sassi v. France* Judgment (ECtHR), para. 55.
[272] See Case 002/01, Trial Chamber Memorandum 'Closing Briefs, SCC judgement in Case 002/01 and TMM', 3 November 2016, E449, para. 3 (emphasis added).
[273] See generally Trial Management Meeting, 8 December 2016, E1/509.1, p. 24.

Chamber concludes that the parties were on notice that a similar recharacterisation could possibly take place.

3. Conclusion

109. For the foregoing reasons, the Supreme Court Chamber concludes the Trial Chamber did not introduce new constitutive elements into the facts when it recharacterised the crime of extermination to murder with *dolus eventualis*. This Chamber also finds that sufficient notice of the possible recharacterisation was provided. KHIEU Samphân's allegations that the Trial Chamber erred in so recharacterising are accordingly dismissed.

C. ALLEGED PARTIALITY OF THE TRIAL CHAMBER

110. KHIEU Samphân raises multiple allegations of bias stemming from the Trial Chamber's prior adjudication of Case 002/01, namely that the Trial Chamber failed to address the allegations of bias he raised,[274] and that its bias is manifested by the automatic importation of findings and evidence from Case 002/01 into Case 002/02.[275] The Supreme Court Chamber addresses these allegations in turn.

1. Alleged Failure to Address Allegations of Bias

111. KHIEU Samphân submits that the Trial Chamber violated his right to a reasoned opinion "by not addressing or not sufficiently addressing [his] allegations of partiality" stemming from its prior adjudication of Case 002/01.[276] He specifically avers that the Trial Chamber "did not recall and did not refer to the arguments developed" in his Closing Brief,[277] and, referring to his previous submissions on the matter,[278] contends that, after judging Case 002/01, the Trial Chamber was not free from bias to adjudicate Case 002/02.[279]

[274] KHIEU Samphân's Appeal Brief (F54), paras 127-129.
[275] KHIEU Samphân's Appeal Brief (F54), paras 127, 129-133, 158-164.
[276] KHIEU Samphân's Appeal Brief (F54), para. 127.
[277] KHIEU Samphân's Appeal Brief (F54), para. 127, referring to KHIEU Samphân's Closing Brief (002/02), 2 May 2017, amended on 2 October 2017 (E457/6/4/1) ("KHIEU Samphân's Closing Brief (E457/6/4/1)"), paras 651-658.
[278] KHIEU Samphân's Appeal Brief (F54), para. 128, and references cited therein.
[279] KHIEU Samphân's Appeal Brief (F54), paras 127-129.

112. The Co-Prosecutors respond that KHIEU Samphân's submissions were already raised and dismissed by a Special Panel of the Trial Chamber, and are therefore no longer subject to appeal.[280] The Lead Co-Lawyers agree with the Co-Prosecutors' submissions.[281]

113. Rule 34 provides that allegations of judicial bias are to be adjudicated by a special panel, excluding the judges against whom the allegations have been raised. A formal application for disqualification is a precondition to consideration of such submissions. The Trial Chamber accordingly deemed that it could not adjudicate KHIEU Samphân's allegations of bias within its own judgment.[282] The Trial Chamber also noted that most of KHIEU Samphân's allegations of partiality had already been rejected by the Special Panel of the Trial Chamber, which was appointed following his application to disqualify the trial judges, or should have otherwise been raised in accordance with the above disqualification procedure in Rule 34.[283] The Special Panel dismissed various allegations of partiality, including submissions that the Case 002/01 Judgment prejudged Case 002/02,[284] and held that:

> [t]he Disqualification Applications fail to establish that a reasonable observer would perceive that the Judges in question might be unable to bring an impartial mind to Case 002/02 just because the Judges made findings based on the evidence in Case 002/01.[285]

114. Since the arguments advanced in KHIEU Samphân's Closing Brief merely expressed disagreement with the majority Decision of the Special Panel, and given that the Special Panel Decision was not open to appeal,[286] the Trial Chamber was not required or able to address the allegations of bias, and adhered to the specific framework governing such allegations. KHIEU Samphân therefore fails to establish any error in the Trial Chamber's refusal to address his allegations of bias further.

2. Alleged Importation of Findings from Case 002/01

115. KHIEU Samphân submits that "it was not humanly possible for the [Trial] Chamber not [*sic*] to disregard the factual and legal findings that it had already reached in Case 002/01",[287] and that it never really strayed from its "deeply rooted" vision of Cases 002/01 and

[280] Co-Prosecutors' Response (F54/1), para. 40; T. 16 August 2021, F1/9.1, p. 59.
[281] Lead Co-Lawyers' Response (F54/2), para. 82.
[282] Trial Judgment (E465), paras 113, 115.
[283] Trial Judgment (E465), paras 113-115.
[284] Disqualification Decision (E314/12/1), paras 71-106.
[285] Disqualification Decision (E314/12/1), para. 106.
[286] Internal Rules, Rule 34(8).
[287] KHIEU Samphân's Appeal Brief (F54), para. 127.

002/02 as a single trial, with the former serving as a "general foundation" for the latter.[288] He argues that the Trial Chamber's approach violated his rights to be presumed innocent and to be tried by an impartial tribunal.[289]

116. The Co-Prosecutors respond that KHIEU Samphân's arguments about bias here fail because they are premised on his erroneous view that a trial chamber which has convicted an accused in a prior inter-related case cannot judge a subsequent case against the same accused impartially.[290] The Lead Co-Lawyers agree with the Co-Prosecutors.[291]

117. The Supreme Court Chamber recalls that KHIEU Samphân's allegations that the Trial Chamber prejudged his guilt in Case 002/02 were dismissed by a final decision of the Special Panel which concluded, based on a review of the Case 002/01 Trial Judgment as a whole, that "the Trial Chamber Judges understood their findings to be limited to Case 002/01."[292] The Special Panel also held that the Trial Chamber's findings in Case 002/01 did not evince attribution of criminal responsibility to the Accused in relation to charges in Case 002/02.[293] The Trial Chamber was nevertheless obliged to treat Cases 002/01 and 002/02 as distinct and refrain from importing any factual findings without a renewed analysis of the evidence.[294] In this respect, the Supreme Court Chamber recalls that the Trial Chamber initially indicated that the severance of Case 002 created separate cases or trials,[295] while at the same time referring to severance as a trial management tool and to continuous phases or segments of the same

[288] KHIEU Samphân's Appeal Brief (F54), paras 131-133. KHIEU Samphân adds that the Trial Chamber convicted him in Case 002/02 of crimes he had already been convicted of in Case 002/01, and relies on arguments made elsewhere in his Appeal Brief regarding his convictions on the basis of facts carried out in the course of Population Movement Phase Two. See KHIEU Samphân's Appeal Brief (F54), para. 134, referring to paras 538-546. The Supreme Court Chamber has dismissed these arguments at Section VI.D.1 and VI.D.2 of the present judgment.
[289] KHIEU Samphân's Appeal Brief (F54), para. 127.
[290] Co-Prosecutors' Response (F54/1), paras 41-44; T. 16 August 2021, F1/9.1, pp. 59-61.
[291] Lead Co-Lawyers' Response (F54/2), paras 81-85; T. 16 August 2021, F1/9.1, pp. 83-85.
[292] Disqualification Decision (E314/12/1), paras 70, 106.
[293] Disqualification Decision (E314/12/1), paras 93, 97.
[294] Decision on KHIEU Samphân's Immediate Appeal against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02, 29 July 2014, E301/9/1/1/3 ("Case 002 Additional Severance Appeal Decision (E301/9/1/1/3)"), para. 85.
[295] Case 002, Severance Order Pursuant to Internal Rule 89*ter*, 22 September 2011, E124 ("Case 002 Severance Order (E124)"), para. 2; Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, 18 October 2011, E131 ("Scheduling Order (E131)"), p. 2; Decision on Additional Severance of Case 002 and Scope of Case 002, 4 April 2014, E301/9/1 ("Case 002 Additional Severance Decision (E301/9/1)"), paras 2, 24, 29.

trial.[296] The Trial Chamber also repeatedly referred to Case 002/01 as forming a "foundation" for examination of the charges in Case 002/02.[297]

118. Noting the inconsistencies in the Trial Chamber's treatment of the severed cases as separate or continuous, the Supreme Court Chamber eventually clarified that "[t]he language of Rule 89*ter* of the Internal Rules readily announces that severance denotes a separation (or split) of proceedings, consequent to which, instead of one criminal case, there are two or more criminal cases".[298] This Chamber further considered the "controversy surrounding the notion of a 'general foundation'" and stressed that it would not "be acceptable for the Trial Chamber to import any attribution of criminal responsibility, should such follow in Case 002/01, into any future trials".[299] The Supreme Court Chamber held that "[e]ven though evidence remains formally common to the severed cases, this commonality does not extend to findings, and common factual elements in all cases resulting from Case 002 must be established anew."[300] In light of this clarification, the Supreme Court Chamber considered that any prior confusion regarding the procedural consequences of the additional severance of Case 002 to form Case 002/02 had been remedied.[301]

119. In several respects this guidance reflects the Trial Chamber's eventual approach in Case 002/02:

> No importation of criminal responsibility is made between cases and factual findings are not transposed from Case 002/01 to Case 002/02. In this context, although there is partial commonality between the oral and documentary evidence in each case, the Trial Chamber evaluates all the material now before it: different conclusions may be reached, including on evidence and matters commonly relevant. When evaluating material from Case 002/01 in relation to issues in Case 002/02, the Chamber satisfies itself that the right to full adversarial debate is preserved. In this regard and concerning the evaluation of oral evidence heard during Case 002/01 proceedings, the Chamber will consider whether the Parties were prevented from examining in court the declarant on matters within the scope of Case 002/02.[302]

The Trial Chamber also stated that, "[w]here the Chamber uses language similar or identical to Case 002/01, this simply reflects that the Trial Chamber's conclusion following its analysis of

[296] Trial Chamber Memorandum entitled "Clarification regarding the use of evidence and the procedure for recall of witnesses, civil parties and experts from Case 002/01 in Case 002/02, 7 February 2014, E302/5 ("Trial Chamber Clarification Memorandum (E302/5)"), paras 5, 7; Case 002 Additional Severance Decision (E301/9/1), paras 2, 14, 23, 29.
[297] See, *inter alia*, Scheduling Order (E131), p. 2; Trial Chamber Clarification Memorandum (E302/5), paras 5, 7; Case 002 Additional Severance Decision (E301/9/1), paras 23, 42.
[298] Case 002 Additional Severance Appeal Decision (E301/9/1/1/3), para. 42.
[299] Case 002 Additional Severance Appeal Decision (E301/9/1/1/3), para. 85.
[300] Case 002 Additional Severance Appeal Decision (E301/9/1/1/3), para. 85.
[301] Case 002 Additional Severance Appeal Decision (E301/9/1/1/3), paras 86, 88.
[302] Trial Judgment (E465), para. 36.

the evidence afresh in Case 002/02 is the same as the one it reached in Case 002/01."[303] KHIEU Samphân concedes that the Trial Chamber had thus acknowledged the Supreme Court Chamber's directions,[304] but essentially argues that the Trial Chamber did not in practice apply this approach.[305]

120. Rather, he claims that a reading of the Trial Judgment demonstrates that, "[n]ot only did the [Trial] Chamber decide Case 002/02 in the same manner on similar matters to those it had already adjudicated in Case 002/01, it obviously also followed the findings it had reached in advance for Case 002/02."[306] He cites the Trial Chamber's finding in Case 002/01 that the regulation of marriage was a CPK policy as an example.[307] He also refers to the Trial Chamber's findings with respect to, *inter alia*, matters relating to the common purpose of the JCE, cooperatives and worksites, and KHIEU Samphân's roles throughout DK.[308]

121. The Supreme Court Chamber notes that, with exception of the finding on the existence of a CPK regulation of marriage policy, KHIEU Samphân fails to identify with sufficient specificity or references to the Case 002/01 Trial Judgment the particular findings which he claims that the Trial Chamber imported into Case 002/02.[309] He also offers no further evidence to substantiate his claim that the Trial Chamber did not make these "similar" findings through a renewed analysis of the evidence in Case 002/02, including regarding the CPK's regulation of marriage policy. To the contrary, a reading of the Trial Chamber's reasoning on the issue in Case 002/02 reveals that it reached its findings separately and on the basis of a body of new evidence not considered in Case 002/01.[310]

122. Moreover, the mere fact that the Trial Chamber may have reached similar conclusions on similar issues in both trials does not, *per se*, demonstrate that its determinations were necessarily biased or attributable to a predisposition against KHIEU Samphân, and is accordingly insufficient to displace the presumption of impartiality. On this, the case law of

[303] Trial Judgment (E465), para. 36, fn. 83.
[304] KHIEU Samphân's Appeal Brief (F54), para. 133, fn. 152, referring to Trial Judgment (E465), para. 36.
[305] KHIEU Samphân's Appeal Brief (F54), paras 127, 129-133.
[306] KHIEU Samphân's Appeal Brief (F54), para. 129 (internal citations omitted).
[307] KHIEU Samphân's Appeal Brief (F54), para. 130, referring to Case 002/01 Trial Judgment (E313), paras 128-130.
[308] KHIEU Samphân's Appeal Brief (F54), para. 129, fns 142-143.
[309] See *supra* Section II, para. 19 ("Appeals shall identify the finding or ruling challenged, with specific reference to the page and paragraph numbers of the decision of the Trial Chamber").
[310] KHIEU Samphân concedes this by his own submission that the Trial Chamber reached its finding in Case 002/01 on the CPK's forced marriage policy "even before considering the evidence in Case 002/02". See KHIEU Samphân's Appeal Brief (F54), para. 130.

the *ad hoc* tribunals echoed by the Special Panel has established that professional judges can be relied upon to rule fairly on the issues before them, relying solely on the evidence adduced in the particular case, and are accordingly not disqualified from hearing two or more cases arising out of the same series of events and involving similar evidence.[311] KHIEU Samphân's submissions in these respects are accordingly dismissed.

3. Alleged Importation of Evidence from Case 002/01

123. KHIEU Samphân also presents examples of the Trial Chamber's allegedly biased importation of findings "from an evidentiary perspective".[312] By way of example, he refers to the Trial Chamber's wrongful attribution of the inaugural speech of the Kampuchea People's Representative Assembly of 11 April 1976 to him, a conclusion which had previously been set aside by the Supreme Court Chamber in Case 002/01.[313] He also submits that the section in the Trial Judgment on administrative structures was "practically cut and paste[d]" from Case 002/01.[314] KHIEU Samphân further alleges that the Trial Chamber's bias is demonstrated because it did not always satisfy itself that KHIEU Samphân's right to full adversarial debate had been preserved when evaluating material from Case 002/01 in relation to issues in Case 002/02.[315] Instead, he avers, the Trial Chamber relied on statements of witnesses heard in Case 002/01 on matters within the scope of Case 002/02 while he was unable to examine them on those matters.[316] He argues that, absent confrontation, Case 002/01 testimony holds the same value as a written statement,[317] and refers to the testimonies of CHHAOM Sé and EM Oeun, among others, in support of his claim.[318] In relation to all witness appearances in Case 002/01, KHIEU Samphân states that he did not "waste [his] time" to examine them in relation to facts within the scope of Case 002/02.[319]

[311] See Disqualification Decision (E314/12/1), paras 66-70, and references cited therein.
[312] KHIEU Samphân's Appeal Brief (F54), paras 158-174.
[313] KHIEU Samphân's Appeal Brief (F54), para. 159; T. 16 August 2021, F1/9.1, p. 45. See also KHIEU Samphân's Appeal Brief (F54), paras 232-233; T. 16 August 2021, F1/9.1, p. 22.
[314] T. 16 August 2021, F1/9.1, p. 45.
[315] See KHIEU Samphân's Appeal Brief (F54), paras 158, 160-164.
[316] KHIEU Samphân's Appeal Brief (F54), para. 163.
[317] KHIEU Samphân's Appeal Brief (F54), paras 161-162.
[318] KHIEU Samphân's Appeal Brief (F54), paras 163-164.
[319] KHIEU Samphân's Appeal Brief (F54), para. 164; T. 16 August 2021, F1/9.1, p. 48. KHIEU Samphân also refers Stephen HEDER, François PONCHAUD, and Philip SHORT, who only testified in Case 002/01 and the Trial Chamber refused to recall in Case 002/02 despite his request. See KHIEU Samphân's Appeal Brief (F54), paras 165-173. The Supreme Court Chamber has dismissed his submissions in respect of these witnesses in Section V.D.6 (Failure to Recall HEDER, POCHAUD and SHORT) of the present judgment.

124. The Co-Prosecutors respond that KHIEU Samphân fails to demonstrate that the Trial Chamber erred by unduly relying on evidence from Case 002/01 or how the alleged error invalidates the Trial Judgment.[320] The Lead Co-Lawyers similarly argue that KHIEU Samphân demonstrates no error warranting appellate intervention in this regard.[321]

125. In Case 002/01, the Trial Chamber found that "KHIEU Samphan, NUON Chea, POL Pot, IENG Thirith and other leaders attended the first session of the [Kampuchea People's Representative Assembly] held from 11 to 13 April 1976",[322] and that "KHIEU Samphan *gave* the inaugural speech on 11 April 1976 claiming that fair and honest elections had been held and endorsing policies regarding work-sites, cooperatives and the ongoing class struggle."[323] On appeal, the Supreme Court Chamber found that the Trial Chamber erred in attributing the inaugural speech to KHIEU Samphân, stating that:

> [w]hile the Trial Chamber apparently relied on the English translation of the DK People's Representative Assembly Meeting Minutes, which identify the speaker as the 'Chairman of the Presidium', the Khmer and French versions of the document refer to the 'President of the Delegates' as the speaker; a reference to KHIEU Samphân is made only in regard to the nomination of the President of the State Presidium. There is no indication in the meeting minutes that KHIEU Samphân had also assumed the role of "President of the Delegates" and delivered the inaugural speech.[324]

126. Despite this factual error, this Chamber in Case 002/01 considered that the "Trial Chamber's overall conclusion that KHIEU Samphân made a 'significant' contribution to the common purpose of the JCE was not erroneous."[325]

127. In Case 002/02, the Trial Chamber found that"[t]he objective of achieving a 'great and magnificent leap' was again *promoted* by KHIEU Samphan at the first session of the People's Representative Assembly, held between 11 and 13 April 1976", and that, "[a]t the meeting, which was attended by POL Pot, NUON Chea, IENG Thirith and other CPK leaders, KHIEU Samphan *endorsed* the priority of building and defending an independent and self-reliant

[320] Co-Prosecutors' Response (F54/1), paras 53-55; T. 16 August 2021, F1/9.1, p. 69.
[321] Lead Co-Lawyers' Response (F54/2), paras 215, 243-246, 249; T. 16 August 2021, F1/9.1, p. 85.
[322] Case 002/01 Trial Judgment (E313), para. 765 (emphasis added), referring to DK People's Representative Assembly Meeting Minutes, 11-13 April 1976, E3/165, ERN (EN) 00184052-00184056, pp. 5-6.
[323] Case 002/01 Trial Judgment (E313), para. 765 (emphasis added), referring to DK People's Representative Assembly Meeting Minutes, 11-13 April 1976, E3/165, ERN (EN) 00184052-00184056, pp. 5-9.
[324] Case 002/01 Appeal Judgment (F36), para. 1023 (internal citations omitted).
[325] Case 002/01 Appeal Judgment (F36), para. 1030.

country quickly while continuing the class struggle against imperialism, colonialism and other 'oppressor classes'".[326]

128. Although the Trial Chamber in Case 002/02 did not repeat *verbatim* that KHIEU Samphân *gave* the inaugural speech, its wording is unclear as to whether it repeated its attribution of the speech to him, or whether it considered that he promoted and endorsed the speech's content by his presence. Upon closer examination, three pertinent considerations arise. First, NUON Chea also attended the inaugural meeting, yet the Trial Chamber neither attributed the speech to him, nor did it find that he had promoted or endorsed its content by his presence.[327] Second, as in Case 002/01, the Trial Chamber relied on the English translation of the meeting minutes. Third, the Trial Chamber relied on this finding to conclude he "actively, *vocally* and publicly promoted, confirmed and endorsed [the common purpose] domestically and on the international stage".[328] Therefore, absent further specification and in view of these considerations, this Chamber concludes that the Trial Chamber intended to attribute the speech to KHIEU Samphân in Case 002/02.

129. The Supreme Court Chamber reiterates that the English translation of the meeting minutes identifies the speaker as the "Chairman of the Presidium", whereas the Khmer and French versions refer to the speaker as the "President of the Delegates". Absent any new evidence that KHIEU Samphân had also assumed the role of "President of the Delegates", the Supreme Court Chamber finds that the Trial Chamber again erred in fact by attributing the speech to KHIEU Samphân.[329] This isolated factual error, is, however, insufficient to conclude that the Trial Chamber systematically transposed factual findings from Case 002/01 to Case 002/02.

[326] Trial Judgment (E465), para. 3739 (emphasis added), referring to DK People's Representative Assembly Meeting Minutes, 11-13 April 1976, E3/165, ERN (EN) 00184052-00184056, pp. 5-9.
[327] See Trial Judgment (E465), para. 4125 ("in mid-April, NUON Chea attended the first session of the People's Representative Assembly, where Khieu Samphan promoted the objective of achieving a 'great and magnificent leap" and endorsed the priority of building and defending an independent and self-reliant country quickly while continuing the class struggle against imperialism, colonialism and other "oppressor classes'").
[328] Trial Judgment (E465), para. 4262 (emphasis added).
[329] The Supreme Court Chamber further observes that that the Trial Chamber relied on this erroneous factual finding in support of the conclusion that KHIEU Samphân shared the JCE's common purpose and significantly contributed to it. See Trial Judgment (E465), paras 3743, 4264. This Chamber has borne this error in mind when evaluating KHIEU Samphân's allegations of error regarding his liability under JCE and concluding, for reasons explained more fully below, that the Trial Chamber's overall conclusions based on a plethora of other evidence that he shared the JCE's common purpose and significantly contributed thereto were not erroneous. See *infra* Section VIII.B.

130. Turning to KHIEU Samphân's submission that the section on administrative structures was "practically cut and paste",[330] the Trial Chamber's use of language is, at times, similar or identical to the language used in Case 002/01, especially when discussing topics that are common to both trials, such as administrative structures, communication structures and historical background. In any event, upon a review of the findings in the section on administrative structures of the CPK, the Trial Chamber relied on additional evidence,[331] changed certain conclusions,[332] and expanded on certain topics.[333] This does not support KHIEU Samphân's contention that findings were simply "cut and paste[d]" from Case 002/01 without a renewed analysis of the evidence.

131. When evaluating material from Case 002/01 to determine issues in Case 002/02, the Trial Chamber stated that it would satisfy "itself that the right to full adversarial debate is preserved".[334] The Trial Chamber would therefore "consider whether the Parties were prevented from examining in court the declarant on matters within the scope of Case 002/02" when evaluating oral evidence heard during the Case 002/01 proceedings.[335] The Supreme Court Chamber recalls that the severance of Case 002/01 did not become final until the close of the Case 002 evidentiary proceedings on 23 July 2013.[336] In consequence, the "evidence accrued until that point remained common to the entirety of Case 002" and the evidence adduced during Case 002/01 remained a part of Case 002/02.[337] However, this Chamber emphasises that, given the change in subject matter and charges, the "formal commonality of evidence adduced in the first trial *does not prejudge questions of relevance or sufficient opportunity to test in relation to charges in the second trial*."[338] Notably, whereas Case 002/01

[330] T. 16 August 2021, F1/9.1, p. 45.
[331] See, *e.g.*, Trial Judgment (E465), paras 344, 345 (Where, in addition to the 1976 CPK Statute it also relies on the 1971 CPK Statute).
[332] *Cf.*, *e.g.*, Case 002/01 Trial Judgment (E313), para. 200 ("It is likely that a second statute was adopted at the Third Party Congress in or around August 1971"); Trial Judgment (E465), para. 343 ("The second statute was adopted at the Third Party Congress in August 1971.").
[333] See, *e.g.*, Trial Judgment (E465), paras 341, 342 (addition of sentence "the existence of the CPK and its leadership was only disclosed to the Cambodian public (outside of the CPK membership) as well as the outside world at the 17th Anniversary of the Party in September 1977"), 344 (preliminary remarks concerning CPK Statutes, 347-354 (Preliminary issues regarding Standing Committee minutes), 356.
[334] Trial Judgment (E465), para. 36.
[335] Trial Judgment (E465), para. 36.
[336] Case 002 Additional Severance Appeal Decision (E301/9/1/1/3), para. 74 (footnote omitted).
[337] Case 002 Additional Severance Appeal Decision (E301/9/1/1/3), para. 74 (footnote omitted).
[338] Case 002 Additional Severance Appeal Decision (E301/9/1/1/3), para. 75 (emphasis added). (The Supreme Court Chamber also clarified the procedural consequences of the severance in that "[t]he language of Rule 89*ter* of the Internal Rules readily announces that severance denotes a separation (or split) of proceedings, consequent to which**,** *instead of one criminal case, there are two or more criminal cases*." Case 002 Additional Severance Appeal Decision (E301/9/1/1/3), para. 42 (emphasis added)).

concerned charges related to the Population Movement Phases One and Two,[339] Case 002/02 concerns wider charges related to the implementation of the remaining CPK policies. This Chamber further observes that, prior to the start of the hearings on the substance in Case 002/01, the Trial Chamber informed the parties that "all testimony sought at trial (whether from witnesses, Experts or Civil Parties) will be limited to [testimony] relevant to a determination of the facts at issue in Case 002/01",[340] and that "[n]o questioning on areas outside the scope of this trial will […] be permitted".[341] This Chamber accordingly agrees with the Lead Co-Lawyers that, even if the evidence heard before the effective severance of Case 002/01 was formally a part of the entirety of Case 002, this evidence "must be assessed in light of questioning which was permitted during those hearings" when relied on in Case 002/02.[342]

132. In this regard, it is noted that the Trial Chamber is not precluded from considering untested evidence.[343] Rather, less weight must be afforded to such evidence and, importantly, "a conviction may not be based solely or to a decisive degree on evidence by a witness whom the defence has not had an opportunity to examine, unless there are sufficient counterbalancing factors in place".[344] This Chamber, moreover, recalls that the principle of adversarial

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[339] See, *e.g.*, Case 002, Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011, E124/7 ("Case 002 Decision on Co-Prosecutors' Request (E124/7)") ("It follows that the Supreme Court Chamber during the early trial segments will give consideration to the roles and responsibilities of the Accused in relation to all policies relevant to the entire Indictment, but will give detailed factual consideration in the first trial mainly to a feature of the Indictment which affected virtually all victims of the Democratic Kampuchea regime (namely population movement phases one and two")).

[340] Notice of Trial Chamber's Disposition of Remaining Pre-Trial Motions (E20, E132, E134. E135. E124/8, E124/9, E124/10, E136 and E139) and Further Guidance to the Civil Party Lead Co-Lawyers, 29 November 2011, E145 ("Notice of Trial Chamber's Disposition (E145)"), p. 2.

[341] Notice of Trial Chamber's Disposition (E145), p. 3. See also Case 002/01, Trial Chamber Memorandum entitled "Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011, 17 November 2011, E141 ("Case 002/01 Trial Chamber Memorandum (E141)"), p. 2.

[342] Lead Co-Lawyers' Response (F54/2), para. 243.

[343] Rule 87 provides that, in principle, all evidence is admissible in proceedings before the ECCC.

[344] Case 002/01 Appeal Judgment (F36), para. 296. See also *Prosecutor v. Martić*, Appeals Chamber (ICTY), IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006 ("*Martić* Appeal Decision on Evidence (ICTY)"), para. 19 ("The Appeals Chamber considers that the jurisprudence of the ECHR provides a useful source of guidance for the interpretation of the right to cross-examination and the scope of its permissible limitations"). The EctHR jurisprudence developed a three-part test in determining whether a trial can be fair even though the evidence of a witness is admitted without the defendant being given an opportunity to cross-examine them: (1) was there was a good reason for the non-attendance of the witness and consequently for the admission of the absent witness's untested statements as evidence; (2) was the evidence of the absent witness the sole or decisive basis for the defendant's conviction; and/or (3) were there sufficient counterbalancing factors to compensate for the handicaps caused to the defendant as a result of the admission of the untested evidence and ensure that the trial, *judged as a whole*, was fair. Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (1st ed. 2021), pp. 516, 528-529, referring to *Al-Khawaja v. United Kingdom*, Grand Chamber (ECtHR), Application nos. 26766/05 and 22228/06, Judgment, 15 December 2011, paras 118-119; *Schatschaschwili v. Germany*, Grand Chamber (ECtHR), Application no. 9154/10, Judgment, 15 December 2015 ("*Schatschaschwili v. Germany* Judgment (ECtHR)"),

proceedings does not require a party to actually examine or make submissions in relation to a given piece of evidence, "as long as each party had an opportunity to do so."[345]

133. As to the weight attributed to the Case 002/01 testimony, the Supreme Court Chamber considers that the Trial Chamber did not err in rejecting KHIEU Samphân's contention that oral evidence from Case 002/01 became, via transcripts, documentary evidence in Case 002/02.[346] While KHIEU Samphân points to two exceptions, namely, "where witnesses in Case 002/01 returned as witnesses in Case 002/02 or when witnesses in Case 002/01 also testified in relation to facts under review in Case 002/02 and were cross-examined on [those] facts",[347] the Supreme Court Chamber recalls that evidence adduced in Case 002/01 remains a part of Case 002/02 and may be relied on where relevant to Case 002/02. The Trial Chamber was, moreover, able to assess the general demeanour and credibility of the individuals as they appeared before the Trial Chamber in Case 002/01. Only on occasions where parties were prevented from examining a witness on a particular matter within the scope of Case 002/02 should less weight be afforded to that particular part of the testimony and only in respect of the particular matter that was not subject to adversarial debate, rather than the entire testimony.

134. In support of the allegation that he was unable to confront certain witnesses on matters within the scope of Case 002/02, KHIEU Samphân refers, in particular, to CHHAOM Sé concerning the Au Kanseng Security Centre and EM Oeun on issues pertaining to forced marriage and Buddhism.[348] He also argues that the Trial Chamber based its findings on the existence of a policy against Buddhists throughout DK on testimonies of witnesses heard in Case 002/01, whereas these witnesses previously only testified on Buddhism in the historical context which concerned the period before DK.[349] The Supreme Court Chamber addresses these allegations in turn.

a. CHHAOM Sé

paras 107, 130-131, 156; *Gani v. Spain*, Third Section (ECtHR), Application no. 61800/08, Judgment, 19 February 2013, paras 11, 43-48 (there was no violation when the defendant had the opportunity to pose questions to the witness during the investigative stage of the proceedings); *Isgrò v. Italy*, ECtHR, Application no. 11339/85, Judgment, 19 February 1991, paras 24-25, 35-37 (there was no violation when the defendant was able to pose questions directly to a witness during a pre-trial confrontation procedure). *Cf. Schatschaschwili v. Germany* Judgment (ECtHR), paras 157-159 (there was a violation when the defendant was not given the right to question the witness also at the investigation stage, and this was the only eyewitness to the offence).

[345] Case 002/01 Appeal Judgment (F36), para. 185 (footnotes omitted).

[346] Trial Judgment (E465), para. 36; KHIEU Samphân's Appeal Brief (F54), paras 161-162.

[347] KHIEU Samphân's Appeal Brief (F54), para. 161.

[348] KHIEU Samphân's Appeal Brief (F54), para. 163.

[349] KHIEU Samphân's Appeal Brief (F54), para. 163.

135. CHHAOM Sé was the former chairman of Au Kanseng Security Centre and his testimony before the Trial Chamber in Case 002/01 primarily concerned the CPK's military structure during the DK period.[350] He passed away before the commencement of the Case 002/02 trial. With respect to the permitted scope of his examination, the Trial Chamber allowed the parties to question CHHAOM Sé on issues pertaining to the structure, communication systems, and reporting methods at Au Kanseng Security Centre.[351] The Trial Chamber, however, generally limited the scope of the parties' examination to the confines of the charges in Case 002/01. For instance, following an objection related to the scope of the Co-Prosecutors' questioning,[352] the President of the Trial Chamber directed the Co-Prosecutors to rephrase their question with a focus on the nature of communication and not "on the functioning of the Au Kanseng structure".[353] Similarly, the Trial Chamber reminded NUON Chea's counsel that "the security centre in Au Kanseng is not the main focus of the hearing" and that questions should be limited to the structure and working communications only.[354] Accordingly, the Supreme Court Chamber considers that while the parties were fully able to question CHHAOM Sé in relation to the military structure, including communication and reporting at Au Kanseng, examination on other topics within the scope of Case 002/02 was limited in view of the Trial Chamber's instructions and the limited scope of Case 002/01 charges.[355]

[350] T. 11 January 2013, E1/159.1; T. 8 April 2013, E1/177.1; Final Decision on Witness, Experts and Civil Parties to be Heard in Case 002/01, 7 August 2014, E312 ("Decision on Witness and Civil Parties (E312)"), para. 41; Trial Chamber Memorandum entitled "Directions to Parties Following Hearing of 21 September", 25 September 2012, E233, para. 5.

[351] See, *e.g.*, T. 11 January 2013, E1/159.1, p. 93 ("[t]he question is not deeply relevant to the correction centre at Au Kanseng; it's relevant rather to the military structure"); T. 8 April 2013, E1/177.1, p. 21 ("Because this question is related to the scope – is related to the communication, thus the objection is not valid"). See also Trial Judgment (E465), para. 2860; Decision on Witness and Civil Parties (E312), para. 41.

[352] T. 11 January 2013, E1/159.1, p. 105 ("I object to this line of questioning because it doesn't fall within the scope. It's not about structure anymore; it's about actual executions within the sector, so I think that is outside the scope of this trial.").

[353] T. 11 January 2013, E1/159.1, p. 106 ("please try to rephrase your question. And the nature of your question shall be the one of the nature of the communication and […] not focus on the functioning of the Au Kanseng structure."). See also T. 11 January 2013, E1/159.1, p. 92 (where the Co-Prosecutors stated it would not speak "in detail about the detention conditions because this is not part of the context of this trial.").

[354] T. 8 April 2013, E1/177.1, p. 68 ("the security centre in Au Kanseng is not the main focus of the hearing. We limit to the structure and the working communication only. So we have to distinguish between the question relevant to the proceeding and the question which are not relevant.").

[355] T. 8 April 2013, E1/177.1, pp. 67-68. See also Trial Judgment (E465), para. 2902 ("According to Witness CHHAOM Se, interrogators 'were not allowed to exert any torture against the prisoner[s]'. In response to questioning by defence counsel in Case 002/1 about whether Security Centre staff would resort to 'torture' or beatings during interrogations, however, the witness testified that interrogators 'asked them again and again, and if they do not tell us we may do it'. […] *this witness's evidence could not further be tested during the course of either trial segment*") (emphasis added).

136. As to the Trial Chamber's reliance on CHHAOM Sé's Case 002/01 testimony in Case 002/02, the Trial Chamber explained that:

> [f]ormer Chairman CHHAOM Se […] could not be recalled in Case 002/02 due to his death prior to appearing as a witness in those proceedings. The Chamber in Case 002/01 permitted certain questions to be put to the witness that were directly or incidentally relevant to the scope of Case 002/02. *Insofar as the substance of these responses was open to examination by the Parties in court, the Chamber has relied upon the witness's responses in making findings in this section*.[356]

137. In this regard, it is observed that the Trial Chamber relied on CHHAOM Sé's evidence primarily in support of findings that were fully within the permitted scope of questioning during his Case 002/01 testimony. For instance, the Trial Chamber relied on CHHAOM Sé's evidence in the section on the "establishment and reporting structure" of Au Kanseng Security Centre,[357] including in relation to findings concerning Division 801 and its oversight of the Security Centre,[358] the dates of operation of the Centre,[359] the finding that CHHAOM Sé served as chairman of Au Kanseng from late 1976 until early 1979[360] and certain findings related to the oversight of Division 801 by the Revolutionary Army of Kampuchea General Staff and by the Northeast Zone Committee.[361]

138. As to evidence directly relevant to the charges in Case 002/02,[362] the Trial Chamber sought corroboration from additional witnesses before relying on CHHAOM Sé's Case 002/01 testimony. For example, the Trial Chamber explained that CHHAOM Sé's testimony that "interrogators would press detainees to reveal their 'tactics' or 'strategies'" […] was corroborated by Witness MOEURNG Chandy, who attested to having repeatedly been questioned about her alleged communications with the Yuon, which she steadfastly denied."[363] When faced with inconsistencies between CHHAOM Sé's statements concerning mistreatment of detainees during interrogations, the Trial Chamber acknowledged the limitations of his testimony, finding that his "evidence could not further be tested during the course of either trial segment" and relied on a different witness to corroborate accounts of mistreatment by interrogators.[364] The Supreme Court Chamber therefore considers that KHIEU Samphân fails to identify any error in the Trial Chamber's approach and reliance on CHHAOM Sé's Case

[356] Trial Judgment (E465), para. 2860 (footnotes omitted) (emphasis added).
[357] Trial Judgment (E465), paras 2863-2884.
[358] Trial Judgment (E465), paras 2863-2866, 2869-2871.
[359] Trial Judgment (E465), para. 2867, fns 9787, 9791.
[360] Trial Judgment (E465), para. 2868, fn. 9792.
[361] See, *e.g.*, Trial Judgment (E465), paras 2873, 2874, 2878, fns 9819, 9826, 9833.
[362] T. 8 April 2013, E1/177.1, pp. 17-25 (*e.g.*, in relation to the arrest and execution of a group of Jarai).
[363] Trial Judgment (E465), para. 2899.
[364] Trial Judgment (E465), para. 2902.

002/01 testimony when reaching findings in Case 002/02. His specific allegations about relying on CHHAOM Sé's Case 002/01 testimony when reaching conclusions concerning the deaths of Vietnamese at Au Kanseng and the racial persecution of Vietnamese there will be addressed in the relevant sections below.[365]

b. EM Oeun

139. Turning to KHIEU Samphân's allegations concerning the use of EM Oeun's testimony, this Chamber observes that this Civil Party was identified primarily to provide testimony in Case 002/01 in relation to his knowledge of the Ministry of Propaganda and the political education by the Accused.[366] However, during both trials he provided testimony on other areas of relevance to Cases 002/01 and 002/02,[367] including on the CPK's policy against Buddhism.[368] The trial record shows that following EM Oeun's testimony on the topic of Buddhism, the Trial Chamber instructed EM Oeun and the examining Civil Party Lawyer to limit any questions and answers to the confines of Case 002/01 and to bear in mind "that we are now examining the facts relevant to the first and the second phase of population movement".[369] Similarly, following EM Oeun's testimony on his forced marriage,[370] the parties were again instructed to limit their questioning to the scope of Case 002/01.[371] While IENG Sary and KHIEU Samphân were able to question EM Oeun about the date of his forced marriage and subsequent divorce and marriage to his second wife,[372] these questions concerned

[365] See *infra* Section VII.B.2.f.
[366] Decision on Witness and Civil Parties (E312), para. 36.
[367] Decision on Witness and Civil Parties (E312), para. 36; T. 23 August 2012, E1/113.1; T. 27 August 2012, E1/115.1; T. 28 August 2012, E1/116.1; T. 29 August 2012, E1/117.1.
[368] T. 23 August 2012 (EM Oeun), E1/113.1, p. 72 ("And I also wish to emphasize that it's really very sad that – at that time I loved Buddhism and I loved people, but at that time the Party asked me to smash the pagoda, the Buddha, but I had no choice […] I was bestowed with the authority to smash the religion".); T. 27 August 2012, E1/115.1, pp. 7-9.
[369] T. 23 August 2012 (EM Oeun), E1/113.1, p. 73 ("[P]lease be advised that you should limit your question to the confine of the case. And the same is true for the witness; witness should try to answer to only question posed by the counsel. You should avoid having to elaborate further beyond the scope of this. […] And please also bear in mind that we are now examining the facts relevant to the first and the second phase of population movement, so please refrain from asking any question that is outside the parameter of the current case before us. It will not be conducive to ascertaining the truth and, in addition, it will not have anything to do with the current crimes alleged with the Accused."); T. 27 August 2012, E1/115.1, pp. 9-10 ("And the Chamber wishes to also remind the Co-Prosecutor that the religious persecution is not part of the segment of the trial proceedings. We are now discussing or examining the political persecution […] and the evacuations of the population, phase 1 and phase 2.") (emphasis added).
[370] T. 23 August 2012, E1/113.1, pp. 104-107.
[371] T. 23 August 2012, E1/113.1, p. 108 ("Counsel, when we discuss about the first phase of the trial, the inhumane or other inhumane acts have already been excluded from the first phase. We are now focussing on the forced transfer, phases 1 and 2. So we would like you to frame your questions in line with the first segment of the trial, Case 002/1, please.") (emphasis added).
[372] T. 28 August 2012 (EM Oeun), E1/116.1, pp. 73, 75-76, 84-86.

alleged inconsistencies between EM Oeun's Civil Party Application rather than constituting a substantive examination on the topic of forced marriage.

140. While it is correct that KHIEU Samphân and other parties were appropriately prevented from fully examining EM Oeun on his forced marriage and knowledge of the CPK's policy against Buddhists in the Case 002/01 trial as these issues were outside the scope of that first trial, this does not mean that the Trial Chamber was prohibited from considering EM Oeun's testimony on these topics in the second trial where that evidence was relevant.[373] The Trial Chamber's limited findings concerning forced marriage based on EM Oeun's testimony were, moreover, corroborated by other evidence from Case 002/02. The Supreme Court Chamber considers that KHIEU Samphân fails to identify any instance where the Trial Chamber erred in its approach. For example, in finding "evidence of wedding ceremonies taking place in various locations throughout Cambodia during the DK regime, including in […] Prey Veng [p]rovince",[374] the Trial Chamber relied not only on EM Oeun, but also on MY Savoeun who testified in Case 002/02[375] and whose testimony would have been subject to examination by KHIEU Samphân.[376]

141. Further, the Trial Chamber's finding that "[s]ome witnesses and Civil Parties eventually consented to marriage because, after having initially refused a number of times, they were threatened by the authorities"[377] was not solely based on EM Oeun's testimony, but primarily on three other witnesses or civil parties who testified in Case 002/02 and whose testimony was subject to examination within the scope of this case and which supported the finding.[378] As to the impact of forced marriage, the Trial Chamber stated that:

> [a] number of witnesses and Civil Parties testified in court about their shocking experiences and negative emotions when they found out that they had to marry someone that they did not know.

[373] T. 27 August 2012 (EM Oeun), E1/115.1, pp. 2-3 ("[T]he Chamber wished to also remind Prosecution and other relevant parties to the proceedings that, before putting questions to the – to the civil party, parties should be mindful of the question – or the subject matters that are relevant to the segment of the trial, which is Case File 002/1. Please try your best to refrain from straying away from the confined subject matters before us. And we hope that by doing so, we will expedite the proceedings sufficiently"). T. 27 August 2012, E1/115.1, pp. 9-10 ("During last week's sessions, we noted that the […] Lead Co-Lawyer for the civil party put some questions which were not falling within this scope, and we didn't try to intervene. But this time, the prosecutor should be mindful – and not do that").
[374] Trial Judgment (E465), para. 3537.
[375] T. 17 August 2016 (MY Savoeun), E1/459.1, p. 25.
[376] T. 17 August 2016 (MY Savoeun), E1/459.1, pp. 82-83, 89-90.
[377] Trial Judgment (E465), para. 3621.
[378] Trial Judgment (E465), para. 3621, fn. 12092, referring to T. 31 August 2016 (PHAN Him), E1/467.1, p. 91; T. 22 August 2016 (OM Yoeurn), E1/461.1, p. 95; T. 1 September 2015 (CHAO Lang), E1/339.1, pp. 70, 75.

> Many of them recalled that they wept and that they were upset, disappointed and fearful during their wedding ceremonies.[379]

The Trial Chamber's findings as to the impact of forced marriage were based on the testimony of several witnesses besides EM Oeun.[380] The Trial Chamber's reliance on EM Oeun's evidence from Case 002/01 in relation to the existence of a policy against Buddhists is subsequently discussed.

c. Policy against Buddhists

142. KHIEU Samphân alleges that the Trial Chamber relied on witnesses who testified in Case 002/01 to find that a policy against Buddhists existed throughout DK. He argues that such a determination was impermissible as the scope of Case 002/01 was limited to hearing testimony on Buddhism only in relation to the historical context of the DK.[381] He refers to the Trial Chamber's reliance on EM Oeun, PEAN Khean, YUN Kim, KHIEV En, HUN Chhunly, PIN Yathay, NOU Mao, KIM Vanndy, SIM Hao, ONG Thong Hoeung, KLAN Fit, and SOPHAN Sovany.[382]

143. As correctly stated by KHIEU Samphân, this Chamber recalls that the scope of Case 002/01 was limited to the development of the policy against Buddhists in the historical context. In this regard, the Trial Chamber considered that:

> the purpose of including reference to [policies other than those relating to forced evacuation] in the first trial is to enable the manner in which policy was developed to be established. What is therefore envisaged is presentation in general terms of the five policies, although the material issue for examination in the first trial is limited to the forced movement of the population (phases one and two). It follows that there will be no examination of the implementation of policies other than those pertaining to the forced movement of the population (phases one and two).[383]

144. In practice, however, the Trial Chamber on occasion permitted questions concerning Buddhism or religion during the DK. For instance, PEAN Khan was questioned on his knowledge of the treatment of monks and pagodas during the DK era,[384] and YUN Kim's

[379] Trial Judgment (E465), para. 3679.
[380] Trial Judgment (E465), para. 3679, fn. 12274, referring to, *inter alia*, T. 5 September 2016 (NOP Ngim), E1/469.1, pp. 40-43; T. 12 October 2016 (PEN Sochan), E1/482.1, p. 68; T. 24 October 2016 (KUL Nem), E1/488.1, p. 90.
[381] KHIEU Samphân's Appeal Brief (F54), para. 164.
[382] KHIEU Samphân's Appeal Brief (F54), fn. 186.
[383] Case 002/01 Trial Chamber Memorandum (E141), p. 2.
[384] T. 2 May 2012, E1/71.1, p. 50 ("Back then, in the regime, had you ever seen monks in pagodas? A. Before Phnom Penh was liberated, there were normal pagodas and activities, there were monks, there were pagodas; people would go here and pay homage to the monks at those pagodas before 1975. Q. What happened after 1975? A. After 1975, such practice were in no existence. There were no pagodas; pagodas were removed and there were no priests. Q. Do you know where monks were taken to? A. I don't know, but I heard people saying that monks were defrocked or disrobed.").

testimony regarding Buddhism concerned the period before and during the DK.[385] None of the parties objected to the scope of their examination and all parties were provided with the opportunity to examine them.[386] NUON Chea's counsel, moreover, specifically examined YUN Kim in relation to the disrobing of monks,[387] an opportunity equally open to KHIEU Samphân. HUN Chhunly's evidence concerning the use of pagodas as detention or training centres was also elicited by NUON Chea's counsel in the context of questions about the evacuation of Battambang during the DK period.[388]

145. KIM Vanndy's evidence as to the relinquishment or prohibition of Buddhist funerary rites during the DK era was provided in the context of the evacuation of Phnom Penh and the subsequent death of his mother.[389] This Chamber considers that KHIEU Samphân could have examined these witnesses within the scope of the questions posed by the parties, but chose not to do so.[390] Further, PIN Yathay was asked about what happened to the monks in a particular pagoda in the context of the forced population movement during the DK era within the scope of Case 002/01[391] and SIM HAO's examination concerned, *inter alia*, the structure of the DK government.[392] In this context, he was questioned about instructions from his superior to destroy paintings and a building in the Tuol Tompoung Pagoda during the DK regime.[393] None

[385] T. 19 June 2012 (YUN Kim), E1/88.1, pp. 50-51 ("During the period of the Democratic Kampuchea regime, between April 1975 and January 1979, were people in Kratie province allowed to practice Buddhism?" A. Buddhism came to an end in 1976. Indeed, immediately after the liberation, there were some monks who still practices Buddhism, but in July or August there were a few monks who remained ordained, but later on they were sent to the district of Ou Reang Ov, Peam Cheang (phonetic) commune. […] So I Can say that there were a few monks in Kratie province before 1976, but after 1976, there were no longer any monks, so there was no more monks by 1976.").
[386] See, *e.g.*, T. 17 May 2012, E1/73.1, pp. 91-106 (Examination by KHIEU Samphân's Defence counsel).
[387] T. 20 June 2012 (YUN Kim), E1/89.1, pp. 76-78.
[388] T. 7 December 2012, E1/150/1, pp. 31-32 ("certain Buddhist pagodas were transformed into prisons. And the other were transformed into the detention centre; for example, one of the pagodas --- there was transformed into the operation training centre."). See also T. 6 December 2012 (HUN Chhunly) , E1/149.1, pp. 59-60.
[389] T. 6 December 2012 (KIM Vanndy), E1/149.1, p. 12 ("I could say that death, during the regime, was very pathetic, because during the previous regime, when people died, there would be some traditional ceremonies where Buddhist monks would be there to attend the ceremonies. But during this Khmer Rouge regime, when someone died, he or she would be buried or covered with some leaves. They died like the dead animals.").
[390] T. 6 December 2012 (KIM Vanndy), E1/149.1, p. 27.
[391] T. 7 February 2013 (PIN Yathay), E1/170.1, pp. 21-22.
[392] Decision on Witness and Civil Parties (E312), para. 42 (SIM Hao's testimony concerned, *inter alia*, the numerous features of the structure of the DK government and the roles of the Accused); T. 12 June 2013 (SIM HAO), E1/206.1, p. 78 ("Actually, a meeting was held in the pagoda. He asked us to look up and saw the paintings in the pagoda. There were paintings of Buddhas and Buddhist monks, and he told us that there was no use of having all of this. And then a few days later, they used a landmine and they detonated this building so that the bricks could be used elsewhere rather than having the temple over there.").
[393] T. 12 June 2013 (SIM HAO), E1/206.1, pp. 96-97.

of the parties objected to the scope of questioning and he was subsequently examined by KHIEU Samphân.[394]

146. As to EM Oeun, the Supreme Court Chamber previously noted that, following certain questions related to Buddhism, the Trial Chamber instructed the parties to limit their questions to the confines of the case and to focus on the Population Movement.[395] Similarly, during KLAN Fit's testimony, the parties were repeatedly reminded to raise questions solely within the scope of Case 002/01.[396] KLAN Fit's testimony that he was not allowed to practice religion concerned the period before the DK and was therefore considered to be within the scope of questioning in Case 002/01.[397] It is observed that KHIEU Samphân chose not to cross-examine him at all.[398] Similarly, testimony from NOU Mao and KHIEV En concerned the period prior to the DK and would have therefore been within the scope of questioning in Case 002/01.[399]

[394] T. 13 June 2013 (SIM HAO), E1/207.2.
[395] T. 23 August 2012 (EM Oeun), E1/113.1, p. 73 ("[P]lease be advised that you should limit your question to the confine of the case. And the same is true for the witness; witness should try to answer to only question posed by the counsel. You should avoid having to elaborate further beyond the scope of this. […] And please also bear in mind that we are now examining the facts relevant to the first and the second phase of population movement, so please refrain from asking any question that is outside the parameter of the current case before us. It will not be conducive to ascertaining the truth and, in addition, it will not have anything to do with the current crimes alleged with the Accused."); T. 27 August 2012 (EM Oeun), E1/115.1, pp. 9-10 ("And the Chamber wishes to also remind the Co-Prosecutor that the religious persecution is not part of the segment of the trial proceedings. We are now discussing or examining the political persecution […] and the evacuations of the population, phase 1 and phase 2."); T. 27 August 2012 (EM Oeun), E1/115.1, pp. 2-3 ("[T]he Chamber wished to also remind Prosecution and other relevant parties to the proceedings that, before putting questions to the – to the civil party, parties should be mindful of the question – or the subject matters that are relevant to the segment of the trial, which is Case File 002/1. Please try your best to refrain from straying away from the confined subject matters before us. And we hope that by doing so, we will expedite the proceedings sufficiently"). T. 27 August 2012 (EM Oeun), E1/115.1, pp. 9-10 ("During last week's sessions, we noted that the […] Lead Co-Lawyer for the civil party put some questions which were not falling within this scope, and we didn't try to intervene. But this time, the prosecutor should be mindful – and not do that").
[396] T. 6 December 2011 (KLAN Fit), E1/17.1, p. 64 ("*But I would like to remind you that the testimony must be related to the first segment of the first trial***.** It does not mean that as long as it is in the case file we can raise it but we have to raise all the points that is relevant to the section in the first phase of trial. So the main subject matter of this segment is the first phase of evacuation from Phnom Penh") (emphasis added); T. 6 December 2011 (KLAN Fit) E1/17.1, p. 66 ("*Secondly, please confine your facts to the first segment of trial* as indicated by the defence team for Nuon Chea that if the facts relevant to the periods in 1978 or 1979, it was out of the scope of our – of the hearing this phase. So we now should confine our argument to the first phase of evacuation from the city to the – and the central zone to the northern zone and eastern zone. So this first phase of mass movement of people concerns with the earlier period of the control of the Khmer Rouge. It is not related to the time period from 1978 or 1979. […] So once again, I would like to remind you that you should confine yourself to the time that is relevant to the first phase of the trial and if you go beyond the scope of times that is confined to this first segment, it's going to be out of the scope of our hearing in this phase.") (emphasis added); T. 11 January 2012 (KLAN Fit), E1/25.1, p. 60 ("Any relevant facts concerning this case file [Case 002/01] are allowed to be put to the civil parties.").
[397] T. 6 December 2011(KLAN Fit), E1/17.1, pp. 92-93; T. 10 January 2012 (KLAN Fit), E1/24.1, p. 98.
[398] T. 11 January 2012 (KLAN Fit), E1/25.1, p. 87.
[399] T. 19 June 2013 (NOU MAO), E1/209.1, pp. 71-72; T. 1 October 2012 (KHIEV En), E1/127.1, pp. 79-80.

147. The Supreme Court Chamber therefore considers that KHIEU Samphân's allegation that he "had to focus on the facts within the scope of Case 002/01 and was evidently not going to waste the time that had been allocated […] to examine them about Buddhism after 1975" lacks merit as the examination of the above witnesses and civil parties either fell within the scope of permitted questioning of Case 002/01, emanated from a line of questioning within the scope of Case 002/01, in the context of questioning related to the Population Movement, or was within the scope of Case 002/02 but permitted by the Trial Chamber. KHIEU Samphân, moreover, chose not to examine certain witnesses or civil parties at all.[400]

148. This Chamber notes that the finding "that a centrally-devised policy to abolish Buddhist practices and forbid the practice of Buddhism in DK existed throughout the indictment period"[401] is based on multiple cited witness testimony heard in Case 002/02, in addition to the evidence discussed in the Tram Kak Cooperatives section,[402] and that of the witnesses whose evidence KHIEU Samphân seeks to impugn. In finding that the evidence demonstrates a "consistent and widespread pattern of the forcible defrocking of monks in the aftermath of 17 April 1975, followed by their expulsion from pagodas throughout the country",[403] the Trial Chamber relied, in addition to six witnesses who had testified in Case 002/01, on seventeen witnesses who testified in Case 002/02 and whose evidence was subject to examination by KHIEU Samphân.[404] For example, RIEL Son stated that more than 100 monks were "evacuated" from Phnom Penh and elsewhere, OR Ho testified to the defrocking of monks in Kampong Thom, MEAS Layhuor stated that all monks had to be defrocked (although she could not remember the year), HUN Sethany met a monk who was instructed to disrobe in Baray District, CHHIT Yoeuk testified that monks were defrocked in Preah Netr Preah District and many other witnesses testified to the defrocking of monks in other locations.[405] Similarly, in finding that "the evidence also demonstrates the subsequent closure and destruction of pagodas," the Trial Chamber relied on Case 002/02 testimony of KEO Louer, who "was told that pagodas at the rear battlefield were destroyed",[406] UM Suonn, who testified to the

[400] T. 2 October 2012 (KHIEV En), E1/128.1, p. 68; T. 11 January 2012 (KLAN Fit), E1/25.1, p. 87; T. 6 December 2012 (KIM Vanndy), E1/149.1, p. 27; T. 30 May 2013 (SOPHAN Sovany), E1/199.1, p. 63.
[401] Trial Judgment (E465), para. 4017.
[402] Trial Judgment (E465), para. 4015.
[403] Trial Judgment (E465), para. 4015.
[404] Trial Judgment (E465), paras 817, 4015, fn. 13300.
[405] Trial Judgment (E465), para. 4015, fn. 13300.
[406] T. 15 June 2015 (KEO Loeur), E1/316.1, p. 31.

destruction of a pagoda in Siem Reap and SOS Romly, who testified to the closure of the "Mango Grove" pagoda.[407]

149. As to the impugned finding that pagodas were used for non-religious purposes, including as security centres and execution sites, warehouses and worksites, as places of accommodation and for administrative purposes, and were desecrated through sacrilegious use,[408] the Trial Chamber relied, in addition to the statements of certain witnesses who had testified in Case 002/01, on witnesses who testified in Case 002/02.[409] These included OR Ho, who testified to the conversion of a pagoda into a security centre in Kampong Thom, UM Suonn, who stated that certain pagodas in Siem Reap were used to pound rice, SEAN Song, who testified that a pagoda in Siem Reap was used to house mobile unit workers, BAN Seak, who stated that the commerce office of Sector 42 was located in a pagoda in Spueu, and several others whose testimony supports the Trial Chamber's findings.[410] The remaining impugned findings on the existence of a policy against Buddhism are also supported by evidence from witnesses who testified in Case 002/02.[411] Finally, the Trial Chamber quoted YUN Kim, who described the destruction of Buddhism during the DK era in his Case 002/01 testimony.[412] As discussed, the Trial Chamber permitted examination related to the Case 002/02 charges, including by Defence counsel for NUON Chea.[413] The finding is, moreover, supported by additional witnesses.[414]

150. The Trial Chamber also quoted testimony from EM Oeun to illustrate his anguish at being ordered to destroy the remnants of Buddhism.[415] As discussed previously, because cross-examination was confined to questions within the scope of Case 002/01 with focus on the Population Movement, KHIEU Samphân was unable to fully examine EM Oeun on this topic. Since the quote could be considered merely illustrative and the finding that "Buddha statutes

[407] Trial Judgment (E465), para. 4015, fn. 13301.
[408] Trial Judgment (E465), para. 4015.
[409] Trial Judgment (E465), para. 4015, fns 13302-13306.
[410] Trial Judgment (E465), para. 4015, fns 13302-13306.
[411] Trial Judgment (E465), para. 4015, fns 13307-13312.
[412] Trial Judgment (E465), para. 4015, fn. 13313.
[413] T. 19 June 2012 (YUN Kim), E1/88.1, pp. 50-51 ("During the period of the Democratic Kampuchea regime, between April 1975 and January 1979, were people in Kratie province allowed to practice Buddhism?" A. Buddhism came to an end in 1976. Indeed, immediately after the liberation, there were some monks who still practices Buddhism, but in July or August there were a few monks who remained ordained, but later on they were sent to the district of Ou Reang Ov, Peam Cheang (phonetic) commune. […] So I Can say that there were a few monks in Kratie province before 1976, but after 1976, there were no longer any monks, so there was no more monks by 1976."); T. 20 June 2012 (YUN Kim), E1/89.1, pp. 76-78. (Questioned by NUON Chea's counsel).
[414] Trial Judgment (E465), para. 4015, fn. 13312.
[415] Trial Judgment (E465), para. 4016.

and religious objects were also frequently destroyed" was supported by additional evidence,[416] the lack of opportunity to examine EM Oeun is not of consequence.

151. For the foregoing reasons, the Supreme Court Chamber concludes that KHIEU Samphân fails to show error in the Trial Chamber's reliance on Case 002/01 testimony of witnesses and civil parties who testified in Case 002/02 on the topic of Buddhism. No bias is apprehended in view of the Trial Chamber's clear reasoning in respect of its approach to the Case 002/01 evidence.

4. Other Findings Allegedly Demonstrating Bias

152. Finally, separate from his arguments alleging bias from the Trial Chamber's treatment of the Case 002/01 findings, KHIEU Samphân alleges that certain legal or factual errors demonstrate the Trial Chamber's biased approach to the examination of the evidence as a whole,[417] its biased approach to the law,[418] and bias in sentencing.[419] The Co-Prosecutors argue that KHIEU Samphân does not demonstrate actual bias in the Trial Chamber's reasoning in any submissions in his Appeal Brief.[420] The Lead Co-Lawyers respond that these are unsupported "offhand allegations",[421] which have the potential to undermine the legitimacy of the Court. In their view, allegations of bias should be made judiciously and with thorough substantiation.[422] They request the Supreme Court Chamber not only to reject the challenges related to bias, but to make clear that the repeated casual allegations of bias throughout KHIEU Samphân's Appeal Brief are without basis.[423]

153. Examples of such repeated allegations include, *inter alia*, that the Trial Chamber demonstrated bias:

- through its alleged lack of analysis or legal definition leading to a sentence when finding that "the Tram Kak authorities were guilty of murder for having 'abstained' from taking appropriate measures to change or alleviate such conditions";[424]

[416] Trial Judgment (E465), para. 4015, fn. 13310.
[417] See, *e.g.*, KHIEU Samphân's Appeal Brief (F54), paras 947, 1211, 1214, 1229, 1239, 1244, 1249.
[418] See, *e.g.*, KHIEU Samphân's Appeal Brief (F54), para. 675.
[419] KHIEU Samphân's Appeal Brief (F54), paras 2145-2146.
[420] Co-Prosecutors' Response (F54/1), para. 41.
[421] Lead Co-Lawyers' Response (F54/2), paras 80, 86-87.
[422] Lead Co-Lawyers' Response (F54/2), paras 86-87; T. 16 August 2021, F1/9.1, pp. 85-86.
[423] Lead Co-Lawyers' Response (F54/2), paras 86-87.
[424] KHIEU Samphân's Appeal Brief (F54), para. 675.

- by "completely ignoring" the Defence's cross-examination, in relation to its erroneous finding that *Yeay* Hay and *Ta* Khut were executed, which supported the Trial Chamber's findings of murder of Vietnamese at Wat Khsach;[425]
- by misrepresenting POL Pot's speech outlining the "one against 30" policy and failing to take into account detailed and corroborating statements of former military personnel "who explained that the speech was intended to encourage the outnumbered DK forces";[426]
- in its analysis of statements about forced marriage that masked key aspects of traditional weddings and by basing generalisations on specific cases;[427]
- through its appreciation of the evidence leading to the conclusion that suffering resulting from forced sexual intercourse reached a level of severity similar to that of other listed crimes against humanity;[428]
- through its different interpretations of the Constitution depending on whether it supported the Trial Chamber's findings;[429]
- by distorting a 30 March 1976 Central Committee decision in order to make findings about the power to order executions in the context of the purges;[430]
- in its erroneous reliance on three speeches supporting its finding on the common purpose;[431] and
- in its interpretation and approach to evidence relating to KHIEU Samphân's knowledge of the alleged crime of persecution on religious grounds of Buddhist in Tram Kak.[432]

154. The Supreme Court Chamber considers that these allegations found throughout KHIEU Samphân's Appeal Brief concern allegations of bias arising from judicial decisions. This Chamber recalls that "[a] showing of bias, or appearance of bias, can be made, *inter alia*, based on statements contained in the reasoning of a decision of the court in question" and that the enquiry is directed at establishing whether its reasoning revealed lack of impartiality.[433] This Chamber dismisses KHIEU Samphân's allegations insofar as they merely disagree with the Trial Chamber's findings or allege factual or legal errors, as matters which are instead subject

[425] KHIEU Samphân's Appeal Brief (F54), para. 1007, fn. 1861.
[426] KHIEU Samphân's Appeal Brief (F54), para. 1030.
[427] KHIEU Samphân's Appeal Brief (F54), paras 1156, 1158.
[428] KHIEU Samphân's Appeal Brief (F54), para. 1312.
[429] KHIEU Samphân's Appeal Brief (F54), para. 1455.
[430] KHIEU Samphân's Appeal Brief (F54), para. 1530.
[431] KHIEU Samphân's Appeal Brief (F54), para. 1702.
[432] KHIEU Samphân's Appeal Brief (F54), para. 1919.
[433] Case 002/01 Appeal Judgment (F36), para. 112.

to appeal,[434] and which are accordingly addressed in the relevant sections of this judgment in accordance with the applicable standard of review. Such allegations do not, however, establish that these findings were made because of a predisposition against KHIEU Samphân.

D. ALLEGED ERRORS IN EVIDENTIARY DECISIONS MADE DURING TRIAL

155. KHIEU Samphân argues that the Trial Chamber's lack of impartiality is further demonstrated in its "partial approach to evidence", which occasioned several errors in its decisions on the admission and hearing of evidence during the trial. These inter-related grounds of appeal allege errors concerning the Trial Chamber's decisions on the sequencing of witness appearances, disclosure of material from Case Files 003 and 004, and admission of evidence during trial, including the Trial Chamber's alleged failure to reopen the proceedings to admit additional evidence and the rejection of requests to recall certain witnesses heard in Case 002/01. He submits that such errors caused him prejudice by violating numerous fair trial rights, including his right to an effective defence, to transparency of proceedings, to reasoned decisions, to be tried without undue delay, and to equality of arms.

1. Decisions on Witness Appearances

156. KHIEU Samphân argues that the Trial Chamber committed a discernible error in the exercise of its discretion which resulted in violations of his rights and prejudice to him by deciding on the sequence of witness appearances as the trial progressed as opposed to at the commencement of trial and by delaying the reasons for its decisions on the sequence of those appearances until the conclusion of the substantive hearings.[435]

157. KHIEU Samphân avers that "when denouncing the Chamber's lack of transparency" and "calling on several occasions for a comprehensive list of the witnesses to be called," his Defence "explained the difficulties caused to its preparation in the long and short term".[436] Had a comprehensive witness list been available, he would have been able to examine witnesses "according to all those who were going to appear" and all parties "would have been able to make requests for admission of documents relevant to examinations at the beginning of the

[434] See Disqualification Decision (E314/12/1), para. 36 ("A disagreement with the substance of a decision is a matter for appeal rather than an application for disqualification"); Decision on KHIEU Samphân's Disqualification Application (11), para. 101.
[435] KHIEU Samphân's Appeal Brief (F54), paras 175-181; Annex A to KHIEU Samphân Appeal (F54.1.1), pp. 6-7.
[436] KHIEU Samphân's Appeal Brief (F54), para. 177.

trial". [437] Instead, the parties' numerous requests for appearances "marred the hearing of the evidence and led to a considerable amount of time being wasted."[438]

158. In his view, the Trial Chamber's approach "left the door open to a number of abuses" as it allowed for the Co-Prosecutors to submit "new requests for appearances depending on the evidence that had already been heard when that evidence was not to [their] liking".[439] The Trial Chamber took advantage of this process by spontaneously calling witnesses whose statements from Cases 003 and 004 were "unlawfully disclosed in bulk by the [Co-Prosecutors] throughout the case".[440] In addition, KHIEU Samphân argues that the Trial Chamber's failure to provide reasons for its decisions on witness appearances at the time of issuance created uncertainty around the delineation of Case 002/02, especially on the subject of "internal purges".[441] KHIEU Samphân further argues that the Trial Chamber's decisions and its delayed reasoning were part of the Trial Chamber's *modus operandi* to seek out and introduce inculpatory evidence "in order to reach [a] finding of guilt and conviction",[442] thus violating his presumption of innocence and his right to an impartial tribunal and transparent proceedings.[443] He submits that the Trial Chamber only provided reasons as to why it had chosen not to hear certain individuals, but failed to explain why it had chosen others, which, in his view, seemed to prove "its preference for inculpatory evidence".[444]

159. The Co-Prosecutors respond that KHIEU Samphân fails to establish that the Trial Chamber abused its broad discretion on matters related to the conduct of the trial or that it caused him any prejudice, and that it provided extensive and timely reasons for its decisions on witness appearances it admitted under Rule 87(4).[445]

160. The Lead Co-Lawyers agree with the Co-Prosecutors and add that KHIEU Samphân ignores the context in which the Trial Chamber's exercise of discretion took place, including

[437] KHIEU Samphân's Appeal Brief (F54), para. 177.
[438] KHIEU Samphân's Appeal Brief (F54), para. 177.
[439] KHIEU Samphân's Appeal Brief (F54), para. 178.
[440] KHIEU Samphân's Appeal Brief (F54), para. 178.
[441] KHIEU Samphân's Appeal Brief (F54), para. 179.
[442] KHIEU Samphân's Appeal Brief (F54), paras 85- 86, 173, 178, 180.
[443] KHIEU Samphân's Appeal Brief (F54), paras 177, fn. 203 (expressly referring to KHIEU Samphân's Closing Brief (E457/6/4/1), paras 660-665, in which he alleges that Case 002/02 "became a quest for inculpatory evidence"), 180.
[444] KHIEU Samphân's Appeal Brief (F54), para. 180.
[445] Co-Prosecutors' Response (F54/1), paras 42-50.

the length of the trial, the advanced age of witnesses and civil parties, and the challenges in securing the appearance of experts.[446]

161. At the outset, the Supreme Court Chamber recalls that subject to the requirements of a fair trial, the Trial Chamber manages the proceedings and enjoys broad discretion over the conduct of the trial proceedings. There is no formal requirement contained in the ECCC's procedural framework which obliges the Trial Chamber to provide a list of all the witnesses, civil parties and experts that it intends to call prior to commencement of the trial, nor indeed would it be practical.[447] The Trial Chamber's wide discretion in managing the trial is, however, constrained by its duty to safeguard the fairness of the proceedings, which includes considerations of expeditiousness and the need to ensure a balance between the rights of all parties.[448]

162. The Supreme Court Chamber recalls that on 8 and 9 May 2014, the parties filed revised lists of proposed witnesses, civil parties and experts to be heard during the Case 002/02 trial.[449] On 12 September 2014, following the parties' submissions,[450] the Trial Chamber issued its "decision on sequencing of the trial proceedings in case 002/02",[451] wherein it adopted a segmented approach to the hearing of evidence and ordered the following sequencing of Case 002/02: cooperatives,[452] worksites,[453] treatment of targeted groups,[454] security centres and internal purges,[455] regulation of marriage (nationwide), nature of the armed conflict, and the role of the Accused.[456] The Trial Chamber reasoned that:

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[446] Lead Co-Lawyers' Response (F54/2), paras 90, 92.
[447] Internal Rules, Rule 91 (which merely provides that the Trial Chamber "shall hear the Civil Parties, witnesses and experts in the order it considers useful").
[448] Internal Rules, Rule 21(1)(a).
[449] Updated List and Summaries of Proposed Witnesses, Civil Parties and Experts [NUON CHEA], 8 May 2014, E305/4 ("NUON Chea's Witness List (E305/4)"); Témoins et experts proposes par la Défense de M. KHIEU Samphân pour le procès 002/2, 9 May 2014, E305/5 ("KHIEU Samphân's Witness List (E305/5)"); Co-Prosecutors' Proposed Witness, Civil Party and Expert List and Summaries for the Trial in Case File 002/02 (with 5 Confidential Annexes, I, II, IIA, III and IIIA), 9 May 2014, E305/6 ("Co-Prosecutors' Witness List (E305/6)"); Civil Party Lead Co-Lawyers' Rule 80 Witness, Expert and Civil Party Lists for Case 002/02 with Confidential Annexes, 9 May 2014, E305/7 ("Lead Co-Lawyers' Witness List (E305/7)"); Addendum to Civil Party Lead Co-Lawyers' Rule 80 Witness, Expert and Civil Party Lists for Case 002/02 With Confidential Annex, 22 July 2014, E305/7/4.
[450] T. 30 July 2014, E1/240.1 (Further Initial Hearing); Co-Prosecutors' Witness List (E305/6), paras 16-18; Lead Co-Lawyers' Witness List (E305/7).
[451] Decision on Sequencing of Trial Proceedings in Case 002/2, 12 September 2014, E315 ("Decision on Sequencing (E315)").
[452] Tram Kak Cooperatives, including the Treatment of Buddhist and the related Kraing Ta Chan Security Centre.
[453] 1st January Dam, Trapeang Thma Dam, and Kampong Chhnang Airfield Construction Site.
[454] Treatment of the Cham, Treatment of Vietnamese, and Former Khmer Republic Officials.
[455] Au Kanseng, Phnom Kraol, and S-21.
[456] Decision on Sequencing (E315), para. 14.

> no clear lines can be drawn between the topics into which this trial will be divided. Regardless of the sequence adopted, it is highly possible that a witness called to testify on one particular topic will also give evidence in relation to one or more other topics. Any sequence adopted for the conduct of the trial should therefore be considered by the Parties as an indication or guideline of the order in which the Chamber intends to hear the evidence in this case. All parties will need to demonstrate a degree of flexibility in this regard. Further, the sequencing of topics and of witnesses is subject to modification depending on *inter alia* case management needs and/or availability of witnesses, civil parties and experts, as well as the health of the Accused.[457]

In the same decision, the Trial Chamber further recalled its broad discretion in matters relating to the conduct of the trial,[458] and that it would "issue an order on the sequence of the witnesses that will be heard in relation to each topic in due course".[459] Seven days later, on 19 September 2014, the Trial Chamber informed the parties, via email, of the names of the first witnesses, civil parties, and experts it intended to hear in relation to the first trial segment.[460] The Trial Chamber provided further updates on 10 October 2014[461] and 10 December 2014,[462] before communicating a final list on 17 December 2014.[463] The first witness in Case 002/02 was heard on 8 January 2015.[464] The Trial Chamber subsequently notified the parties of the witnesses it intended to hear in advance of each trial segment.[465]

163. Following KHIEU Samphân's request for a comprehensive list of all witnesses that the Trial Chamber intended to call,[466] the Trial Chamber reasoned that it had adopted its phased

[457] Decision on Sequencing (E315), para. 7.
[458] Decision on Sequencing (E315), para. 8.
[459] Decision on Sequencing (E315), para. 12.
[460] Email entitled "First Witnesses, Civil Parties and Experts", 19 September 2014, E316/2.1.1.
[461] Attachment 12 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.12 (Trial Chamber Email on the Subject "Further Information regarding First Witnesses and Civil Parties" dated 10 October 2014).
[462] Attachment 13 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.13 (Trial Chamber Email on the Subject "Witnesses, Civil Parties and Experts – Topic 1" dated 10 December 2014).
[463] Scheduling Order for Evidentiary Proceedings, 17 December 2014, E328, pp. 2-3; Tram Kok Cooperatives and Kraing Ta Chan Security Centre Witnesses, Civil Parties and Experts, 17 December 2014, E328.1; T. 8 January 2015, E1/247.1, pp. 19-20.
[464] T. 8 January 2015, E1/247.1, pp. 1-2 (The substantive hearings in Case 002/02 were opened on 17 October 2014; Khieu Samphân's Defence refused to participate in the proceedings until after the filing of the Appeal Brief in Case 002/01. This resulted in the adjournment of the proceedings until 8 January 2015. See, *e.g.*, T. 24 November 2014, E1/246.1, p. 1).
[465] See, *e.g.*, Attachment 16 to KHIEU Samphân Appeal Brief, 27 February 2020, F54.1.16 (Trial Chamber Email on the Subject "1st January Dam – witnesses and civil parties" dated 17 February 2015); Email from the Trial Chamber Senior Legal Officer entitled "Witnesses, Civil Parties & Expert List: Treatment of the Cham", dated 7 August 2015, 25 September 2015, E366/1.2; Attachment 1 to Email from Trial Chamber Legal Officer to the Parties entitled "Hearing Schedule upon Resumption from the Pchum Ben Recess" dated 13 September 2016, 26 October 2016, E448.1.1 (Armed Conflict).
[466] Submissions of the Defence for Mr KHIEU Samphân on the Co-Prosecutors' Disclosure Obligation, 24 August 2015, E363 ("KHIEU Samphân's Submissions on Disclosure (E363)"), para. 48. See also Réponse de la Défense de M. KHIEU Samphân à la demande du co-Procureur international d'entendre trois témoins supplémentaires sur le traitement des Chams et demande incidente d'avoir la liste globale des témoins à comparaître dans 002/02, 25 September 2015, E366/1, paras 4, 22-25, 28; Demande de KHIEU Samphân visant à obtenir la communication de la liste de témoins, parties civiles et experts cités à comparaître lors de la dernière phase du procès 002/02, 5 July 2016, E421/2.

approach to determining which witnesses, civil parties, and experts would testify on a particular topic for a variety of reasons, including:

> the unpredictability of whether witnesses contacted at the beginning of trial will be available to testify on a date far in the future and the limited resources of the Witness and Expert Support Unit to contact every proposed individual. The Chamber has generally provided the parties with at least four weeks' notice of the list of witnesses, Civil Parties and experts it intended to hear on a trial topic. The Chamber considers this sufficient time for the parties to prepare for the examination of witnesses in view of their participation during the pre-trial phase of this case. Providing at this time a comprehensive list of witnesses, Civil Parties and experts is impracticable and unnecessary to the proper administration of these proceedings.[467]

The Trial Chamber recalled its "long-established practice" of communicating lists of witnesses, civil parties, and experts to the parties prior to the hearings on a specific segment, with the purpose of providing "the parties with a priority list of individuals the Court considers to be the most relevant to each segment and therefore to be heard at trial."[468] Following the conclusion of the evidentiary hearings, the Trial Chamber issued its "Decision on Witnesses, Civil Parties and Experts Proposed to be Heard during Case 002/02", which included the Trial Chamber's rationale for not calling certain witnesses that were proposed by the parties as relevant to Case 002/02.[469]

164. Based on the Trial Chamber's above reasoning, the Supreme Court Chamber sees no error in the Trial Chamber's exercise of its discretion to prepare and manage the hearing of evidence. The reasoning provided by the Trial Chamber shows its considered and flexible approach of managing the practicalities of selecting and hearing hundreds of witnesses whose testimony was relevant to multiple trial segments. Its intended approach and the reasons behind it were well flagged to the parties and the Trial Chamber provided them with sufficient notice of witnesses it intended to call in advance of each trial segment.[470] The Supreme Court Chamber observes that KHIEU Samphân raised the same complaint at trial, calling for a full witness list on all trial segments prior to the commencement of the evidentiary hearings, which the Trial Chamber rejected as "impracticable and unnecessary to the proper administration of these proceedings".[471] Its reasoning explained the unpredictability of whether witnesses contacted at the start of the trial would still be available at a later date and the burden such a

[467] Decision on KHIEU Samphan Defence Motion regarding Co-Prosecutors' Disclosure Obligations, 22 October 2015, E363/3 ("Decision on Disclosure Obligations (E363/3)"), para. 26.
[468] Decision on International Co-Prosecutor's Request for Clarification Regarding Proposed Witnesses for the Regulation of Marriage Segment, 7 September 2016, E425/2, para. 5 (emphasis added).
[469] Decision on Witnesses, Civil, Parties and Experts Proposed to be Heard during Case 002/2, 18 July 2017, E459 ("Decision on Proposed Witnesses (E459)").
[470] Decision on Disclosure Obligations (E363/3), para. 26.
[471] Decision on Disclosure Obligations (E363/3), para. 26.

process would place on the Witness and Expert Support Unit ("WESU") to contact every proposed individual.[472] The Trial Chamber, in addition, pointed to case management needs and the health of the Accused as potential reasons to vary the sequencing of witnesses and/or trial segments.[473] This Chamber observes that KHIEU Samphân does not substantiate any error in the reasoning that guided the Trial Chamber's decision to adopt a phased approach to witness selection, and merely seems to disagree with its approach. The Supreme Court Chamber considers the Trial Chamber's decision and reasoning to be fair and reasonable taking into account the parties, including KHIEU Samphân's, ability to prepare for their respective cases for each trial segment. Turning to KHIEU Samphân's allegation that the Trial Chamber's approach caused difficulties in his long-term ability to prepare for the trial,[474] this Chamber also observes that, subject to Rule 87(4) requests which govern the admission of evidence during trial,[475] the individuals selected to testify were drawn from the parties' revised lists of proposed witnesses, civil parties and experts filed in early May 2014.[476] These lists included summaries of the proposed testimony[477] and the Co-Prosecutors' and Lead Co-Lawyers' proposed order of witnesses for each trial segment.[478] The Trial Chamber had previously informed the parties of the various segments on 12 September 2014,[479] while the first witness appeared on 8 January 2015, leaving the parties with ample time to prepare for the examination of those called to testify.[480] Having been informed of the order of the various trial segments and with access to the lists of proposed witnesses, the Supreme Court Chamber considers that there is no merit to KHIEU Samphân's claim that his long-term ability to prepare for the trial was impaired.

165. As to his short-term ability to prepare, the Trial Chamber notified the parties in advance of the relevant trial segment of the identity of the witnesses who were scheduled to appear. For instance, in relation to the second trial segment concerning worksites, that is, 1st January Dam,

[472] Decision on Disclosure Obligations (E363/3), para. 26.
[473] Decision on Sequencing (E315), para. 7.
[474] KHIEU Samphân's Appeal Brief (F54), para. 177.
[475] See, *e.g*, Trial Chamber Memorandum entitled "Decision on the KHIEU Samphan Defence's Opposition to the Appearance of 2-TCW-987 (E364)", 18 February 2016, E364/1.
[476] NUON CHEA's Witness List (E305/4); KHIEU Samphân's Witness List (E305/5); Co-Prosecutors' Response's Witness List (E305/6); Lead Co-Lawyers' Witness List (E305/7).
[477] See, *e.g*., Annex III: OCP Updated Witness, Civil Party and Expert Summaries, 9 May 2014, E305/6.4; Annex B – Updated Summaries of Witnesses, Civil Parties and Experts (No Protective Measures Sought) – NUON Chea Defence Team, 8 May 2014, E305/4.2.
[478] Annex I: Co-Prosecutors' Combined, Witness, Civil Party and Expert List for Case 002/02 in Recommended Order of Trial Segments and Appearance, 9 May 2014, E305/6.1; Annex IV: Civil Parties Lead Co-Lawyers' Proposed Order of Segments, 9 May 2014, E305/7.1.4.
[479] Decision on Sequencing (E315).
[480] T. 8 January 2015, E1/247.1, pp. 1-2.

Trapeang Thma Dam, and Kampong Chhnang Airfield Construction Site, the Trial Chamber, on 27 February 2015, sent a notification of the tentative witness list and their expected order of appearance in relation to 1st January Dam[481] and provided an updated final list on 28 April 2015.[482] The hearing of evidence concerning the 1st January Dam commenced on 19 May 2015.[483] The Trial Chamber notified the parties of the witnesses in relation to the Kampong Chhnang Airfield Construction Site on 12 May 2015[484] and in relation to the Trapeang Thma Dam on 22 June 2015.[485] The hearing of evidence in relation to these topics commenced on 9 June 2015 and 27 July 2015, respectively.[486]

166. With regard to the third trial segment on the treatment of targeted groups, the Trial Chamber initially notified the parties of the expected order and time allocations on 7 August 2015 in relation to the Cham,[487] and on 18 September 2015 in relation to the Vietnamese.[488] The first witnesses for the Cham and Vietnamese appeared before the Trial Chamber on 7 September 2015 and 27 October 2015, respectively.[489] While the order and date of appearance of witnesses and civil parties in this particular trial segment were subject to frequent changes,[490] this Chamber considers that the circumstances leading to such modifications, which included the ill-health[491] and death of some of the scheduled witnesses,[492] were beyond the Trial

[481] Attachment 16 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.16 (Trial Chamber Email on the Subject "1 st January Dam – Witnesses and Civil Parties" dated 27 February 2015).
[482] Attachment 19 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.19 (Trial Chamber Email on the Subject "Order and Time Allocations for 1st January Dam" dated 28 April 2015).
[483] T. 19 May 2015, E1/301.1, p. 1.
[484] Attachment 20 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.20 (Trial Chamber Email on the Subject "Re: Order and Time Allocations for Kampong Chhnang Airport" dated 12 May 2015).
[485] Attachment 21 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.21 (Trial Chamber Email on the Subject "Order and Time Allocations for Trapeang Thma Dam Work site" dated 22 June 2015).
[486] T. 9 June 2015, E1/312.1, p. 2; T. 27 July 2015, E1/323.1, p. 2.
[487] Letter, 25 September 2015, E366/1.2 (Email from the Trial Chamber Senior Legal Officer entitled "Witnesses, Civil Parties & Expert Order List: Treatment of the Cham", dated 7 August 2015).
[488] Annex 1, 23 December 2015, E318.1.1 (Email from Ken Roberts, Senior Legal Officer, Trial Chamber entitled "List of Witnesses/Civil Parties for Treatment of the Vietnamese", dated 18 September 2015).
[489] T. 7 September 2015, E1/342.1, p. 50; T. 27 October 2015, E1/357.1, p. 46.
[490] Annex 1, 23 December 2015, E318.1.1 (Email from Ken Roberts, Senior Legal Officer, Trial Chamber, entitled "List of Witnesses/Civil Parties for Treatment of the Vietnamese", dated 18 September 2015); Attachment 22 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.22 (Trial Chamber Email on the Subject "Re: Notice of Next Witnesses (Cont.)" dated 20 October 2015); Annex 3, 23 December 2015, E381.1.3 (Email from Ken Roberts, Senior Legal Officer, Trial Chamber, entitled "Scheduling from 30 November 2015", dated 6 November 2015); Letter, 15 January 2016, E364/2/1.1.1 (Email from Trial Chamber Senior Legal Officer entitled "Re: Request for Clarification on the Conduct of Further Scheduling of the Segment on the Treatment of the Targeted Groups", dated 24 December 2015).
[491] See, *e.g.*, T. 28 September 2015, E1/350.1, p. 45; Annex 3, 23 December 2015, E381.1.3 (Email from Ken Roberts, Senior Legal Officer, Trial Chamber, entitled "Scheduling from 30 November 2015", dated 6 November 2015).
[492] Letter of Confirmation of Death- KHUN Mon (confidential) (2-TCW-958), 25 September 2015, E29/506; Death Certificate- LANG Hel (confidential) (2-TCW-927), 23 January 2015, E29/507 (Both witnesses initially appeared on the Trial Chamber's provisional witness and Civil Party list selected to testify on the topic of the

Chamber's control.[493] When such changes to the witness schedule were required, the Trial Chamber notified the parties sufficiently in advance.[494]

167. As to the remaining trial segments concerning security centres and internal purges, regulation of marriage, nature of the armed conflict, and the role of the Accused, the Trial Chamber similarly provided sufficient advance notice of the scheduling and order of the appearance of witnesses[495] and of any changes in light of illness of witnesses or other scheduling issues.[496] Finally, the Supreme Court Chamber considers that, apart from general statements, such as: "if a comprehensive list had been available to the Defence, it would have been able to prepare for this",[497] KHIEU Samphân does not identity any concrete prejudice or examples of how the Trial Chamber's approach or re-scheduling impaired his ability to prepare for the trial, for instance by identifying the testimony of a specific witness he was hindered

Treatment of Vietnamese). See also Annex 1, 23 December 2015, E381.1.1 (Email from Ken Roberts, Senior Legal Officer, Trial Chamber, entitled "List of Witnesses/ Civil Parties for Treatment of the Vietnamese", dated 18 September 2015).

[493] See, *e.g*., Attachment 22 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.22 (Trial Chamber Email on the Subject "Re: Notice of Next Witnesses (Cont.)" dated 20 October 2015) (logistical reasons for changing the order of witness appearances); Letter, 15 January 2016, E364/2/1.1.1 (Email from Trial Chamber Senior Legal Officer entitled "Re: Request for Clarification on the Conduct of Further Scheduling of the Segment on the Treatment of the Targeted Groups", dated 24 December 2015).

[494] T. 28 October 2015, E1/358.1, p. 69 (For example, the Trial Chamber notified the parties on 28 October 2015 that it would continue hearing testimony in relation to the treatment of Vietnamese on 30 November 2015). See also Attachment 22 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.22 (Trial Chamber Email on the Subject "Re: Notice of Next Witnesses (Cont.)" dated 20 October 2015).

[495] Attachment 23 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.23 (Report "Witnesses for the Au Kanseng Security Centre" dated 13 January 2016); F54.1.24 Attachment 24 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.24 (Trial Chamber Email on the Subject "Scheduling – Au Kanseng Security Centre" dated 13 January 2016); Letter, 9 May 2016, E405.1.1 (Email from Trial Chamber Senior Legal Officer to the Parties entitled "Revised Scheduling 29 February – 17 March", dated 12 February 2016); Email from Trial Chamber Senior Legal Officer to Parties, entitled "S-21, Time Allocation for 2-TCE-88 and Scheduling Order for the Week of 21-24 March", 7 March 2016); Attachment 1, 9 August 2016, E408/6.1 (Email from Trial Chamber Senior Legal Officer to Parties, entitled "Internal Purges: List of Witnesses, Civil Parties and Experts", dated 8 April 2016); Attachment 1, 24 March 2016, E390/1.1.1 (Email from Trial Chamber Senior Legal Officer to Parties, entitled "Phnom Kraol Security Centre Witness List and Time Allocations", dated 5 February 2016); Annex 1, 31 August 2016, E431/2.2 (Email from Trial Chamber Senior Legal Officer, entitled "List of Witnesses, Civil Parties and Experts on the Regulation of Marriage", dated 3 June 2016); Attachment 2, 30 August 2016, E434.1.2 (Email from Trial Chamber Senior Legal Officer to the Parties, entitled "List of Witnesses and Experts: Nature of the Armed Conflict", dated 30 June 2016); Annex 2, 20 December 2016, E453/1.2 (Email from Trial Chamber Legal Officer entitled "List of Witnesses and Civil Parties for the Trial Topic on Role of the Accused", dated 14 September 2016).

[496] Attachment 27 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.27 (Trial Chamber Email on the Subject "Scheduling Issue" dated 8 October 2016 (Regulation of Marriage)); Attachment 28 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.28 (Trial Chamber Email on the Subject "Scheduling – Week of 12 September 2016" dated 9 June 2016 (Regulation of Marriage)); Attachment 1, 26 October 2016, E448.1.1 (Email from Trial Chamber Legal Officer to the Parties, entitled "Hearing Schedule Upon Resumption from the Pchum Ben Recess", dated 13 September 2016 (Armed Conflict); Attachment 29 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.29 (Trial Chamber Email on the Subject "Re: Scheduling for the Week of 19 September 2016" dated 9 September 2016); Attachment 30 to KHIEU Samphân's Appeal Brief, 27 February 2020, F54.1.30 (Trial Chamber Email on the Subject "Fw: Replacement of 2-TCW-871", dated 12 June 2016).

[497] KHIEU Samphân's Appeal Brief (F54), para. 177.

from examining. Considering the above, KHIEU Samphân's allegations as to his alleged inability to prepare his examination of witnesses are dismissed.

168. As to the alleged undue delay in the Trial Chamber's provision of reasoning until after the close of the trial proceedings, the Supreme Court Chamber observes that the Trial Chamber's Decision on Witnesses, Civil Parties and Experts Proposed to be Heard During Case 002/02 sets out "the rationale for *not* calling certain individuals proposed by the Parties as relevant to Case 002/02."[498] Under the ECCC legal framework, the Trial Chamber selects witnesses that are most conducive to ascertaining the truth and "shall hear the Civil Parties, witnesses and experts in the order it considers useful."[499] A Trial Chamber may decide to call additional witnesses towards the end of the proceedings, depending on the exigencies of the case, particularly if death or illness leave an issue in an ambiguous state. Accordingly, until the proceedings concluded, the Trial Chamber could not make a final decision or provide its reasoning as to which witnesses or not to call. KHIEU Samphân therefore fails to establish any unreasonable delay or prejudice because the hearing on the evidence concluded on 11 January 2017 and the Trial Chamber issued its reasoning on 18 July 2017. This is not unreasonable given the size of the decision, which includes the reasoning for not calling dozens of witnesses as well as the fact that the Trial Chamber was deliberating on the Judgment at the same time.

169. Insofar as bias is alleged, the Supreme Court Chamber determines that KHIEU Samphân fails to substantiate his serious claim in view of the Trial Chamber's clear reasoning regarding its approach to the hearing of witnesses throughout the trial. Concerning alleged abuses resulting from the Trial Chamber's approach, particularly the admission of evidence towards the end of the evidentiary hearings and calling of new witnesses,[500] the Supreme Court Chamber finds that the Co-Prosecutors' or any other parties' requests for the appearance of new witnesses or admission of new evidence during the trial are clearly foreseen by Rule 87(4) which provides that "[d]uring the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence *which it deems conducive to ascertaining the truth*".[501] Regardless of whether the Trial Chamber provided a more comprehensive witness list prior to the trial, the parties could have requested additional witnesses not included on such a list under the Rule. The merit of the Co-

[498] Decision on Proposed Witnesses (E459), para. 1 (emphasis added).
[499] Internal Rules, Rule 91.
[500] KHIEU Samphân's Appeal Brief (F54), para. 188.
[501] Internal Rules, Rule 87(4).

Prosecutors' requests, like any other Rule 87(4) request, were determined based on the specific criteria governing this Rule, which were assessed and reasoned by the Trial Chamber in its decisions on these requests.[502] The Co-Prosecutors' reliance on this Rule does not demonstrate any violation or abuse. KHIEU Samphân's arguments that the Trial Chamber erred in applying the criteria of Rule 87(4) requests are addressed elsewhere in this Judgment.[503]

170. With regard to any alleged uncertainty regarding the scope of the charges in Case 002/02, particularly on the topic of internal purges,[504] the Supreme Court Chamber observes that the Trial Chamber promptly addressed KHIEU Samphân's request for clarification, explaining that "the sequence of trial topics or the scheduling of particular witnesses to be heard nominally under one trial topic rather than another does not alter the scope of Case 002/02" and that the "scope of Case 002/02 therefore remains as set out in the Trial Chamber's severance decision."[505] KHIEU Samphân thus fails to demonstrate how the Trial Chamber's phased approach to witness selection could have caused him uncertainty. KHIEU Samphân's other allegations regarding the scope of trial and the Trial Chamber's *saisine* are addressed elsewhere in this Judgment.[506]

171. Finally, in response to the Trial Chamber's alleged failure to provide reasons for hearing certain individuals,[507] the Supreme Court Chamber observes that the Trial Chamber stated that it had called those individuals it deemed most conducive to ascertaining the truth and that it had provided the main topic of the witnesses' testimony prior to hearing the proposed

[502] See, *e.g.*, Decision on International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kok Cooperatives and Kraing Ta Chan Security Center and Order on Use of Written Records of Interview from Case Files 003 and 004, 24 December 2014, E319/7 ("Decision on International Co-Prosecutor's Request (E319/7)"); Decision on International Co-Prosecutor's Request Pursuant to Rules 87(3) and 87(4) to Admit Documents and to Hear on Additional Trial Witness Relating to the Tram Kok District/ Kraing Ta Chan Segment of Case 002/02, 8 April 2015, E319/17/1 ("Decision on Request Pursuant to Rules 87(3) and 87(4) (E319/17/1)"); Decision on International Co-Prosecutor's Request to Admit Statements Pursuant to Rules 87(3) and 87(4), 17 July 2015, E319/22/1 ("Decision on Request to Admit Statements (E319/22/1)"); Decision on International Co-Prosecutor's Request to Admit Written Records of Interview Relating to Treatment of Cham Pursuant to Rules 87(3) & 87(4), 18 February 2016, E319/32/1 ("Decision on Request to Admit Written Records of Interview (E319/32/1)"); Decision on International Co-Prosecutor's Request to Admit Written Records of Interview Pursuant to Rules 87(3) & 87(4) and to Call Four Additional Witnesses for Upcoming Case 002/02 Segments, 25 May 2016, E319/36/2 ("Decision on Request to Admit Written Records of Interview and to Call Witnesses (E319/36/2)").
[503] See *infra* Section V.D.3.a.
[504] KHIEU Samphân's Appeal Brief (F54), para. 179, fn. 208, referring to Requête urgente de la Défense de M. KHIEU Samphân aux fins de clarification de l'étendue de la saisine de la Chambre concernant les « purges internes », 22 June 2016, E420.
[505] Trial Chamber Memorandum entitled "Decision on KHIEU Samphan Urgent Request for Clarification of the Scope of Case 002/02 concerning Internal Purges", 1 July 2021, E420/1, para. 9.
[506] See *infra* Section VI.D.
[507] KHIEU Samphân's Appeal Brief (F54), para. 180.

individuals.[508] Furthermore, the witnesses called were chosen from the parties' proposed witness lists, which included information on the relevance of such witnesses' testimony. In view of the above, KHIEU Samphân fails to establish a violation of his rights to have adequate time and facilities for the preparation of his defence, to be informed of the nature and cause of the charges against him, to legal and procedural certainty and to a reasoned decision.[509]

2. Disclosure of Case 003 and 004 Material

172. The investigations into Cases 003 and 004, which were conducted concurrently with the Case 002/02 proceedings, resulted in a large number of new documents becoming available and disclosed in Case 002/02.

173. KHIEU Samphân argues that the Trial Chamber failed to direct the Co-Prosecutors to introduce only potentially exculpatory material and then failed to exclude this "illegally" disclosed material from the Case File.[510] While recognising that the Trial Chamber granted measures to ensure that the parties' had sufficient time to review the material during the proceedings, he submits that such measures "aggravated the violation of [his] right to be tried without undue delay",[511] and allowed the Co-Prosecutors to "build up a huge pool of inculpatory evidence".[512] In this respect, he adds that the Trial Chamber "consistently refused to direct the Prosecution to specify which [new] items were exculpatory", despite the institution of "certification procedure" for disclosure requests by the Office of the Co-Investigating Judges, which required the Co-Prosecutors to include "detailed information as to which portions it considers potentially exculpatory".[513]

174. KHIEU Samphân further submits that the Trial Chamber held a "contradictory attitude" and acted in bad faith when making decisions to admit and hear evidence from the disclosed material, as it already had sufficient evidence in Case 002/02 to decide on the responsibility of the Accused without unnecessarily complicating and prolonging the trial.[514] The decisions include: (1) granting the Co-Prosecutors' request for the appearance of individuals of

[508] Trial Chamber Memorandum entitled "Decision on Reiterated Request of KHIEU Samphan Defence to Hear Stephen HEDER (2-TCE-87) and François PONCHAUD (2-TCE-99)", 3 November 2016, E408/6/2 ("Decision on Request to Hear HEDER and PONCHAUD (E408/6/2)"); Decision on Proposed Witnesses (E459).
[509] KHIEU Samphân's Appeal Brief (F54), paras 180-181.
[510] KHIEU Samphân's Appeal Brief (F54), paras 201, 205.
[511] KHIEU Samphân's Appeal Brief (F54), para. 198.
[512] KHIEU Samphân's Appeal Brief (F54), paras 202-203.
[513] KHIEU Samphân's Appeal Brief (F54), paras 205-207.
[514] KHIEU Samphân's Appeal Brief (F54), paras 210, 214.

"dubious" relevance based on the disclosed documents, such as SUN Vuth;[515] (2) failing to provide reasons for its *propio motu* decision to hear the new Civil Party PREAP Sokhoeurn after the deadline for request for admission of new evidence had passed;[516] and; (3) making decisions on the basis of documents that were disclosed but not admitted, for example in relation to the appearances of MUY Vanny and LONG Sat.[517]

175. KHIEU Samphân submits that the Trial Chamber's errors resulted in violations of his rights to be tried without undue delay, to be informed of the nature and cause of the charge against him, to legal and procedural certainty, to an impartial tribunal, to have adequate time and facilities for the preparation of his defence, to an adversarial trial, to be heard, to an effective defence, to reasoned decisions and to equality of arms.[518]

176. The Co-Prosecutors respond that KHIEU Samphân fails to establish that the Trial Chamber abused or erred in the exercise of its discretion.[519]

177. The Lead Co-Lawyers agree with the Co-Prosecutors.[520]

178. At the outset, the Supreme Court Chamber observes that some of KHIEU Samphân's arguments reveal confusion between the distinct procedures governing the disclosure of material to parties and the admission of evidence. In this regard, the Supreme Court Chamber emphasises that Rules 53(4) and 87(4) create separate regimes in relation to the disclosure and admission of material during the trial, as repeatedly held by the Trial Chamber.[521] While Rule 53(4) concerns the Co-Prosecutors' obligation to disclose certain material to the Trial Chamber and the parties, Rule 87(4) regulates the admission of new evidence during the trial and "clarifies the conditions under which new material may be admitted."[522]

179. Disclosure is thus governed by Rule 53(4), which provides that "[t]he Co-Prosecutors shall, as soon as practicable, disclose to the Co-Investigating Judges any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the

[515] KHIEU Samphân's Appeal Brief (F54), para. 211.
[516] KHIEU Samphân's Appeal Brief (F54), para. 212.
[517] KHIEU Samphân's Appeal Brief (F54), paras 213-214.
[518] KHIEU Samphân's Appeal Brief (F54), paras 208-209, 215.
[519] Co-Prosecutors' Response (F54/1), paras 68-70; T. 16 August 2021, F1/9.1, p. 66.
[520] Lead Co-Lawyers' Response (F54/2), paras 94-101.
[521] Decision on Disclosure Obligations (E363/3), para. 20; Decision on Requests regarding Internal Rules 87(4) Deadlines, 21 September 2016, E421/4 ("Decision on Rules 87(4) Requests (E421/4)"), para. 9.
[522] Decision on Disclosure Obligations (E363/3), para. 20.

Suspect or the Charged Person or affect the credibility of the prosecution evidence."[523] This Chamber previously held that this Rule imposes a continuing obligation on the Co-Prosecutors to disclose to the Chambers and the parties any material in their possession that may suggest the innocence or mitigate the guilt of the Accused or affect the reliability of the evidence.[524] Disclosure obligations are thus fundamental in preventing a miscarriage of justice by ensuring that all parties and judges are privy to material that may establish the innocence or mitigate the guilt of the accused and are confined to disclosure of such potentially exculpatory material. As previously stated by this Chamber the duty to disclose is "a component of fair trial [and] accords with the prosecutorial role of assisting the court in ascertaining the truth".[525]

180. The Supreme Court Chamber considers it appropriate to set out the relevant context in which the disclosure of Case 003 and 004 material took place. This Chamber observes that the closely related substance and overlap in time frames, geographical areas, and crime sites of the ongoing investigations into Cases 003 and 004 resulted in new *prima facie* relevant material becoming available throughout the Case 002/02 proceedings.[526] As the only party in Case 002/02 with access to the confidential Case Files 003 and 004, the Co-Prosecutors sought permission from the Office of the Co-Investigating Judges to disclose certain material to the Trial Chamber and the parties in Case 002/02. The International Co-Prosecutor explained:

> [a]s the Case 003 and Case 004 investigations proceed, the [Office of the Co-Investigating Judges] regularly places new documents on the Case 003 and Case 004 case files. Once notified of these documents, the Co-Prosecutor reviews them to determine whether they are subject to disclosure obligations. He then submits requests to the [Office of the Co-Investigating Judges] for leave to disclose any statements that he has identified as being subject to disclosure to the Case 002/02 Trial Chamber and parties. […] Whenever the Co-Prosecutor receives permission from the [Office of the Co-Investigating Judges] to disclose documents in Case 002 (which sometimes is only allowed in redacted form), the Co-Prosecutor files a motion to the Trial Chamber disclosing those documents […].[527]

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[523] Internal Rules, Rule 53(4).
[524] Decision on Part of NUON Chea's Third Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, 16 March 2015, F2/4/2 ("Decision on Request for Additional Evidence (F2/4/2)"), para. 17, referring to Trial Chamber Memorandum entitled "Disclosure of Witness Statements for Witnesses who May Testify in Case 002", 24 January 2012, E127/4 ("Disclosure of Witness Statements Memorandum (E127/4)") (the Supreme Court Chamber agreed with the Trial Chamber's interpretation of this Rule in Case 002/01: "Rule 53(4) imposes a continuing obligation on the Co-Prosecutors to disclose to the Trial Chamber any material in its possession that may suggest the innocence or mitigate the guilt of the Accused or affect the reliability of the evidence").
[525] Decision on Request for Additional Evidence (F2/4/2), para. 17, referring to Criminal Procedure Code of Cambodia, Art. 4.
[526] Trial Judgment (E465), para. 140.
[527] Information and Clarification Regarding the Disclosure Process in Case 002/02 in the Context of the Ongoing Investigations in Cases 003 and 004, 23 February 2015, E319/14, para. 7. See also Trial Judgment (E465), para. 141.

181. Between 20 October 2014 and 12 August 2015, the International Co-Prosecutor filed 15 disclosure motions before the Trial Chamber, comprising statements and other documents from Cases 003 and 004.[528] In these motions, the International Co-Prosecutor stated and understood that the obligation to disclose documents pursuant to Rule 53(4) encompassed "relevant material, whether inculpatory or exculpatory".[529] The International Co-Prosecutor filed separate requests seeking the admission of some of the disclosed documents pursuant to Rules 87(3) and 87(4), which govern the admission of new evidence during the trial.[530]

182. On 24 August 2015, KHIEU Samphân filed submissions regarding the Co-Prosecutors' disclosure obligation,[531] in which he argued that the International Co-Prosecutor had, *inter alia*, distorted the applicable law by disclosing all material relevant to Case 002/02, rather than limiting disclosure to exculpatory material only.[532] The Trial Chamber held that "the Accused has a fundamental right to have access to potentially exculpatory material" and reiterated that Rule 53(4) imposes a continuous obligation to disclose such material that remains in effect throughout the trial proceedings.[533] The Trial Chamber clarified that it is the exclusive

[528] International Co-Prosecutor's Disclosure of Statements from Case File 004, 17 October 2014, E319 ("International Co-Prosecutor's Disclosure (E319)"); International Co-Prosecutor's Disclosure of Statements from Case File 004 relevant to 1st Segment of Case 002/02 Trial, 22 January 2015, E319/8; International Co-Prosecutor's Disclosure of Statements from Case File 004 Relevant to Case 002, 11 February 2015, E319/12; International Co-Prosecutor's Disclosure of Statements from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/11, 18 February 2015, E319/13; International Co-Prosecutor's Disclosure of Statements from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/13, 27 February 2015, E319/15; International Co-Prosecutor's Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/15, 18 March 2015, E319/19; International Co-Prosecutor's Disclosure of Documents Relevant to Case 002 Pursuant to Case 004-D193/16, 16 March 2015, E319/20; International Co-Prosecutor's Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/21, 13 April 2015, E319/21; International Co-Prosecutor's Disclosure of: 1) Two DC-Cam Statements; and 2) Documents from Case File 003 Relevant to Case 002 Pursuant to Case 003-D100/9, 3 June 2015, E319/23; International Co-Prosecutor's Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/24, 9 June 2015, E319/24; International Co-Prosecutor's Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/28, 24 July 2015, E319/25; International Co-Prosecutor's Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/30, 3 August 2015, E319/26; International Co-Prosecutor's Disclosure of Documents from Case File 003 and Case File 004 Relevant to Case 002 Pursuant to Case 003-D100/12 and Case 004-D193/33, 10 August 2015, E319/27; International Co-Prosecutor's Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/34, 12 August 2015, E319/28; International Co-Prosecutor's Disclosure of Documents from Case File 004 Relevant to Case 002 Pursuant to Case 004-D193/37, 12 August 2015, E319/29.

[529] See, *e.g.*, International Co-Prosecutor's Disclosure (E319), para. 1.

[530] See, *e.g.*, International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kak Cooperatives and Kraing Ta Chan Security Centre pursuant to Rules 87(3) and 87(4), 14 November 2014, E319/5 ("International Co-Prosecutor's Request to Admit Documents (E319/5)").

[531] KHIEU Samphân's Submissions on Disclosure (E363).

[532] KHIEU Samphân's Submissions on Disclosure (E363), paras 6-10.

[533] Decision on Disclosure Obligations (E363/3), para. 22, referring to Disclosure of Witness Statements Memorandum (E127/4). See also Trial Chamber Memorandum entitled "Decision on Requests regarding Internal Rule 87(4) deadlines, 26 August 2016, E421/3, p. 2; Decision on Rules 87(4) Requests (E421/4), para. 9; Trial

responsibility of the Co-Prosecutors to determine in good faith what information may be exculpatory and considered that "[u]ncertainties as to the precise theories of the Defence teams do not provide an excuse to undertake an overbroad approach to disclosure, nor does it justify including clearly inculpatory evidence within disclosures made pursuant to Internal Rule 53(4)".[534] It therefore held that "by including in their Case 003 and 004 disclosures any evidence that is relevant to Case 002/02, including evidence that is inculpatory, the Co-Prosecutors have applied an overly broad interpretation of Internal Rule 53(4)".[535] It nevertheless held that "[d]isclosure of additional materials does not in itself constitute a violation of the Accused's rights", even in cases where a large quantity of materials are provided, so long as other accommodations are made".[536]

183. The Trial Chamber subsequently directed the Co-Prosecutors to "limit all future disclosures to exculpatory materials and the statements of individuals who ha[d] testified or who [we]re proposed to testify" in Case 002/02.[537] The Trial Chamber fixed a deadline of 30 January 2016 for the Co-Prosecutors to seek admission of previously disclosed documents[538] and instituted further remedies in view of the size of the disclosure.[539] It adjourned the proceedings for several weeks to allow the parties to review disclosures, delayed the hearings of particular witnesses and civil parties, issued guidelines restricting the scope of disclosure of Civil Party Applications and aided the Defence teams in obtaining additional financial resources.[540] Following the Trial Chamber's instructions, the International Co-Prosecutor continued to disclose material from Cases 003 and 004 and separately sought the admission of certain evidence pursuant to Rules 87(3) and 87(4).

184. The Supreme Court Chamber addresses, hereafter: (1) the alleged legal errors in the Trial Chamber's interpretation and application of Rule 53(4); and (2) whether the Trial Chamber's approach to disclosure violated KHIEU Samphân's fair trial rights.

a. Alleged Legal Errors

Chamber Memorandum entitled "Trial Chamber Guidelines on the Disclosure of Cases 003 and 004 Civil Party Applications in Case 002/02", 24 August 2015, E319/14/2.
[534] Decision on Disclosure Obligations (E363/3), para. 24.
[535] Decision on Disclosure Obligations (E363/3), para. 31.
[536] Decision on Disclosure Obligations (E363/3), para. 31.
[537] Decision on Disclosure Obligations (E363/3), para. 36.
[538] Decision on Disclosure Obligations (E363/3), para. 35.
[539] Decision on Disclosure Obligations (E363/3), para. 38.
[540] Decision on Disclosure Obligations (E363/3), para. 38.

185. On appeal, the Supreme Court Chamber understands KHIEU Samphân to argue that the Trial Chamber was required, pursuant to Rule 53(4), to direct the Co-Prosecutors to introduce only exculpatory material,[541] to exclude "illegally" disclosed material from the Case File,[542] and to direct the Co-Prosecutors to provide information on specifically exculpatory material within disclosed documents.[543]

186. With regard to the first submission and in view of the Trial Chamber's clear directions to limit all *future* disclosure to exculpatory materials and statements of individuals who had testified or who were proposed to testify in Case 002/02,[544] the Supreme Court Chamber considers that this allegation has effectively been addressed by the Trial Chamber and is without merit.[545] This submission on appeal is moreover repetitive of the arguments raised during the trial without demonstrating how the Trial Chamber erred in interpreting or applying Rule 53(4).

187. Furthermore, as part of his submission that the Trial Chamber "consistently refused to direct the [Co-Prosecutors] to specify which items were exculpatory",[546] KHIEU Samphân appears to argue that the Trial Chamber was required to direct the Co-Prosecutors to review all previously disclosed materials with a view to identifying material that did not strictly meet the definition of exculpatory material. With regard to these prior disclosures, the Trial Chamber explained that a retroactive review of prior disclosure is "likely to increase rather than reduce the workload of the Defence as well as the other parties"[547] and held that this was not "necessary for the purposes of ascertaining the truth."[548] Referring to international jurisprudence on this issue, the Trial Chamber found that the duty to assess the materials that are subject to disclosure lies with the Co-Prosecutors who have access to the confidential Case Files 003 and 004 and who are presumed to act in good faith, unless proven otherwise.[549] The

[541] KHIEU Samphân's Appeal Brief (F54), para. 201.
[542] KHIEU Samphân's Appeal Brief (F54), para. 205.
[543] KHIEU Samphân's Appeal Brief (F54), para. 205.
[544] Decision on Disclosure Obligations (E363/3), para. 36.
[545] KHIEU Samphân's Appeal Brief (F54), para. 201.
[546] KHIEU Samphân's Appeal Brief (F54), para. 205.
[547] KHIEU Samphân's Appeal Brief (F54), para. 205, referring to Decision on Disclosure Obligations (E363/3), para. 35.
[548] Decision on Disclosure Obligations (E363/3), para. 35.
[549] Decision on Disclosure Obligations (E363/3), para. 22; *Nahimana et al. v. Prosecutor*, Appeals Chamber (ICTR), ICTR-99-52-A, Decision on Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, 20 June 2006, para. 7; *Nahimana et al. v. Prosecutor*, Appeals Chamber (ICTR), ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, paras 11, 34; *Prosecutor v. Blaškić*, Appeals Chamber (ICTY), IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing

Supreme Court Chamber therefore considers that the burden was on KHIEU Samphân to raise any impropriety by the Co-Prosecutors, and agrees with the Trial Chamber's determination that he failed to exercise due diligence in raising the Co-Prosecutors' overly broad interpretation of Rule 53(4) in a timely manner. A review of the procedural history shows that although the International Co-Prosecutor first disclosed relevant including inculpatory material on 20 October 2014, KHIEU Samphân did not raise his objection until 24 August 2015, following 14 subsequent disclosures of relevant, including inculpatory, material. This Chamber discerns no error on the basis of the Trial Chamber's reasoning and approach.

188. Addressing the second submission concerning the Trial Chamber's alleged failure to exclude "illegally" disclosed material from the Case File,[550] the Supreme Court Chamber recalls that material disclosed under Rule 53(4) is not automatically admitted onto the Case File. The Trial Chamber on several occasions reminded the parties that disclosed documents are not automatically admitted or put before the Trial Chamber.[551] It explained that "[w]hat is in the shared drive […] has not been tendered into evidence and is not on record. All that is being done is to place documents at the disposal of parties"[552] in order to "make them subject of an 87(4) request. If this doesn't happen, then it's not part of the case file and cannot […] be the basis for any verdict".[553] Furthermore, irrespective of the Co-Prosecutors' obligation to disclose exculpatory material to the Defence pursuant to Rule 53(4), the Co-Prosecutors may seek the admission of inculpatory material under Rule 87(4). In this regard, the Trial Chamber considered that, "[a]lthough the Co-Prosecutors' duty to disclose is limited to exculpatory information, they may also seek the admission of new evidence which they consider to be

Schedule, and Additional Filings, para. 39; *Prosecutor v. Bralo*, Appeals Chamber (ICTY), IT-95-17-A, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Materials, 30 August 2006, para. 30. "The determination of what material meets … [the] disclosure requirements is primarily a made by and under the responsibility of the Prosecutor". "[T]he Appeal Chamber would not intervene in the exercise of the Prosecutor's discretion unless it is show that the Prosecutor abused it and where there is no evidence to the contrary, will assume that the Prosecutor is acting in good faith". *Nahimana et al. v. Prosecutor*, Appeals Chamber (ICTR), ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayawiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza be Expunged from the Record, 30 October 2006, para. 6. See also *Prosecutor v. Karemera et al.*, Appeals Chamber (ICTR), ICTR-98-44-AR73.7, Decision on Interlocutory Appeal regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 ("*Karemera et al.* Appeal Decision (ICTR)"), para. 9.

[550] KHIEU Samphân's Appeal Brief (F54), para. 205.

[551] Decision on Rules 87(4) Requests (E421/4), para. 9; T. 4 August 2016, E1/454/1.1, pp. 16, 18, 20.

[552] T. 4 August 2016, E1/454/1.1, pp. 16, 18.

[553] T. 4 August 2016, E1/454/1.1, p. 20.

conducive to ascertaining the truth, including inculpatory evidence from Cases 003 and 004 or other sources",[554] via reasoned applications under Rule 87(4).[555]

189. The International Co-Prosecutor's initial broad disclosure under Rule 53(4) did not result in any "illegal" material being placed on the Case File. The legal framework of the ECCC provides a separate procedure under Rules 87(3) and 87(4) for the admission of new evidence during proceedings. In this case, when the International Co-Prosecutor sought to file new documents, the Trial Chamber directed the Co-Prosecutors to seek admission of Case 003 and 004 materials that did not fall into the two categories of disclosure by filing an application pursuant to Rule 87(4), explaining why those documents should be admitted and attaching the proposed documents.[556] As a result, the Case 003 and 004 materials which the International Co-Prosecutor sought for admission under Rule 87(4) were disclosed solely for the purpose of admission to the Trial Chamber and parties at the time of the Rule 87(4) applications.[557] The International Co-Prosecutor made a clear distinction between those applications and disclosure motions, and provided additional information regarding whether the disclosed documents contained exculpatory material or were prior statements.[558] Rule 87(4) similarly allowed KHIEU Samphân to request admission of potentially exculpatory evidence, following the disclosure of such material from Cases 003 and 004. Accordingly, this Chamber does not consider that any material was "illegally disclosed" or that this allowed the Co-Prosecutors to build up "a huge pool of inculpatory evidence".

190. With regard to the third submission regarding the Trial Chamber's alleged failure to direct the Co-Prosecutors to provide information on specifically exculpatory material to *highlight* sections within disclosed documents,[559] KHIEU Samphân relies on international jurisprudence to the effect that the prosecution must actively review the material in its possession for exculpatory material and that it is insufficient for the prosecution to "simply make available its entire evidence collection in a searchable format."[560] While this proposition

[554] Decision on Disclosure Obligations (E363/3), para. 28.
[555] Decision on Disclosure Obligations (E363/3), para. 36.
[556] Decision on Disclosure Obligations (E363/3), para. 36.
[557] See, *e.g*., International Co-Prosecutor's Requests to Admit Written Records of Interview Pursuant to Rules 87(3) & 87(4), 4 May 2016, E319/47.
[558] See, *e.g*., Annex A – Open Session Documents, 29 January 2016, E319/40.2; Annex A, 10 March 2016, E319/41.2; Annex 1, 16 March 2016, E319/42.2; Annex A, 22 March 2016, E319/43.2; Annex 1, 4 April 2016, E319/44.2; Annex A – Open Session Documents, 21 April 2016, E319/45.2; Annex 1, 26 April 2016, E319/46.2.
[559] KHIEU Samphân's Appeal Brief (F54), para. 205.
[560] KHIEU Samphân's Appeal Brief (F54), para. 205, referring to KHIEU Samphân's Submissions on Disclosure (E363), paras 20-21.

is undoubtedly correct, this Chamber notes that the Trial Chamber effectively addressed the Co-Prosecutors' wide disclosure practices at the time the issue was raised when on 22 October 2015, it directed the Co-Prosecutors to limit their future disclosure to exculpatory material and prior statements, and by directing measures to be taken to manage the sizeable disclosure.[561] This was done to ensure the Accused had ample time to review relevant disclosed documents and make decisions on whether to seek their admission of them into evidence. From that time, the Co-Prosecutors' subsequent disclosures included, in addition, the specific reasons for disclosure of each document, for instance, that the document "contains potentially exculpatory material" or is a "statement of [a] selected witness".[562] It is in this context that the Trial Chamber rejected NUON Chea's subsequent request to direct the Co-Prosecutors to highlight, within the disclosed documents, the specific sections that they considered exculpatory. The Trial Chamber reasoned that he had failed to "identify any jurisprudence that would impose on the Co-Prosecutors, in addition to their duty to disclose, an obligation to *highlight* portions of disclosed documents that they consider to be potentially exculpatory."[563] KHIEU Samphân, on appeal, merely refers to NUON Chea's rejected request but does not demonstrate any error in the Trial Chamber's approach.

191. International jurisprudence, moreover, supports the Trial Chamber's decision that the Co-Prosecutors must point the Defence to the existence of the exculpatory material but not that there is an obligation to highlight sections within a disclosed document.[564] The International Criminal Tribunal for Rwanda ("ICTR") Appeals Chamber considered that the prosecution's obligation to disclose "extends beyond simply making available its entire evidence collection in a searchable format"[565] and required it to "actively review the material in its possession for exculpatory material and, *at the very least, inform* the accused of its existence".[566] ICTY Chambers, as a matter of practice, encouraged the prosecution to indicate which documents it disclosed under the relevant Rule for exculpatory material "to secure a fair and expeditious

[561] Decision on Disclosure Obligations (E363/3), para. 38.
[562] See, *e.g.*, Annex A – Open Session Documents, 29 January 2016, E319/40.2; Annex A, 10 March 2016, E319/41.2; Annex 1, 16 March 2016, E319/42.2; Annex A, 22 March 2016, E319/43.2; Annex 1, 4 April 2016, E319/44.2; Annex A – Open Session Documents, 21 April 2016, E319/45.2; Annex 1, 26 April 2016, E319/46.2.
[563] Decision on Rules 87(4) Requests (E421/4), para. 10 (the Trial Chamber held that NUON Chea "fails to identify any jurisprudence that would impose on the Co-Prosecutors, in addition to their duty to disclose, an obligation to *highlight* portions of disclosed documents that they consider to be potentially exculpatory. There is no suggestion that the Co-Prosecutors have acted in bad faith, nor is there any showing that the size or manner of disclosure has materially prejudiced the Accused") (emphasis added).
[564] See, *e.g.*, *Karemera et al.* Appeal Decision (ICTR), para. 10.
[565] *Karemera et al.* Appeal Decision (ICTR), para. 10.
[566] *Karemera et al.* Appeal Decision (ICTR), para. 10.

trial".[567] Such an obligation did not include the indexing the disclosed documents.[568] In *Karadžić*, the ICTY Trial Chamber considered that the prosecution discharged its obligation when the electronically disclosed material was placed in a special folder for exculpatory material.[569]

b. Alleged Violations of Fair Trial Rights

192. The Trial Chamber found that "in view of the additional time and resources provided to the Defence, as well as the substantive and procedural limitations placed upon the Co-Prosecutors' filings, the disclosure process did not violate the Accused's right to prepare an effective defence nor did it favour the Co-Prosecutors."[570] The Trial Chamber recalled that it had addressed the potential impact of the disclosures by, *inter alia*, adjourning the proceedings to permit parties to review disclosures, delaying the hearing of particular witnesses and civil parties, issuing guidelines restricting the scope of disclosure of Civil Party Applications, and aiding the Defence teams in obtaining additional financial resources. [571]

193. On appeal, KHIEU Samphân submits that the "late and very insufficient nature of these measures only slightly mitigated the violation of [his rights to effectively prepare his defence and equality of arms] and aggravated the violation of [his] right to be tried without undue delay."[572] He claims that the Trial Chamber "should have given priority to [his] right to be tried without undue delay rather than granting measures extending the trial."[573]

[567] *Prosecutor v. Krajišnik & Plavšić*, Trial Chamber (ICTY), IT-00-39, Decision on Motion from Momčilo Krajišnik to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68, 19 July 2001 ("Considering (a) that while Rule 68 does not specifically require the Prosecution to identify the relevant material, but merely to disclose it; (b) nonetheless, as a matter of practice and in order to secure a fair and expeditious trial, the Prosecutor should normally indicate which material it is disclosing under the Rule and it is no answer to say that the Defence are in a better position to identify it".)
[568] *Prosecutor v. Halilović*, Trial Chamber I, Section A (ICTY), IT-01-48-T, Decision on Motion for Enforcement of Court Order Re Electronic Disclosure Suite, 27 July 2005 ("Considering that the Rules do not require an index to be made of the documents disclosed or of relevant material made available to be provided to the Defence" […] the Trial Chamber […] is satisfied that the Prosecution is complying with its disclosure obligations and informs the Defence whenever new material is placed within the Halilovic folder".).
[569] *Prosecutor v. Karadžić*, Trial Chamber (ICTY), IT-95-5/18-PT, Decision on Motions for Disclosure of Rule 68 material and Reconsideration of Decision on Adequate Facilities, 10 March 2009, para. 20 (The Trial Chamber held that "[it was] satisfied that the existence of Rule 68 [exculpatory] materials on the EDSD is known to the Accused and that these materials are reasonable accessible to him".)
[570] Trial Judgment (E465), para. 148.
[571] Trial Judgment (E465), para. 145.
[572] KHIEU Samphân's Appeal Brief (F54), para. 198.
[573] KHIEU Samphân's Appeal Brief (F54), para. 202.

194. The Supreme Court Chamber observes that the Co-Prosecutors, from the outset, notified the parties of the voluminous nature of the upcoming disclosures,[574] and that the Trial Chamber facilitated the discussion on the ongoing disclosure process through a Trial Management Meeting.[575] During this meeting, NUON Chea stressed the critical relevance of the material disclosed to date, asked the Trial Chamber to "order the Prosecution to request the disclosure of [other relevant] evidence as soon as possible" and requested an adjournment to review the disclosed documents.[576] KHIEU Samphân requested additional time to review the disclosed evidence,[577] but only raised his objections to the Co-Prosecutors' overall disclosure practices on 24 August 2015.[578] By that time, the Trial Chamber had instituted various measures to accommodate the parties in their review of disclosed material and to preserve the parties' fair trial rights. This Chamber considers that the disclosure of a large of amount of material from Cases 003 and 004 did not *per se* violate KHIEU Samphân's rights against a backdrop of the Trial Chamber's reasonable and effective measures to safeguard the accused's ability to review the disclosed materials.

195. KHIEU Samphân further alleges that the Trial Chamber deprived him of his right to adversarial debate and his right to be heard in relation to the Co-Prosecutors' certification requests and requests for admission of evidence.[579]

196. On 31 October 2016, following the Trial Chamber's decision to set a final deadline for the Co-Prosecutors' Rule 87(4) admission requests with the exception of certain material,[580] the International Co-Investigating Judge imposed a procedure that required the Co-Prosecutors to seek leave from the Trial Chamber to request the disclosure of Case 003 and 004 material

[574] T. 21 October 2014, E1/243.1, p. 11.
[575] T. 5 March 2015, E1/272.5.
[576] T. 5 March 2015, E1/272.5, pp. 6 (NUON Chea's Counsel: "Based on what we have been able to review from the evidence it is of critical relevance to our Case, to Case 002/02 overall, and also to issues which are contested and are now being appealed in Case 002/01. And some of the evidence fundamentally affects what evidence we now have on the case file about several key issues which are being contested in this Case and on appeal."), 9 (NUON Chea's Counsel: "Mr. President, when we look at the disclosure statements more generally we can see that across the board they seem to contain information of critical relevance to multiple aspects of the Defence case. Not just specific witnesses and specific events examined in specific trial segments. […] all of this evidence requires further analysis before the current trial segment can proceed. […] it is the right of the Accused to have time process this evidence and consider how it […] affects our case strategy."), 14 ("we have asked that the Chamber order the International Co-Prosecutor to advise you and all of us whether there may indeed be other types of relevant evidence on those case files, and if so we ask the Chamber to order the Prosecution to request the disclosure of this evidence as soon as possible.").
[577] T. 5 March 2015, E1/272.5, pp. 17-18, 21.
[578] KHIEU Samphân's Submissions on Disclosure (E363).
[579] KHIEU Samphân's Appeal Brief (F54), paras 208-209.
[580] Decision on Rules 87(4) Requests (E421/4).

from that office.[581] The International Co-Investigating Judge specified that "[t]his permission […] serves merely to enable the respective Chamber and the Defence to assess whether the requested material complies with the criteria for new material set out in the Trial Chamber Decision."[582] The Trial Chamber could either request the disclosure of material directly from the International Co-Investigating Judge or certify the Co-Prosecutors' request for disclosure,[583] which would then be considered by the International Co-Investigating Judge "as soon as possible with the appropriate conditions to protect the confidentiality of the investigations in Cases 003 and 004 subject to any responses the Defence in Cases 003 and 004 may submit."[584]

197. The Trial Chamber considered that KHIEU Samphân had no standing to oppose the Co-Prosecutors' certification or leave request to the Trial Chamber. However, this Chamber considers that the certification process, as outlined by the International Co-Investigating Judge, entailed a two-step process by which (1) the Co-Prosecutors sought leave from the Trial Chamber to disclose new material or requested the Trial Chamber to seek such disclosure directly from the International Co-Investigating Judge, (2) after which, such a request would be assessed by the International Co-Investigating Judge, subject to any response from the Defence in Cases 003 and 004. While KHIEU Samphân clearly had no standing to oppose the Co-Prosecutors' request for disclosure before the International Co-Investigating Judge which was subject only to responses from the Cases 003 and 004 Defence teams, this should not have prevented him from opposing the initial certification/leave request before the Trial Chamber itself.[585] In this regard, the Supreme Court Chamber considers that the instruction for the Co-Prosecutors "to present any material the disclosure of which [they] intend[] to request, […] to the Trial or Supreme Court Chamber and the Defence in Case 002 under the condition of *strict confidentially*",[586] was to enable the Defence to challenge not only the subsequent admission into evidence of any material but also to enable it to assess whether the Co-Prosecutors complied with the Trial Chamber's disclosure instructions. Given that the burden is on the

[581] Decision on YIM Tith's Request to Set a Timetable for Disclosure Request in Case 004, 31 October 2016, E319/62 ("Decision on YIM Tith's Request (E319/62)").
[582] Decision on YIM Tith's Request (E319/62), para. 30 (a)(ii) (emphasis added).
[583] Decision on YIM Tith's Request (E319/62), para. 30 (a)(iii) ("The relevant Chamber may either certify to the Prosecution such compliance and the Prosecution shall file the disclosure request together with such certification or the Chamber may request disclosure directly").
[584] Decision on YIM Tith's Request (E319/62), para. 30 (a)(iv).
[585] Trial Chamber Memorandum entitled "Decision on KHIEU Samphan Response to the International Co-Prosecutor's Proposed Disclosure of Documents from Cases 003 and 004 (E319/63)", 27 December 2016, E319/63/2.
[586] Decision on YIM Tith's Request (E319/62), para. 30 (a)(ii).

Defence to raise any impropriety with regard to the Co-Prosecutors' disclosure practices, which are presumed to be undertaken in good faith, KHIEU Samphân should have been granted the opportunity to respond to the Co-Prosecutors' certification requests.

198. Moreover, it is observed that the Co-Prosecutors' certification requests were not limited to requests for the disclosure of material but also requested the Trial Chamber to admit some of the material on the Case File.[587] Accordingly, while the Trial Chamber correctly noted that KHIEU Samphân had a right to oppose the admission into evidence in Case 002/02 of any of the materials disclosed from Cases 003 and 004, it incorrectly stated that "no such admission request has yet been made".[588] Within their disclosure requests, the Co-Prosecutors had also requested the Trial Chamber to "admit the statements of testifying witnesses as described in the Annexes into Case 002"[589] and the Trial Chamber, in a subsequent memorandum, granted the admission into evidence of these documents while stating that it had not received any responses.[590] This Chamber considers that this practice prevented KHIEU Samphân from effectively challenging the disclosure procedure and the requests for admission into evidence of material within three disclosure requests. In examining any resulting prejudice to KHIEU Samphân, it is observed that the requests for disclosure and admission related to a limited number of statements from witnesses and individuals who had already testified in Case 002/02. Therefore, this Chamber finds that KHIEU Samphân was not materially prejudiced by the admission into evidence of these statements.

199. KHIEU Samphân further alleges that the Trial Chamber acted in bad faith by making "decisions on the basis of documents that were simply disclosed even though they had not been admitted".[591] He bases this argument on the Trial Chamber's *proprio motu* decision on the appearance of Witnesses MUY Vanny and LONG Sat, prior to the admission into evidence of

[587] International Co-Prosecutor's Proposed Disclosure of Documents from Cases 003 and 004, 2 December 2016, E319/63 ("International Co-Prosecutor's Proposed Disclosure (E319/63)"), para. 6(b). See also International Co-Prosecutor's Proposed Disclosure of Documents from Cases 003 and 004, 24 February 2017, E319/68 ("International Co-Prosecutor's Proposed Documents Disclosure (E319/68)").
[588] Trial Chamber Memorandum entitled "Decision on KHIEU Samphan Response to the International Co-Prosecutor's Proposed Disclosure of Documents from Cases 003 and 004 (E319/63), 27 December 2016, E319/63/2, para. 3.
[589] International Co-Prosecutor's Proposed Disclosure (E319/63), para. 6(b). See also International Co-Prosecutor's Proposed Documents Disclosure (E319/68).
[590] Trial Chamber Memorandum entitled "Admission of Newly Disclosed Written Records of Interviews from Cases 003 and 004 of Witnesses Heard in the Course of the Case 002 Trial Proceedings", 26 January 2017, E319/67, referring to the Admission Request in International Co-Prosecutor's Proposed Disclosure (E319/63), para. 6(b). See also International Co-Prosecutor's Proposed Disclosure of Documents from Case and 004, 10 January 2017, E319/66.
[591] KHIEU Samphân's Appeal Brief (F54), para. 213.

their statements.[592] The Supreme Court Chamber observes that such practice was conducted in accordance with Rule 87(4) which provides the Trial Chamber may "on its own motion" decide to summon or hear any party or admit any new evidence that it deems conductive to ascertaining the truth. KHIEU Samphân was granted an opportunity to comment on the appearance of these witnesses,[593] and further fails to identify and demonstrate any error in the Trial Chamber's reasoning for calling them.[594] Allegations of bad faith on account of the Trial Chamber are, accordingly, dismissed.

200. Finally, the Supreme Court Chamber recognises that the voluminous nature of the disclosure from Cases 003 and 004 presented challenges to the various parties but considers that the Trial Chamber sufficiently addressed the parties' concerns and the need to preserve the civil parties' and NUON Chea's rights who had sought additional disclosure from Cases 003 and 004.[595] The Supreme Court Chamber, moreover, agrees that the fact that the disclosed documents were not admitted "by the simple fact of being made available to the other parties" reduced any harm alleged by KHIEU Samphân.[596] It considers that KHIEU Samphân fails to demonstrate that these measures were insufficient to preserve his fair trial rights.

3. Admission of Evidence During Trial

[592] KHIEU Samphân's Appeal Brief (F54), paras 213-214.
[593] See, *e.g.*, Opposition de la Défense de M. KHIEU Samphân à la comparution de 2-TCW-987, 3 September 2015, E364 (MUY Vanny); T.15 September 2016, E1/474.1, pp. 70-71 (LONG Sat).
[594] Trial Chamber Memorandum entitled "Decision on KHIEU Samphan Defence's Opposition to the Appearance of 2-TCW-987 (E364), 18 February 2016, E364/1 (MUY Vanny); T. 22 September 2016, E1/479.1 (LONG Sat), p. 3; Decision on Proposed Witnesses (E459), fn. 464 (LONG Sat); Attachment 28, 8 May 2017, E457/6/3.1.28 (Email from Trial Chamber Legal Officer entitled "Hearing Schedule Upon Resumption from the Pchum Ben Recess", dated 13 September 2016).
[595] Decision on Disclosure Obligations (E363/3), para. 33. See also T. 5 March 2015, E1/272.5, pp. 6 (NUON Chea's Counsel: "Based on what we have been able to review from the evidence it is of critical relevance to our Case, to Case 002/02 overall, and also to issues which are contested and are now being appealed in Case 002/01. And some of the evidence fundamentally affects what evidence we now have on the case file about several key issues which are being contested in this Case and on appeal."), 9 (NUON Chea's Counsel: "Mr. President, when we look at the disclosure statements more generally we can see that across the board they seem to contain information of critical relevance to multiple aspects of the Defence case. Not just specific witnesses and specific events examined in specific trial segments. […] all of this evidence requires further ranalysis before the current trial segment can proceed. […] it is the right of the Accused to have time process this evidence and consider how it […] affects our case strategy."), 14 ("we have asked that the Chamber order the International Co-Prosecutor to advise you and all of us whether there may indeed be other types of relevant evidence on those case files, and if so we ask the Chamber to order the Prosecution to request the disclosure of this evidence as soon as possible."), 10 ("it is for all these reasons that we ask that we adjourn hearings for now").
[596] Decision on Disclosure Obligations (E363/3), para. 32.

201. While parties may request the admission of evidence at any stage of the proceedings, all proposed evidence not available at the opening of the trial is considered as "new" evidence and subject to the requirements of Rule 87(4), which provides that:

> During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3). The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial.

202. The criteria contained in Rule 87(3) serves as a basis for the Trial Chamber to reject a request for evidence where it finds that it is:

a. irrelevant or repetitious;
b. impossible to obtain within a reasonable time;
c. unsuitable to prove the facts it purports to prove;
d. not allowed under the law; or
e. intended to prolong proceedings or is frivolous.

203. KHIEU Samphân submits that the Trial Chamber erred in law by failing to correctly apply Rule 87(4) when ruling on certain requests to admit evidence during the trial, which he argues led to subsequent errors in the exercise of the Trial Chamber's discretion that caused him prejudice.[597] He argues that the legal error arose when the Trial Chamber failed to acknowledge the "exceptional nature" of Rule 87(4), which he contends requires parties seeking admission of new evidence to satisfy the "extremely high threshold" of demonstrating that the evidence was not available before the trial *and* that the late of admission of evidence was "vital" or "essential" in the interests of justice.[598] By failing to apply the latter criterion, the Trial Chamber gave "free rein" to the Co-Prosecutors to introduce a large amount of evidence during the trial, which unnecessarily delayed the proceedings and violated his rights to adequate time and facilities for the preparation of his defence, to legal and procedural certainty, and to be tried without undue delay.[599]

204. KHIEU Samphân argues that despite the Trial Chamber's "return to the spirit and letter of Internal Rule 87(4)" towards the end of the trial where requests for admission of new evidence were subjected to "heightened scrutiny", he submits that this approach should have

[597] KHIEU Samphân's Appeal Brief (F54), paras 182-197; Annex A to KHIEU Samphân's Appeal Brief (F54.1.1), p. 8.
[598] KHIEU Samphân's Appeal Brief (F54), paras 188-189 (emphasis added).
[599] KHIEU Samphân's Appeal Brief (F54), paras 189, 197.

been adopted from the start.[600] His submissions focus on the Trial Chamber's decisions to admit:

(i) written statements from Case Files 003 and 004;[601]

(ii) various documents of "inherently low probative value (and of very limited relevance)";[602] and

(iii) "complete books" by experts NAKAGAWA Kasumi and Peg LEVINE who testified on the regulation of marriage during DK.[603]

205. In terms of prejudice, he submits that, "to the detriment of [his] preparation for the substantive hearing, [he] spent considerable time objecting to requests for admission" and had "to prepare for the trial during the trial", which had a negative impact on the expeditiousness of the proceedings.[604] Further, given "the thousands of items of evidence already admitted in Case 002/02", he argues that the admission of such evidence was largely neither "vital" nor "essential" in the interests of justice.[605] He notes that many new documents admitted during the trial were not referred to in the Trial Judgment, thus confirming their non-essential nature.[606]

206. The Co-Prosecutors respond that KHIEU Samphân fails to demonstrate any error in, or prejudice resulting from, the Trial Chamber's admission of new evidence.[607]

207. The Lead Co-Lawyers agree with the Co-Prosecutors.[608]

a. Admission of Evidence During Trial under Rule 87(4)

208. The Supreme Court Chamber observes that in the course of lengthy trials involving crimes committed over an extended period in a conflict situation, it is inevitable that new information becomes available to leading to objections and delays. Rule 87(4) anticipates such occurrences and provides for the appropriate procedures. There will always be occasions when

[600] KHIEU Samphân's Appeal Brief (F54), paras 191-192.
[601] KHIEU Samphân's Appeal Brief (F54), para. 189, fn. 221. The Supreme Court Chamber notes that KHIEU Samphân's interrelated submissions concerning the disclosure of Case 003 and Case 004 documents have been considered above in Section V.D.2.
[602] KHIEU Samphân's Appeal Brief (F54), para. 192.
[603] KHIEU Samphân's Appeal Brief (F54), para. 194, fn. 230.
[604] KHIEU Samphân's Appeal Brief (F54), para. 196.
[605] KHIEU Samphân's Appeal Brief (F54), para. 190.
[606] KHIEU Samphân's Appeal Brief (F54), para. 196.
[607] Co-Prosecutors' Response (F54/1), paras 71-78.
[608] Lead Co-Lawyers' Response (F54/2), paras 250-254.

the President must rule *ex tempore* as well as when lengthy debate, submissions and written applications are necessary. Such exigencies must be faced and managed by the Trial Chamber. In all cases, the Trial Chamber must be guided by principles of relevance to ascertaining the truth, provided that the parties, and especially the Accused, have time and resources to digest the new evidence and to adjust their questioning strategy. KHIEU Samphân points to no occasion where such new evidence was admitted which failed to meet criteria of relevance or where any finding of guilt was based on such new evidence to the prejudice of the Accused. Engaging in a minute examination of the various decisions to admit such evidence without further substantiation is an exercise in time wasting, leading to no discernible remedy and is futile. These appeal grounds alleging errors in the failure of the Trial Chamber to treat new and relevant evidence as of an exceptional character, rather than as subject to Rule 87(4), fails.

b. Admission of Case 003 and 004 Materials

209. KHIEU Samphân further submits that, when deciding on the parties' Rule 87(4) requests, the Trial Chamber erred by "merely […] [limiting] its reasons to the (questionable) relevance" of the evidence sought to be admitted and by equating relevance with conduciveness to ascertaining the truth.[609] He specifically contests the admissions of written statements from Cases 003 and 004,[610] in particular evidence admitted via memoranda E319/7, E319/17/1, E319/22/1, E319/32/1, and E319/36/2.[611]

210. This Chamber recalls that the closely related substance and overlap in time frames, geographical areas, and crime sites of the ongoing investigations into Cases 003 and 004 resulted in new *prima facie* relevant material becoming available throughout the Case 002/02 proceedings.[612] A large number of the parties' admission requests under Rule 87(4) concerned statements and material from these cases. However, in most instances, the Trial Chamber did not rely on the interest of justice exception.[613] The material from Cases 003 and 004 was

[609] KHIEU Samphân's Appeal Brief (F54), para. 189.
[610] KHIEU Samphân's Appeal Brief (F54), para. 189, fn. 221.
[611] KHIEU Samphân's Appeal Brief (F54), para. 189, fn. 222, referring to Decision on International Co-Prosecutor's Request (E319/7), para. 10; Decision on Request Pursuant to Rules 87(3) and 87(4) (E319/17/1), para. 4; Decision on Request to Admit Statements (E319/22/1), para. 5; Decision on Request to Admit Written Records of Interview (E319/32/1), para. 10; Decision on Request to Admit Written Records of Interview and to Call Witnesses (E319/36/2), paras 21-22, 26-27, 30, 40-41.
[612] Trial Judgment (E465), para. 140.
[613] See International Co-Prosecutor's Request to Admit Documents (E319/5); Decision on International Co-Prosecutor's Request (E319/7); Decision on International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kak Cooperatives and Kraing Ta Chan Security Centre Pursuant to Rules 87(3) and 87(4)- Confidential, 26 February 2015, E319/11/1; Decision on Request Pursuant to Rules 87(3) and 87(4) (E319/17/1), para. 4; Decision on Request to Admit Statements (E319/22/1); Decision on Civil Party Lead Co-Lawyers' Request to

produced only after the initial hearing (pre-severance) in Case 002 in June 2011, the operative date for considering whether the evidence was available before the opening of the trial and became available only after the Office of the Co-Investigating Judges authorised its disclosure.[614] Where the Co-Prosecutors had exercised due diligence in requesting the admission of such material, the admission requests strictly met the Rule 87(4) requirements and were not subject to the interest of justice exception.[615] Only in a small number of occasions cases, where the Trial Chamber considered a request to be untimely,[616] did the interests of justice override the delay in seeking admission.[617]

211. Upon a review of memoranda E319/7, E319/17/1 and E319/22/1, this Chamber finds no reason to criticise the procedure adopted to admit the new evidence.[618] The Trial Chamber was satisfied that the evidence was: (1) *prima facie* relevant; (2) not available prior to the opening of the trial; (3) conducive to ascertaining the truth; and (4) no party had objected to the admission of the evidence.[619] The Trial Chamber also observed that the Co-Prosecutors' requests for admission of evidence were timely.[620]

Admit Information Forms and Related Documents, 18 November 2015, E319/31/2, paras 5-6; Decision on Request to Admit Written Records of Interview (E319/32/1), paras 8-10, 12.

[614] Decision on Disclosure Obligations (E363/3), fn. 64 ("Evidence from the confidential investigations in Cases 003 and 004 is unavailable for the purposes of Rule 87(4) until the Office of the Co-Investigating Judges authorises the Co-Prosecutors to provide it to the parties in Case 002/02."); Decision on Request to Admit Written Records of Interview and to Call Witnesses (E319/36/2), para. 9 ("A document originating from investigations in Case 003 and 004 is not considered "available" within the meaning of Internal Rule 87(4) until disclosure is authorized by the International Co-Investigating Judge.").

[615] See, *e.g.*, Decision on Civil Party Lead Co-Lawyers' Internal Rule 87(4) Request to Put Before the Chamber New Evidence (E289) and Khieu Samphan's Response (E289/1), 14 June 2013, E289/2, paras 4-6.

[615] Decision Concerning New Documents and Other Related Issues, 30 April 2012, E190, para. 36; Decision on Parties' Joint Request for Clarification Regarding Application of Rule 87(4) (E307) and the NUON Chea Defence Notice of Non-Filing of Updated Lists Evidence (E305/3), 11 January 2014, E307/1; Decision on Joint Request for *de novo* Ruling on the application of Internal Rule 87(4), 21 October 2014, E307/1/2; International Co-Prosecutor's Request to Admit Documents Relevant to Tram Kak Cooperatives and Kraing Ta Chan Security Centre pursuant to Rules 87(3) and 87(4), 13 November 2014, E319/5.

[616] See, *e.g.*, Decision on Request to Admit Written Records of Interview and to Call Witnesses (E319/36/2), paras 17, 21, 25, 30, 34, 39, 43, 45; Decision on International Co-Prosecutor's Requests to Admit Written Records of Interview Pursuant to Rules 87(3) and 87(4), 29 June 2016, E319/47/3 ("Decision on Request to Admit Written Records of Interview (E319/47/3)"), para. 20; Decision on NUON Chea's Rule 87(4) Request for Admission of Statements and One Annex Relevant to Case 002/02, 15 September 2015, E319/30/1.

[617] Decision on Request to Admit Written Records of Interview and to Call Witnesses (E319/36/2), paras 17, 24, 31, 37, 41, 43, 46.

[618] Decision on International Co-Prosecutor's Request (E319/7), para. 10; Decision on Request Pursuant to Rules 87(3) and 87(4) (E319/17/1), para. 4.

[619] Decision on International Co-Prosecutor's Request (E319/7), paras 7, 10; Decision on Request Pursuant to Rules 87(3) and 87(4) (E319/17/1), paras 1, 4; Decision on Request to Admit Statements (E319/22/1), paras 1, 3-6.

[620] Decision on International Co-Prosecutor's Request (E319/7), para. 10; Decision on Request Pursuant to Rules 87(3) and 87(4) (E319/17/1), para. 4.

212. Concerning the 21 written statements admitted via memorandum E319/32/1, this Chamber observes that the Trial Chamber was satisfied that: (1) the written statements were not available prior to the opening of the trial; (2) they satisfied *prima facie* standards of relevance, reliability, and authenticity; (3) they were relevant and conducive to ascertaining the truth concerning the treatment of the Cham and other trial topics of Case 002/02, including regulation of marriage, internal purges, and the treatment of the Vietnamese; and (4) the Co-Prosecutors had exercised due diligence in requesting for the admission of evidence.[621]

213. Lastly, in relation to the evidence admitted via memorandum E319/36/2, the Trial Chamber found that some of the requests for admission of evidence were filed in a timely manner, while others were not.[622] With regard to the requests for admission of evidence filed in a timely manner, the Trial Chamber was satisfied that the evidence (1) was not available prior to the opening of the trial; and (2) was relevant to the various trial topics.[623] The Trial Chamber admitted the evidence on this basis. Regarding the requests which were untimely, the Trial Chamber held that the evidence was relevant to other material on Case 002/02 case file and the interests of justice required the sources to be evaluated together, and that KHIEU Samphân did not object to the admission of the evidence.[624] Contrary to KHIEU Samphân's argument, this Chamber finds that the Trial Chamber did not depart from the jurisprudence on Rule 87(4) by equating relevance with conduciveness to ascertaining the truth. This Chamber finds that KHIEU Samphân does not demonstrate any error in the exercise of the Trial Chamber's discretion when applying the requirements under Rule 87(4) in admitting evidence during the trial.

214. With respect to KHIEU Samphân's argument that the "heightened scrutiny" approach should have been conducted from the start and not just at the end of the trial, this Chamber finds that this position ignores the context in which the Trial Chamber adopted such an approach. Towards the end of the trial in June 2016, the Trial Chamber announced that it would: (1) impose a deadline of 1 September 2016 for submission of requests for admission of

[621] Decision on Request to Admit Written Records of Interview (E319/32/1), paras 8-10.
[622] Decision on Request to Admit Written Records of Interview and to Call Witnesses (E319/36/2), paras 14, 17, 19, 25, 30, 34, 39, 43, 45.
[623] Decision on Request to Admit Written Records of Interview and to Call Witnesses (E319/36/2), paras 14-16, 19-20, 25-26, 39-40.
[624] Decision on Request to Admit Written Records of Interview and to Call Witnesses (E319/36/2), paras 17, 21-24, 27-29, 31-32, 35-37, 41, 43, 45-46.

evidence under Rule 87(4);[625] and (2) subject such requests to heightened scrutiny in light of the late stage of the trial proceedings.[626] The Trial Chamber allowed for two exceptions to the deadline: for requests to admit new evidence in order to rebut potentially exculpatory evidence sought to be adduced by the defence[627] and for requests concerning expert testimony yet to be heard.[628]

215. A key consideration of the Trial Chamber's decision to set this deadline and subject requests for admission of new evidence to "heightened scrutiny" was that it could not wait for the completion of the investigations in Cases 003 and 004 to bring the proceedings in Case 002/02 to an end; it therefore held that "there must come a point when the parties can rely upon the evidentiary record that has been established throughout the investigation and trials in this case".[629] The Trial Chamber noted that the potential value of additional evidence in ascertaining of the truth must be weighed against the rights of the accused, specifically the right to have adequate time to respond to any new evidence admitted and the right to be tried without undue delay. The Trial Chamber noted that therefore, unless it was shown that the new evidence was exculpatory or absolutely necessary to ascertain the truth, it would refuse to admit the new evidence at such a late stage of the trial proceedings in order to protect the accused's right to a fair trial.[630]

216. In view of the clear guidance and reasoning of the Trial Chamber on the steps taken and the principles applied throughout the trial hearing and especially during the final phases, the Supreme Court Chamber finds no substance in the complaints made, and thus dismisses KHIEU Samphân's submissions on the admission of documents from Cases 003 and 004.

c. Admission of Written Statements of "Low Probative Value and Relevance" and "Complete Books"

217. KHIEU Samphân argues that the Trial Chamber's "heightened scrutiny" approach did not in any event prevent it from admitting documents of low probative value and limited

[625] Trial Chamber Memorandum entitled "Final Stages of Case 002/02 – Notice of Deadlines", 28 June 2016, E421, para. 3.
[626] Decision on Request to Admit Written Records of Interview (E319/47/3), para. 23; Decision on Two Requests by the International Co-Prosecutor to Admit Documents Pursuant to Rule 87(3) and 87(4) (E319/51 and E319/52), 23 November 2016, E319/52/4 ("Decision on Requests to Admit Documents (E319/52/4)"), para. 12.
[627] Decision on Rules 87(4) Requests (E421/4), para. 19.
[628] Decision on Rules 87(4) Requests (E421/4), para. 20.
[629] Decision on Rules 87(4) Requests (E421/4), paras 17-18; Decision on Request to Admit Written Records of Interview (E319/47/3), para. 23.
[630] Decision on Request to Admit Written Records of Interview (E319/47/3), para. 23.

relevance, as well as "complete books", at the end of the trial.[631] With respect to the written statements, he fails to elaborate or explain his allegations of error, but merely refers to the *Kordić & Čerkez* Appeal Judgment.[632] The burden of demonstrating that the Trial Chamber erred in the exercise of its discretion in admitting evidence rests on the party alleging the error and in this instance KHIEU Samphân fails to meet the requirement of substantiation.

218. Regarding the admission of "complete books", KHIEU Samphân refers this Chamber to the admission of two books written by expert witnesses who testified before the Trial Chamber on the regulation of marriage during DK: (1) *Motherhood at War: Pregnancy during the Khmer Rouge Regime Oral History* by NAKAGAWA Kasumi;[633] and (2) *Love and Dread in Cambodia: Weddings, Births and Ritual Harm under the Khmer Rouge* by Peg LEVINE.[634]

219. The first book, *Motherhood at War*, was published in 2015, and the Co-Prosecutors requested its admission into evidence on 31 August 2016, the day prior to the 1 September 2016 deadline for submission of Rule 87(4) requests.[635] During the trial, KHIEU Samphân submitted that the admission should only be limited to excerpts relevant to the regulation of marriage on the basis that "there's no point in examining an expert on points that are not mentioned in the charges".[636] In deciding whether to admit the book into evidence, the Trial Chamber first considered whether the Co-Prosecutors had exercised reasonable diligence and held that the book was available for at least eight months prior to the request for admission of evidence being filed, thus finding the request was untimely.[637] Nonetheless, the Trial Chamber found that it was in the interests of justice to admit the book in its entirety because it was relevant to NAKAGAWA Kasumi's expertise and closely related to the substantive testimony she was expected to provide in court.[638] The Trial Chamber was also of the view that

[631] KHIEU Samphân's Appeal Brief (F54), paras 192, 194.
[632] KHIEU Samphân's Appeal Brief (F54), para. 193, fn. 229, referring to *Prosecutor v. Kordić & Čerkez*, Appeals Chamber (ICTY), IT-95-14/2-A, Judgment, 17 December 2004 ("*Kordić & Čerkez* Appeal Judgment (ICTY)"), paras 221-222.
[633] Nagakawa Kasumi, *Motherhood at War: Pregnancy during the Khmer Rouge Regime – Oral History* (1st ed. 2015), E3/10655.
[634] Peg Levine, *Love and Dread in Cambodia: Weddings, Births and Ritual Harm under the Khmer Rouge* (1st ed. 2010), E3/10677.
[635] Nagakawa Kasumi, *Motherhood at War: Pregnancy during the Khmer Rouge Regime – Oral History* (1st ed. 2015), E3/10655; Co-Prosecutors' Request to Admit Two Documents Pursuant to Rules 87(3) & 87(4) Relating to the Upcoming Testimony of 2-TCE-82, 31 August 2016, E431/1.
[636] T. 5 September 2016, E1/469.1, p. 17; Written Reasons for Decision on Requests to Admit Documents Pursuant to Internal Rules 87(3) & 87(4) and NUON Chea's Rule 93 Request Relevant to the Testimony of Expert NAKAGAWA Kasumi (2-TCE-82), 17 November 2016, E431/5 ("Written Reasons for Decision on Requests (E431/5)"), para. 23.
[637] Written Reasons for Decision on Requests (E431/5), para. 26.
[638] Written Reasons for Decision on Requests (E431/5), paras 27-28.

the book would provide an additional basis for parties to challenge her expertise.[639] This Chamber notes that while the book was available 8 months prior to the Co-Prosecutors' request, NAKAGAWA Kasumi was called to testify only on 3 June 2016,[640] three months before the Co-Prosecutors' request for admission, and designated as an expert on 23 August 2016.[641] This Chamber therefore considers that the Trial Chamber's finding that the Co-Prosecutors' request was untimely is incorrect. In any case, this Chamber agrees with the outcome of the decision and the necessity for the full book to admitted into evidence for the reasons outlined by the Trial Chamber.

220. The second book to which KHIEU Samphân takes issue is *Love and Dread in Cambodia*, which was published in 2010 and is a revised version of Peg LEVINE's thesis that had already been admitted into evidence at the time of the request for admission of evidence.[642] The Rule 87(4) request was filed by the Lead Co-Lawyers on 12 October 2016.[643] At the time of the filing of the request, Peg LEVINE was expected to testify as an expert,[644] and the Lead Co-Lawyers had requested certain excerpts of the book to be admitted, namely Chapters 1, 2, 4, 5 and 9.[645] The Lead Co-Lawyers submitted that the excerpts were *prima facie* reliable and relevant, and would contribute to the ascertainment of the truth.[646] At the hearing of the request for admission of evidence, the Co-Prosecutors did not object to the request, but submitted that there appeared to be "some subtle differences, some that are important" between the book and the original thesis.[647] The Co-Prosecutors therefore orally requested that the entire book to be admitted into evidence.[648] KHIEU Samphân agreed with the Lead Co-Lawyers request but objected to the Co-Prosecutors' request, arguing that it was not necessary to admit the entire book because "there are repeats with regard to the dissertation [s]o the chapters that were identified by the civil party Co-Lead Lawyers seem sufficient".[649]

[639] Written Reasons for Decision on Requests (E431/5), para. 28.
[640] Annex 1, 31 August 2016, E431/2.2 (Email entitled "List of Witnesses, Civil Parties and Experts on the Regulation of Marriage", dated 3 June 2016).
[641] Decision on Designation of 2-TCE-82, 23 August 2016, E431.
[642] Peg Levine, *Love and Dread in Cambodia: Weddings, Births and Ritual Harm under the Khmer Rouge* (1st ed. 2010), E3/10677; Lead Co-Lawyers' Rule 87(4) Request regarding 2-TCE-81, 12 October 2016, E433/3 ("Lead Co-Lawyers' Rule 87(4) Request (E433/3)"), para. 6.
[643] Lead Co-Lawyers' Rule 87(4) Request (E433/3).
[644] Lead Co-Lawyers' Rule 87(4) Request (E433/3), para. 5.
[645] Lead Co-Lawyers' Rule 87(4) Request (E433/3), paras 8-10; Annex A – Document Requested for Admission Pursuant to Internal Rule 87(4) for 2-TCE-81, 12 October 2016, E433/3.1; T. 10 October 2016, E1/480.1, p. 3.
[646] Lead Co-Lawyers' Rule 87(4) Request (E433/3), paras 7-10.
[647] T. 10 October 2016, E1/480.1, p. 4.
[648] T. 10 October 2016, E1/480.1, p. 5.
[649] T. 10 October 2016, E1/480.1, p. 6.

221. Having heard the parties, in considering whether to admit the book *Love and Dread in Cambodia*, which this Chamber notes is published in short pamphlet form, the Trial Chamber found that even though the Lead Co-Lawyers' request for admission was untimely, it nevertheless considered that it was in the interests of justice to admit the book in its entirety.[650] In deciding so, the Trial Chamber considered that when the thesis and the book were being considered together, these two documents would allow for a "more complete and comprehensive evaluation" of Peg LEVINE's expert testimony.[651] It is observed that expert evidence was one of the exceptions to the 1 September 2016 deadline for submission of Rule 87(4) requests, allowing the Trial Chamber to admit this request dated 12 October 2016.[652] In view of the reasoning provided by the Trial Chamber in admitting each request and the absence of substantiation on the part of KHIEU Samphân to demonstrate a discernible error in the exercise of the Trial Chamber's discretion, this Chamber dismisses his arguments.

d. Allegations of Prejudice: "Undue Delay"

222. The last issue to be considered is whether KHIEU Samphân suffered prejudice by the admission of additional documents. He specifically draws the attention of this Chamber to one occasion concerning two written documents admitted by the Trial Chamber[653] that were considered "'additionally relevant' to the acts and conducts of the Accused" but that "could be used as evidence for this purpose only if the authors testified before the court".[654] The Trial Chamber then stated that it "drew the attention of the Parties [to] this potential additional relevance should they wish to file the requests to summons these witnesses".[655] KHIEU Samphân argues that as a result of the Trial Chamber's comment, the Co-Prosecutors "rushed in" and immediately requested to summons new witnesses to testify on the issue of his role.[656] KHIEU Samphân concedes that the Trial Chamber had in fact rejected the request, but he nevertheless argues that time was spent on hearing the request at the very end of the trial, causing undue delay.[657]

[650] Decision on Lead Co-Lawyers' Rule 87(4) Request regarding Expert Peg LEVINE (2-TCE-81), 1 December 2016, E433/4 ("Decision on Lead Co-Lawyers' Expert Request (E433/4)"), para. 4.
[651] Decision on Lead Co-Lawyers' Expert Request (E433/4), para. 5.
[652] Decision on Rules 87(4) Requests (E421/4), para. 20.
[653] KHIEU Samphân's Appeal Brief (F54), para. 195.
[654] Response to the KHIEU Samphân Defence Request for Clarification in Relation to the Trial Chamber Decision E319/52/4, 6 December 2016, E319/52/5 ("Response to the KHIEU Samphân's Request (E319/52/5)"), para. 3.
[655] Response to the KHIEU Samphân's Request (E319/52/5), para. 3.
[656] KHIEU Samphân's Appeal Brief (F54), para. 195.
[657] KHIEU Samphân's Appeal Brief (F54), para. 195.

223. This Chamber acknowledges that when new evidence is presented late into proceedings it can affect an accused's ability to respond and review such evidence and potentially consumes valuable time and resources and potentially affect fair trial rights.[658] Those rights apply to the prosecution and the civil parties as well as the accused and must be carefully balanced. No party can either anticipate or fully control that a smooth trial with witnesses and documents being available at the appropriate time with all translation and technical supports in place will occur. As previously mentioned, unplanned occurrences and glitches happen even in the best regulated trials. There must be a degree of tolerance for these events. This Chamber considers that the time spent by KHIEU Samphân in opposing requests for admission of evidence or summoning witnesses is simply a consequence of the exercise of his defence rights in addressing applications under Rule 87(4), and not an illustration of undue delay. This Chamber is concerned with *undue delay* giving way to prejudice and not necessary delays due to unexpected exigencies. The Co-Prosecutors exercised their right to request the Trial Chamber to summon witnesses or to admit evidence in accordance to Rule 87(4). Once all parties were given the opportunity to be heard and time to consider any new evidence or to prepare for the presentation of new witnesses, then any delays which occurred in applying fair trial rights could not be described as *undue*.

224. Apart from the above, KHIEU Samphân argues that since the Trial Chamber failed to use the new evidence in the Trial Judgment, this confirms that its late admission was not essential or vital in the interests of justice, and that the evidence was irrelevant and therefore unnecessarily delayed the trial.[659]

225. This argument repeats previous complaints regarding the provision of oppressive quantities of documents from Cases 003 and 004 and new evidence. The additional complaint is that the fact that this new evidence was not referred to in the trial judgment is indicative of its uselessness. This is an expression of opinion and not a valid reason for an appeal to this Chamber.

226. In view of the foregoing, this Chamber finds that the Trial Chamber did not commit an error of law in its application of Rule 87(4) nor did it commit subsequent errors in the exercise of its discretion in admitting evidence under this Rule.

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[658] Case 002/01 Appeal Judgment (F36), para. 162; *Prosecutor v. Delalić et al.*, Appeals Chamber (ICTY), IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgment (ICTY)"), para. 290.
[659] KHIEU Samphân's Appeal Brief (F54), para. 196.

4. Admission of Documents Originating from Christopher GOSCHA

227. During the trial proceedings, the Trial Chamber obtained and admitted into evidence 13 newly obtained documents consisting of a complete copy of the CPK Standing Committee minutes of 11 April 1977 ("Minutes"), as well as minutes from other high-level meetings such as Office 870 or military committee meetings.[660] The admission of these documents originated from the Co-Prosecutors' Request to the Trial Chamber to contact the editors of a publication *Genocide in Cambodia* which referred to minutes of a Standing Committee meeting in order to obtain a more complete copy of the said document.[661] The Co-Prosecutors submitted that since all other Standing Committee minutes on the Case File are dated 1975 or 1976, those minutes were a potentially unique record of the Standing Committee's decisions during nationwide internal purges.[662] To put the Co-Prosecutors' objections into context: the NUON Chea Defence had requested that the only available excerpt of the Minutes, which formed part of the documentary evidence received during the 1979 People's Revolutionary Tribunal which tried POL Pot and IENG Sary *in absentia* in the immediate aftermath of the collapse of the Khmer Rouge/CPK regime, be admitted into evidence. The Trial Chamber granted that Request on 30 June 2015.[663]

228. The Trial Chamber subsequently directed its Greffier to contact numerous individuals and institutions, including Philip SHORT, who testified as an expert in Case 002/01 and Christopher GOSCHA of the University of Québec, both of whom indicated that any complete copy of the Minutes would most likely be archived at the People's Army Library ("Library") in Hanoi, Vietnam.[664] Christopher GOSCHA informed the Trial Chamber that he had visited the Library in Hanoi 25 years previously and taken verbatim notes of the entire documents by hand.[665] He also stated that he had donated the copies to the Texas Tech University Virtual

[660] Decision on Requests regarding Copies of Vietnamese Documents Originating from Professor Christopher Goscha, 25 November 2016, E327/4/7 ("Decision on GOSCHA Documents (E327/4/7)"), paras 15-28; Trial Judgment (E465), para. 352, fn. 980.
[661] Co-Prosecutors' Objections and Reservations to Parties' Proposed Document Lists in Response to the Trial Chamber's Memorandum E327 and Request to Obtain Documents, 2 February 2015, E327/4 ("Co-Prosecutors' Objections (E327/4)"), paras 9, 10.
[662] Co-Prosecutors' Objections (E327/4), para. 9.
[663] Annex C: Documents Proposed by the NUON Chea Defence Put before the Chamber, 30 June 2015, E/305/17.3.
[664] Annex 6: Trial Chamber Greffier E-mail Correspondence with Mr. Philip Short, 18 March 2016, E327/4/3.6 (Trial Chamber Email on the Subject "Inquiry to be Sent to Case 002/01 Witness Philip SHORT" dated 6 February 2016); Annex 7: Trial Chamber Greffier E-mail Correspondence with Prof. Christopher Goscha, 18 March 2016, E327/4/3.7 (Trial Chamber Email on the Subject "Democratic Kampuchea Standing Committee Meeting Minutes Christopher Goscha" dated 25 January 2016).
[665] Annex 6: Trial Chamber Greffier E-mail Correspondence with Mr. Philip Short, 18 March 2016. E327/4/3.6 (Trial Chamber Email on the Subject "Inquiry to be Sent to Case 002/01 Witness Philip SHORT" dated 6 February

Archive ("Virtual Archive") and provided a publicly accessible internet address where he indicated certain documents originating from Cambodia and contemporaneous with the DK regime could be found.[666] The Trial Chamber responded to the Co-Prosecutors' Request on 17 March 2016, informing the parties of its attempted and on-going efforts to obtain a full copy of the Minutes. It attached the email correspondence with Christopher GOSCHA and included the public link to the Virtual Archive.[667]

229. On 10 May 2016, the Trial Chamber's Greffier *via* email, requested follow-up information from Christopher GOSCHA regarding the copies he had donated to the Virtual Archive, particularly whether the original documents were only available in Vietnamese, if they were copied verbatim, and if they had been translated into any other language(s).[668] Christopher GOSCHA confirmed that all of the documents which he copied verbatim were in Vietnamese translation and that he had never seen the original Khmer language versions.[669] He added that, while he had not sought translations into any other languages, he had made the documents available to Philip SHORT, who translated some of them into French.[670] At the direction of the Trial Chamber, the Greffier reviewed the English language bibliography found on the Virtual Archive and selected 15 out of 74 titles for translation from Vietnamese to English.[671] When the majority of the translations were completed, the Trial Chamber informed the parties of its above-mentioned contact with Christopher GOSCHA on 24 August 2016, explaining that while searching for the Minutes, it became aware of other documents sourced by Christopher GOSCHA ("GOSCHA documents") and selected 15 of these copies that

2016); Annex 7: Trial Chamber Greffier E-mail Correspondence with Prof. Christopher Goscha, 18 March 2016, E327/4/3.7 (Trial Chamber Email on the Subject "Democratic Kampuchea Standing Committee Meeting Minutes Christopher Goscha" dated 25 January 2016).

[666] Annex 6: Trial Chamber Greffier E-mail Correspondence with Mr. Philip Short, 18 March 2016. E327/4/3. 6 (Trial Chamber Email on the Subject "Inquiry to be Sent to Case 002/01 Witness Philip SHORT" dated 6 February 2016); Annex 7: Trial Chamber Greffier E-mail Correspondence with Prof. Christopher Goscha, 18 March 2016, E327/4/3.7 (Trial Chamber Email on the Subject "Democratic Kampuchea Standing Committee Meeting Minutes Christopher Goscha" dated 25 January 2016).

[667] Trial Chamber Memorandum Entitled "Translation of Copies of Vietnamese Documents Obtained from Texas Tech University Archive Originating from Christopher Goscha", 24 August 2016, E327/4/5 ("Trial Chamber Memorandum (E327/4/5)"), para. 5; Annex 7: Trial Chamber Greffier E-mail Correspondence with Prof. Christopher Goscha, 18 March 2016, E327/4/3.7 (Trial Chamber Email on the Subject "Democratic Kampuchea Standing Committee Meeting Minutes Christopher Goscha" dated 25 January 2016).

[668] Decision on GOSCHA Documents (E327/4/7), para. 3; Annex 4: Email Correspondence between Legal Officer and Expert, 30 June 2016, E327/4/5.4 (Email on the Subject "Follow-up Question on Texas Tech Archive" dated 10 May 2016).

[669] Annex 4: Email Correspondence between Legal Officer and Expert, 30 June 2016, E327/4/5.4 (Email on the Subject "Follow-up Question on Texas Tech Archive" dated 10 May 2016).

[670] Annex 4: Email Correspondence between Legal Officer and Expert, 30 June 2016, E327/4/5.4 (Email on the Subject "Follow-up Question on Texas Tech Archive" dated 10 May 2016).

[671] Trial Chamber Memorandum (E327/4/5), para. 2.

"appear by their titles to have sufficient relevance for translation into English".[672] The Trial Chamber placed all 15 documents on the Shared Materials Drive – nine of which had been translated into English, with the remaining to follow as they became available – and invited parties' submissions on their admissibility.[673]

230. KHIEU Samphân then requested that the Trial Chamber issue a reasoned decision for each investigative action it had taken to acquire the other documents, and that the Trial Chamber also rule that, all of the copies were inadmissible.[674] The Trial Chamber explained why it decided to obtain the other documents transcribed by Christopher GOSCHA and how "the parties were also provided [with] an opportunity to make submissions on the admissibility of the documents that were eventually obtained, [and] the Chamber considers that all procedural rights of the Accused have been respected".[675] The Trial Chamber determined that admitting the 15 documents into evidence, with the exception of two that are repetitive, was in the interests of justice, as they were *prima facie* reliable and authentic, and relevant and conducive to ascertaining the truth.[676]

231. The Trial Chamber found similarities between the document described as Minutes sourced by Christopher GOSCHA and those used in the Peoples' Revolutionary Trial also described as "Minutes" of a meeting of the Standing Committee, namely the same subject matter of the discussion, same attendees of the meeting, and the adoption of a substantive decision regarding "internal enemies".[677] The Trial Chamber also noted that the content of some of the GOSCHA documents was corroborated by a *Revolutionary Flag* issue which served "to buttress a finding of authenticity for the January 1978 GOSCHA document".[678] However, given the difficulties in establishing the chain of custody and completeness of the handwritten transcript of the Vietnamese translations "potentially impacting on the reliability of the document", the Trial Chamber limited its use of the GOSCHA documents to corroboration purposes.[679]

[672] Trial Chamber Memorandum (E327/4/5), para. 2.
[673] Trial Chamber Memorandum (E327/4/5), para. 2.
[674] Mr KHIEU Samphân's Submissions Regarding the Admissibility of the Documents Submitted by the Trial Chamber (E327/4/5), 16 September 2016, E327/4/6 ("KHIEU Samphân's Admissibility Submissions (E327/4/6)"), para. 33.
[675] Decision on GOSCHA Documents (E327/4/7), para. 19.
[676] Decision on GOSCHA Documents (E327/4/7), paras 15-27.
[677] Trial Judgment (E465), para. 352.
[678] Trial Judgment (E465), para. 352.
[679] Trial Judgment (E465), paras 353-354.

232. On appeal, KHIEU Samphân challenges the Trial Chamber's acquisition of the documents, its decision to admit them into evidence during trial, and its assessment of their probative value.[680] He relies on his trial arguments, in which he disputed the Trial Chamber's lack of reasoning and transparency regarding the steps it took to obtain the documents pursuant to Rule 93. He argues before this Chamber that the Trial Chamber erred in exercising its discretion by concluding that "all procedural rights of the Accused [had] been respected" in its steps to obtain the documents.[681] In refuting this finding, he advances two arguments. First, that the Trial Chamber "failed to provide reasons for its decision on the steps taken to obtain the documents under Internal Rule 93" and, second, that its "investigative action […] to obtain the documents from Christopher GOSCHA far exceeded the Prosecution's request, which consisted solely of searching for the excerpt from the Minutes".[682] On this basis, he argues that the Trial Chamber violated his procedural rights and exhibited partiality.[683] In addition to claiming that the Trial Chamber lacked transparency, his submissions also accuse the Trial Chamber of acting in "bad faith" when it "stat[ed] that the Defence had failed to object to the Prosecution's request to search for the excerpt from the Minutes".[684]

233. Second, KHIEU Samphân submits that the Trial Chamber committed another discernible error in exercising its discretion by deciding to admit the documents, which he contends are unreliable and do not meet the admissibility criteria set forth in Rule 87(4).[685] He contends that the Trial Chamber should have taken "more seriously" the factors affecting the reliability of the documents, such as the inability to trace their chain of custody, the fact that the originals were not found, and the possibility of transposition errors in copying them by hand.[686] He specifically argues that the Trial Chamber erred in assessing the documents' reliability by stating that they were copied "verbatim" and that several bore the names of translators and translation dates.[687] According to KHIEU Samphân, no reasonable trier of fact could have found the documents to be *prima facie* reliable and authentic, and thus the Trial Chamber erred by admitting them under Rule 87(4).[688]

[680] KHIEU Samphân's Appeal Brief (F54), paras 216-225.
[681] KHIEU Samphân's Appeal Brief (F54), para. 218.
[682] KHIEU Samphân's Appeal Brief (F54), paras 217-218.
[683] KHIEU Samphân's Appeal Brief (F54), para. 220.
[684] KHIEU Samphân's Appeal Brief (F54), para. 219.
[685] KHIEU Samphân's Appeal Brief (F54), para. 217.
[686] KHIEU Samphân's Appeal Brief (F54), paras 221-222.
[687] KHIEU Samphân's Appeal Brief (F54), para. 222.
[688] KHIEU Samphân's Appeal Brief (F54), para. 223.

234. Lastly, KHIEU Samphân submits that the Trial Chamber made a legal and factual error in considering and using the documents for corroboration in circumstances where the probative value of such documents is "nil".[689] In his view, the legal error involves the Trial Chamber's consideration that the documents had corroborative value. He refers to his previous arguments disputing their reliability and the findings on their authenticity, which he argues were made flippantly and based on a single numerical match between the documents and the evidence in the Case File.[690] Furthermore, KHIEU Samphân accuses the Trial Chamber of "distort[ing] the evidence" by attempting to reconcile the content of two documents to give the appearance that they concerned the same meeting.[691] He argues that the Trial Chamber erred by using the documents for corroboration due to their unreliability and low probative value, and he requests that the findings on which the Trial Chamber relied be excluded from the Trial Judgment.[692]

235. The Co-Prosecutors respond that KHIEU Samphân fails to substantiate the alleged errors in the Trial Chamber's acquirement, admission, and use of the impugned documents, and that he fails to show how their use resulted in unreasonable findings or rendered the Trial Judgment invalid.[693]

a. The Trial Chamber's Steps to Obtain the GOSCHA Documents

236. At the outset, this Chamber observes that KHIEU Samphân reiterates his trial arguments, challenging the legitimacy and transparency of the Trial Chamber's additional steps taken on its own initiative to obtain the other documents pursuant to Rule 93,[694] which governs the process of ordering additional investigations, which the Trial Chamber may initiate at any time. Rule 93 does not require any formal notification or leave from any party.

237. The Trial Chamber's actions in initiating additional investigations cannot therefore violate an accused's procedural rights. In this case, the Trial Chamber's actions were disclosed to the parties, who were provided with the opportunity to submit their comments. In addressing KHIEU Samphân's allegations that the Trial Chamber failed to follow the requirements of Rule 93, the Trial Chamber reasoned that:

> [it] may direct Greffiers or WESU to take steps limited to contacting individuals or institutions

[689] KHIEU Samphân's Appeal Brief (F54), paras 224, 1463.
[690] KHIEU Samphân's Appeal Brief (F54), para. 224.
[691] KHIEU Samphân's Appeal Brief (F54), para. 225.
[692] KHIEU Samphân's Appeal Brief (F54), para. 1463.
[693] Co-Prosecutors' Response (F54/1), paras 189-193.
[694] KHIEU Samphân's Admissibility Submissions (E327/4/6), paras 7-16.

> to obtain specific information either at the request of the Parties or on the Chamber's own initiative without initiating a formal Internal Rule 93 Investigation.[695]

238. This Chamber observes that the Trial Chamber's impugned additional steps included a follow-up e-mail enquiry from its Greffier to Christopher GOSCHA after he provided the link to the Virtual Archive, which may have contained the Minutes that were the subject of the Co-Prosecutors' Request, along with other contemporaneous documents. The Greffier explained in the e-mail that he had reviewed the documents available in the archive and that a number of documents appeared "potentially important to the trial proceedings" based on the titles.[696] Noticing that the documents were only available in Vietnamese, he inquired from Christopher GOSCHA about the original language of the other documents, if they were available in other languages, and how he copied them.[697] These steps were taken in order to make these potentially important documents accessible to the parties in a working language of the Court, allowing parties to file submissions on their admissibility. The nature of the follow-up enquiries confirms this, as does the fact that once the majority of the translations were available in English, the Trial Chamber notified parties of their existence, placed them on the Shared Materials Drive and invited the parties' submissions on their admissibility.[698]

239. This Chamber has little hesitation in supporting the legality of the actions of the Trial Chamber in seeking the GOSCHA documents and of its very thorough enquiries into how the documents were created, sourced and translated. Ignoring such potentially highly relevant and possibly contemporaneous evidence that was brought to its attention would have been remiss. After hearing the parties' submissions, the Trial Chamber admitted 13 documents into evidence in the interests of justice, finding that:

> [t]he substance of all of the Copies relates to the deliberations and activities of what the Closing Order describes as the top decision-making body of Democratic Kampuchea the Standing Committee or related bodies Office 870. Such documents have a bearing on the actions and knowledge of the Accused in this case.[699]

240. The Supreme Court Chamber observes that the Trial Chamber notified the parties of its proposed additional steps when the majority of the documents were available in an accessible

[695] Decision on GOSCHA Documents (E327/4/7), para. 16.
[696] Annex 4: Email Correspondence between Legal Officer and Expert, 30 June 2016, E327/4/5.4 (Email on the Subject "Follow-up Question on Texas Tech Archive" dated 10 May 2016).
[697] Annex 4: Email Correspondence between Legal Officer and Expert, 30 June 2016, E327/4/5.4 (Email on the Subject "Follow-up Question on Texas Tech Archive" dated 10 May 2016); Decision on GOSCHA Documents (E327/4/7), para. 3.
[698] Trial Chamber Memorandum (E327/4/5).
[699] Decision on GOSCHA Documents (E327/4/7), para. 20.

language in order that those documents were available for the parties to consult and examine ahead of any submissions on their admissibility. For these reasons, KHIEU Samphân's arguments that the Trial Chamber failed to provide reasons for taking these additional steps is without merit. KHIEU Samphân makes further unattractive arguments alleging lack of transparency in relation to the Trial Chamber's proposed additional steps. This Chamber notes that on 17 March 2016, the Trial Chamber informed parties of its initial contact with Christopher GOSCHA to obtain the Minutes and attached the email exchange, which included the link to the Virtual Archive. [700] Accordingly, as of this date, any party could access the documents and seek their admission into evidence if they considered they were relevant to the Case 002/02 proceedings. On 24 August 2016, after the major part of the documents had been translated and were available, the Trial Chamber informed the parties of how its search for the Minutes led it to learn of other documents sourced by Christopher GOSCHA, attaching the correspondence once more and explaining its selection of 15 documents on which it invited parties' admissibility submissions. Lastly, in response to the Request from KHIEU Samphân, the Trial Chamber further provided additional reasons for its steps in its decision on the admissibility of the 15 documents on 25 November 2016. The preceding steps demonstrate the Trial Chamber acted reasonably in notifying parties of its actions when it deemed it appropriate to do so. This Chamber considers that the described steps provided both transparency and ample opportunity for adversarial discussion by facilitating the translation of the documents into one of the Court's official languages and inviting the parties' submissions on the documents' admissibility. The Trial Chamber granted KHIEU Samphân's Request to make oral submissions in order to extend the imposed deadline for filing admissibility submissions, affording him sufficient time to review and respond to the other documents.[701] KHIEU Samphân took advantage of this opportunity, requesting that the Trial Chamber would rule that all of the documents were inadmissible and provide the reasons for its decision to obtain the other documents. KHIEU Samphân's submissions fail to explain how the aforementioned steps resulted in any prejudice to him.

[700] Trial Chamber Memorandum (E327/4/5), para. 5; Annex 7: Trial Chamber Greffier E-mail Correspondence with Prof. Christopher Goscha, 18 March 2016, E327/4/3.7 (Trial Chamber Email on the Subject "Democratic Kampuchea Standing Committee Meeting Minutes Christopher Goscha" dated 25 January 2016).
[701] KHIEU Samphân's Admissibility Submissions (E327/4/6), para. 4, fns 5-6, referring to E-mail from Anta GUISSÉ sent on 8 August 2016 at 8:35 a.m., entitled "*Deux demandes suite au mémo E327/4/5 et à la dernière 87-4 des co-Procureurs*" and Transcript of Hearing of 25 August 2015, unrevised version, between [10.10.22] and [10.36.57].

241. Finally, KHIEU Samphân's argues that the Trial Chamber acted in bad faith by stating that "[a]t no point did the KHIEU Samphân Defence object until the Chamber apparently obtained the 11 April 1977 Minutes", despite having been notified of the Trial Chamber's steps to obtain the documents.[702] It should be noted that the correspondence cited by the Trial Chamber in support of this statement concerns the Trial Chamber's search for the Minutes rather than the additional documents sourced by Christopher GOSCHA because this correspondence predates their discovery. It is this Chamber's view that while the Trial Chamber's statement could perhaps benefit from more clarity, there is no evidence that it was made in bad faith. The parties were provided with an opportunity to review and respond to the documents. This does not support any accusations of bad faith or bias.

242. For the forgoing reasons, this Chamber finds that the Trial Chamber did not abuse its discretion in taking additional steps to obtain the GOSCHA documents.

b. Challenges to the Trial Chamber's Admission of GOSCHA Documents

243. Before admitting the GOSCHA documents, the Trial Chamber examined several factors, including the content, accuracy and provenance of the documents and found that it was satisfied that they met the *prima facie* standards of relevance, reliability, and authenticity.[703] The Trial Chamber drew reference to their contemporaneity, particularly those of the CPK Standing Committee, which it considered "important evidence in these proceedings as they relate to decision making and policy of the CPK at its highest levels".[704] Although the documents were available at the start of the trial and could have been discovered through due diligence, the Trial Chamber decided that admitting them was in the interests of justice, noting that:

> [a]lthough the Chamber is approaching the end of the evidentiary proceedings in this case the parties will have an opportunity at the latest in their closing briefs and statements to make submissions on the probative value and weight to be afforded to the Copies.[705]

244. KHIEU Samphân repeats his submissions on the reliability of GOSCHA brought before the Trial Chamber on the basis that they merit more serious consideration especially on the weaknesses in the chain of custody and transmission of the documents, the possibility of transposition errors, discrepancies regarding the dates of some of the documents and the

[702] Decision on GOSCHA Documents (E327/4/7), para. 18; KHIEU Samphân's Appeal Brief (F54), para. 219.
[703] Decision on GOSCHA Documents (E327/4/7), paras 20-27.
[704] Decision on GOSCHA Documents (E327/4/7), para. 27.
[705] Decision on GOSCHA Documents (E327/4/7), para. 27.

Vietnamese government's lack of cooperation with the Trial Chamber.[706] The Trial Chamber's reasoning shows that it did consider the factors previously raised by KHIEU Samphân and found that while the absence of the original documents and the process of copying them by hand may have had some impact on their accuracy, these factors did not preclude it from finding the impugned documents were *prima facie* reliable and authentic.[707] The Trial Chamber specifically noted that these factors must be taken into account in assessing the probative value of the documents, and that the parties would have an opportunity to make submissions on the weight to be afforded to them in their closing briefs and statements.[708]

245. In illustrating that the Trial Chamber erred in assessing the documents' reliability, KHIEU Samphân points out that the Trial Chamber stated that "several" bore the names of translators and translation dates, when in fact only two documents provide the translators' names and only one bears the translation date.[709] This infelicitous adjective is simply that. It is not an error that normally merits appellate review. The same is true of his allegation that the Trial Chamber erred in finding that Christopher GOSCHA copied the documents "verbatim", despite his statement that he "almost always [...] copied the entire document".[710] When determining that the documents met the *prima facie* standard of reliability, the Trial Chamber specifically considered Christopher GOSCHA's process of copying the documents by hand, including any potential impact on their accuracy.[711]

246. It seems that KHIEU Samphân overlooks other factors that influenced the Trial Chamber's decision to admit the documents, for instance, Christopher GOSCHA's confirmation that he visited the People's Army Library in Hanoi and "copied verbatim documents in Vietnamese" and that expert witness Philip SHORT's statement that Christopher GOSCHA was "the authority on such matters […]. To my knowledge, he's the only non-Vietnamese to have been permitted to work there [in the People's Army Library]".[712] Consideration of such factors led the Trial Chamber to conclude that the documents constituted "methodical translations, which were conserved in a repository that was likely to maintain the integrity of the documents since the DK period".[713] He ignores that the Trial Chamber deemed

[706] KHIEU Samphân's Appeal Brief (F54), para. 221.
[707] Decision on GOSCHA Documents (E327/4/7), paras 26-27.
[708] Decision on GOSCHA Documents (E327/4/7), para. 27.
[709] KHIEU Samphân's Appeal Brief (F54), para. 222.
[710] KHIEU Samphân's Appeal Brief (F54), para. 222.
[711] Decision on GOSCHA Documents (E327/4/7), para. 26.
[712] Decision on GOSCHA Documents (E327/4/7), para. 25.
[713] Decision on GOSCHA Documents (E327/4/7), para. 25.

their content to be of high importance and relevance to the trial proceedings because they contained contemporaneous information relating to the internal workings of the Standing and Central Committees as well as Office 870, which had a "bearing on the actions and knowledge of the accused in this case".[714]

247. This Chamber finds that KHIEU Samphân's submissions are limited to identifying issues affecting the reliability of the documents after they were included in the Trial Chamber's decision to admit the documents. They overlook that the Trial Chamber's considerations were on the relevance of the documents to ascertaining the truth, and the factors supporting their potential reliability and authenticity. His arguments merely offer an alternative assessment of the factors before the Trial Chamber, without demonstrating that the Trial Chamber abused its discretion or caused resulting prejudice to him. The Trial Chamber's assessment and reasoning demonstrates that it gave appropriate weight to the factors pertaining to the relevance, reliability and authenticity of the documents, and that it adequately explained the basis on which it found them to satisfy the admissibility criteria. Accordingly, the Supreme Court Chamber finds that KHIEU Samphân has failed to demonstrate any error or resulting prejudice in the Trial Chamber's decision to admit the documents.

c. Challenges to the Trial Chamber's Use of the GOSCHA Documents

248. With regard to KHIEU Samphân's allegation that the Trial Chamber erred in law and fact by relying on the GOSCHA documents for corroboration, this Chamber notes that in determining the probative value of evidence, the Trial Chamber considered: (1) the criteria set out in Rule 87(3); (2) the circumstances surrounding the creation or recording of evidence; (3) whether the document admitted was an original or a copy; (4) the legibility and discrepancies with other versions; (5) whether the parties had the opportunity to challenge the evidence; and (6) other indicia of reliability, including chain of custody and provenance.[715]

[714] Decision on GOSCHA Documents (E327/4/7), paras 20, 24, 27.
[715] Trial Judgment (E465), para. 61. See also Decision on Objections to Documents Proposed to be Put Before the Chamber in the Co-Prosecutors' Annexes A1-A5 and to Documents Cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments of Case 002/01, 9 April 2012, E185 ("Decision on Objections to Documents (E185)"), paras 30, 34, fn. 49; Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 7 December 2012, E251, paras 26, 28, 36; Case 002, Decision on Co-Prosecutors' Rule 92 Submission regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, 20 June 2012, E96/7 ("Case 002 Decision on Co-Prosecutors' Rule 92 Submission (E96/7)"), paras 17, 25-29. See also Case 002/01 Appeal Judgment (F36), paras 296, 328-329, 375.

249. In response to KHIEU Samphân's argument that the Trial Chamber erred in law by affording corroborative value to the Minutes despite their alleged unreliability, a review of the Trial Judgment shows that the Trial Chamber considered both positive and adverse factors relating to the reliability of the documents, and that it further conducted a comparative exercise between the Minutes sourced by Christopher GOSCHA and the evidence on the Case File, in reaching its determination.[716] In its assessment, the Trial Chamber noted that some contents of the Minutes were corroborated by an issue of the *Revolutionary Flag*, finding that both concerned the same time period and contained a reference to the killing or wounding of 29,000 enemies.[717] Contrary to KHIEU Samphân's argument that the Trial Chamber "confirmed" the authenticity of this document based on a single numerical match, it in fact concluded that the numerical consistency served to "buttress" a finding of its authenticity as well as noting the similar time frame both documents concerned.[718]

250. As to KHIEU Samphân's argument that the Trial Chamber erred by "attempting to cross-reference" one of the GOSCHA documents, E3/10693, in order to corroborate E3/7328, another Case File document,[719] a comparison of the two documents demonstrates that E3/10693 contains Christopher GOSCHA's translation of the minutes from the Standing Committee meetings on 10, 11 and 13 April 1977, while E3/7328 – a document previously used by the Peoples' Revolutionary Tribunal in 1980[720] – contains an excerpt from the minutes of the Standing Committee meeting on 11 April 1977. Although the precise language is not identical, the Trial Chamber held that a comparison between the two documents demonstrates the same subject matter of the discussion, many of the same attendees at the meeting, and the adoption of a decision of substance regarding "internal enemies".[721] To clarify the reference to a "decision of substance" that the Trial Chamber found in both documents, it provided a footnote with two quotes for comparison:

- E3/10693: "[c]ontinuance of the fight against reactionaries and hunt for reactionaries inside our department and bases in order to promote and foster the mission in 1977".[722]

[716] Trial Judgment (E465), paras 352-354.
[717] Trial Judgment (E465), para. 352.
[718] Trial Judgment (E465), para. 352.
[719] KHIEU Samphân's Appeal Brief (F54), para. 225.
[720] Trial Judgment (E465), para. 352.
[721] Trial Judgment (E465), para. 352.
[722] Trial Judgment (E465), fn. 983.

- E3/7328: "[e]very unit, service, and ministry should take the initiative, within its organization, to continue to purge and sweep away adversaries, and at the same time carry out normal activity".[723]

Upon reviewing these documents, the Supreme Court Chamber observes that the quote from E3/10693 is from the minutes of the Standing Committee Meeting on 13 April 1977,[724] not the 11 April 1977.[725] This Chamber, however, considers this minor error has no bearing on the interpretation of the decision concerning "internal enemies" and that it was only one of several factors considered by the Trial Chamber in its assessment.[726] Accordingly, KHIEU Samphân fails to demonstrate an error of law warranting appellate intervention in the Trial Chamber's method of determination of the reliability of the documents and their probative value.

251. While KHIEU Samphân lists various findings to be overturned as a result of this alleged error of law in a footnote, he fails to explain how using the documents for corroborative purposes invalidates the Trial Chamber's findings.[727] KHIEU Samphân elaborates on two instances in his Appeal Brief where the Trial Chamber referred to the Minutes copied by Christopher GOSCHA, which concerned meetings discussing the identification and treatment of spy networks and enemies.[728] In requesting the content of these Minutes to be excluded, KHIEU Samphân repeats his previous complaints about the conditions under which the notes were copied, submitting that the Trial Chamber erred in fact and "was wrong in using their content".[729] Beyond that, he fails to substantiate or even explain how the Trial Chamber's use of the documents resulted in factual findings that no reasonable trier of fact could have made. A review of these two instances reveals that on each occasion where the Trial Chamber referenced the GOSCHA documents, it expressly restricted its use of the GOSCHA documents to "subject-matter, theme and general thrust, without according undue weight to the meaning of particular words or phrases".[730] This approach is consistent with the documents' corroborative nature.

[723] Trial Judgment (E465), fn. 983.
[724] See Standing Committee Minutes and Minutes of Meeting Secretaries and Deputy Secretaries of Divisions and Regiments (copied by C.E. Goscha), 10, 11, 13 April 1977, E3/10693 ("Standing Committee Minutes (E3/10693)"), p. 6.
[725] See Standing Committee Minutes (E3/10693), p. 5.
[726] See Trial Judgment (E465), paras 352-354.
[727] KHIEU Samphân's Appeal Brief (F54), para. 225.
[728] Trial Judgment (E465), paras 3805, 3814.
[729] KHIEU Samphân's Appeal Brief (F54), para. 1463.
[730] Trial Judgment (E465), paras 3805, 3814.

252. In light of the foregoing, the Supreme Court Chamber finds that KHIEU Samphân fails to demonstrate any error of law or fact with respect to the Trial Chamber's exercise of discretion in the admission and use of the GOSCHA documents.

5. Admission of the S-21 Logbook

253. Walter HEYNOWSKI produced a documentary, *Die Angkar*, in which he showed original documentation discovered at the S-21 Security Centre in 1979, including an orange booklet containing the daily records of prisoners ("S-21 Logbook").[731] *In lieu* of hearing Walter HEYNOWSKI' s testimony after the NUON Chea Defence requested it, the Trial Chamber sought information from him regarding his knowledge about the original documentation shown in *Die Angkar*.[732] The Trial Chamber subsequently received the S-21 Logbook from Walter HEYNOWSKI.[733] Thereafter, the Trial Chamber invited the parties to review the documents and submit their comments on their admissibility.[734] During the hearing, KHIEU Samphân submitted that if the S-21 Logbook was admitted, the Trial Chamber should not only recall SUOS Thy and KAING Guek Eav *alias* Duch, but also Walter HEYNOWSKI to question him about the chain of custody and annotations on the documents.[735] KHIEU Samphân also contested the probative value of the S-21 Logbook, claiming that a document previously presented before the Trial Chamber contained information that differed from the S-21 Logbook.[736] The Trial Chamber rejected KHIEU Samphân's Request to summon SOUS Thy and KAING Guek Eav *alias* Duch because they had testified on the S-21 Logbook in the Case 002/01 trial through being shown excerpts of the *Die Angkar* film and the parties had an opportunity to question these witnesses on the content of dozens of similar log sheets.[737] Despite Walter HEYNOWSKI's confirmed willingness to testify, the Trial Chamber decided not to hear him due to "the combination of certain technical difficulties and the time-consuming

[731] Trial Chamber Memorandum Entitled "Documents Obtained from Professor Walter Heynowski", 7 December 2016, E443/2 ("HEYNOWSKI Documents (E443/2)"), para. 1; NUON Chea's Fourth Witness Request for the Case 002/02 Security Centres and "Internal Purges" Segment (S-21 Operations and Documentary Evidence), 7 June 2016, E412 ("NUON Chea's Witness Request (E412)"), paras 31-32.
[732] NUON Chea's Witness Request (E412), paras 31-32; Decision on NUON Chea Defence Requests to Hear Additional Witnesses Pursuant to Internal Rules 87(4) (E391, E392, E395, E412, and E426), 21 September 2016, E443 ("Decision on NUON Chea Defence Requests (E443)"), para. 1.
[733] HEYNOWSKI Documents (E443/2), para. 6.
[734] HEYNOWSKI Documents (E443/2), para. 9.
[735] T. 9 December 2016, E1/510.1, p. 17.
[736] T. 9 December 2016, E1/510.1, p. 16.
[737] Decision on Request to Admit Logbook and to Recall Two Witnesses regarding S-21, 27 December 2016, E443/3 ("S-21 Logbook Decision (E443/3)"), paras 3-4.

procedural requirements of judicial cooperation".[738] The S-21 Logbook was admitted by the Trial Chamber because it was "directly relevant to a crime site within the scope of the current trial" and "*prima facie* relevant and reliable (including authentic)".[739]

254. On appeal, KHIEU Samphân submits that the Trial Chamber ignored his submissions *vis-à-vis* the flaws that tainted the admission of the S-21 Logbook and its very low probative value.[740] He argues that the Trial Chamber erred in law by admitting the S-21 Logbook at the end of the trial without recalling SUOS Thy and KAING Guek Eav *alias* Duch and summoning Walter HEYNOWSKI, and that admitting the S-21 Logbook notwithstanding the fact that its authenticity and reliability could not be verified demonstrated the Trial Chamber's bias.[741] He submits that the Trial Chamber's findings based on the S-21 Logbook must be invalidated and reversed.[742]

255. The Co-Prosecutors respond that KHIEU Samphân fails to establish that the Trial Chamber erred by admitting the S-21 Logbook and declining to call the three requested witnesses.[743]

256. The Trial Chamber held that it was unnecessary to recall SUOS Thy because KHIEU Samphân had the opportunity to question him "as to the content of dozens of similar log sheets" that were available at the time of his testimony.[744] As to his argument that those log sheets could not be compared to the 250 pages of the S-21 Logbook on which he did not have the opportunity to question SUOS Thy,[745] this Chamber notes that KHIEU Samphân did not challenge SUOS Thy regarding the S-21 Logbook at any material time during his cross-examination.[746] Moreover, KHIEU Samphân did not dispute that SUOS Thy kept the S-21 Logbook during his stint at the S-21 Security Centre.[747] KHIEU Samphân fails to demonstrate

[738] Trial Chamber Memorandum Entitled "Notice of Trial Chamber's Decision not to Hear 2-TCE-946 (Walter HEYNOWSKI)", 18 January 2017, E443/7, para. 4.
[739] S-21 Logbook Decision (E443/3), para. 3; S-21 Prisoner List Daily Report, E3/10770.
[740] KHIEU Samphân's Appeal Brief (F54), para. 226.
[741] KHIEU Samphân's Appeal Brief (F54), paras 216, 226; Annex A to KHIEU Samphân's Appeal Brief (F54.1.1), p. 9.
[742] KHIEU Samphân's Appeal Brief (F54), para. 226; Annex A to KHIEU Samphân's Appeal Brief (F54.1.1), p. 9.
[743] Co-Prosecutors' Response (F54/1), paras 194, 201-202.
[744] S-21 Logbook Decision (E443/3), para. 4.
[745] KHIEU Samphân's Closing Brief (E457/6/4/1), paras 1189-1191.
[746] T. 6 June 2016 (SOUS Thy), E1/432.1, p. 78; T. 7 June 2016 (SOUS Thy), E1/433.1, pp. 16-40.
[747] KHIEU Samphân's Closing Brief (E457/6/4/1), para. 1189.

that the Trial Chamber's decision not to recall SUOS Thy constituted an error of law rendering its findings invalid.

257. The Supreme Court Chamber similarly finds no error in the Trial Chamber's decision not to recall KAING Guek Eav *alias* Duch, having found that this was unnecessary because he testified that he "never had access to this type of log" and could not recognise it.[748]

258. In the case of Walter HEYNOWSKI, the Trial Chamber not only obtained information from him *in lieu* of hearing his testimony, but also received confirmation from him that he was willing to testify.[749] It has to be recalled that the hearings had by then concluded. The Trial Chamber, however, held that the proceedings would not be re-opened to hear Walter HEYNOWSKI due to the technical difficulties associated with video-link testimony and the need to ensure the expeditiousness of the proceedings, and thus it declined to summon him.[750]

259. This Chamber recalls that: (1) the Trial Chamber enjoys discretion with regard to procedural matters;[751] (2) there is no unfettered right to examine witnesses;[752] and (3) KHIEU Samphân may not re-litigate trial arguments or advance claims unless he can demonstrate that the Trial Chamber's rejection of his arguments constituted an error warranting the Supreme Court Chamber's intervention. The Supreme Court Chamber is of the view that the Trial Chamber's approach was well within the ambit of its discretionary power to admit the S-21 Logbook without recalling SUOS Thy and KAING Guek Eav *alias* Duch and summoning Walter HEYNOWSKI.

260. With respect to KHIEU Samphân's argument that the Trial Chamber "relied heavily" on the S-21 Logbook, this Chamber finds that KHIEU Samphân fails to substantiate his argument that an error lies therein, and thus fails to meet the standard of appellate review. It is insufficient to merely point to instances in the Trial Judgment where the Trial Chamber relied on the S-21 Logbook without demonstrating how this invalidates the Trial Judgment in whole or in part.[753] In any event, a review of the Trial Judgment shows that, with the exception of one

[748] S-21 Logbook Decision (E443/3), para. 4; T. 15 June 2016 (Kaing Guek *alias* Duch), E1/438.1, pp. 91-92.
[749] Decision on NUON Chea Defence Requests (E443), para. 1; Trial Chamber Memorandum Entitled "Notice of Trial Chamber's Decision not to Hear 2-TCE-946 (Walter HEYNOWSKI)", 18 January 2017, E443/7, para. 4.
[750] Trial Chamber Memorandum Entitled "Notice of Trial Chamber's Decision not to Hear 2-TCE-946 (Walter HEYNOWSKI)", 18 January 2017, E443/7, para. 4.
[751] Case 002/01 Appeal Judgment (F36), para. 274.
[752] Case 002/01 Appeal Judgment (F36), paras 286-287.
[753] KHIEU Samphân's Appeal Brief (F54), para. 226, referring to Trial Judgment (E465), paras 419, 1467, 2115-2116, 2122-2123, 2289, 2296-2297, 2299, 2369, 2397, 2436, 2443, 2505, 2549-2551, 2886, 3054, 3058.

instance referred to by KHIEU Samphân, the Trial Chamber's findings were not solely based on the S-21 Logbook, but also on other evidence, including other daily control lists identical to those in the S-21 Logbook.[754] The single exception relates to the finding that "May and June at S-21 show an increased removal and execution of prisoners from the State of Ministry of Commerce", which remains uncontested by KHIEU Samphân, and thus insufficient to invalidate the Trial Judgment.[755]

261. Moreover, the Trial Chamber considered a number of factors going to the reliability of the S-21 Logbook, including its in-court authentication by SUOS Thy, who testified to having the logbook in his custody and control and using it to tally a daily prisoner count at S-21; Walter HEYNOWKSI's confirmation that he had taken the logbook from the premises of S-21; the testimonies of SUOS Thy and KAING Guek Eav *alias* Duch on various aspects of the different lists, including daily controlling lists, kept at S-21; its consistency in substance and form to many other lists on the Case File, including identical duplicate daily controlling lists and daily controlling lists which fill the gaps in time at the start and end of 1977; that the parties had the opportunity to question witnesses as to the content of dozens of similar log sheets which were available to them at the time of his testimony.[756] KHIEU Samphân does not develop any argument substantiating his submission that the S-21 Logbook is of "low probative value" as would prompt this Chamber to intervene.

262. The Supreme Court Chamber therefore finds that KHIEU Samphân has failed to demonstrate that the Trial Chamber erred in its admission of and reliance on the S-21 Logbook.

6. Failure to Recall Stephen HEDER, François PONCHAUD and Philip SHORT

263. KHIEU Samphân argues that the Trial Chamber unfairly exercised its discretion by refusing to recall Stephen HEDER, François PONCHAUD and Philip SHORT to testify in the Case 002/02 proceedings even though they provided testimony in the Case 002/01 trial.[757] He submits that the error arose from the Trial Chamber's failure to apply the same "standard of relevance" to his requests for the appearance of these three witnesses compared to witnesses proposed by other parties.[758] He submits that the re-examination of these witnesses was of key

[754] Trial Judgment (E465), paras 419, 1467, 2114-2116, 2122-2123, 2289, 2296-2297, 2436, 2443, 2505, 2459-2551, 2886, 3054, 3058.
[755] Trial Judgment (E465), para. 2297.
[756] Trial Judgment (E465), paras 2115-2119, 2123; S-21 Logbook Decision (E443/3); Trial Chamber Memorandum "Documents Obtained from Professor Walter Heynowski", 7 December 2016, E443/2.
[757] KHIEU Samphân's Appeal Brief (F54), paras 166-172; T. 16 August 2021, F1/9.1, p. 46.
[758] KHIEU Samphân's Appeal Brief (F54), paras 171-172, fn. 805.

importance to his case and impugns the Trial Chamber's grounds for refusal as "fallacious". This error, he submits, violated his rights to equality of arms, adversarial debate, to reasoned decisions, to be heard, to an impartial tribunal and to be tried without undue delay.[759]

264. KHIEU Samphân impugns the Trial Chamber's reasoning in declining to recall these witnesses, where the Trial Chamber found that because these witnesses had previously appeared in Case 002/01, their testimony in Case 002/02 would be repetitious and cause undue delay in the proceedings.[760] He argues that the Trial Chamber "completely disregarded" that he had not been able to examine them in Case 002/01 on matters within the scope of Case 002/02, violating his right to adversarial debate.[761] KHIEU Samphân stresses that the Trial Chamber's refusal to recall Stephen HEDER and François PONCHAUD was "much less justified" in light of its *proprio motu* decision to recall witnesses who had testified in Case 002/01, such as PHAN Van and SAO Sarun, "even though the latter was one of the very few people heard in Case 002/01" on all matters within the scope of Case 002.[762] He submits that "this is very revealing of the Chamber's bias", in particular because the Trial Chamber "expected Sao Sarun […] to have inculpatory material as regards marriage".[763]

265. KHIEU Samphân submits that Stephen HEDER and François PONCHAUD, "who have an experience not only with Cambodia, but also, in the case of [Stephen HEDER], with the ECCC procedure, would have been highly useful regarding in particular the issue of the Cham"[764] and that the Trial Chamber relied on their statements despite the fact that he did not have the opportunity to question them on this matter.[765] He submits that François PONCHAUD and Stephen HEDER "had lots of things to say about moral principles as regards the matrimonial policy" and regarding cooperatives and "the way in which rice cultivation was organized."[766] In relation to Philip SHORT, he submitted that the Trial Chamber decided not to recall him on the basis that more extensive questioning had been allowed in Case 002/01. KHIEU Samphân avers however, that the Trial Chamber in Case 002/01 had reversed itself on the authorisation to allow the parties to question Philip SHORT outside matters relating to Case

[759] KHIEU Samphân's Appeal Brief (F54), para. 174.
[760] KHIEU Samphân's Appeal Brief (F54), paras 166-167; T. 16 August 2021, F1/9.1, p. 46.
[761] KHIEU Samphân's Appeal Brief (F54), para. 168; T. 16 August 2021, F1/9.1, p. 46.
[762] KHIEU Samphân's Appeal Brief (F54), para. 169; T 16 August 2021, F1/9.1, pp. 46-47.
[763] T. 16 August 2021, F1/9.1, p. 47.
[764] T. 16 August 2021, F1/9.1, p. 47.
[765] T. 16 August 2021, F1/9.1, p. 47.
[766] T. 16 August 2021, F1/9.1, p. 47.

002/01 in order to ensure the expeditiousness of the trial[767] but refused to admit documents concerning genocide in relation to Philip SHORT's appearance on the ground that genocide was not part of the charges of which it was seised in Case 002/01.[768]

266. The Co-Prosecutors respond that KHIEU Samphân fails to establish error in the Trial Chamber's exercise of discretion in rejecting the recall of these witnesses.[769]

267. Throughout the proceedings in Case 002/01, the Trial Chamber heard evidence on topics that were relevant to both Cases 002/01 and 002/02, including the administrative, communication, and military structures; historical background; JCE polices; and the roles and character of the Accused. The Trial Chamber acknowledged that, due to the limited scope of Case 002/01, "certain of these matters may not have been fully examined"[770] and considered, in relation to the potential recall of witnesses in Case 002/02, that:

> the Internal Rules already establish a legal framework for the recall of witnesses, civil parties and experts, in particular Rules 87(3) and 87(4). *In this regard the Chamber will consider whether the parties were prevented or did not have an opportunity to fully examine an individual they intend to recall in court, because of the limited scope of case 002/01*: The Trial Chamber reminds the parties that the Chamber may reject a request for evidence which it finds irrelevant or repetitious under Internal Rule 87(3)(a).[771]

268. The Supreme Court Chamber will address KHIEU Samphân's submissions to determine whether the Trial Chamber erred in its discretion by refusing the request to call (a) Stephen HEDER and François PONCHAUD, and; (b) Philip SHORT. For this purpose, it notes that HEDER is considered one of the leading authorities on the history, evolution and authority structure of the CPK and DK regime. He authored numerous books, academic articles and working papers on the Khmer Rouge and conducted interviews with many CPK cadres and leaders, including KHIEU Samphân. François PONCHAUD lived in Cambodia since 1965 and was one of the last foreigners to leave the country, several weeks after the Khmer Rouge captured Phnom Penh. He also kept abreast of DK broadcasts throughout the period. In Case 002/01, he testified to having witnessed relevant events in the lead up to, and during the DK period. Following his departure from Cambodia on 7 May 1975, he interviewed refugees in Thailand and France and kept informed of developments by listening to broadcasts on the Khmer Rouge radio.[772] As a journalist and author, Philip SHORT conducted extensive

[767] KHIEU Samphân's Appeal Brief (F54), para. 170, fn. 195.
[768] KHIEU Samphân's Appeal Brief (F54), para. 170.
[769] Co-Prosecutors' Response (F54/1), paras 60-61; T. 16 August 2021, F1/9.1, pp. 70-71.
[770] Case 002 Additional Severance Decision (E301/9/1), para. 42.
[771] Trial Chamber Clarification Memorandum (E302/5), para. 8.
[772] See Case 002/01 Appeal Judgment (F36), para. 342.

interviews with senior leaders of the CPK, including KHIEU Samphân, IENG Sary and SON Sen. He is the author of the book "*Pol Pot: The History of a Nightmare"*, which was placed on the Case File.[773] Despite their broad knowledge of events prior to and during the DK period, neither Stephen HEDER nor François PONCHAUD testified as experts in Case 002/01.[774] Philip SHORT was called as an expert but the Trial Chamber indicated that he "may also be questioned on facts within [his] personal knowledge relevant to Case 002/01."[775]

a. Stephen HEDER and François PONCHAUD

269. Prior to the start of the Case 002/02 proceedings, KHIEU Samphân sought Stephen HEDER's testimony on a broad range of topics, including the communication system within the CPK, measures taken against the Cham and Buddhists, cooperatives and worksites, security centres and execution sites, genocide, crimes against humanity and grave breaches of the Geneva Conventions.[776] KHIEU Samphân also proposed François PONCHAUD to testify on the historical context, the armed conflict, cooperatives and worksites, and measures taken against the Cham, Vietnamese and Buddhists, as well as genocide, crimes against humanity and grave breaches of the Geneva Conventions.[777]

270. During the proceedings in the present case, KHIEU Samphân submitted requests to hear Stephen HEDER and François PONCHAUD as a replacement for Michael VICKERY (2-TCE-94),[778] while NUON Chea suggested Stephen HEDER or Stephen MORRIS (2-TCE-98) as possible alternatives to CHANDA Nayan (2-TCE-83) to explain the nature of the armed conflict[779] and because, up to that point, not a single expert proposed by the Defence had been heard.[780] The Co-Prosecutors agreed that the Trial Chamber should make an effort to accommodate the Defence and call one or more of these proposed witnesses.[781] The Trial

[773] See Decision on Assignment of Experts, 5 July 2012, E215 ("Decision on Assignment of Experts (E215)"), para. 8.
[774] Trial Chamber Memorandum Entitled "Announcement of Remaining Hearings Prior to the Close of Evidentiary Proceedings in Case 002/01 and Scheduling of Final Trial Management Meeting for 13 June 2013", 31 May 2013, E288, para. 4; Memorandum from the Witness and Expert Support Unit Entitled "TCE-33, HEDER, Stephen Russel", 24 May 2013, E202/82/1.
[775] Decision on Assignment of Experts (E215), para. 18.
[776] Annex III – Updated Summaries of the Testimonies of Witnesses and Experts not Seeking Any Protective Measures, 3 April 2017, E305/5.2, p. 5.
[777] Annex III – Updated Summaries of the Testimonies of Witnesses and Experts not Seeking Any Protective Measures, 3 April 2017, E305/5.2, p. 6.
[778] Demande réitérée de la Défense de M. KHIEU Samphân d'entendre 2-TCE-87 and 2-TCE-99, 9 August 2016, E408/6; T. 16 August 2016, E1/458.1, pp. 32-35.
[779] T. 16 August 2016, E1/458.1, pp. 26-32.
[780] T. 16 August 2016, E1/458.1, p. 30.
[781] T. 16 August 2016, E1/458.1, pp. 36-37.

Chamber subsequently selected Stephen MORRIS as an expert during the trial on the nature of the armed conflict.[782]

271. On 13 October 2016, KHIEU Samphân filed a further request seeking clarification from the Trial Chamber on whether it intended to hear Stephen HEDER and François PONCHAUD.[783] The Trial Chamber rejected the request on the basis that:

> both Stephen HEDER (2-TCE-87) and François PONCHAUD (2-TCE-99) testified as witnesses in Case 002/01 and *[…] their respective testimonies remain part of the evidence available in Case 002/02* (E318, para. 3(b)). Stephen HEDER (2-TCE-87) testified for 7 days covering various topics also relevant to Case 002/02, including Khmer Rouge administrative structures, Khmer Rouge ideology, Khmer Rouge policies and practices against Vietnamese and Chams, as well as internal purges (T., 9-11 July 2013 and T., 15-18 July 2013). François PONCHAUD (2-TCE-99) testified for 3 days, covering various topics, including cooperatives and worksites, religious persecutions, forced marriage, and Khmer Rouge leadership (T., 9-11 April 2013). In addition, the Chamber notes that it has selected another expert, Stephen MORRIS (2-TCE-98) who has been heard on matters relevant to the Nature of the Armed Conflict trial topic (see T., 18-20 October 2016 (DRAFT)). In light of the topics that were already covered during the testimony of Stephen HEDER (2-TCE-87) and François PONCHAUD (2-TCE-99) in Case 002/01, as well as the selection of Stephen MORRIS (2-TCE-98), the Chamber finds that it would be repetitious to call Stephen HEDER 2-TCE-87 and François PONCHAUD (2-TCE-99) to testify again in Case 002/02. Further, the Chamber finds that recalling these individuals would cause an undue delay to the proceedings.[784]

272. The Trial Chamber further recalled that in selecting witnesses, civil parties, and experts, it is guided by its duty to ascertain the truth and that "[w]hile it endeavours to hear individuals proposed by all Parties, there is no requirement to ensure proportionality in this regard."[785]

273. In rejecting KHIEU Samphân's request to call Stephen HEDER and François PONCHAUD on the basis that their testimony would be repetitious, this Chamber observes that the Trial Chamber was guided by two main considerations: (1) that Stephen HEDER and François PONCHAUD testified in Case 002/01 on topics that were relevant to Case 002/02; and (2) the selection of Stephen MORRIS as an expert to testify during the trial topic on the nature of the armed conflict.

[782] Decision on Designation of 2-TCE-98, 27 September 2016, E445, para. 1, referring to Email from the Trial Chamber Legal Officer of 13 September 2016.
[783] Demande de la Défense de M. KHIEU Samphân aux fins de clarification concernant 2-TCE-87 et 2-TCE-99, 13 October 2016, E408/6/1.
[784] Decision on Request to Hear HEDER and PONCHAUD (E408/6/2), para. 6 (emphasis added).
[785] Decision on Request to Hear HEDER and PONCHAUD (E408/6/2), para. 4.

274. The Supreme Court Chamber observes that, François PONCHAUD testified for three days as a witness during the Case 002/01 proceedings.[786] His testimony covered, in particular, the historical background of various CPK policies and the subsequent evacuation of Phnom Penh. François PONCHAUD was called primarily to testify on the events he saw and witnessed himself before 1975 and up until 6 or 7 May 1975 when he was forced to leave Cambodia.[787] In addition, he was called to testify in relation to the documents on the Case File that he authored, including accounts of refugees gathered in Thailand, France and other locations.[788] As noted by the Trial Chamber, his testimony touched on several topics relevant to Case 002/02, including cooperatives and worksites, religious persecution, forced marriage, and Khmer Rouge leadership.[789] For instance, François PONCHAUD was briefly questioned on purges in 1977 and 1978 in connection with a report that he authored. He was also questioned on, *inter alia*, the accounts of religious persecution of Buddhists and the Cham which he had obtained from refugees and which had been presented in contemporaneous reports and newspaper articles,[790] including by NUON Chea's counsel.[791] None of the parties objected to the scope of the examination.

275. Similarly, Stephen HEDER was called as a witness, principally to address the significant number of documents in the Case 002 Case File that he authored.[792] During his seven days of testimony, questions were directed primarily to evidence he had gathered, "either during interviews he conducted or the evidence he accumulated in research which forms the basis for the books or articles authored by him."[793] He provided evidence, primarily on the events prior to 1975, the numerous features of the DK government and the roles of the

[786] T. 9 April 2013 (François PONCHAUD), E1/178.1; T. 10 April 2013 (François PONCHAUD), E1/179.1; T. 11 April 2013 (François PONCHAUD), E1/180.1. See further T. 9 April 2013 (François PONCHAUD), E1/178.1, pp. 67- 68 ("PONCHAUD has been called as a witness, and as such, it is for the Chamber to determine not only the relevance of the questions that are put to him, but their probative value. […] His testimony has been informed to some degree by his writings but of course they are based on his personal experiences, but *we do not consider him to be an expert in the technical sense* that it would be used in this courtroom") (emphasis added). See also T. 10 April 2013 (François PONCHAUD), E1/179.1, p. 19.
[787] T. 9 April 2013 (François PONCHAUD), E1/178.1, p. 67.
[788] T. 9 April 2013 (François PONCHAUD), E1/178.1, p. 67.
[789] Case 002/01, Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01, 7 August 2014, E312 ("Case 002/01 Decision on Witnesses (E312)"), paras 31, 60. See, *e.g.*, T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 73-74 (forced marriage).
[790] T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 72-73.
[791] T. 11 April 2013 (François PONCHAUD), E1/180.1, pp. 34-35.
[792] Trial Chamber Memorandum entitled "Announcement of Remaining Hearings Prior to the Close of the Evidentiary Proceedings in Case 002/01 and Scheduling of Trial Management Meeting for 13 June 2013", 31 May 2013, E288, para. 4.
[793] T. 10 July 2013 (Stephen HEDER), E1/221.1, p. 59.

Accused.[794] These topics were fully within the scope of examination of Case 002/01 but were also of relevance to Case 002/02. Stephen HEDER's Case 002/01 testimony, in addition concerned topics within the scope of Case 002/02 such as Khmer Rouge policies and practices against Vietnamese and Chams, as well as internal purges.

276. In view of the above, the Supreme Court Chamber considers that, while the parties were under general instructions to focus their examination on topics within the scope of Case 002/01, the parties were able to question François PONCHAUD and Stephen HEDER on topics common to both cases and relevant to Case 002/02. Clearly the right to adversarial debate was fully exercised and preserved in respect of those topics. While this Chamber agrees that these witnesses were not examined in detail on all topics relevant to Case 002/02, it recalls that "the most important criterion for the decision as to whether or not to summons a witness to testify before the Court is the relevance of the anticipated testimony to the events that are the subject of the charges. At the same time, when several possible witnesses or other means of evidence are available to testify to the events in question, a judicious Chamber has to select the best placed witnesses to avoid repetition and delay with a view to ensuring the expeditiousness of the proceedings."[795]

277. In this regard, the Supreme Court Chamber notes that François PONCHAUD was present during the evacuation of Phnom Penh and testified to having witnessed relevant events in the years leading up to and including the period of DK. However, his knowledge on Case 002/02 topics stems mainly from the interviews and accounts gathered from refugees and by listening to Khmer Rouge radio broadcast and by reading documents.[796] Similarly, Stephen HEDER, was called principally to address the significant number of documents in the Case 002 Case File that he authored. This information remains on the Case File and the Defence in Case 002/01 was able to examine Stephen HEDER and François PONCHAUD on their methodology in obtaining and recording the information relevant to Case 002/02. Moreover, the witnesses testified extensively to the historical background, development of CPK policies, and other topics relevant to both cases.

[794] Case 002/01 Decision on Witnesses (E312), paras 31, 42. See also Case 002/01 Appeal Judgment (F36), para. 341.
[795] Case 002/01 Appeal Judgment (F36), para. 144; T. 16 August 2021, F1/9.1, p. 47.
[796] See T. 9 April 2013 (François PONCHAUD), E1/178.1, pp. 67, 82-105; T. 10 April 2013 (François PONCHAUD), E1/179.1, pp. 14, 27-30, 33-35, 38-43, 56-65, 67-74, 94, 99-103, 108-109.

278. One of the primary reasons for KHIEU Samphân's request to call Stephen HEDER and François PONCHAUD in Case 002/02 relates to their observations regarding the Cham,[797] and their submissions that the measures taken against the Cham did not constitute genocide or persecution.[798] In this regard, the Supreme Court Chamber notes that KHIEU Samphân's counsel who, during Stephen HEDER's testimony objected to questions related to the impact of the implementation of a policy against the Cham because the question led to the personal analysis of the witness whereas he was not called as an expert.

279. Michael VICKERY, a historian designated as an expert on account of, *inter alia*, his extensive experience in South-East Asian history, who had lived in Cambodia prior to 1975 and collected first-hand accounts of Cambodian refugees in 1980 before publishing works on the Khmer Rouge and DK period,[799] had been proposed by KHIEU Samphân to testify on "relations between the central and local administration, in particular with regard to the degree of autonomy of the local commanders as well as on the dissident factions on under DK; *de jure* and *de facto* authority of the Accused; the armed conflict with Vietnam; the factual allegations of the crime of genocide, crimes against humanity and grave breaches of the Geneva Conventions (movement of the population, cooperatives and worksites, security centres and execution sites as well as the treatment of specific groups)", and by NUON CHEA on the "[c]onditions in cooperatives and worksites, general living conditions, armed conflict with Vietnam, alternative power structures during the DK period, Vietnamese aggression against DK and top ranking CPK factional support […], internal divisions within the CPK particularly within the Standing and Central Committees, and designation of traitors and internal

[797] KHIEU Samphân's Appeal Brief (F54), para. 1573.
[798] See, *e.g.*, T. 10 April 2013 (François PONCHAUD), E1/179.1, p. 73 ("With regard, to the Cham, I got some more information from different sources, as you have mentioned. I do not believe that the Khmer Rouge persecuted the Cham based on religious grounds. Therefore, there was no genocide committed based on religious grounds. The ethnic Cham had their own traditions, and the Khmer rouge wanted I am certain of this in the case of Christians, the same goes for Buddhist, Those who were killed, and some were, were not killed because of their religion but because they were perceived as political enemies and they refused to apply the orders of Angkar. It is true that the regime was anti-religious, but I would not describe this as genocide or persecution or persecutions, because once again it was not because they were religious figures that the people concerned were executed but because they were enemies. I would say that the same applied to the Chams. The Khmer Rouge ideology was stupid and bad, you had to be part of it. If you failed to join you were eliminated." All the people to be alike. So, those who agreed to follow the Khmer Rouge line would survive, whether they were ethnic Cham or Vietnamese. But if they did not follow the Khmer Rouge line they would be in dangerAfter 1978, the situation became strange. The Cham were persecuted. They searched for the Cham, especially on the eastern side of the Mekong River, because of the conflict between Cambodia and Vietnam, and the ethnic Cham were suspected of supporting the Vietnamese.").
[799] Decision on Designation of 2-TCE-94 (Michael Vickery), 27 Mary 2016, E408.

purges."[800] He declined to testify.[801] KHEU Samphân then proposed Stephen HEDER and François PONCHAUD as replacements for Michael VICKERY.[802] The Trial Chamber noted that the topics for which Stephen HEDER and François PONCHAUD had been proposed "differ in many respects from those on which Michael VICKERY (2-TCE-94) was to testify" and that the two proposed experts would therefore not strictly speaking replace Michael VICKERY in terms of the substantive issues to be addressed.[803] Stephen MORRIS, selected by NUON Chea to replace Michael VICKERY, was also proposed to testify on the armed conflict with Vietnam and other topics similar to those Michael VICKERY was supposed to cover.[804] The Trial Chamber designated Stephen MORRIS as an expert in view of his extensive research experience and specialised knowledge of Vietnamese-Cambodian relationships during the relevant time, including his book "*Why Vietnam Invaded Cambodia, Political Culture and the Causes of War*".[805]

280. An extensive review of these events and submissions leads this Chamber to conclude that the Trial Chamber's actions and reasons reveal no error. The substantive issues to be addressed by Stephen MORRIS, more closely resemble those that Michael VICKERY would have addressed; in particular in relation to the topic covering the armed conflict with Vietnam. Moreover, Stephen MORRIS had not been heard in Case 002/01 and his expertise covered a different topic so repetition was unlikely.

281. In light of the above, the Supreme Court Chamber finds no error in the Trial Chamber's decision to refuse KHIEU Samphân's request to call Stephen HEDER and François PONCHAUD. The Trial Chamber clearly reasoned its decision in view of the fact that both witnesses testified at length in Case 002/01 on topics of relevance to both Cases 002/01 and 002/02, that they were examined, albeit to a more limited extent, on topics of particular relevance to Case 002/02, and that their respective testimonies remain part of the evidence available in Case 002/02. The Supreme Court Chamber, moreover, observes that both witnesses were primarily called to discuss the methodology of the documents in the Case File that they

[800] Annex B – Updated Summaries of Witnesses, Civil Parties and Experts (No Protective Measures Sought) – NUON Chea Defence Team, 8 May 2014, E305/4.2, pp. 22-23.
[801] Trial Chamber Memorandum entitled "Outstanding issues relating to Expert Michael Vickery (2-TCE-94), 4 August 2016, E408/5.
[802] Demande réitérée de la Défense d M. KHIEU Samphân d'entendre 2-TCE-87 and 2-TCE-99, 9 August 2016, E408/6; T. 16 August 2016, E1/458.1, pp. 32-35.
[803] Decision on Request to Hear HEDER and PONCHAUD (E408/6/2), para. 5.
[804] Annex B – Updated Summaries of Witnesses, Civil Parties and Experts (No Protective Measures Sought) – NUON Chea Defence Team, 8 May 2014, E305/4.2, pp. 19-20.
[805] Stephen J. Morris, *Why Vietnam Invaded Cambodia, Political Culture and the Causes of War* (1st ed. 1999).

authored, and that all parties had the opportunity to extensively question Stephen HEDER and François PONCHAUD in this regard.

282. The Trial Chamber's decision accords with its guidance stated earlier, in which it held that it would consider whether parties were prevented from fully examining an individual but also reminded the parties that it may "reject a request for evidence which it finds irrelevant or repetitious under Internal Rule 87(3)(a)".[806] It is recalled that "general concerns of expeditiousness circumscribe the right of the accused to obtain […] evidence [in his or her defence] where the motion for evidence would, in fact, not serve the defence, such as, per Internal Rule 87(3), where evidence sought is irrelevant, repetitious or the motion is meant to prolong the proceedings."[807] In respect of the topics on which KHIEU Samphân wished to lead a more full examination, it is noted that several other witnesses and documentary evidence were led, particularly in respect of the treatment of the Cham in Case 002/02, worksites and cooperatives and forced marriage policy. Finally, while the parties were under general instructions to focus their examination on topics within the scope of Case 002/01, the parties were nonetheless able to question François PONCHAUD and Stephen HEDER on certain topics relevant to Case 002/02. In view of the above, KHIEU Samphân fails to demonstrate a violation of his right to adversarial debate or that prejudice arose as a result of the Trial Chamber's decision.

b. Philip SHORT

283. KHIEU Samphân complains that he sought Philip SHORT's expert testimony on the topics of the historical context, administrative structures, the armed conflict, cooperatives and worksites, security centres and execution sites, measures against specific groups, genocide, crimes against humanity, and grave breaches of the Geneva Conventions.[808] The Trial Chamber, however, declined KHIEU Samphân's request to hear Philip SHORT on the basis that:

> [t]he KHIEU Samphan Defence requested Philip SHORT (2-TCE-92) to testify as an expert on the pre-1975 history of the CPK and its institutional organization. The Chamber notes that Philip SHORT (2-TCE-92) testified as an expert in Case 002/01 in relation to events prior to 1975 and that his testimony forms part of the significant amount of documentary evidence pertaining to this subject-matter that was admitted in Case 002/02. The Chamber notes that Philip SHORT (2-

[806] Trial Chamber Clarification Memorandum (E302/5), para. 8.
[807] Case 002/01 Appeal Judgment (F36), para. 162 (footnotes omitted).
[808] Annex III – Updated Summaries of the Testimonies of Witnesses and Experts not Seeking Any Protective Measures, 3 April 2017, E305/5.2, p. 3.

> TCE-92) was among the experts proposed *prior to the severance of Case 002 and it therefore allowed for more extensive questioning within his unique area of expertise* in order to avoid recalling him unnecessarily. The Chamber therefore considers that hearing Philip SHORT (2-TCE-92)'s evidence a second time is likely to be substantially repetitive of evidence on the Case File, including the Case 002/01 testimonies of Francois PONCHAUD (2-TCE-99), Stephen HEDER (2-TCE-87) and David CHANDLER (2-TCE-84).[809]

284. KHIEU Samphân argues that this decision was inconsistent in its reasoning because the Trial Chamber did not actually allow the parties to question Philip SHORT beyond the scope of Case 002/01, refused to admit documents related to the charge of genocide, and interrupted his testimony when questioned on this topic.[810]

285. This Chamber believes that the facts should be portrayed more accurately. First, this Chamber observes that the Co-Prosecutors, in Case 002/01, proposed Philip SHORT to be heard on various topics, including the pre-1975 history of the CPK and the development of the CPK policies, such as the suppression of religion.[811] Philip SHORT had thus been proposed as an expert on the development of the CPK policies and not their implementation during the DK, which was part of Case 002/02. The Trial Chamber ordered the appointment of Philip SHORT as an expert "in accordance with the assignments as set out in this Decision".[812] It considered Philip SHORT and Elizabeth BECKER,

> by virtue of their research and publication of books on the relevant period to possess *specialised knowledge in the proposed field of expertise*, the Chamber notes that they are principally sought by the parties due to their personal knowledge of facts relevant to the Democratic Kampuchea period either through their presence in Cambodia during the relevant period covered by Case 002/01 *or through their interviews with leaders or cadres of the Democratic Kampuchea period, including the Accused IENG Sary and KHIEU Samphan*. They are therefore called as experts although they may also be questioned on facts within their personal knowledge relevant to Case 002/01.[813]

286. In addition, to avoid the need for their recall and to ensure the expeditiousness of the proceedings, the Trial Chamber had determined that several individuals, including Philip SHORT "may be questioned on all matters within their knowledge or expertise relevant to the entirety of the Closing Order in Case 002".[814] The Trial Chamber later reminded the parties that the principal focus of examination should be the subject matter of Case 002/01, in view of

[809] Decision on Proposed Witnesses (E459), para. 193 (emphasis added).
[810] KHIEU Samphâns' Appeal Brief (F54), para. 170.
[811] Decision on Assignment of Experts (E215), para. 9, referring to Annex 1: Witness, Civil Party, and Expert Summaries with Points of the Indictment – OCP", 23 February 2011, E9/13.1.
[812] Decision on Assignment of Experts (E215), Disposition.
[813] Decision on Assignment of Experts (E215), para. 18 (emphasis added).
[814] Decision on Assignment of Experts (E215), para. 4.

ensuring the expeditiousness of the trial.[815] It also stated that "[q]uestioning on matters beyond this scope should be limited to areas which the parties consider these individuals to be uniquely qualified to answer."[816] Finally, the Trial Chamber determined that Philip SHORT "may be questioned on all matters within [his] knowledge or expertise relevant to Case 002/01".[817]

287. On 8 February 2013, the Supreme Court Chamber annulled the Severance Order of 22 September 2011[818] on the grounds that the parties had not been consulted. The immediate consequence of this Decision was that Case 002 was no longer confined to the scope initially determined in the Severance Order of 22 September 2011.[819] The Trial Chamber then "proposed to proceed to hear […] all individuals imminently scheduled to appear before the Chamber on the basis of the scope of the trial as defined in the [Case 002/01] Severance Order and related decisions."[820] This included the imminent testimonies of Elizabeth BECKER and Philip SHORT. The Trial Chamber instructed the parties that "both experts may be questioned on the entirety of Case 002 on areas within the knowledge of the experts, and the parties are encouraged to focus their questions on areas relevant to the facts at issue in Case 002/01."[821]

288. On 29 March 2013, the Trial Chamber announced in court that it had decided to re-sever Case 002,[822] with reasons following on 26 April 2013.[823] It considered that returning to the previous form of Case 002/01 "in accordance with the parameters of trial understood by all parties from the outset of the trial" would best alleviate any concerns regarding legal certainty[824] and ordered "the resumption of proceedings in Case 002/01 from the point it had reached when the [Supreme Court Chamber] Decision was rendered on 8 February 2013."[825]

[815] Decision on Assignment of Experts (E215), para. 4.
[816] Decision on Assignment of Experts (E215), para. 4.
[817] Decision on Assignment of Experts (E215), para. 4.
[818] First Severance Appeal Decision (E163/5/1/13).
[819] Trial Chamber Memorandum entitled "Directions to the Parties in Consequence of the Supreme Court Chamber's Decision on Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision concerning the Scope of Case 002/01 (E163/5/1/13)", 12 February 2013, E163/5/1/13/1 ("Directions in Consequence of Severance (E163/5/1/13/1)"), para. 2.
[820] Directions in Consequence of Severance (E163/5/1/13/1), para. 3(v).
[821] Annex 1: Email of Trial Chamber Legal Officer to Case 002 Parties, 29 March 2013, E264/1/2/1/1.2 (Trial Chamber Email on the Subject "Directions to the Parties following Hearing on Severance" dated 21 February 2013).
[822] T. 29 March 2013, E1/176.1, pp. 2-4.
[823] Case 002, Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, E284 ("Case 002 Second Severance Decision (E284)").
[824] Case 002 Second Severance Decision (E284), para. 88.
[825] Case 002 Second Severance Decision (E284), para. 90.

289. Philip SHORT subsequently testified from 6 to 9 May 2013.[826] Prior to the start of his testimony, the Trial Chamber reminded the parties that he could be questioned on all the areas and that he would respond "according to his knowledge".[827] The parties were encouraged to question the expert based on the second severance order of Case 002 (E284). The Trial Chamber noted that "the scope for questioning of this witness is rather extensive within Case 002 […] [h]owever all the parties should focus their questioning on the relevant part of the severed cases, in particular 002/01."[828] The transcripts show that while the parties were generally directed to focus on Case 002/01, that broader questioning was within the unique area of the expertise of Philip SHORT. This is a reasonable and pragmatic use of its discretion in the management of the trial considering the complexities arising from severance. It is further noted that this guidance was announced to the parties well ahead of the examination of these experts.

290. In support of his submission that the Trial Chamber had not allowed the questioning of Philip SHORT beyond the scope of Case 002/01, KHIEU Samphân points to the Trial Chamber's refusal to admit certain documents concerning allegations of genocide sought by NUON Chea pursuant to Rule 87(4) for use in its examination of Philip SHORT.[829] The documents in question concerned an article by Blythe YEE entitled "Navigating Darkness", in which Philip SHORT discusses the research methods he employed to write his book "*Pol Pot: Anatomy of a Nightmare*", a transcript of an interview of Philip SHORT conducted by Charlie ROSE on 29 March 2005, an article entitled "*Cambodia Confronts the 'G' Word*" by Brendan BRADY on whether genocide occurred in Cambodia, and a news report by Press TV of 18 December 2009 on the decision to charge the Accused with genocide, in which Philip SHORT is quoted commenting on these charges.[830] It is observed that during the Case 002/01 proceedings, the Trial Chamber denied the request for admission, reasoning that:

[826] T. 6 May 2013 (Philip SHORT), E1/189.1; T. 7 May 2013 (Philip SHORT), E1/190.1; T. 8 May 2013 (Philip SHORT), E1/191.1; T. 9 May 2013 (Philip SHORT), E1/192.1.
[827] T. 6 May 2013 (Philip SHORT), E1/189.1, p. 1.
[828] T. 6 May 2013 (Philip SHORT), E1/189.1, p. 1.
[829] Trial Chamber Memorandum entitled "Response to Internal Rule 87(4) Requests to Place New Documents on the Case File concerning the Testimony of Witnesses François PONCHAUD and Sydney SCHANBERG (E243) and Experts Philip SHORT (E226, 226/1 and 230) and Elizabeth BECKER (E232 and E232/1)", 18 January 2013, E260 ("Trial Chamber Memorandum on Rule 87(4) Requests (E260)"), paras 7-8; Rule 87 Request to Use Documents During Cross-Examination of Witness Philip SHORT, 3 September 2012, E226.
[830] Trial Chamber Memorandum on Rule 87(4) Requests (E260), para. 7.

> [g]iven that genocide is not part of the charges in the current case and as Philip SHORT will testify and thus will be available for questioning on his research methodology, the Chamber is unconvinced of the relevance or necessity to admit any of these documents.[831]

The Trial Chamber further noted that some of the documents raised issues of reliability because they appeared to have been prepared by the NUON Chea Defence itself, "presumably by reproducing the contents of the originals".[832] This Chamber notes that, while these documents were not admitted in Case 002/01 and were therefore not used during Philip SHORT's examination, a number of these documents were subsequently filed as part of KHIEU Samphân's updated Rule 80(3) list in preparation for the Case 002/02 trial.[833] The Trial Chamber accepted these proposed documents was therefore able to consider them in Case 002/02.[834]

291. Further, Philip SHORT's testimony in Case 002/01 was interrupted following his statement that he objected to the use of the nomenclature genocide to describe what had happened to the Cham.[835] This occurred because the charge of genocide was not part of Case 002/01 and because the Trial Chamber considered that genocide "is a legal label" and "is really for the Judges" to determine.[836] He was nevertheless briefly questioned on this topic by NUON Chea's counsel.[837]

292. More importantly, this Chamber notes that Philip SHORT was designated as an expert on the early development of CPK policies, including the suppression of religion, rather than in relation to their implementation post-1975. All parties examined Philip SHORT who was questioned extensively on these topics, which are also of relevance to Case 002/02. He was examined on his research methodology. This Chamber deduces no error in the exercise of the Trial Chamber's decision not to recall Philip SHORT on the basis that his testimony would likely be repetitive. In view of the above, KHIEU Samphân fails to demonstrate a violation of his right to adversarial debate or that prejudice arose as a result of the Trial Chamber's decision.

7. Failure to Reopen Trial Proceedings to Admit Evidence of Two Witnesses

[831] Trial Chamber Memorandum on Rule 87(4) Requests (E260), para. 8.
[832] Trial Chamber Memorandum on Rule 87(4) Requests (E260), para. 8.
[833] Documents Proposed by the KHIEU Samphan Defence for the Trial in Case 002/02, 13 June 2014, E305/12.
[834] Decision on Objections to Documents Proposed to Be Put before the Chamber in Case 002/02, 30 June 2015, E305/17 ("Decision on Objections to Documents in Case 002/02 (E305/17)") ("The Trial Chamber considers to be put before the Chamber […] all documents listed in Annex D to this decision, which includes documents submitted through the KHIEU Samphan Document List".).
[835] T. 6 May 2013 (Philip SHORT), E1/189.1, pp. 58-59.
[836] T. 6 May 2013 (Philip SHORT), E1/189.1, pp. 58-59.
[837] T. 9 May 2013 (Philip SHORT), E1/192.1, pp. 17-19.

293. KHIEU Samphân submits that the Trial Chamber erred in law and in the exercise of its discretion by failing to reopen the proceedings to admit the written statements disclosed from Cases 003 and 004 of EK Hen and CHUON Thy after the hearings had concluded.[838] He argues that these statements had "a significant impact on the assessment of the reliability and credibility of their evidence" and that there was a missed opportunity to discuss EK Hen's inconsistencies and CHUON Thy's exculpatory evidence.[839] KHIEU Samphân argues that the Trial Chamber's practice, as outlined in the Trial Judgment,[840] was to admit all prior statements of witnesses, experts, and civil parties disclosed in Cases 003 and 004 when these individuals were heard at trial.[841] In his view, the Trial Chamber contradicted its previous practice when it failed to reopen the proceedings to admit the statements of witnesses CHUON Thy and EK Hen, following the late disclosure of their statements from Cases 003 and 004.[842] This, he argues, prevented him from discussing the contents of exculpatory statements or the credibility of witnesses EK Hen and CHUON Thy,[843] because the parties cannot make submissions during the deliberations of the Trial Chamber pursuant to Rule 96(2).[844] Although he acknowledges that the Supreme Court Chamber admitted the statements on appeal, he nonetheless argues that the Trial Chamber's error resulted in prejudice as he "lost the opportunity to argue his case before one level of jurisdiction".[845]

294. The Co-Prosecutors respond that KHIEU Samphân fails to demonstrate that the Trial Chamber erred in law and/or abused its discretion by not re-opening the proceedings to admit EK Hen and CHUON Thy's statements which were, in any event, admitted on appeal.[846] The Lead Co-Lawyers agree.[847]

295. As stated by KHIEU Samphân, throughout the proceedings the Trial Chamber "admitted all prior statements of witnesses, experts and civil parties disclosed from Cases 003 and 004 when these individuals were heard at trial".[848] This was done in the interests of justice to provide the parties "an opportunity to confront these individuals with alleged discrepancies

[838] KHIEU Samphân's Appeal Brief (F54), paras 244-246.
[839] KHIEU Samphân's Appeal Brief (F54), para. 246.
[840] KHIEU Samphân's Appeal Brief (F54), para. 244, referring to Trial Judgment (E465), para. 51.
[841] KHIEU Samphân's Appeal Brief (F54), para. 244.
[842] KHIEU Samphân's Appeal Brief (F54), paras 244-245; Annex A to KHIEU Samphân Appeal Brief (F54.1.1), p. 12.
[843] KHIEU Samphân's Appeal Brief (F54), paras 245-246.
[844] KHIEU Samphân's Appeal Brief (F54), para. 245.
[845] KHIEU Samphân's Appeal Brief (F54), para. 246.
[846] Co-Prosecutors' Response (F54/1), paras 79-83.
[847] Lead Co-Lawyers' Response (F54/2), paras 102-105.
[848] KHIEU Samphân's Appeal Brief (F54), para. 244; Trial Judgment (E465), para. 51.

between their oral evidence and prior statements at trial."[849] KHIEU Samphân complains that this practice did not apply to documents that were disclosed *after* the close of the evidentiary proceedings.[850]

296. The documents in question concern CHUON Thy and EK Hen's Written Records of Interview, recorded by Office of the Co-Investigating Judge's investigators in the context of the investigation into Cases 003 and 004, dated 28 February 2017 and 6 March 2017 respectively.[851] These were disclosed by the International Co-Investigating Judge on 3 September 2018,[852] shortly before the pronouncement of the summary of the Judgment on 16 November 2018[853] and well into the Trial Chamber's deliberations following the close of the evidentiary proceedings.[854]

297. Rule 96(2) governing deliberations of the Trial Chamber reads "[a]t this stage, no further applications may be submitted to the Chamber, and no further submissions may be made. During the course of the deliberations, *the judges may reopen the proceedings.*"[855] The word "may" indicates the discretionary nature of this judicial power and the compelling exigencies of the submission. Obviously, evidence not previously available which could undermine the tenor of evidence previously heard will be received. The Co-Prosecutors refer this Chamber to a decision of the ICTY in this regard[856] where the criteria applied were "whether the probative value of the evidence substantially outweighs any delay caused by reopening the case, keeping in mind the stage of the trial at which the request is made."[857] In this case, the statements of the two witnesses in question were not made available until

[849] Trial Judgment (E465), para. 51. See also Decision on Rules 87(4) Requests (E421/4); Trial Chamber Memorandum entitled "Admission of Newly Disclosed Written Records of Interviews from Cases 003 and 004 of Witnesses Heard in the Course of the Case 002 Trial Proceedings", 25 April 2017, E319/68/1; Trial Chamber Memorandum entitled "Admission of Newly Disclosed Written Records of Interviews from Cases 003 and 004 of Witnesses Heard in the Course of the Case 002 Trial Proceedings", 9 May 2017, E319/69; Trial Chamber Memorandum entitled "Admission of Newly Disclosed Written Records of Interviews from Cases 003 and 004 of Witnesses Heard in the Course of the Case 002 Trial Proceedings", 1 January 2017, E319/67.
[850] KHIEU Samphân's Appeal Brief (F54), paras 244-246.
[851] Written Record of Interview of CHUON Thy, 28 February 2017, E319/71.2.4; Written Record of Interview of EK Hen, 6 March 2017, E319/71.2.7.
[852] International Co-Prosecutor's Proposed Disclosure of Documents from Cases 003 and 004, 3 September 2018, E319/71; Trial Chamber Memorandum entitled "International Co-Prosecutor's (ICP) Request to Disclose Case 003 and 004 Documents (CONFIDENTIAL)", 10 September 2018, E319/71/1; Decision on Disclosure Request E319/71/1 Directed through the Trial Chamber, 11 September 2018, E319/71/2; Decision on Disclosure Request E319/71/1 Directed through the Trial Chamber, 13 September 2018, E319/71/3.
[853] T. 16 November 2018 ("Pronouncement of Judgment in Case 002/02"), E1/529.1.
[854] T. 23 June 2017, E1/528.1, p. 42.
[855] Internal Rules, Rule 96(2) (emphasis added).
[856] Co-Prosecutors' Response (F54/1), para. 81.
[857] Co-Prosecutors' Response (F54/1), para. 81, referring to *Čelebići* Appeal Judgment (ICTY), para. 283.

deliberations were all but concluded. No criticism can be directed to the Defence of KHIEU Samphân, nor in fairness could it be directed to the Trial Chamber who were in the very last phases of writing the Trial Judgment. Unless the newly available witness statements were of an explosive nature, which they clearly were not, this Supreme Court Chamber sees no error in their decision not to reopen the trial proceedings.

298. While the statements did not convince the Trial Chamber to change its course, they are now before this Chamber to consider. The Supreme Court Chamber recalls that in its decision on KHIEU Samphân's request to admit these statements on appeal, no fault was attributed to "the International Co-Prosecutor for the timing in which the materials in question were transmitted for disclosure"[858] and that it granted KHIEU Samphân's request to admit the Written Records of Interview and their corresponding audio recordings into evidence on the basis that "EK Hen and CHUON Thy were relatively key witnesses to some findings" and because the "KHIEU Samphân Defence attaches considerable weight to the potentially exculpatory nature of that evidence."[859] Accordingly, the statements in question now form part of the Case File and have been reviewed by the Supreme Court Chamber during the appellate phase of these proceedings. It is recalled that, in determining whether prejudice has arisen that led to a "grossly unfair outcome in judicial proceedings", this Chamber takes into account all phases of the proceedings, including measures that were taken in the course of the appeals phase.[860] The Supreme Court Chamber determines that KHIEU Samphân fails to demonstrate any prejudice and his submission that he lost the opportunity to argue his case before one level of jurisdiction is without merit.[861]

E. ALLEGED ERRORS IN THE TRIAL CHAMBER'S EVIDENTIARY APPROACH

1. Challenges to Evidentiary Standards

a. Burden and Standard of Proof

299. KHIEU Samphân submits that the Trial Chamber correctly recalled the standard of proof for entering a conviction as being beyond reasonable doubt but that it failed to apply this principle.[862]

[858] Decision on Admission of Additional Evidence (F51/3), para. 33.
[859] Decision on Admission of Additional Evidence (F51/3), para. 37.
[860] Case 002/01 Appeal Judgment (F36), para. 100.
[861] KHIEU Samphân's Appeal Brief (F54), para. 246.
[862] KHIEU Samphân's Appeal Brief (F54), paras 229, 237.

300. He contends that the Trial Chamber misunderstood the civil law concept of *intime conviction* and, in fact, used a standard lower than beyond reasonable doubt.[863] Had the Trial Chamber correctly applied this legal standard, it "could not have been satisfied of KHIEU Samphân's guilt",[864] and accordingly requests that the Supreme Court Chamber invalidate his convictions and sentence.[865]

301. The Co-Prosecutors respond that KHIEU Samphân demonstrates no error.[866]

302. Before the ECCC, the presumption of innocence and burden and standard of proof are enshrined in Rules 21(d) and 87(1).[867] Cambodian law derives from civil law, which contains the notion of the judge's *intime conviction.* This notion is retained in the French version of Rule 87(1), whereas both the Khmer and English versions thereof state that a finding of guilt against the accused requires that the Chamber be convinced beyond reasonable doubt.

303. In the Trial Judgment, the Trial Chamber reiterated:

> The Accused are presumed innocent until proved guilty. The Co-Prosecutors bear the burden of proof. In order to convict, the Chamber must be convinced of an Accused's guilt "beyond reasonable doubt" […] Upon a reasoned assessment of the evidence, the Chamber interprets any doubt as to guilt in the Accused's favour.[868]

304. Thus, whatever the Trial Chamber's understanding of the civil law concept of *intime conviction*, it correctly understood the applicable burden and standard of proof, emphasising that "[a]ll facts underlying the elements of the crime or the form of responsibility alleged, as well as all facts which are indispensable for entering a conviction, […] must be established beyond reasonable doubt".[869] The Trial Chamber further correctly understood that "[t]his must be supported by a reasoned opinion on the basis of the entire body of evidence, without applying the standard of proof 'beyond reasonable doubt' in a piecemeal fashion".[870]

[863] KHIEU Samphân's Appeal Brief (F54), paras 227-230.
[864] KHIEU Samphân's Appeal Brief (F54), para. 231.
[865] KHIEU Samphân's Appeal Brief (F54), para. 231. See also T. 16 August 2021, F1/9.1, pp. 25, 46; T. 19 August 2021, F1/12.1, p. 39.
[866] Co-Prosecutors' Response (F54/1), paras 95-101.
[867] Rule 21(d) provides in relevant part that "[e]very person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established." Rule 87(1) states that "[u]nless provided otherwise in these [Internal Rules], all evidence is admissible. The onus is on the Co-Prosecutors to prove the guilt of the accused. In order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt."
[868] Trial Judgment (E465), para. 38 (internal citations omitted).
[869] Trial Judgment (E465), para. 40.
[870] Trial Judgment (E465), para. 40.

305. The Supreme Court Chamber thus discerns no error in the Trial Chamber's understanding or statement of the standard and burden of proof. As to its application thereof in evaluating the evidence, the Supreme Court Chamber notes that KHIEU Samphân refers generally to "unreasonable" findings" which he contends are "demonstrated below in this brief", albeit without providing further specificity.[871] The Supreme Court Chamber recalls that it is for the parties on appeal to substantiate alleged errors in an impugned judgment. Where alleged errors are not clearly articulated or particularised, this Chamber is under no obligation to provide extensive reasons and may, in its discretion, decline to make any findings. Where these assertions are instead developed sufficiently as part of other grounds of appeal, they will be addressed in the relevant sections of this Judgment.

306. KHIEU Samphân's arguments are otherwise accordingly dismissed.

b. Deductive Reasoning, Extrapolations and Generalisations

307. KHIEU Samphân submits that inferences drawn from the evidence "must be consistent with the guilt of the accused".[872] This "prohibits extrapolation to make findings that must be established beyond reasonable doubt".[873] He contends that even if correctly identifying the relevant legal standards concerning deductive reasoning and extrapolations from generalised evidence, the Trial Chamber misapplied these principles. He alleges that the Trial Chamber "contradicted itself […] by making findings based on generalisations and extrapolations that had no place in a criminal judgment".[874] These standards also oblige the Trial Chamber to consider the plausibility of alternative explanations, including those favourable to him.[875]

308. On this basis, KHIEU Samphân submits that the Trial Chamber committed "multiple errors of law which must be invalidated" and that the Supreme Court Chamber must consequently declare his trial to have been unfair.[876] In support of this argument, he cites

[871] See, *e.g.*, KHIEU Samphân's Appeal Brief (F54), paras 229, 237, referring to para. 1421.
[872] KHIEU Samphân's Appeal Brief (F54), para. 238.
[873] KHIEU Samphân's Appeal Brief (F54), para. 239. See also Annex A to KHIEU Samphân Appeal (F54.1.1), p. 11.
[874] KHIEU Samphân's Appeal Brief (F54), para. 239.
[875] KHIEU Samphân's Appeal Brief (F54), para. 238, citing Trial Judgment (E465), paras 64-65; Case 002/01 Appeal Judgment (F36), para. 598.
[876] KHIEU Samphân's Appeal Brief (F54), paras 238-239.

paragraphs 64 and 65 of the Trial Judgment and incorporates by reference examples drawn from paragraphs 695, 910, 1611, 1829-1835 and 1881 of his Appeal Brief.[877]

309. In response, the Co-Prosecutors submit that KHIEU Samphân's challenges should be dismissed.[878]

310. The Trial Chamber held that in order to convict, "all reasonable inferences that may be drawn from the evidence must be consistent with the guilt of the accused".[879] The Trial Chamber further referred to the Case 002/01 Appeal Judgment, where the Supreme Court Chamber observed that:

> [i]n cases involving alleged mass criminality, it will often be impossible to call all witnesses that could testify to the set of events in question. In such situations, the fact finder may be called upon to make inferences from the evidence [heard from a limited number of individuals] as to the broader experience.[880]

311. In the present case, the Trial Chamber emphasised that "[g]eneralised inferences may be drawn from the specific evidence of a limited number of witnesses, *but only where the generalised finding is established beyond reasonable doubt*".[881]

312. The Trial Chamber further stipulated that "[p]rior to drawing an adverse inference from evidence presented at trial, the Chamber must consider the plausibility of alternative explanations, including those that may be favourable to the Accused."[882]

313. The Supreme Court Chamber finds no error in the Trial Chamber's statement of the law regarding the proper treatment of inferences or the treatment of alternative explanations derived from that evidence. Insofar as these challenges allege an error of law, these submissions fail to particularise any deficiencies in the Trial Chamber's reasoning.

314. Where alleging a factual error, the accused bears the burden of demonstrating that any particular extrapolation made by the first-instance chamber in reaching its finding was

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[877] KHIEU Samphân's Appeal Brief (F54), para. 238, fn. 333 (incorporating by reference, without further particularisation, "factual examples" in paras 695, 910, 1611 and 1881); KHIEU Samphân's Appeal Brief (F54), para. 239, fn. 336 (similarly incorporating by reference the "factual example" contained in paras 1829-1835, whilst adding that "[c]onclusions on knowledge of cooperative sites: the Accused's knowledge of the Preah Vihear cooperative is synonymous with knowledge of the situation throughout DK.").
[878] Co-Prosecutors' Response (F54/1), paras 105-111, 115-116.
[879] Trial Judgment (E465), para. 64.
[880] Case 002/01 Appeal Judgment (F36), para. 598.
[881] Trial Judgment (E465), para. 64 (emphasis added).
[882] Trial Judgment (E465), para. 65.

unreasonable. The Supreme Court Chamber has previously cautioned that "arguments limited to disagreeing with the conclusion of the Trial Chamber and submissions based on unsubstantiated alternative interpretations of the same evidence are not sufficient to overturn factual findings of the trier of fact."[883]

315. In support of his contention that the Trial Chamber misapplied the legal standard or otherwise reached erroneous factual conclusions, KHIEU Samphân references the examples of: (1) the forced transfer of Vietnamese from Tram Kak district;[884] (2) the killing of Cham at Wat Au Trakuon;[885] (3) purges of CPK cadre;[886] (4) inferences drawn by the Trial Chamber regarding his awareness of crimes that had been committed;[887] and (5) alleged errors regarding his knowledge of living conditions in Preah Vihear.[888]

316. These examples frequently fail to meet the necessary burden of specificity. KHIEU Samphân merely incorporates by reference other sections of his Appeal Brief. The Supreme Court Chamber limits its observations at this juncture to alleged errors within the Trial Chamber's overall approach to the evaluation of evidence, insofar as these can be identified within KHIEU Samphân's submissions.

317. In the first example incorporated by reference concerning these challenges,[889] it is alleged that the Trial Chamber made unsupported inferences from the available evidence concerning the forced transfer of a large number of Vietnamese people from Tram Kak district in late 1975 and early 1976.[890] In this allegation, KHIEU Samphân does not identify any specific portion of the Trial Judgment, however the immediately preceding paragraphs impugn the highlighted portions of paragraph 1158 of the Trial Judgment. This paragraph in its totality reads:

> The evidence established clear instructions to kill Vietnamese from the district level and the gathering of large numbers of Vietnamese over the course of a few days in 1975 or early 1976. However, the available evidence failed to demonstrate specific instances of particular executions of Vietnamese during this period. *Nor did the evidence allow the Chamber to track with specificity the fate of particular Vietnamese persons gathered up at this time.* Notwithstanding these evidential gaps, the Chamber is satisfied that *the only reasonable inference to be drawn*

[883] Case 002/01 Appeal Judgment (F36), para. 90. See also *supra* Section II.C.
[884] KHIEU Samphân's Appeal Brief (F54), para. 695.
[885] KHIEU Samphân's Appeal Brief (F54), para. 910.
[886] KHIEU Samphân's Appeal Brief (F54), para. 1611.
[887] KHIEU Samphân's Appeal Brief (F54), para. 1881.
[888] KHIEU Samphân's Appeal Brief (F54), paras 1829-1835.
[889] KHIEU Samphân's Appeal Brief (F54), para. 695.
[890] KHIEU Samphân's Appeal Brief (F54), paras 689-695 (variously depicting the Chambers' findings as vitiated by "contradictory conclusions", "evidential gaps" and "incoherence").

> *from the overall evidence is that – at a bare minimum – significant numbers of them were expelled to Vietnam, as confirmed by the Chamber's assessment of the April 1976 issue of Revolutionary Flag and Chamber's findings as to the exchange whereby Khmer Krom arrived in Tram Kak district in return for Vietnamese people who left. This satisfies the Chamber that some Vietnamese persons gathered up in Tram Kak district indeed crossed the international border and were sent to Vietnam* and that there existed an overarching intention to displace these persons across a national border.[891]

318. On the basis of the emphasised portions of this paragraph, KHIEU Samphân questions how the Trial Chamber could conclude that a large number of Vietnamese people were expelled to Vietnam on the basis of evidence which did not allow the Trial Chamber to determine the fate of particular Vietnamese persons in Tram Kak.[892] In his submission, this demonstrates that the Trial Chamber "relied solely on circumstantial evidence to extrapolate what happened to the Vietnamese people from [Tram Kak]".[893]

319. The Supreme Court Chamber has found no basis to concur with these submissions. The Trial Chamber's conclusions concerning the treatment of the Vietnamese at Tram Kak followed a comprehensive examination of the totality of the evidence regarding forcible transfer and deportation. This evidence was drawn from a plethora of sources, including the testimony of multiple eye witnesses to the treatment of the Vietnamese in Tram Kak and elsewhere, their Written Records of Interview, as well as contemporaneous Khmer Rouge era documentation, including Tram Kak District Records.[894] On the basis of this evidence, the Trial Chamber concluded that large numbers of Vietnamese were gathered up in the Tram Kak district from late 1975 into early 1976, with many expelled and/or disappearing.[895] The Trial Chamber held that this occurred within a coercive environment in which the Vietnamese people involved, who were lawfully present at the time, were expelled.[896] The Trial Chamber also found that there was an agreement between the DK and Vietnamese authorities to exchange persons, and that Khmer Krom arrived in Tram Kak in return for Vietnamese people who left the district.[897] Regarding inferences drawn from the totality of the evidence, the Trial Chamber prefaced its finding by saying that the Vietnamese of the Tram Kak district were *at a bare*

[891] Trial Judgment (E465), para. 1158 (emphasis added). The highlighted portions of this paragraph correspond to the parts of this paragraph impugned in KHIEU Samphân's Appeal Brief (F54), paras 690-691.
[892] KHIEU Samphân's Appeal Brief (F54), para. 692.
[893] KHIEU Samphân's Appeal Brief (F54), para. 695.
[894] See, *e.g.*, Trial Judgment (E465), paras 1110-1125 (one portion of many in the Trial Judgment pertaining to the treatment of the Vietnamese) are based on the testimony of a dozen witnesses, their Written Records of Interview, and Khmer Rouge era documents such as *Revolutionary Flag*, the Kraing Ta Chan Notebook and multiple contemporaneous Tram Kak District Records (variously cited in Trial Judgment (E465), fns 3707-3788).
[895] Trial Judgment (E465), para. 1125.
[896] Trial Judgment (E465), para. 1157. See also *infra* Section VII.D.1.
[897] Trial Judgment (E465), paras 1110-1125, 1156-1159, 3429-3440, 3502-3507.

minimum expelled to Vietnam. The Supreme Court Chamber finds that no reasonable trier of fact could dispute the minimalist nature of that inference. Certainly, KHIEU Samphân has not met his burden of showing that these findings were unsubstantiated or that they were not the only reasonable inferences from the totality of this evidence. His contention that these conclusions were reached only by means of extrapolations unsupported by evidence is therefore rejected.

320. In his second example,[898] KHIEU Samphân alleges that the Trial Chamber erred in finding that there was sufficient evidence of Cham people being held at Wat Au Trakuon before being taken away *en masse*. On the basis of the Trial Chamber's findings, he contends that "this circumstantial evidence was not established and was not sufficient to establish beyond reasonable doubt that Cham were being executed."[899]

321. The Trial Chamber acknowledged that while the witnesses and civil parties heard by it did not directly and personally witness the killings, it had before it multiple hearsay accounts of executions at the pagoda of people perceived as enemies, including Cham civilians, who were executed *en masse*.[900] The Trial Chamber further indicated that it heard direct evidence, from villagers of the Kang Meas District as well as from members of the security forces and militia operating at Wat Au Trakuon, of Cham people being systematically rounded up in various villages of Kang Meas District and taken to Wat Au Trakuon by militiamen. The Trial Chamber also heard accounts of Cham people being tied up and held at the pagoda before being taken away *en masse*, screams coming from the pits and calls for help, and music from loudspeakers being played at night over the screams. On this basis, the Trial Chamber concluded that a large number of people, including a majority of Cham from the Kang Meas District, Sector 41, were arrested and brought to Wat Au Trakuon in 1977, where they were executed.[901]

322. KHIEU Samphân does not particularise how the Trial Chamber erred in its findings beyond simply submitting that the evidence is insufficient. By contrast, the Trial Chamber undertook an extensive assessment of the evidence before arriving at its findings. The Trial Chamber extensively evaluated the *viva voce* evidence of seven villagers and members of the

[898] KHIEU Samphân's Appeal Brief (F54), para. 910.
[899] KHIEU Samphân's Appeal Brief (F54), para. 910, fns 1651-1652, referring to Trial Judgment (E465), paras 3302, 3306.
[900] Trial Judgment (E465), para. 3302.
[901] Trial Judgment (E465), para. 3306.

security forces then operating at Wat Au Trakuon concerning the arrests and killing of the Cham at the pagoda.[902] The Trial Chamber also noted that numerous Written Records of Interview and other documents corroborate the mass killing of Cham at Wat Au Trakuon.[903] On this basis, the Trial Chamber concluded that a large number of people perceived as enemies, including Cham people from various villages of Kang Meas District, Sector 41, were systematically arrested and executed at Wat Au Trakuon in 1977.[904] The Supreme Court Chamber rejects as unsubstantiated KHIEU Samphân's submissions concerning the Trial Chamber's evaluation of evidence concerning the presence of Cham and their execution at Wat Au Trakuon.

323. KHIEU Samphân's third example concerns CPK cadres who were purged.[905] Therein, KHIEU Samphân notes that the Trial Chamber evaluated the situation of a number of CPK cadres who were purged but it could not establish a connection between their presence at S-21 and KHIEU Samphân.[906] He also relies on the Trial Chamber's reference to a meeting with KAING Guek Eav *alias* Duch on 6 January 1979 just before the arrival of the Vietnamese, about which the chairman of S-21 allegedly gave conflicting statements, and which, in KHIEU Samphân's submission, also fails to establish his connection to S-21. On this basis, he argues that apart from circumstantial evidence within its reasoning about the purges, the Trial Chamber was unable to establish either KHIEU Samphân's presence at S-21 or his knowledge of the facility.[907]

324. KHIEU Samphân's citations are in no way inconsistent with the Trial Chamber's determination of his criminal responsibility.[908] Although finding that KHIEU Samphân never went to S-21, the Trial Chamber described meetings between KHIEU Samphân and KAING Guek Eav *alias* Duch, and noted that he issued instructions to KAING Guek Eav *alias* Duch

[902] Corresponding to Section 13.2.9.2.2. (Killing of Cham at Wat Au Trakuon) of the Trial Judgment (E465). This testimony is extensively referenced in Trial Judgment (E465), fns 11160-11220 and accompanying text.
[903] See, *e.g.*, Trial Judgment (E465), fns 11215-11220 (referencing various Written Records of Interview).
[904] Trial Judgment (E465), para. 3306 (further noting that systematic arrests and mass executions of Cham people at Wat Au Trakuon were consistent with evidence showing similar patterns of conduct in other parts of Sector 41, in particular in Kampong Siem district).
[905] KHIEU Samphân's Appeal Brief (F54), para. 1611.
[906] KHIEU Samphân's Appeal Brief (F54), para. 1611, fns 3081-3082, citing Trial Judgment (E465), paras 2300, 2312, 2320. In fn. 3081 of his Appeal Brief, KHIEU Samphân incorporates further portions of his Appeal Brief by reference. See KHIEU Samphân's Appeal Brief (F54), paras 1851-1853, 1862-1873. These paragraphs, which concern the Accused's knowledge and awareness of crimes committed in security centres and other locations, are evaluated in Section VIII.B.8.
[907] KHIEU Samphân's Appeal Brief (F54), para. 1611, fn. 3083, referring to Trial Judgment (E465), paras 2373, 2557-2558.
[908] KHIEU Samphân's Appeal Brief (F54), para. 1611, referring to Trial Judgment (E465), paras 2300, 2313, 2320, 2373, 2557-2558.

prior to the entry of Vietnamese forces into Phnom Penh.[909] The Trial Chamber also concluded that by virtue of KHIEU Samphân's regular attendance and participation at Standing Committee meetings, it was likely that he was aware of the practice of torture at S-21. Concerning his knowledge of the purges, these paragraphs also describe the arrest of several CPK cadres, including a zone secretary who used his authority to arrest the relatives of KHIEU Samphân.[910] Apart from disagreeing with the findings, KHIEU Samphân does not establish the unreasonableness of the Trial Chamber's conclusions. The allegation also ignores the Trial Chamber's extensive overall assessment of the evidence regarding his knowledge and intent, roles and responsibilities and criminal responsibility.[911]

325. In addition, KHIEU Samphân challenges inferences drawn by the Trial Chamber regarding his awareness of crimes that had been committed.[912] He argues that the Trial Chamber's conclusion that he knew of the crimes committed against the Cham during the DK period is erroneous and "based solely on a sequence of inferences and thus on inferred circumstantial evidence which served in turn as the starting point for another inference, and so on".[913] Although acknowledging the possibility of proving knowledge using indirect evidence, he contends that the Trial Chamber erred in law by making a finding of awareness in a "general, vague and overall manner by using expressions like 'some crimes', or 'during the DK period' without specifying the crimes of which KHIEU Samphân would have known, and above all if he had known about them. It then committed errors of fact on each of the pieces of circumstantial evidence on which it relied to reach the finding on KHIEU Samphân's knowledge without explaining why its finding was the sole reasonable finding possible."[914]

326. In support of these contentions, KHIEU Samphân points to a single paragraph of the Trial Judgment relating to the targeting of the Cham, which reads:

> The Chamber recalls its finding that the CPK specifically targeted the Cham throughout the DK period as part of a policy which evolved over time. While the Chamber has found that KHIEU Samphân stressed the importance of preserving "forever the fruits of the revolution and the Kampuchean race" at a time when CPK cadres in the Central Zone and in the East Zone along the Mekong river were executing a genocidal policy to destroy the Cham religious and ethnic group in DK, the timing of such speeches coincided with the destruction of the Vietnamese racial,

[909] Trial Judgment (E465), paras 2372, 2557-2558.
[910] Trial Judgment (E465), para. 2320, referring to KANG Chap, whose exercise of this power later resulted in him being punished by POL Pot. KANG Chap, who was arrested and interrogated at S-21, was executed on 31 October 1978.
[911] See Trial Judgment (E465), paras 562-624 (Roles and Responsibilities), 4201-4329 (Criminal Responsibility).
[912] KHIEU Samphân's Appeal Brief (F54), para. 1888.
[913] KHIEU Samphân's Appeal Brief (F54), para. 1881, referring to Trial Judgment (E465), para. 4236.
[914] KHIEU Samphân's Appeal Brief (F54), para. 1881.

> national and ethnic group, as such. Nevertheless, as a senior leader with unique standing in the Party Centre, KHIEU Samphân supported the common purpose and was privy to the implementation of policies aimed at establishing an atheistic and homogenous Khmer society of worker-peasants. Inherent in the policies targeting specific groups, including Cham populations, was the commission of crimes on a discriminatory basis aimed at achieving an atheistic society. The Chamber is therefore satisfied that KHIEU Samphân knew of the commission of crimes committed against the Cham during the DK period.[915]

327. The above paragraph does not demonstrate that the Trial Chamber found in a vague manner that KHIEU Samphân was aware of "some crimes", as he alleges. It refers to a genocidal policy to destroy the Cham religion and ethnic group and the destruction of the Vietnamese. Additionally, KHIEU Samphân ignores the extensive evidentiary analysis that preceded these conclusions.[916] He does not particularise which conclusions are allegedly based on erroneous generalisations or show how the Trial Chamber's generalised findings are unreasonable. He offers no plausible alternative inferences nor explains why no reasonable trier of fact could have concluded as the Trial Chamber did. The Supreme Court Chamber therefore rejects these submissions as unfounded.

328. Finally, KHIEU Samphân impugns the judgment under appeal with reference to alleged errors regarding his knowledge of living conditions in Preah Vihear.[917] The Supreme Court Chamber has declined to evaluate all contentions contained therein, on the grounds that many are insufficiently particularised to enable it to identify any specific allegations of error.[918] The specificities of the errors alleged in KHIEU Samphân's Appeal Brief are assessed elsewhere in this Judgment.[919] At this juncture, they are considered only insofar as they are alleged to demonstrate a flawed overall approach by the Trial Chamber to the assessment of evidence.

329. These allegations impugn the Trial Chamber's findings concerning KHIEU Samphân's awareness of crimes committed during the internal purges throughout the DK period, and his knowledge of security centres, work sites and cooperatives. KHIEU Samphân submits that nothing in the account of witness MEAS Voeun enables the Trial Chamber to conclude that he had knowledge of the events within the cooperatives, and that, therefore, it was wrong of the Trial Chamber to conclude that he knew of the abject working conditions at cooperatives and

[915] Trial Judgment (E465), para. 4236 (internal citations omitted).
[916] See also *infra* Section VIII.B.8.a.
[917] KHIEU Samphân's Appeal Brief (F54), paras 1829-1835.
[918] See, *e.g.*, KHIEU Samphân's Appeal Brief (F54), para. 239, fn. 336, which reads: "See factual example below: ss. 1829-1835. Conclusions on knowledge of cooperative sites: the Accused's knowledge of the Preah Vihear cooperative is synonymous with knowledge of the situation throughout DK."
[919] See especially *infra* Section VIII.B.8.c.

worksites during the DK period. In KHIEU Samphân's submission, to do so "relies solely on speculation and on the distortion of pieces of evidence" and, as such, should be annulled.[920]

330. The Trial Chamber found as follows:

> Consistently with KHIEU Samphan's contemporaneous knowledge about living conditions in cooperatives in Preah Vihear, as well as his 1987 concession that 20,000 people "died from illness and food shortage during the three-year period throughout the country", the Chamber finds that KHIEU Samphân knew of the abject working conditions at cooperatives and worksites during the DK period.[921]

331. In reaching its conclusions regarding KHIEU Samphân's knowledge of living conditions in Preah Vihear, the Trial Chamber relied on the testimony of MEAS Voeun and documentary evidence, including publications authored by KHIEU Samphân himself, as well as his own Written Record of Interview.[922] As KHIEU Samphân correctly notes, the testimony of MEAS Voeun pertains to the conditions prevailing at Preah Vihear, and not to the generality of conditions in other communes and worksites during the DK period. However, MEAS Voeun provides compelling evidence that in the latter part of 1978, he reported to KHIEU Samphân of conditions at the security centre where his wife's sister and other relatives were detained in Preah Vihear, as well as the conditions generally in that province. It also demonstrates that the Khmer Rouge spared no one, even those closely related to those at the upper echelons of the CPK, where they were deemed to be impediments to the achievement of its aims.

332. The Trial Chamber found that KHIEU Samphân's 1987 concession that 20,000 people died from illness and food shortage was consistent with his knowledge of the abject working conditions at cooperatives and worksites during the DK period.[923] These sources thus assisted the Trial Chamber in rejecting KHIEU Samphân's assertions that he was unaware of the arrest and detention of civilians, or the conditions faced by the population across the country.[924]

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[920] See KHIEU Samphân's Appeal Brief (F54), paras 1831-1835, referring to Trial Judgment (E465), paras 4216, 4233, 4235.
[921] Trial Judgment (E465), para. 4216 (internal citations omitted).
[922] See Trial Judgment (E465), paras 4216, referring to KHIEU Samphân's DK Publication "What are the Truth and Justice about the Accusations Against Democratic Kampuchea of Mass Killings from 1975 to 1978?", 15 July 1987, E3/703 (which conceded that 20,000 people died from illness and food shortage during a three-year period of the DK rule throughout the country); Trial Judgment (E465), paras 4232-4234, citing T. 4 October 2012 (MEAS Voeun), E1/130.1; Written Record of Interview of MEAS Voeun, 16 December 2009, E3/424; Written Record of Interview with KHIEU Samphân, 14 December 2007, E3/210; KHIEU Samphân's Letter, 16 August 2001, E3/205, ERN (EN) 00149526.
[923] Trial Judgment (E465), paras 4219, 4233, fn. 13819, citing DK Publication "What are the Truth and Justice about the Accusations Against Democratic Kampuchea of Mass Killings from 1975 to 1978?", 15 July 1987, E3/703.
[924] Trial Judgment (E465), para. 4234 (also noting the degree to which the influence and authority of KHIEU Samphân's position enabled him to intervene in Party affairs).

333. The Supreme Court Chamber agrees with KHIEU Samphân that information provided after specific enquiry in Preah Vihear cannot on its own lead to the inference that KHIEU Samphân was aware of the abject conditions in other communes and worksites throughout the DK period. However, the Trial Chamber did not base its overall findings concerning KHIEU Samphân's knowledge of conditions in worksites and cooperatives solely on the testimony of MEAS Voeun. The Trial Chamber's overall findings concerning KHIEU Samphân's knowledge and awareness instead followed an extensive assessment of multiple sources of evidence, in which it considered the totality of KHIEU Samphân's statements and conduct, including statements made after the fall of the DK in evaluating the extent of his contemporaneous knowledge of these crimes.[925] As the Trial Judgment under appeal amply attests, KHIEU Samphân's knowledge and awareness of crimes and conditions in worksites and cooperatives was also acquired by virtue of his position as Head of State and the functions he carried out in consequence of his responsibilities, including attendance at Standing Committee meetings.[926]

334. In sum, focusing upon a single paragraph of the verdict in isolation may create the impression that the Trial Chamber generalised its findings in relation to worksites and cooperatives from a source which pertained to Preah Vihear alone. However, the totality of the Judgment does not suggest that the Trial Chamber formulated its conclusions on the basis of impermissible inferences, generalisations, or extrapolations. The Trial Chamber's conclusions regarding KHIEU Samphân's contemporaneous knowledge of living conditions in various worksites and cooperatives instead followed an extensive assessment of multiple sources of evidence, which evaluated the totality of KHIEU Samphân's statements and conduct throughout the DK period, in addition to his roles and responsibilities at the highest echelons of the CPK.[927] This argument is accordingly rejected.

c. Alleged Errors in Relation to Exculpatory Evidence

[925] See, *e.g.*, Trial Judgment (E465), paras 562-624 (detailing KHIEU Samphân's roles and responsibilities), 4201-4319 (outlining his criminal responsibility), 4235 (indicating, on the basis of these sources and the totality of the evidence, that the Trial Chamber was satisfied that KHIEU Samphân knew of the crimes committed during the course of internal purges throughout the DK period).
[926] See, *e.g.*, Trial Judgment (E465), para. 4235 (indicating, on the basis of these sources and the totality of the evidence, that the Trial Chamber was satisfied that KHIEU Samphân knew of the crimes committed during the course of internal purges throughout the DK period).
[927] See, *e.g.*, Trial Judgment (E465), paras 562-624 (detailing KHIEU Samphân's roles and responsibilities), 4201-4319 (outlining his criminal responsibility), 4235 (indicating, on the basis of these sources and the totality of the evidence, that the Trial Chamber was satisfied that KHIEU Samphân knew of the crimes committed during the course of internal purges throughout the DK period).

335. KHIEU Samphân submits that the Trial Chamber erred in law by failing to consistently apply the principle it articulated concerning the evaluation of exculpatory evidence.[928] He alleges that the Trial Chamber failed to consider other plausible explanations, including potentially exculpatory ones, or the possibility that the evidence in question could be inculpatory for a particular issue but exculpatory for the Accused on another.[929] In particular, the Trial Chamber allegedly disregarded exculpatory evidence on behalf of KHIEU Samphân by refusing to recall his character witnesses from Case 002/01 and failing to consistently apply the established legal standards in its assessment of this evidence.[930] The Trial Chamber also allegedly applied a double standard in the treatment of inculpatory and exculpatory evidence, causing legal uncertainty for KHIEU Samphân and violating "all of his procedural rights."[931]

336. In support of these allegations, KHIEU Samphân incorporates by reference multiple other portions of his Appeal Brief and claims that the Trial Chamber's assessment of exculpatory evidence in the Trial Judgment is inconsistent with the principles espoused in paragraph 65 thereof. The multiplicity of paragraphs incorporated by reference at this juncture concern a variety of themes, including the Trial Chamber's articulation of the burden of proof, corroboration, and its treatment of publications, the writings of experts and written statements, all of which are considered elsewhere in this Judgment.[932]

337. In response, the Co-Prosecutors submit that KHIEU Samphân failed to demonstrate that the Trial Chamber erred in law by omitting exculpatory evidence in its assessment of the evidence.[933] He has failed to demonstrate that the Trial Chamber neglected to consider good character evidence, which was heard in Case 002/01, during its deliberations in this case. The fact the Trial Chamber did not change its assessment of this evidence in Case 002/02 does not imply that it omitted or ignored allegedly exculpatory evidence. The Trial Chamber simply did not find this evidence sufficient to affect its determination of an appropriate sentence in view of the seriousness of the crimes for which KHIEU Samphân was convicted.[934] In addition, KHIEU Samphân mischaracterises the evidence upon which he seeks to rely. Witnesses alleged

[928] KHIEU Samphân's Appeal Brief (F54), para. 235, citing Trial Judgment (E465), para. 65.
[929] KHIEU Samphân's Appeal Brief (F54), para. 236, citing Case 002/01 Appeal Judgment (F36), para. 418.
[930] KHIEU Samphân's Appeal Brief (F54), para. 236, citing Trial Judgment (E465), para. 4399.
[931] KHIEU Samphân's Appeal Brief (F54), para. 234.
[932] KHIEU Samphân's Appeal Brief (F54), para. 234, citing by way of an example and incorporating by reference KHIEU Samphân's Appeal Brief (F54), paras 241-242, 293-305, 312-313, 314-319, 329-330, 756, 891, 922, 999, 1195, 1235, 1279-1280, 1383, 1529, 1752, fn. 3400.
[933] Co-Prosecutors' Response (F54/1), para. 112.
[934] Co-Prosecutors' Response (F54/1), para. 113.

to have provided good character evidence or unanimously "laudatory accounts" on behalf of KHIEU Samphân did not, in fact, do so.[935] KHIEU Samphân's remaining arguments are similarly misplaced and do not establish that the Trial Chamber omitted exculpatory evidence.[936]

338. According to the Co-Prosecutors, KHIEU Samphân also fails to show that the Trial Chamber erred in law and fact by applying a double standard in evaluating exculpatory and inculpatory evidence.[937] These alleged legal and factual errors are not sufficiently specified by him. Instead, he makes broad and unsupported assertions, with no argument to substantiate his claim of error beyond simply referring to multiple paragraphs in the Trial Judgment and his Appeal Brief.[938] Contrary to his claim, the Trial Chamber did deal with exculpatory evidence, accepting and rejecting it at times.[939]

339. The Co-Prosecutors add that KHIEU Samphân's incorporation of multiple other portions of his Appeal Brief by reference, often without further comment, results in significantly duplicated arguments across multiple allegations. His cross-references to numerous other portions of his Appeal Brief are thus evaluated in detail only where his arguments pertaining to the Trial Chamber's generalised approach to exculpatory evidence can be ascertained with any particularity.[940]

340. In the Trial Judgment, the Trial Chamber found that:

> Prior to drawing an adverse inference from evidence presented at trial, the Chamber must consider the plausibility of alternative explanations, including those that may be favourable to

[935] Co-Prosecutors' Response (F54/1), para. 113, citing KHIEU Samphân's Appeal Brief (F54), paras 236, 2177-2183. The Co-Prosecutors assert that allegedly exculpatory witnesses did not, in fact, give, in relation to KHIEU Samphân, "unanimously laudatory accounts." François PONCHAUD testified that for the period through 1970, he admired the Appellant but that "what happened next was different story". Philip SHORT's testimony was similarly faint in his praise. NOU Hoan testified to the Appellant's character by referring to the Cambodian proverb "one rotten apple can rot all the other apples in the basket", and testified that when the Appellant went to live with the black-hearted Khmer Rouge, he became part of the rotten apples. He also testified that the Appellant did not love his nation but rather, destroyed it. Others admitted to a lack of knowledge of the Appellant's actions during the DK regime or to having had no contact with him during the DK era, and or that they did not know the Appellant personally. See Co-Prosecutors' Response (F54/1), paras 1305-1306.
[936] Co-Prosecutors' Response (F54/1), para. 114, citing KHIEU Samphân's Appeal Brief (F54), paras 236, 756, 1279-1280.
[937] Co-Prosecutors' Response (F54/1), para. 120.
[938] Co-Prosecutors' Response (F54/1), para. 121, fn. 461 (noting that the references to the judgment reflect only the Trial Chamber's framework for the assessment of evidence, while his multiple Appeal Brief references simply send the reader to numerous additional paragraphs of his Appeal Brief).
[939] Co-Prosecutors' Response (F54/1), para. 121, citing Trial Judgment (E465), paras 1007, 1135, 1346, 1373-1374.
[940] Co-Prosecutors' Response (F54/1), paras 122-127 (determining only paragraphs 999 and 1383 of KHIEU Samphân's Appeal Brief (F54), to meet this threshold, but rejecting the merits of his arguments contained therein).

> the Accused. For example, statements made for propagandistic purposes may diminish their reliability. Furthermore, it is essential for the Chamber to identify and consider exculpatory evidence alongside evidence which may be inculpatory on any particular issue.[941]

341. The Supreme Court Chamber stated in the Case 002/01 Appeal Judgment, which was also referenced by KHIEU Samphân, that "the finder of fact must be satisfied beyond reasonable doubt, on the basis of the totality of the evidence, that all facts forming the elements of the crimes and mode of liability are established, as well as the facts indispensable for entering a conviction."[942]

342. No errors are discernible, nor alleged by KHIEU Samphân, in relation to these paragraphs. Instead, KHIEU Samphân's assertion of error herein stems from his contention that by failing to call certain character witnesses on his behalf, the Trial Chamber ignored exculpatory evidence and thus erred in its determination of sentence.

343. In paragraph 4399 of the Trial Judgment, which pertains to character witnesses, the Trial Chamber acknowledged that "[n]o character witnesses were heard by the Trial Chamber in respect of NUON Chea or KHIEU Samphân." However, the Trial Chamber noted in a footnote to that paragraph that it had previously considered the evidence of five-character witnesses who testified on behalf of KHIEU Samphân during Case 002/01.[943]

344. The Trial Chamber further recalled that in Case 002/01, it had heard these witnesses and concluded that KHIEU Samphân may have treated his wife well and been kind to people in specific instances based on this evidence.[944] However, in the Case 002/01 Trial Judgment, the Trial Chamber determined that these factors could not play any significant role in mitigating crimes such as those for which KHIEU Samphân was convicted. In view of the seriousness of these crimes, the Trial Chamber in Case 002/01 declined to give this evidence undue weight.[945]

345. These findings in Case 002/01 were affirmed on appeal, with this Chamber rejecting as baseless the argument that the Trial Chamber erred in failing to take account of KHIEU Samphân's good character.[946] The Supreme Court Chamber considered it obvious that the Trial

[941] Trial Judgment (E465), para. 65 (citations omitted).
[942] Case 002/01 Appeal Judgment (F36), para. 418.
[943] Trial Judgment (E465), fn. 14190. KHIEU Samphân correctly identifies these witnesses as SO Socheat, TUN Soeun, SOK Roeu, Philippe JULLIAN-GAUFRES and CHAU Sok Kon in KHIEU Samphân's Appeal Brief (F54), para. 2178, fn. 4179.
[944] Trial Judgment (E465), fn. 14190, citing Case 002/01 Trial Judgment (E313), para. 1103.
[945] Case 002/01 Trial Judgment (E313), para. 1103.
[946] Case 002/01 Appeal Judgment (F36), para. 1115.

Chamber *did* give consideration to KHIEU Samphân's character as a potentially mitigating factor: it merely declined to afford this evidence undue weight.[947] Furthermore, this Chamber saw no contradiction in the Trial Chamber's conclusion that a person may have been kind in specific instances whilst also finding that this did not entitle him to significant mitigation in relation to the seriousness of the crimes for which he was convicted.[948]

346. Although KHIEU Samphân correctly notes that the Trial Chamber did not recall these witnesses in Case 002/02, the Supreme Court Chamber disagrees that the Trial Chamber thereby "validated the incorrect examination made previously rather than apply itself to a more thorough assessment of the value to be given to these testimonies."[949] The Supreme Court Chamber has previously refuted allegations of error in the Trial Chamber's evaluation of this evidence, determining that the Trial Chamber was correct in giving limited weight to KHIEU Samphân's purported good character as a mitigating factor in sentencing. He provides no cogent basis for the Supreme Court Chamber to reconsider its previous assessment.

347. In view of the limited weight accorded to this exact same evidence in Case 002/01, and the Supreme Court Chamber's endorsement of the Trial Chamber's evaluation of it, the Trial Chamber exercised its discretion correctly in declining to recall these witnesses in Case 002/02. As a re-hearing of these witnesses in Case 002/02 could not in any case have materially affected the Case 002/02 Trial Judgment, KHIEU Samphân's arguments in this regard are rejected. The Supreme Court Chamber also found, elsewhere in this Judgment, that the evidence characterised by KHIEU Samphân as "laudatory" was, in fact, not so. In any case, nor was it ignored by the Trial Chamber.[950]

[947] Case 002/01 Appeal Judgment (F36), para. 1115.
[948] Case 002/01 Appeal Judgment (F36), para. 1115.
[949] KHIEU Samphân's Appeal Brief (F54), para. 2178 (internal citations omitted).
[950] In this respect, the Co-Prosecutors correctly note that allegedly exculpatory witnesses did not, in fact, give, in relation to KHIEU Samphân, "unanimously laudatory accounts." François PONCHAUD testified that for the period through 1970, he admired the Appellant but that "what happened next was different story". Philip SHORT's testimony was similarly faint in his praise. NOU Hoan testified to the Appellant's character by referring to the Cambodian proverb "one rotten apple can rot all the other apples in the basket", and testified that when the Appellant went to live with the black-hearted Khmer Rouge, he became part of the rotten apples. He also testified that the Appellant did not love his nation but rather, destroyed it. Others admitted to a lack of knowledge of the Appellant's actions during the DK regime or to having had no contact with him during the DK era, and or that they did not know the Appellant personally. See Co-Prosecutors' Response (F54/1), paras 1305-1306.

348. The remaining paragraphs of KHIEU Samphân's Appeal Brief, to which he refers in this challenge, without further explanation, are also not indicative of a failure to consider or consistently evaluate exculpatory.[951]

349. KHIEU Samphân incorporates by reference a large number of additional paragraphs of his Appeal Brief as allegedly illustrative of a double standard in the Trial Chamber's assessment of exculpatory evidence *vis-à-vis* inculpatory evidence.[952] The majority of these paragraphs either do not raise any obvious issue pertaining to the evaluation of exculpatory evidence, or are arguments that have already been fully evaluated elsewhere in this Judgment. The Supreme Court Chamber considers only arguments referenced by KHIEU Samphân in paragraphs 999 and 1383 of his Appeal Brief to warrant further consideration when exercising its discretion to disregard allegations that are insufficiently particularised or fail to identify a discernible error with sufficient specificity. However, these arguments contain a number of flaws, prompting the Supreme Court Chamber to reject them.

350. KHIEU Samphân contends in paragraph 999 of his Appeal Brief that the Trial Chamber erred by allegedly relying erroneously on a copy of a DK Report dated 20 March 1978 of low probative value. He contends, without identifying or elaborating on the impugned findings, that the Trial Chamber's conclusion that a number of Vietnamese civilians died as a result of the sinking of a boat on 19 March 1978 "is not the only reasonable finding possible" and that this evinces a "double standard in [the Trial Chamber's] assessment of evidence."[953]

351. The basis for KHIEU Samphân's allegation of inconsistency is that elsewhere in the Trial Judgment, the Trial Chamber held that the killing of other Vietnamese could not be substantiated on the basis of a telegram from the West Zone dated 4 August 1978, on the grounds that the telegram alone was insufficient to prove beyond a reasonable doubt a distinct incident or incidents of killing. The Trial Chamber's caution was because the telegram did not

[951] KHIEU Samphân's Appeal Brief (F54), para. 2177 (referenced in para. 236, fn. 321) incorporates by reference arguments that the Trial Chamber did not properly take account of his state of health. There is no discernible error. Trial Judgment (E465), para. 4398 (The Trial Chamber noted that the appropriate sentence will always have to be determined based on the facts of the specific case and the level of culpability of the individual accused, and concluded that the circumstances of this case were not so exceptional so as to warrant consideration of ill health as a mitigating factor). KHIEU Samphân's Appeal Brief (F54), para. 756 (KHIEU Samphân challenges the Trial Chamber's finding that Vietnamese in Tram Kak District were rounded up, deported and/or disappeared. This paragraph does not raise any issue of exculpatory evidence. The arguments in KHIEU Samphân's Appeal Brief (F54), paras 1279-1280, which challenge the Trial Chamber's findings regarding forced marriage, also do not raise any clear issues regarding exculpatory evidence).
[952] KHIEU Samphân's Appeal Brief (F54), fn. 316, referring to paras 241-242, 293-305, 312-313, 314-319, 329-330, 891, 922, 999, 1195, 1235, 1383, 1529, 1752, fn. 3400.
[953] KHIEU Samphân's Appeal Brief (F54), paras 998-999.

provide sufficiently precise information about the exact circumstances of the killings, was unclear about the sources of the number of deaths reported, and was not corroborated by other evidence.[954]

352. While KHIEU Samphân has not identified the impugned portions of the Trial Judgment, he appears to be referring to the Trial Chamber's findings in Section 13.3.9.1, entitled Capture of Vietnamese Boats, and in particular, paragraph 3460 of the Trial Judgment.[955]

353. In paragraph 3460, the Trial Chamber referred to a Division 164 report dated 20 March 1978, in which MEAS Muth informed SON Sen of two incidents involving Vietnamese boats, following a five-paragraph review of multiple sources of evidence. In the first incident, on 19 March 1978, Division 164 fired at a Vietnamese motorboat one kilometre south of Koh Khyang, causing it to sink. The second incident occurred at Koh Tang Island on 20 March 1978 and involved the capture of two Vietnamese motorboats. According to the report, 76 Vietnamese people, both young and old, male and female, were tied up and brought to the mainland, and they lost two persons who fell into the water because "the smaller motor-boat was shaky and plunged."[956] On this basis, the Trial Chamber was "satisfied that Vietnamese boats entering DK territorial waters were systematically seised or otherwise targeted during the DK period, and that a number of Vietnamese fisherman and refugees were killed as a result, either on the spot or short[ly] after they were ashore."[957]

354. As a result, paragraph 3460 does not demonstrate that the Trial Chamber applied a double standard in assessing exculpatory and inculpatory evidence. The fact that the Trial Chamber found certain evidence sufficient to support findings in one incident while finding different evidence insufficient in another incident, does not *per se* evince a double standard or inconsistency. In the paragraphs preceding paragraph 3460, the Trial Chamber referred to multiple sources of evidence, including the testimony of military commanders and members of Division 164, as well as DK Report E3/997, as the basis for its overall conclusion in paragraph 3493. The Trial Chamber concluded that it was satisfied that a number of Vietnamese

[954] KHIEU Samphân's Appeal Brief (F54), para. 999, fn. 1840, citing Trial Judgment (E465), para. 3471.
[955] This subsection comprises paragraphs 3456-3461 of the Trial Judgment (E465), which are contained in Section 13.3.9, pertaining to Killing of Vietnamese Civilians Outside Prey Veng and Svay Rieng provinces.
[956] Trial Judgment (E465), para. 3460, citing DK Report, 20 March 1978, E3/997, ERN (FR) 00233649.
[957] Trial Judgment (E465), para. 3461.

fishermen and refugees were intentionally killed by CPK forces on several dates, including "on 19 March 1978 as reported by Division 164."[958]

355. DK Report E3/997 is a contemporaneous DK-era document produced by the military chain of command, not a document of low probative value. KHIEU Samphân has not dislodged the presumption of relevance and reliability, including authenticity, that attaches to this document, and in the absence of efforts at trial to request or obtain access to originals of copies of documents supplied by the Documentation Center of Cambodia ("DC-Cam"), he cannot sustain a complaint before the Supreme Court Chamber that the document is a copy.

356. KHIEU Samphân's speculation about the fate of the persons whose boat was sunk, as recorded in DK Report E3/997, is also insufficient to establish any error on the part of the Trial Chamber.[959] Moreover, he has not established that any such alleged error was critical to the verdict or resulted in a miscarriage of justice. Consequently, the Trial Chamber correctly relied on DK Report E3/997, read in conjunction with other evidence, and he has not discharged his burden of showing that the Trial Chamber applied a double standard in assessing exculpatory and inculpatory evidence.

357. KHIEU Samphân alleges, without further particularisation, that the Trial Chamber "systematically rejected all the statements given by cadre except where they mention evidence that it considers as incriminatory or exculpatory."[960] He contends, also without specificity, that the Trial Chamber applied a double standard in its treatment of inculpatory and exculpatory evidence. However, he does not demonstrate where the Trial Chamber allegedly discarded the abundantly-corroborated evidence of cadre, whilst "systematically accept[ing] the credibility of all of the statements made by Civil Parties", notwithstanding their allegedly inconsistent, isolated or uncorroborated nature.[961]

358. Instead, the Trial Chamber copiously considered KHIEU Samphân's arguments regarding the civil parties whose evidence he challenges due to alleged inconsistencies.[962] Following careful consideration, these alleged inconsistencies were determined to be minor

[958] Trial Judgment (E465), para. 3493.
[959] KHIEU Samphân's Appeal Brief (F54), para. 998.
[960] KHIEU Samphân's Appeal Brief (F54), para. 1383.
[961] KHIEU Samphân's Appeal Brief (F54), para. 1383.
[962] See, *e.g.*, KHIEU Samphân's Appeal Brief (F54), paras 1386-1388 (describing the testimony of several Civil Parties, including OM Yoern, PREAP Sokhouern and MOM Vun, to contain "omissions" and "belated, last-minute corrections").

discrepancies that had no bearing on their overall credibility.[963] Furthermore, his arguments are essentially repeated in relation to other challenges.

359. The Supreme Court Chamber consequently finds that KHIEU Samphân has failed to show that the Trial Chamber disregarded exculpatory evidence or employed a double standard in its overall assessment of inculpatory and exculpatory evidence. On this basis, it is also impossible to conclude that his procedural rights were breached. Accordingly, his arguments are rejected in this regard.

d. Number of Evidentiary Items and Probative Value

360. KHIEU Samphân submits that the Trial Chamber erred in law by contradicting itself in its reasoning in Case 002/02, and by failing to consistently apply established principles regarding the assessment and probative value of a number of sources of evidence. In doing so, the Trial Chamber breached its obligation to assess the entire body of evidence, to refrain from assessing it piecemeal, and to avoid "adding up" evidentiary items in order to meet the burden of proof.[964] KHIEU Samphân refers principally to paragraph 2026 of his Appeal Brief, and to paragraph 4271 of the Trial Judgment to support these claims.[965]

361. The Co-Prosecutors respond that KHIEU Samphân does not establish that the Trial Chamber erred in this manner.[966]

362. According to paragraph 4271 of the Trial Judgment:

> KHIEU Samphan vocally supported the CPK's policies concerning the deportation of the Vietnamese. In 1975 and 1976, he attended and personally lectured at events stressing the importance of "evacuating" all Vietnamese from Cambodia. At this time, he specifically lectured Cambodian returnees from abroad on the common purpose, including that "all people in Kampuchea had to do farming" and remarked that those who could not – "especially the Vietnamese" – "would be sent back to Vietnam". He repeated this call in April 1978, a point at which the CPK's policy had evolved from their deportation to their destruction. After the shift in the CPK's policy toward the Vietnamese in 1977, KHIEU Samphân lectured at indoctrination sessions that the "Khmer had to be united" and that the "Khmer shall be free of [the] Vietnamese", while also attending and lecturing at political training sessions at which the Vietnamese and their "agents" were denounced as enemies.[967]

[963] See Trial Judgment (E465), paras 3648-3661.
[964] KHIEU Samphân's Appeal Brief (F54), para. 240, citing Trial Judgment (E465), para. 40, fns 96-99.
[965] KHIEU Samphân's Appeal Brief (F54), fn. 337, referring to, inter alia, Trial Judgment (E465), paras 40, 4271, fns 96-99, 13938, 13939, and numerous additional references therein. See also KHIEU Samphân's Appeal Brief (F54), fn. 338, referring to Trial Judgment (E465), paras 3517, 3385, 3390-3391, 3396, fn. 11436.
[966] Co-Prosecutors' Response (F54/1), paras 128-130.
[967] Trial Judgment (E465), para. 4271 (citations omitted).

363. In paragraph 2026 of his Appeal Brief and other paragraphs referenced therein, KHIEU Samphân argues that several factual findings regarding what he is alleged to have said about the Vietnamese and Office S-71 Chairman CHHIM Sam Aok *alias* Pang are improperly based on EK Hen's testimony, which he alleges is contradictory and lacking in credibility.[968] EK Hen, a worker in a garment unit under the authority of Office 870, testified concerning a training session conducted by KHIEU Samphân that she attended, with 400 to 500 other participants, during which KHIEU Samphân explained that "Khmer had to be united and Khmer shall be free of Vietnamese or *Yuon*."[969]

364. KHIEU Samphân does not explain why EK Hen's evidence should be given so little credence, beyond stating, erroneously, that EK Hen is the sole evidentiary source regarding speeches by KHIEU Samphân.[970] In fact, her evidence regarding his speeches and their contents is corroborated by many other sources referred to in the Trial Judgment.[971] In other parts of his Brief cross-referenced by this challenge, EK Hen's evidence is described variously as "lacking credibility", "inconsistent", and as being subject to other possible interpretations.[972] EK Hen herself is described as confused and with poor memory.[973] Contrary to KHIEU Samphân's depiction of her evidence, the Trial Chamber found the detailed information provided by EK Hen, particularly concerning political rallies and trainings given by KHIEU Samphân, to be useful and credible.[974] Neither the trial record nor his submissions demonstrate any particular deficiency in EK Hen's account of the events she attended and recalled, and the Supreme Court Chamber accepts the Trial Chamber's reliance on it.

365. Finally, KHIEU Samphân criticises the Trial Chamber for seeking to corroborate EK Hen's testimony with the transcript of an interview with NEOU Sarem on *Voice of America*, claiming that this statement was made outside of a judicial context and has very little probative

[968] KHIEU Samphân's Appeal Brief (F54), para. 2026, referring to paras 1075, 1759, 1892-1894.
[969] Trial Judgment (E465), para. 3390, citing T. 3 July 2013 (EK Hen), E1/217.1, pp. 40, 42, 47.
[970] KHIEU Samphân's Appeal Brief (F54), fn. 338.
[971] Political meetings, training sessions and speeches given by KHIEU Samphân's are described by various witnesses in several portions of the Trial Judgment. See, *e.g.*, Trial Judgment (E465), paras 607, 3390 (noting that the Trial Chamber heard testimony from "a number of witnesses" (including EK Hen) pertaining to lectures given by the Appellant and his co-Accused, which labelled the Vietnamese as enemies), 3406, 3739, 3916, 3961 (describing a corroborative account by Civil Party PREAP Chhon, who told the Chamber that, in delivering a speech to a group of East Zone evacuees at Chbar Ampov market in 1977, KHIEU Samphân's stated that the goal of the revolution was to eliminate the Lon Nol regime, as well as capitalist, feudalist and intellectual elements. (T. 30 November 2016 (PREAP Chhon), E1/504.1, pp. 90, 95-96)), 3968, 4272.
[972] KHIEU Samphân's Appeal Brief (F54), para. 1075.
[973] KHIEU Samphân's Appeal Brief (F54), paras 1759, 1893.
[974] See, *e.g.*, Trial Judgment (E465), paras 3390, 4272, fns 11437, 13946 (further describing EK Hen's in-court testimony as having been corroborated by her Written Record of Interview (E3/474)).

value.[975] He further argues that it is unclear how the content of this interview could potentially corroborate the testimony of EK Hen since it placed the training received by EK Hen in mid-1978 and that of NEOU Sarem in late 1976. KHIEU Samphân contends that it is, therefore, impossible for the Trial Chamber to find, based on this evidence, that his words "mirrored the substance form and ultimate implementation of the common purpose of deporting all Vietnamese peoples across the border in 1975 and 1976."[976] Furthermore, and even if his statements reflected the common purpose of deporting the Vietnamese, "this does not exempt the Chamber from the necessity of substantiating his [KHIEU Samphân's] knowledge that Vietnamese people from the [Tram Kak] district were deported in late 1975, early 1976 and from the Prey Veng province in 1975 and 1976. In the absence of evidence, the Chamber cannot find that KHIEU Samphân was aware that the crime of deportation was committed against the Vietnamese during the DK."[977]

366. Arguments pertaining to KHIEU Samphân's alleged lack of knowledge concerning crimes against the Vietnamese are amply addressed elsewhere in this Judgment.[978] For the purposes of this challenge, it suffices to note that the Trial Chamber's findings in this respect do not hinge on the testimony of any single witness but rather on the basis of multiple evidentiary sources.

367. Regarding the basis for evaluating the totality of the evidence, the Trial Chamber conducted an extensive evidentiary analysis in order to establish KHIEU Samphân's criminal responsibility, including his knowledge and intent regarding crimes committed against the Vietnamese.[979] Paragraph 4271 and associated parts of the Trial Judgment refer back to numerous parts of Section 13:3: Treatment of the Vietnamese, all of which refer to significant quantities of evidence and multiple sources that corroborate it.[980] Far from demonstrating a piecemeal approach to the evidence as alleged by KHIEU Samphân, these parts of the Trial Judgment show that the Trial Chamber conducted a detailed and painstaking assessment of KHIEU Samphân's criminal responsibility, based on multiple credible sources of evidence.

[975] KHIEU Samphân's Appeal Brief (F54), para. 1894, fn. 3671, citing Trial Judgment (E465), para. 3390, fn. 11437.
[976] KHIEU Samphân's Appeal Brief (F54), para. 1894, citing Trial Judgment (E465), para. 4237.
[977] KHIEU Samphân's Appeal Brief (F54), para. 1894.
[978] See *infra* Section VIII.B.8.c.
[979] See, *e.g.*, Trial Judgment (E465), paras 562-624 (Roles and Functions), 4201-4329 (Criminal Responsibility), 3961. See also *infra* Section VIII.B.8.c.
[980] See Trial Judgment (E465), fns 13936-13939, referring to Section 13:3: Treatment of the Vietnamese, paras 3400, 3416, 3390, 3517.

368. KHIEU Samphân fails to undermine the probative value of the testimonies of witnesses, such as EK Hen, and other sources of evidence cited by the Trial Chamber in support of its findings regarding his support for CPK policy. KHIEU Samphân also fails to demonstrate that the Trial Chamber's conclusions were based solely upon piecemeal evidence or a significant volume of evidence with low probative value. To the contrary, the Trial Chamber based its conclusions on an exhaustive analysis of the evidence *in toto.* Consequently, the Supreme Court Chamber finds that KHIEU Samphân has not demonstrated any error in the Trial Chamber's overall assessment of the evidence. This challenge is accordingly rejected.

e. Corroboration

369. In relation to the Trial Chamber's approach to corroboration, which KHIEU Samphân does not generally dispute, he contends that the Trial Chamber contradicted itself in its reasons by failing to consistently apply the established principle.[981] He states that the Case 002/02 trial called for particular scrupulousness because the events in question occurred more than 40 years ago and the evidence adduced is particularly fallible.[982] In support of his contention, KHIEU Samphân relies upon paragraphs 49 and 53 of the Trial Judgment and factual examples drawn from five paragraphs contained elsewhere in his Appeal Brief.[983]

370. In response, the Co-Prosecutors submit that KHIEU Samphân does not establish that the Trial Chamber erred.[984]

371. In paragraph 49 of the Trial Judgment, the Trial Chamber held that:

> By virtue of their special status, Civil Parties were not required to take an oath. The Chamber approaches Civil Party, witness and expert evidence on a case-by-case basis in light of the credibility of the testimony and in consideration of factors such as the demeanour of the person testifying, consistencies and inconsistencies in relation to material facts, possible ulterior motivations, corroboration and all of the circumstances of the case.[985]

372. The Trial Chamber further held in paragraph 53 of the Trial Judgment that:

> In a related matter, the NUON Chea Defence takes issue with the practice used during some examinations of refreshing the recollection of witnesses and Civil Parties by quoting their prior statements during their testimony. It appears to submit that this practice amounts to leading the witness or Civil Party, thus rendering the testimony of these individuals unreliable. The Chamber observes that these objections were rejected where open questions were first asked and when

[981] KHIEU Samphân's Appeal Brief (F54), paras 241-242.
[982] KHIEU Samphân's Appeal Brief (F54), para. 242.
[983] KHIEU Samphân's Appeal Brief (F54), fns 341, 342, referring to paras 238, 312-313, 781, 866.
[984] Co-Prosecutors' Response (F54/1), para. 134.
[985] Trial Judgment (E465), para. 49 (internal citations omitted).

> quotes were made with the view to confronting the author of the evidence with his or her own statements. The Chamber further recalls that the credibility of testimony is assessed on a case-by-case basis, taking into consideration factors such as consistencies and inconsistencies in relation to material facts, corroboration and all the circumstances of the case. The extent of leading questions, such as the use of prior statements to refresh the recollection of a witness or Civil Party, is also relevant to the credibility and reliability of testimony which the Chamber will take into consideration.[986]

373. Whilst concurring with the principles articulated by the Trial Chamber in these passages, KHIEU Samphân contends, with reference to paragraphs 781 and 866 of his Appeal Brief, that the Trial Chamber failed to consistently uphold these standards.

374. KHIEU Samphân takes issue with aspects of the Trial Chamber's finding that certain deaths on worksites were caused by accidents, in particular landslides which buried workers. He alleges that the testimony of NUON Narom is insufficient to support this conclusion, as she stated during her evidence that although working at the location in question for six or seven months, no one died.[987] In KHIEU Samphân's view, the Trial Chamber could thus not rely on her testimony to find that any death had ensued. KHIEU Samphân similarly dismisses the testimonies of HUN Sethany, UN Rann and UTH Seng as "only hearsay" and thus incapable of "serv[ing] as corroborating testimony concerning the death of a person caused by a landslide given the weakness of the alleged eyewitness evidence."[988]

375. These findings are contained in Section 11.2.12 of the Trial Judgment, concerning work conditions and quotas. This section describes arduous work conditions at the 1st January Dam worksite. Paragraph 1535 summarises testimony concerning landslides which killed or injured several workers. Whilst the accounts of some witnesses do contain hearsay,[989] there is no absolute prohibition against the utilisation of such evidence provided this is done with caution. Further, the witnesses' accounts are credible when viewed in light of the deplorable work conditions existing at worksites and cooperatives. They also possess inherent *indicia* of reliability, as they are clear in depicting what the witnesses observed, and the sources of this information.

[986] Trial Judgment (E465), para. 53.
[987] KHIEU Samphân's Appeal Brief (F54), para. 781, fn. 1397, citing T. 1 September 2015 (NUON Narom), E1/304.1, 10.49.39 to 10.51.56.
[988] KHIEU Samphân's Appeal Brief (F54), para. 781, fn. 1401, referring to Trial Judgment (E465), fn. 5236.
[989] See, *e.g.*, Trial Judgment (E465), fn. 5236, citing T. 28 May 2015 (UN Rann), E1/307.1, pp. 14, 80 (stating that she also heard about the landslide which covered three workers, killing one on the spot. But she did not observe the incident as it happened far away from her place of work and sleeping quarters).

376. The Supreme Court Chamber thus finds no error in the Trial Chamber's reliance on the evidence of eye-witnesses such as NUON Narom and the hearsay evidence of UN Rann and others. It also bears emphasising that the impugned portions of the Judgment are references to selected parts of witness statements within a single footnote of the Trial Judgment. It is difficult to see how any such alleged error, even if substantiated, could have an impact on the Trial Judgment sufficient to warrant the corrective intervention of the Supreme Court Chamber.

377. KHIEU Samphân submits that the Trial Chamber erred in relying on the written statements of Civil Parties UONG Dos and SOK El in finding certain killings at the Phnom Kraol Security Centre to have occurred.[990] He further faults the Trial Chamber for failing to take account of the circumstances in which these statements were recorded.[991] These arguments will be dealt with in the section of this Judgment addressing the crime against humanity of murder at Phnom Kraol.[992] The Supreme Court Chamber has overturned the finding of the crime against humanity of murder at Phnom Kraol, which was based on these written statements.

378. Finally, KHIEU Samphân contends, without identifying any particular error in the Trial Judgment, that corroboration is a guiding principle in the law of evidence and criminal procedure. This is because it requires evidence to be subjected to examination, and prohibits the drawing of inferences based on hearsay.[993] In support of this contention, he cites paragraphs 238 and 312-313 of his Appeal Brief. As the arguments contained in these paragraphs are fully canvassed elsewhere in this Judgment, they are not evaluated further under this challenge.[994]

379. For the foregoing reasons, KHIEU Samphân has not demonstrated that the Trial Judgment is vitiated, whether in whole or in part, because he alleges that the Trial Chamber disregarded the evidentiary principles pertaining to corroboration. This argument accordingly fails.

f. Inconsistencies

380. In paragraph 243 of his Appeal Brief, KHIEU Samphân cites the framework established by the Trial Chamber for the assessment of evidence in paragraphs 49-54 and 61 of the Trial

[990] KHIEU Samphân's Appeal Brief (F54), paras 865-866, referring to Civil Party Application of UONG Dos, 02 March 2016, E3/6260; Civil Party Application of SOK El, 30 August 2016, E3/6314.
[991] KHIEU Samphân's Appeal Brief (F54), para. 866, citing Case 002/01 Appeal Judgment (F36), para. 430.
[992] See *infra* Section VII.A.5.e.
[993] KHIEU Samphân's Appeal Brief (F54), para. 242.
[994] See *supra* Section V.E.1.b and *infra* Section V.E.1.h.

Judgment.[995] While agreeing with the Trial Chamber's articulation in these paragraphs, he alleges that the Trial Chamber erred in law by contradicting this framework in its reasoning and by failing to consistently apply it.[996] In support of this contention, KHIEU Samphân refers to alleged contradictions in the evidence of EM Oeun, as described in paragraphs 1757-1758 of his Appeal Brief.[997]

381. In response, the Co-Prosecutors submit that KHIEU Samphân does not establish any error in the Trial Chamber's assessment of any alleged contradictions or inconsistencies in this evidence.[998]

382. The legal framework cited by KHIEU Samphân in paragraphs 49-54 and 61 of the Trial Judgment bears no obvious relationship to this challenge and is largely reproduced in the arguments above.

383. In paragraphs 1757-1758 of his Appeal Brief, KHIEU Samphân merely reiterates that EM Oeun is not a credible witness. He opines that his testimony was "rife with contradictions and inconsistencies", describing his "purportedly word-for-word recollection" of KHIEU Samphân's speech calling for the surveillance of enemies as "unlikely".[999] EM Oeun is also alleged to have become confused regarding the timeline of events, and to have provided "multiple different explanations" depending on who was questioning him.[1000] In consequence, KHIEU Samphân alleges that the Trial Chamber "could not reasonably rely on his testimony" and that by disregarding these contradictions despite efforts by the Defence to highlight them during questioning, has failed in its duty to provide a properly substantiated decision.[1001]

384. The sole portion of the Trial Judgment impugned by KHIEU Samphân in this respect is footnote 1904.[1002] However, he identifies no particular error in relation to the extensive and

[995] KHIEU Samphân's Appeal Brief (F54), para. 243, citing Internal Rules, Rule 87(3); Case 002 Decision on Co-Prosecutors' Rule 92 Submission (E96/7); Case 002, Decision on Objections to the Admissibility of Witness, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, 15 August 2013, E299; Decision on Objections to Documents in Case 002/02 (E305/17).
[996] KHIEU Samphân's Appeal Brief (F54), para. 243.
[997] KHIEU Samphân's Appeal Brief (F54), para. 243, fn. 347.
[998] Co-Prosecutors' Response (F54/1), paras 139-142.
[999] KHIEU Samphân's Appeal Brief (F54), para. 1757.
[1000] KHIEU Samphân's Appeal Brief (F54), para. 1758.
[1001] KHIEU Samphân's Appeal Brief (F54), para. 1758.
[1002] KHIEU Samphân's Appeal Brief (F54), fn. 3386, referring to Trial Judgment (E465), fn. 1904; T. 27 August 2012 (EM Oeun), E1/115.1, pp. 25-33, 45-46.

detailed references contained therein.[1003] This footnote is found in paragraph 607 of the Trial Judgment, where the Trial Chamber discusses KHIEU Samphân's attendance and lectures, at political training sessions held at Borei Keila (K-6) and the Khmer-Soviet Friendship Institute of Technology (K-15) between 17 April 1975 and 1978, at times alongside NUON Chea and other CPK leaders. Participants at these sessions numbered in the tens to the thousands. They were variously instructed on revolutionary principles, cooperatives, agricultural techniques and economic matters, with KHIEU Samphân lecturing on identifying "enemies" and uncovering "traitors".

385. Civil Party EM Oeun, a former medic, attended one of the lectures at Borei Keila at which POL Pot, NUON Chea, KHIEU Samphân, and other senior leaders were present. While EM Oeun is referenced in multiple portions of the Trial Judgment, his evidence is most closely evaluated in paragraphs 607, 3942, 3943 and 3967: passages of the Judgment that pertain to mass rallies and political training sessions, and in particular, the identification and routing out of enemies. In these paragraphs and in related findings, EM Oeun is one source among many

[1003] Trial Judgment (E465), fn. 1904 reads in its entirety: "T. 17 May 2012 (PEAN Khean), E1/73.1, pp. 20-23 (stating that he saw 'Uncle Hem' at Borei Keila administering 'high-level political education' to cadres and discussed the development of the country and cooperatives, moral education and building a prosperous country); T. 25 July 2012 (ROCHOEM Ton alias PHY Phuon), E1/96.1, pp. 77-79 (recalling a training session by KHIEU Samphan's at the 'Soviet Technical School' where the internal and external political situation and 'common enemy' were discussed); T. 1 August 2012 (ROCHOEM Ton alias PHY Phuon), E1/100.1, pp. 94-96 (recalling 40 participants having taken part at the training session at the Soviet Technical School, including future Office 870 and Ministry of Foreign Affairs staff, cadres and combatants); T. 7 August 2012 (ONG Thong Hoeung), E1/103.1, pp. 97-99 (recalling being told by his wife that she attended a training session by KHIEU Samphan at the Institute of Technology (K-15) after their return to Cambodia); T. 23 August 2012 (EM Oeun), E1/113.1, pp. 79-87, 97-99 (recalling the 'great leap forward' being discussed at Borei Keila, with POL Pot, NUON Chea and KHIEU Samphan's, who was a guest speaker alongside HU Nim, addressing 'approximately 2,000 attendees' including those ranked 'at least' district secretaries or deputy secretaries); T. 27 August 2012 (EM Oeun), E1/115.1, pp. 25-33, 45-46 (clarifying that KHIEU Samphan's was present during POL Pot's introductory session about the 'great leap forward', that any detractors from the 'great leap forward' were considered enemies and that KHIEU Samphan's talked about 'uncover[ing] the traitors of the Revolution and the infiltrated enemies'); T. 28 August 2012 (EM Oeun), E1/116.1, p. 4 (clarifying that he attended the Borei Keila training session in late 1977); T. 20 September 2012 (CHEA Say), E1/124.1, pp. 30-37, 71 (recalling a three or four-day training session at Borei Keila or the Technical Institute by NUON Chea and KHIEU Samphan's about economisation and rebuilding the country); T. 6 May 2013 (Philip SHORT), E1/189.1, pp. 74-75 (referring to political seminars by KHIEU Samphan's and NUON Chea about a range of topics including military, economic, diplomatic and political matters); T. 7 May 2013 (Philip SHORT), E1/190.1, pp. 17-19 citing Book by P. Short: Pol Pot: The History of a Nightmare, E3/9, pp. 316-317, ERN (En) 00396524-00396525 (discussing political education of returnees); T. 3 July 2013 (EK Hen), E1/217.1, pp. 40-48, 63, 78-82, 87-88, 90-98 (recalling two lectures in 1976 or 1977, and 1978, at which KHIEU Samphan lectured between 400 to 500 participants about work quotas, including the production of three tonnes of rice per hectare, and Vietnamese collaborators). See also, T. 6 June 2012 (SAO Sarun), E1/82.1, pp. 16-18 (recalling study sessions at Borei Keila and possibly the Technical Institute ['a location in between Borei Keila and Russian Confederation Boulevard'] at which he saw KHIEU Samphân's name as one of the participants, but only recalling having seen NUON Chea); T. 30 August 2016 (CHEA Dieb), E1/466.1, pp. 87-90 (recalling two occasions where she saw Khieu Samphan's, once at Wat Ounalom and once at Borei Keila); T. 26 July 2012 (ROCHOEM Ton alias PHY Phuon), E1/97.1, p. 93 (stating that 'instil[ling] political and ideological standpoints and leadership […] was the portfolio of the politburo [i.e. the Standing Committee])".

relied upon by the Trial Chamber in reaching its conclusions regarding the contents of KHIEU Samphân's speeches and his participation in training and re-education sessions. As KHIEU Samphân states, the alleged contradictions in EM Oeun's evidence to which his adverts were pointed out at trial, and thus presumably taken into account by the Trial Chamber in its deliberations and weighed when reaching its verdict.

386. It is difficult to discern from KHIEU Samphân's selective dissection of the evidence of EM Oeun any generalised defect in the Trial Chamber's approach to contradictions in the totality of the evidence in Case 002/02. This argument is dismissed.

g. Cultural Bias

387. KHIEU Samphân submits that the Trial Chamber judges displayed cultural bias when referring to living conditions and hygiene at the Trapeang Thma Dam. Furthermore, and to avoid distortion, the Trial Chamber ought to have relied on the guidance of its Cambodian members to evaluate events occurring between 1975 and 1979 only in light of Khmer culture at the time rather than through a contemporary lens.[1004] He also argues that the Trial Chamber failed to apply these principles, most obviously in its findings on marriage, which "completely disregarded the socio-cultural context."[1005]

388. In response, the Co-Prosecutors submit that KHIEU Samphân fails to establish any instance in which the judges distorted facts due to cultural bias.[1006]

389. The Trial Chamber held that "[t]he Chamber also relies upon the guidance of its Cambodian members in the assessment of witness credibility in order to avoid cultural bias".[1007]

390. KHIEU Samphân submits that in giving effect to this principle, the Trial Chamber fell into error in a number of specified findings concerning, first, food and hygiene conditions at certain crime sites and second, the nature of marriage under DK.

391. With regard to conditions of food and hygiene, KHIEU Samphân erroneously references paragraph 1298 of the Trial Judgment. The correct portion of the Trial Judgment is

[1004] KHIEU Samphân's Appeal Brief (F54), para. 255, citing Trial Judgment (E465), paras 62, 1298, fn. 4648.
[1005] KHIEU Samphân's Appeal Brief (F54), para. 256, referring to paras 1140-1144, 1157-1162.
[1006] Co-Prosecutors' Response (F54/1), paras 152-155.
[1007] Trial Judgment (E465), para. 62.

instead paragraph 1327, where the Trial Chamber noted that "[t]here were many flies around the food all the time."[1008]

392. The Supreme Court Chamber finds that the Trial Chamber's conclusions regarding substandard food and hygiene do not reflect cultural bias but instead accurately reflect the evidence of multiple witnesses who testified in court concerning these conditions.[1009]

393. Secondly, KHIEU Samphân submits that the Trial Chamber fell into error in terms of cultural bias on the basis of submissions contained in paragraphs 1140-1144 and 1157-1162 of his Appeal Brief. These arguments are considered in substance elsewhere in this Judgment in relation to the regulation of marriage. They are assessed here insofar as they illustrate the Trial Chamber's generalised approach to the evaluation of evidence *vis-à-vis* the need to avoid cultural bias.

394. In paragraphs 1140-1144 and 1157-1162 of his Appeal Brief, KHIEU Samphân submits that inculpating forced marriage in the Cambodian context raises difficult questions regarding universalism versus relativism.[1010] While the notion of a marriage to which both parties have consented is nowadays almost universally prescribed, this was not the case in Cambodia between 1975 and 1979.[1011] In KHIEU Samphân's submission, the Trial Chamber erred by failing to adopt a more sensitive anthropological/legal approach, and by ignoring the essential similarity of traditional Cambodian marriages and marriages which took place under DK.[1012] The Trial Chamber further underestimated that social and parental pressure did not allow individuals to contest their parents' choice of spouse and thus, the Trial Chamber took an idealised view of traditional marriage and created an artificial distinction between this and marriages in DK.[1013] Given this cultural context, the Trial Chamber ought to have evaluated

[1008] Trial Judgment (E465), para. 1327, fn. 4548.
[1009] Trial Judgment (E465), para. 1327, fn. 4548, citing T. 17 August 2015 (CHHUM Seng), E1/331.1, p. 62; T. 27 July 2015 (SEN Sophon), p. 70 (explaining that "there were swarms of flies and that you could actually see the darkness of flies on your bowl of gruel"); T. 19 August 2015 (TAK Boy), E1/333.1, p. 60; T. 2 September 2015 (SAM Sak), E1/340.1, p. 38 ("There were flies coming all over the rice").
[1010] KHIEU Samphân's Appeal Brief (F54), para. 1140.
[1011] KHIEU Samphân's Appeal Brief (F54), para. 1141 (noting that the Cambodian Civil Code prescribed forced marriage only with reference to the consent of parents).
[1012] KHIEU Samphân's Appeal Brief (F54), paras 1144-1145 (relying on the evidence of Expert Peg LEVINE, who depicted marriages under DK as "conscripted" rather than "forced" (T. 11 October 2016 (Peg LEVINE), E1/481.1, pp. 4-5)), 1157-1160 (noting that even though authority changed in DK from the parents to the local authority and to Angkar, the process was "very similar to the arrangement made according to tradition").
[1013] KHIEU Samphân's Appeal Brief (F54), para. 1161 (further considering the alleged gathering of consent of future spouses, in addition to that of the local authorities, to represent progress, even if the regulation of marriage may have in some cases been poorly implemented).

the nature of arranged marriage that was an integral part of Cambodian culture long before the DK regime, but instead mischaracterised the suffering allegedly resulting from the different ways of organising marriage during DK.[1014]

395. The Supreme Court Chamber finds that the Trial Chamber's conclusions regarding the regulation of marriage were not based on flawed notions of universalism or cultural relativism. Nor did the Trial Chamber improperly evaluate the evidence through a contemporary prism or any other similarly distorted lens. Instead, these findings are based on the testimony of numerous witnesses and civil parties who lived through these experiences and who themselves spoke about whether or not marriages as regulated under DK conformed to their cultural expectations. These witnesses and civil parties also spoke persuasively of the impact of the modalities by which marriages were arranged under DK, and of the marriages themselves.[1015]

396. Further, the arguments now raised on appeal by KHIEU Samphân were fully aired before the Trial Chamber but ultimately rejected. In paragraph 3687 of the Trial Judgment, the Trial Chamber adverted to KHIEU Samphân's contention that marriages under DK were essentially similar to traditional Cambodian arranged marriage. In his submission, these marriages did not correspond to the Western concept of marriage, but were instead an agreement between two families in which neither the sentiment of love nor the consensus of the future husband and wife played a central role.[1016] The Trial Chamber found that:

> contrary to the Defence teams' submissions, arranged marriage in Cambodian culture is very different from forced marriage in the DK regime as charged in the Closing Order. Arranged marriage in Cambodian culture pre-DK regime was based on a mutual trust between parents and children. [….] The Chamber accepts the position of both Defence teams that weddings in the Cambodian culture do not correspond to the Western concept of marriage. […] In traditional Khmer culture, the making of this assessment and choice is delegated by the children to their parents on the basis of trust. Generally, arranged marriages do not include an element of force. There is no evidence that this delegation based on trust and the existence of a functional, caring family system was voluntarily transferred to the Party (*Angkar*) in DK. Finally, to what extent and how often social pressure in traditional marriages impacted the ability to freely consent is

[1014] KHIEU Samphân's Appeal Brief (F54), para. 1162.
[1015] See, *e.g.*, Trial Judgment (E465), para. 3619, fns 12081-12083, citing T. 24 June 2015 (CHUM Samoeurn), E1/321.1, pp. 64-68; T. 29 July 2015 (KHIN Vat), E1/325.1, p. 90; T. 30 July 2015 (KHIN Vat), E1/326.1, pp. 10-11; T. 1 March 2016 (SIENG Chanthy), E1/394.1, p. 20; T. 23 August 2016 (SOU Sotheavy), E1/462.1, pp. 35, 81; T. 25 August 2016 (YOS Phal), E1/464.1, p. 11; T. 30 August 2016 (CHEA Deap), E1/466.1, pp. 68, 97; T. 31 August 2016 (CHEA Deap), E1/467.1, p. 71; T. 19 September 2016 (HENG Lai Heang), E1/476.1, pp. 12, 101; T. 12 October 2016 (PEN Sochan), E1/482.1, p. 73; T. 24 October 2016 (NGET Chat), E1/488.1, p. 123; T. 24 October 2016 (PREAP Sokhoeurn), E1/488.1, p. 80; T. 14 September 2015 (SEN Srun), E1/346.1, p. 53; T. 22 August 2016 (OM Yoeurn), E1/461.1, p. 97; T. 29 January 2015 (CHANG Srey Mom), E1/254.1, p. 18; T. 30 March 2016 (SUN Vuth), E1/411.1, p. 80; T. 5 September 2016 (NOP Ngim), E1/469.1, p. 52; T. 16 September 2016 (MOM Vun), E1/475.1, pp. 47-48, 52.
[1016] Trial Judgment (E465), para. 3687.

> not of relevance for the facts charged in these proceedings. The evidence set out in this section clearly demonstrates a practice during the DK regime that was far from reflective of traditional Khmer wedding tradition: families of future spouses were not involved at all in the negotiation, communities were not involved, tradition was absent from wedding ceremonies and individuals agreed to get married for fear of being punished by the Party. [….] The arguments of the Defence teams in this regard are therefore rejected.[1017]

397. In relation to the evidence of Expert Peg LEVINE, relied upon by KHIEU Samphân in support of this argument,[1018] the Trial Chamber rejected it in part for similar reasons, noting that:

> the material available to the expert was far more limited than the totality of evidence before [the Trial Chamber]. Where the opinion of [an] expert is based on reasoning which contradicts the preponderance of the evidence before the Chamber – especially the contemporaneous documents concerning the CPK regulations of marriages and the statements made in court by those who experienced marriage during the DK era – the Chamber will discard it as erroneous.[1019]

398. The Supreme Court Chamber finds that KHIEU Samphân has failed to show that the above findings of the Trial Judgment are vitiated by any cultural bias. This argument is rejected.

h. Hearsay

399. Whilst KHIEU Samphân agrees with the Trial Chamber's articulation of the need for caution when evaluating hearsay evidence, he submits that the Trial Chamber contradicted itself in the Trial Judgment by failing consistently to apply this principle.[1020] He argues that during the trial, the Co-Prosecutors and the Trial Chamber were "uninterested in the sources of […] hearsay heard in court", with the Trial Chamber ultimately contradicting itself in its finding that Vietnamese from Pou Chentam village were deported to Vietnam.[1021]

400. In response, the Co-Prosecutors submit that KHIEU Samphân does not establish that the Trial Chamber erred in assessing and relying on hearsay evidence.[1022]

[1017] Trial Judgment (E465), paras 3688-3689, 3691 (noting that in the majority of cases, parents of individuals were not involved in the wedding ceremony, traditional rituals were abandoned, and many couples were married at the same time).
[1018] Trial Judgment (E465), para. 3530, citing T. 11 October 2016 (Peg LEVINE), E1/481.1 (describing marriage under DK as "conscripted", opining that people were not forced to marry during the DK regime, and concluding that there was no policy on weddings at the beginning of the regime, although the structure of a policy in relation to wedding ceremonies and proceedings had developed by 1978).
[1019] Trial Judgment (E465), para. 3531.
[1020] KHIEU Samphân's Appeal Brief (F54), para. 312, citing Trial Judgment (E465), paras 908, 919, 921, 971, 975, 987, 991-992, 1004-1005, 1007, 1011, 1013-1014, 1044, 1095, 1266, 1762, 1868.
[1021] KHIEU Samphân's Appeal Brief (F54), paras 312-313, citing Trial Judgment (E465), paras 3505-3507.
[1022] Co-Prosecutors' Response (F54/1), paras 156-160.

401. The Trial Chamber articulated the relevant legal standards for the assessment of hearsay evidence as follows:

> In assessing the probative value of hearsay evidence, the Chamber takes into account the fact that the source of the hearsay has not been cross-examined as well as "the infinitely variable circumstances which surround [the] hearsay evidence". Hearsay evidence is therefore approached with caution.[1023]

402. The Supreme Court Chamber has also previously cautioned that the "weight and probative value to be afforded to [hearsay] evidence will usually be less than that accorded to the evidence of a witness who has given it under oath and who has been cross examined.".[1024] The same paragraph of the Case 002/01 Appeal Judgment nonetheless observed that:

> It is settled jurisprudence at the *ad hoc* international criminal tribunals that hearsay evidence is admissible as long as it is probative, and that a trial chamber may rely on uncorroborated hearsay evidence to establish an element of a crime, although caution is required in such circumstances. […] In sum, a trial chamber has broad discretion to consider and rely on hearsay evidence, though this must be done with caution; it is for the appealing party to demonstrate that no reasonable trier of fact could have relied upon it in reaching a specific finding.[1025]

403. In the Case 002/01 Appeal Judgment, KHIEU Samphân was found to have "merely assert[ed] that the Trial Chamber erred in relying on hearsay, but provid[ed] no specific references to support this assertion."[1026] In paragraph 304 of the Case 002/01 Appeal Judgment, the Supreme Court Chamber indicated that:

[1023] Trial Judgment (E465), para. 63, citing Case 002/01 Appeal Judgment (F36), para. 302, quoting *Prosecutor v. Karera*, Appeals Chamber (ICTR), ICTR-01-74-A, Judgment, 2 February 2009 ("*Karera* Appeal Judgment (ICTR)"), para. 39; *Popović et al.* Appeal Judgment (ICTY), para. 1307; *Prosecutor v. Kalimanzira*, Appeals Chamber (ICTR), ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgment (ICTR)"), para. 96.

[1024] Case 002/01 Appeal Judgment (F36), para. 302, citing *Kalimanzira* Appeal Judgment (ICTR), para. 96, quoting *Karera* Appeal Judgment (ICTR), para. 39.

[1025] Case 002/01 Appeal Judgment (F36), para. 302. See also Case 002/01 Appeal Judgment (F36), para. 889, where the Supreme Court Chamber observed that the Trial Chamber relied on anonymous hearsay references in two U.S. Government memoranda, on the grounds that these memoranda identified their sources and could be presumed to accurately reflect the content of these sources and their hearsay character did not detract from their general reliability. Further, they were able to be assessed in light of other corroborating evidence, in particular several newspaper articles, which had appeared in different publications and had been authored by different journalists, and whose narrations resonated with each other and thus reinforced their credibility through their mutual corroboration. See, however, cautionary examples to the contrary in *Prosecutor v. Ndindabahizi*, Appeals Chamber (ICTR), ICTR-01-71-A, Judgement, 16 January 2007, para. 115; *Kalimanzira* Appeal Judgment (ICTR), paras 77-80 (reversing a conviction based on witness testimony which was both undetailed as to the relevant factual circumstances and unclear as to whether the accounts were of hearsay nature); *Prosecutor v. Muvunyi*, Appeals Chamber (ICTR), ICTR-2000-55A-A, Judgment, 29 August 2008 ("*Muvunyi* Appeal Judgment (ICTR)"), paras 68-70 (finding that the Trial Chamber did not act reasonably and with the required degree of caution in basing a conviction entirely on undetailed circumstantial and hearsay evidence and noting that no reasonable trier of fact could have reached a certain factual conclusion solely on the basis of vague and unverifiable hearsay, in a case where no particulars attesting to the reliability of the account referred to by a witness had been provided).

[1026] Case 002/01 Appeal Judgment (F36), para. 304.

> Mere assertions of error without further substantiation do not meet the standard of appellate review. Although the Trial Chamber has an obligation to provide a reasoned opinion, it is not required to articulate every step of its reasoning in detail, and it is presumed to have properly evaluated all the evidence before it, as long as there is no indication that it completely disregarded any particular piece of evidence […] [Where] KHIEU Samphân points to Trial Chamber's factual findings improperly based, in his averment, on hearsay evidence […], the Supreme Court Chamber will [however] consider [these arguments].[1027]

404. In these proceedings, KHIEU Samphân similarly refers to nineteen paragraphs of the Trial Judgment without further argument, merely labelling evidence as hearsay and asserting that the Trial Chamber could not rely on it.[1028] The Supreme Court Chamber has declined to assess these arguments in view of the requirement that it is for the appealing party to demonstrate with reasonable specificity why no reasonable trier of fact could have reached a particular finding.

405. KHIEU Samphân does, however, particularise that paragraphs 3505, 3507, and 3431 of the Trial Judgment are allegedly vitiated by error.[1029] In paragraph 3505, the Trial Chamber held that:

> The witnesses and Civil Parties gave accounts of having seen, or heard of, a number of Vietnamese being gathered and evacuated and never returning to their villages throughout Prey Veng province. Specific instances of families being gathered, removed and seen leaving by boats were found in Anlung Trea village, Preaek Chrey commune, Kampong Leav district, Pou Chentam village, Svay Antor commune, Prey Veng district and Angkor Yos village, Preaek Anteah, Prey Veng district. The Chamber also found that it was very likely that some Vietnamese people were deported from Svay Rieng to Vietnam but that the available evidence did not meet the requisite standard to establish specific instances of forcible displacements of Vietnamese beyond reasonable doubt in Svay Rieng province from 1975.[1030]

406. In relation to these paragraphs, KHIEU Samphân submits that the Trial Chamber erred in finding that Vietnamese from Pou Chentam Village were deported to Vietnam, on the grounds that this conclusion was based solely on the testimony of Civil Party DOUNG Oeun, which the Trial Chamber acknowledged was hearsay.[1031] Specifically, he impugns paragraph 3431 of the Trial Judgment, where the Trial Chamber held:

[1027] Case 002/01 Appeal Judgment (F36), para. 304.
[1028] KHIEU Samphân's Appeal Brief (F54), para. 312, referring to Trial Judgment (E465), paras 908, 919, 921, 971, 975, 987, 991-992, 1004-1005, 1007, 1011, 1013-1014, 1044, 1095, 1266, 1762, 1868.
[1029] KHIEU Samphân's Appeal Brief (F54), para. 977.
[1030] Trial Judgment (E465), para. 3505. See also para. 3507, wherein the Trial Chamber stated that it was satisfied that the crime against humanity of deportation was established, as there existed a policy from 1975 until the end of 1976 to expel people of Vietnamese ethnicity living in Cambodia, a large number of Vietnamese from Prey Veng province were expelled in 1975 and 1976, and the displacements of Vietnamese across the Cambodian boarder were intentional.
[1031] KHIEU Samphân's Appeal Brief (F54), para. 313, citing Trial Judgment (E465), paras 73, 3431; KHIEU Samphân's Appeal Brief (F54), para. 977. Trial Judgment (E465), para. 73 states that "Civil Party Applications

> From 1975, DOUNG Oeurn who was living in Pou Chentam village, Svay Antor commune, Prey Veng district, Prey Veng province, heard that the Vietnamese living in her area had to return to Vietnam and that Ta Ki, Yeay Min and their children did. The manner in which this return occurred, however, was not further explored in court.[1032]

407. Having acknowledged that the circumstances surrounding their return were not clarified further but without explaining how it arrived at its finding, KHIEU Samphân submits that "[i]n the absence of any direct or detailed evidence, the Chamber's finding [that Vietnamese from Pou Chentam were deported to Vietnam is] based solely on limited and unsubstantiated information [and] must be discarded."[1033]

408. As discussed in Section VII.D.2 of this Judgment, the Supreme Court Chamber finds that the Trial Chamber relied on insufficient evidence to find that deportation occurred specifically from Pou Chentam village. However, it was reasonable for the Trial Chamber to rely on the hearsay evidence of DOUNG Oeurn together with all of the other evidence it considered in making its finding that Vietnamese were deported from Prey Veng. The Trial Chamber did not err by considering this hearsay evidence as corroborative of the other evidence of deportations from Prey Veng.

409. The Supreme Court Chamber finds that KHIEU Samphân has not established that the Trial Chamber erred in its identification of the legal framework for the assessment of hearsay evidence. Nor did the Trial Chamber err in its assessment of the challenged evidence identified by KHIEU Samphân with sufficient specificity. This argument is accordingly rejected.

2. Assessment of Documentary Evidence

410. KHIEU Samphân contests the Trial Chamber's assessment of documentary evidence, claiming that the Trial Chamber committed several errors in determining reliability, authenticity and relevance of: (1) contemporaneous documents; (2) KHIEU Samphân's interviews, statements and publications; (3) out-of-court statements; (4) propaganda; (5)

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are not created by a judicial entity and are accordingly not accorded a presumption of reliability and are accorded little, if any, probative value".

[1032] See, *e.g.*, T. 25 January 2016 (DOUNG Oeurn), E1/381.1, pp. 5, 7, 10-11 ("Q. During the Khmer Rouge regime starting from 1975, did you hear or receive any information that Vietnamese who were living in Cambodia or in your area had to return to Vietnam? A. Yes. And in fact, I urged my husband to go together, but he refused to go. He said to live or to die, he would remain in Cambodia."); T. 25 January 2016 (DOUNG Oeurn), E1/381.1, p. 11 ("Q. And did you know if there were any Vietnamese families that returned to Vietnam after the announcement was made for Vietnamese to return to Vietnam? Did you know any? A. Yes. There were *Ta* Ki and Yeay Min and their children. The whole family actually went to Vietnam. And the man actually returned to Cambodia and, later on, he died.").

[1033] KHIEU Samphân's Appeal Brief (F54), para. 977.

evidence obtained through torture; (6) witness and civil party evidence; (7) documents benefiting from presumption; and (8) expert evidence.[1034] The Co-Prosecutors respond that KHIEU Samphân has failed to establish an error of law, fact or discretion in the Trial Chamber's assessment of the said documentary evidence.[1035] Each of these issues will be addressed by the Supreme Court Chamber in sequence.

a. Assessment of Contemporaneous Documentary Evidence

411. The Trial Chamber explained its approach in assessing the documentary evidence presented before it.[1036] In assessing the parties' final submissions as to the probative value of evidence advanced at trial, the Trial Chamber relied on Rule 87(2) which requires that the evidence upon which the findings are based is subjected to adversarial debate.[1037] It outlined the factors relevant to the assessment of the documentary evidence, namely the criteria under Rule 87(3) such as the circumstances of documenting evidence, whether the document was an original or a copy, its legibility, discrepancies and deficiencies that were credibly alleged, whether the parties could challenge the evidence and other supporting information concerning its reliability.[1038] It also evaluated the identification, examination, bias, source and motive of the sources of the evidence.[1039]

412. KHIEU Samphân submits that the Trial Chamber erred by failing to consistently apply the criteria set forth in Rule 87(3) when it assessed the probative value of contemporaneous evidence.[1040] He specifically points to the Trial Chamber's assessment of the CPK Statutes and the Standing Committee meeting minutes provided by DC-Cam in digitalised format.[1041]

413. The Co-Prosecutors respond that KHIEU Samphân merely disagrees with the Trial Chamber's assessment of the evidence and that his arguments should be dismissed.[1042]

[1034] KHIEU Samphân's Appeal Brief (F54), paras 224-226, 257-311, 314-330, 1819-1828, 1875.
[1035] Co-Prosecutors' Response (F54/1), paras 161-244.
[1036] Trial Judgment (E465), paras 61-67.
[1037] Trial Judgment (E465), para. 61.
[1038] Trial Judgment (E465), para. 61.
[1039] Trial Judgment (E465), para. 61.
[1040] KHIEU Samphân's Appeal Brief (F54), paras 323-324.
[1041] KHIEU Samphân's Appeal Brief (F54), paras 325-328. KHIEU Samphân also points to documents provided by Christopher GOSCHA, the S-21 Logbook, and three interviews with KHIEU Samphân. See KHIEU Samphân's Appeal Brief (F54), para. 324, fn. 518, referring to paras 217-225 (GOSCHA documents), 226, 1464 (S-21 Logbook), 1819-1828, 1875 (interviews). The Supreme Court Chamber has already dismissed KHIEU Samphân's challenges pertaining to the assessment of the GOSCHA documents and S-21 Logbook elsewhere in this Judgment, and will therefore not reiterate them here. See *supra* Section V.D.4 and Section V.D.5. The arguments related to his three interviews will be addressed in the following section. See *infra* Section V.E.2.b.
[1042] Co-Prosecutors' Response (F54/1), paras 161-164.

414. The Lead Co-Lawyers agree with the Co-Prosecutors' Response.[1043]

i. CPK Statutes

415. The Trial Chamber noted that the 1976 CPK Statute was authenticated by several witnesses, including KAING Guek Eav *alias* Duch and NUON Chea, as well as the similarity in the language used in the 1971 and 1976 versions.[1044] The Trial Chamber held that, since the author of the 1972 notes containing the 1971 draft CPK Statute is unknown, it would approach the document with caution and rely on the content of these notes only insofar as they are corroborated.[1045]

416. KHIEU Samphân argues that the Trial Chamber erred by: (1) stating that NUON Chea authenticated the 1976 CPK Statute; (2) relying on the 1976 CPK Statute despite the lack of a date; and (3) comparing the 1960, 1971 and 1976 CPK Statutes.[1046] He claims that during the trial, NUON Chea only highlighted the form of the CPK Statutes but did not state that the document in question (E3/130) was the 1976 CPK Statute.[1047] He further contends that since the 1960 CPK Statute is not on the Case File, the Trial Chamber cannot rely on it to compare the 1971 and 1976 CPK Statutes, hence the findings based on the CPK Statutes are invalid.[1048]

417. The Co-Prosecutors respond that KHIEU Samphân's allegations about the CPK Statutes are unfounded.[1049]

418. The Supreme Court Chamber observes that, while the Trial Chamber stated that the 1976 CPK Statute was "authenticated by several witnesses" including NUON Chea, it explicitly noted he "[clarified] that E3/130 accorded with his recollection of the CPK Statute, bearing 30 articles and 8 Chapters" and "[commented] on the concept of 'democratic centralism' contained in Article 6 of the 1976 CPK Statute".[1050] Further, KHIEU Samphân

[1043] Lead Co-Lawyers' Response (F54/2), paras 181-183.
[1044] Trial Judgment (E465), para. 344.
[1045] Trial Judgment (E465), para. 344.
[1046] KHIEU Samphân's Appeal Brief (F54), para. 325.
[1047] KHIEU Samphân's Appeal Brief (F54), para. 325.
[1048] KHIEU Samphân's Appeal Brief (F54), para. 325, fn. 523, referring to KHIEU Samphân's Appeal Brief (F54), paras 344, 398.
[1049] Co-Prosecutors' Response (F54/1), para. 168.
[1050] Trial Judgment (E465), para. 344, fn. 951, referring to, *inter alia*, T. 13 December 2011 (Accused NUON Chea), E1/21.1, pp. 23-24 (stating the document corresponds to his recollection of the CPK Statute, containing 30 articles and 8 chapters); T. 15 December 2011 (Accused NUON Chea), E1/23.1, pp. 32-36; T. 28 May 2012 (NY Kan), E1/76.1, pp. 83-84 ("[E3/130] is the Statute of the CPK"); T. 21 March 2012 (KAING Guek Eav), E1/52.1, p. 70.

ignores the fact that KAING Guek Eav *alias* Duch and NY Kan authenticated the document, with KAING Guek Eav *alias* Duch specifically stating that it was the 1976 version. The Supreme Court Chamber considers that KHIEU Samphân has not demonstrated that the Trial Chamber erred by relying on this document as the 1976 CPK Statute based on all the evidence on the record.

419. While the Trial Chamber did not have the 1960 CPK Statute before it, it relied on KAING Guek Eav *alias* Duch's testimony and a *Revolutionary Flag* publication to compare the criteria for Party membership contained in the different Statutes.[1051] The Supreme Court Chamber considers that KHIEU Samphân has not demonstrated that the Trial Chamber erred by relying on KAING Guek Eav *alias* Duch's testimony or the CPK publication; that it was required to consult a copy of the 1960 CPK Statute for its analysis; nor that a hypothetical error in this regard would be capable of invalidating all of its findings on the provisions of the CPK Statutes. Moreover, as his criminal responsibility in no way rests on the criteria for CPK membership contained in the Party's Statute of 1960, KHIEU Samphân has not demonstrated how an error in this regard could conceivably result in a miscarriage of justice. These allegations are accordingly dismissed.

ii. Standing Committee Meeting Minutes

420. The Trial Chamber assessed the reliability of minutes of Standing Committee meetings obtained by the court from several different sources.[1052] KHIEU Samphân's challenges are directed to those provided by DC-Cam in a digitalised format.[1053]

421. Before turning to KHIEU Samphân's specific arguments in this regard, the Supreme Court Chamber wishes to recall the following. The Trial Chamber first set out its views and approach to assessing the reliability of documents provided by DC-Cam including the Standing Committee meeting minutes in Case 002/01. In an interlocutory decision rejecting KHIEU Samphân's challenges in this regard, the Trial Chamber considered that the documents were

[1051] Trial Judgment (E465), para. 398, referring to, *inter alia*, T. 21 March 2012 (KAING Guek Eav), E1/52.1, p. 75 (where he referred to the 1960 Statute while discussing the criteria for CPK leadership positions and indicated that the 1971 and 1976 Statutes were different from the 1960 Statute with respect to the CPK membership criteria); Revolutionary Flag, August 1978, E3/747, ERN (EN) 00499769-00499780, pp. 4-15.
[1052] Trial Judgment (E465), Section 5.1.2 "Administrative Structures: Structure of the CPK: Standing Committee and Central Committee: Preliminary issues regarding Standing Committee minutes".
[1053] KHIEU Samphân's Appeal Brief (F54), paras 326-328.

entitled to a *prima facie* or rebuttable presumption of reliability including authenticity.[1054] This was based in significant part on the testimony of CHHANG Youk, Director of DC-Cam, about the way in which DC-Cam collected and stored the documents, and that DC-Cam was prepared to assist the parties with the authentication of any copies on the Case File by providing an opportunity to inspect the originals on request.[1055]

422. This approach was upheld by the Supreme Court Chamber in Case 002/01. It held that:

> [i]t is for the party disputing the authenticity of a document which is judicially presumed to be *prima facie* authentic to rebut this presumption, and verification could have been sought by the disputing party […] by sending a member of his Defence team to DC-Cam to review the originals of disputed documents on request.[1056]

As neither appellant had offered any evidence to rebut the presumption of authenticity of the documents except a blanket contestation thereof, the presumption remained intact and the relevant grounds of appeal were dismissed.[1057]

423. The Trial Chamber adopted the same reasoning with respect to the DC-Cam Standing Committee meeting minutes in Case 002/02.[1058] The Trial Chamber recalled its earlier finding that DC-Cam's protocols for collecting and storing the documents provide no reasonable apprehension of tampering, distortion or falsification.[1059] It noted that any party that had concern as to either the accuracy of a copy contained in the Case File or as to the provenance or reliability of a document could request to examine the original at DC-Cam.[1060] Having received no additional evidence or new arguments in this regard, the Trial Chamber was satisfied that the minutes are authentic, and as contemporaneous documents, of "significant probative value".[1061]

424. KHIEU Samphân submits that the Trial Chamber erred in law by according *prima facie* reliability to the Standing Committee meeting minutes provided by DC-Cam because it did not

[1054] Decision on Objections to Documents Proposed to be put before the Chamber on the Co-Prosecutor's Annexes A1-A5 and to Documents cited in Paragraphs of the Closing Order Relevant to the First Two Trial Segments in Case 002/01, 9 April 2012, E185 ("Decision on Objections to Documents (E185)"), para. 28.
[1055] Decision on Objections to Documents (E185), para. 28. KHIEU Samphân's arguments in this regard are contained in Motion for the Original Copies of Contemporaneous Documents to be Produced before the Chamber, 6 February 2012, E168.
[1056] Case 002/01 Appeal Judgment (F36), para. 375.
[1057] Case 002/01 Appeal Judgment (F36), paras 375-376.
[1058] Trial Judgment (E465), para. 348.
[1059] Trial Judgment (E465), para. 348, referring, *inter alia*, to Decision on Objections to Documents (E185), para. 28.
[1060] Trial Judgment (E465), para. 348.
[1061] Trial Judgment (E465), para. 350.

establish or explain "how DC-Cam handled the processing of this evidence" so as to eliminate the possibility for outside interference and provide "sufficient judicial and procedural safeguards."[1062] He recalls out that DC-Cam's Director, CHHANG Youk, did not wish to disclose on the stand the physical location of the original documents for reasons of their safety and security, and submits that these reasons were not adequately explained to the parties.[1063] Finally, KHIEU Samphân argues that the Trial Chamber erred by not verifying the authenticity of the originals itself or through a court-appointed expert.[1064] He argues that findings based on this evidence should be invalidated.[1065]

425. The Co-Prosecutors recall that there is no procedural requirement to call witnesses to authenticate documents, nor that only original documents may be placed in evidence; rather, it is for the Trial Chamber to determine the weight it assigns to the evidence before it in light of the totality of the evidence.[1066] They argue that KHIEU Samphân raises arguments about the DC-Cam Standing Committee meeting minutes which the Supreme Court Chamber dismissed in Case 002/01, whilst not showing error in the Trial Chamber's assessment of the reliability of these minutes obtained from various sources.[1067] KHIEU Samphân had no need to know the location of the original documents held by DC-Cam to avail himself of the opportunity to request to see them, argue the Co-Prosecutors, and he has not showed that he attempted unsuccessfully to do so.[1068] As such, he has failed to show that the Trial Chamber erred in holding that the DC-Cam Standing Committee minutes were sufficiently reliable to be the basis of judicial finding of fact.[1069]

426. The Supreme Court Chamber sees no reason to depart from its earlier reasoning on this point. It observes, moreover, that KHIEU Samphân had clear notice of the approach that both the Trial and Supreme Court Chambers would adopt to this evidence and ample time to request examination of the documents, including with the assistance of an expert, if he believed this to be necessary for the conduct of his defence. He has made no such request and again brought no evidence or argument that would displace the presumption in favour of the DC-Cam

[1062] KHIEU Samphân's Appeal Brief (F54), para. 326.
[1063] KHIEU Samphân's Appeal Brief (F54), paras 327-328, referring to T. 2 February 2012 (CHHANG Youk), E1/38.1, p. 11.
[1064] KHIEU Samphân's Appeal Brief (F54), para. 328.
[1065] KHIEU Samphân's Appeal Brief (F54), para. 328, fn. 530.
[1066] Co-Prosecutors' Response (F54/1), para. 163.
[1067] Co-Prosecutors' Response (F54/1), para. 169, referring to Case 002/01 Appeal Judgment (F36), paras 369-375.
[1068] Co-Prosecutors' Response (F54/1), para. 164.
[1069] Co-Prosecutors' Response (F54/1), paras 164, 169.

Standing Committee meeting minutes' reliability. The Supreme Court Chamber concurs with the Co-Prosecutors that the documents' physical location is immaterial since KHIEU Samphân could request to inspect them, and considers CHHANG Youk's reasons for declining to disclose their physical location to be self-explanatory. Accordingly, these arguments are dismissed.

b. KHIEU Samphân's Interviews, Statements and Publications

i. KHIEU Samphân's Interviews

427. KHIEU Samphân submits that the Trial Chamber erred by relying on transcripts of his three interviews (E3/4050, E3/4043, and E3/4041).[1070] According to him, these interview transcripts lack "information enabling verifying their authenticity"[1071] because they do not contain an indication of the date on which the interviews were given and the author of the re-transcription, and are incomplete as they transcribe only his replies to the interviewer and not the questions posed.[1072]

428. According to KHIEU Samphân, the dates of the interviews are crucial as he belatedly acquired new information about the regime by reading the works of Philip SHORT.[1073] Further, nothing in the transcribed extracts suggests that he was speaking of knowledge he had under the DK regime, as opposed to knowledge he obtained after the events.[1074] He submits that, not knowing the questions he was asked as well as the Trial Chamber quoting selectively means crucial context is lacking about to what precisely he was referring and, as such, the Trial Chamber's interpretation is based on speculation and distortion.[1075] With respect to E3/4041, KHIEU Samphân submits that the transcribed document uses brackets in certain phrases implying "they were not the original statements" by him.[1076] He submits that all findings drawing on these documents should be invalidated.[1077]

[1070] Transcript of the Interview with KHIEU Samphân, E3/4050, ERN (EN) 00789062-00789063; Transcript of the Interview with KHIEU Samphân, E3/4043, ERN (EN) 00786109-00786111; Transcript of the Interview with KHIEU Samphân, E3/4041, ERN (EN) 00790270-00790271.
[1071] KHIEU Samphân's Appeal Brief (F54), para. 1819.
[1072] KHIEU Samphân's Appeal Brief (F54), paras 1820-1821, 1824, 1875.
[1073] KHIEU Samphân's Appeal Brief (F54), paras 1820, 1875.
[1074] KHIEU Samphân's Appeal Brief (F54), para. 1819.
[1075] KHIEU Samphân's Appeal Brief (F54), paras 1820-1828, 1875.
[1076] KHIEU Samphân's Appeal Brief (F54), para. 1875, referring to Trial Judgment (E465), para. 4231.
[1077] KHIEU Samphân's Appeal Brief (F54), paras 1820, 1828, referring to Trial Judgment (E465), paras 4214-4218, fns 13757-13758; KHIEU Samphân's Appeal Brief (F54), para. 1875, referring to Trial Judgment (E465), para. 4231.

429. According to the Co-Prosecutors, KHIEU Samphân's allegations with respect to E3/4050 and E3/4043 are without merit, as he ignores the vast amount of evidence on which the Trial Chamber relied to determine his knowledge of crimes, which corroborates these interviews.[1078] A fair reading of these interviews leads to the conclusion that they are based largely on KHIEU Samphân's recollection of the events, not his research.[1079] They argue that KHIEU Samphân's complaints about the Trial Chamber's alleged omissions in its excerpts and the lack of recorded questions are also irrelevant to the significance of the extracts and do not diminish the "self-evident content of the answers".[1080] The Co-Prosecutors do not respond to KHIEU Samphân's submissions with respect to E3/4041.

430. The Supreme Court Chamber recalls that "[a]uthenticity relates to whether a document is what it professes to be in origin or authorship."[1081] KHIEU Samphân argues neither that he did not give the interviews in question, the audio recordings of which are, in any case, available on the Case File, nor indeed that there is any error in their transcription. The issues he raises are therefore not ones of authenticity and his arguments in that regard are misplaced. In this regard, he offers no explanation about why the transcriber's identity is important and that submission is not further considered.

431. KHIEU Samphân's contention that he may not have been speaking from individual recollection but on the basis of research he undertook after the events is belied by the evidence. In the first instance (E3/4050), KHIEU Samphân is evidently explaining the thinking of the DK leadership, himself included, at the time of the events as to why sick people had to work.[1082] In the second (E3/4043), KHIEU Samphân expressly states that "that is what I saw".[1083] The Supreme Court Chamber is of the view that the text is sufficiently clear on its face so that the absence of the questions, which are in any case sparse in what is mostly monologue, does not mean that crucial context is missing. Similarly, the text re-inserted by KHIEU Samphân, which contains his justifications of the suffering inflicted on the people by the CPK, in no way detracts from his evident actual knowledge. Contrary to KHIEU Samphân's allegation that certain

[1078] Co-Prosecutors' Response (F54/1), para. 166.
[1079] Co-Prosecutors' Response (F54/1), para. 166.
[1080] Co-Prosecutors' Response (F54/1), para. 166.
[1081] *Prosecutor v. Prlić et al.,* IT-04-74-A, Decision on Jadranko Prlić's Interlocutory Appeal Against the 'Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence', 3 November 2009, para. 34.
[1082] Transcript of the Interview with KHIEU Samphân, E3/4050, ERN (EN) 00789062 ("If we had hesitated many more people would have died. So then, both the healthy people and the sick people had to work. Moderately sick people had to work too.")
[1083] Transcript of the Interview with KHIEU Samphân, E3/4043, ERN (EN) 00786109.

phrases in brackets in the interview E3/4041 "were not the original statements",[1084] this Chamber observes that only one word was in brackets used to correct a grammatical mistake.[1085] Finally, the Supreme Court Chamber notes that a wealth of evidence underlies KHIEU Samphân's knowledge of the crimes, and he has made no attempt at all to demonstrate that these three interviews were crucial to his conviction such as to show a miscarriage of justice.

432. KHIEU Samphân's arguments with respect to his interviews E3/4050, E3/4043 and E3/4041 are dismissed.

ii. KHIEU Samphân's Statements and Publications

433. KHIEU Samphân submits that the Trial Chamber erred in law by adopting "different analytical frameworks" to assess his own testimony and publications.[1086] The Co-Prosecutors respond that KHIEU Samphân's assertion is unsubstantiated.[1087] The Supreme Court Chamber notes that KHIEU Samphân merely summarises the Trial Chamber's statement as to its approach in this regard, but does not further elaborate why this was erroneous or indeed what it was different from and how. The Supreme Court Chamber therefore declines to consider this submission.

434. In the second place, KHIEU Samphân argues that the Trial Chamber "contradicted itself […] distorted and mispresented [his] statements or documents or used them entirely for inculpatory purposes".[1088] For this assertion, he cross-refers to a number of other sections of his Appeal Brief.[1089] The Supreme Court Chamber's review of the 19 cited paragraphs reveals a single reference to KHIEU Samphân's testimony, wherein he avers that the Trial Chamber distorted his testimony in Case 002/01 on criticism and self-criticism.[1090] The Supreme Court Chamber notes that the portion said by KHIEU Samphân to be distorted is a direct quote of his testimony, and does not accept that this constitutes a distortion.[1091]

[1084] KHIEU Samphân's Appeal Brief (F54), para. 1875.
[1085] Transcript of the Interview with KHIEU Samphân, E3/4041, ERN (EN) 00790270 ("Those [they] arrested were in the framework of the Communist Party of Kampuchea.").
[1086] KHIEU Samphân's Appeal Brief (F54), para. 257, referring to Trial Judgment (E465), paras 192-195.
[1087] Co-Prosecutors' Response (F54/1), paras 175-176.
[1088] KHIEU Samphân's Appeal Brief (F54), para. 257, fn. 385.
[1089] KHIEU Samphân's Appeal Brief (F54), para. 257, fn. 385, referring to KHIEU Samphân's Appeal Brief (F54), paras 1244, 1395-1398, 1526-1540.
[1090] KHIEU Samphân's Appeal Brief (F54), para. 257, fn. 385, referring to KHIEU Samphân's Appeal Brief (F54), para. 1536.
[1091] Trial Judgment (E465), para. 3967; T. 29 May 2013 (KHIEU Samphân), E1/198.1, p. 23.

c. Out-of-Court Statements

435. The Trial Chamber set out its approach to the assessment of out-of-court statements as follows:

> statements taken outside the framework of a judicial process, such as statements recorded by DC-Cam, Civil Party Applications, reports, unsworn refugee accounts and newspaper articles are of inherently low probative value. Where a finding relies in part on such statements, the reasons for the finding must be clearly explained, particularly if a conviction depends wholly or decisively on such evidence. To test the accuracy of a witness statement, the Chamber may consider whether the statement is corroborated by other evidence and, if so, the nature of that evidence. The Chamber may also consider whether the prior statements of a witness are mutually consistent and whether inconsistencies are explained adequately.[1092]

436. KHIEU Samphân submits that the Trial Chamber erred in law when it "considered that it was possible to rest a conviction on out-of-court statements […] as long as its reasoning was clearly explained."[1093] According to KHIEU Samphân, "[s]uch a legal framework infringes all of [his] procedural rights" and is "legally impermissible".[1094] In support of this proposition, he cites, first, two ECCC authorities, to the effect that out-of-court statements enjoy no presumption of reliability.[1095] Second, he quotes an ICC interlocutory decision which states that whether a document is created for the purpose of criminal proceedings is one of several factors relevant for assessing reliability.[1096] Third, KHIEU Samphân refers to the Supreme Court Chamber's judgment in Case 002/01[1097] which, in setting out its approach for assessing the reasonableness of the Trial Chamber's factual findings, stated that:

> when faced with […] evidence of inherently low probative value (such as out-of-court statements […]), it is likely that the Trial Chamber's explanation as to how it reached a given factual conclusion based on the evidence in question will be of great significance for the determination of whether that conclusion was reasonable. As a general role, where the underlying evidence for a factual conclusion appears on its face weak, more reasoning is required than when there is a sound evidentiary basis.[1098]

437. KHIEU Samphân cites four instances in which the Trial Chamber allegedly "based convictions solely on out-of-court statements."[1099] These relate to its use of research and

[1092] Trial Judgment (E465), para. 69 (internal citations omitted).
[1093] KHIEU Samphân's Appeal Brief (F54), para. 307.
[1094] KHIEU Samphân's Appeal Brief (F54), para. 307.
[1095] KHIEU Samphân's Appeal Brief (F54), paras 307-308 referring to Case 002 Decision on Co-Prosecutors' Rule 92 Submission (E96/7), para. 29; Case 004/01 Closing Order (D308/3), paras 103-108.
[1096] KHIEU Samphân's Appeal Brief (F54), para. 309, referring to *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II (ICC), ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, para. 27.
[1097] KHIEU Samphân's Appeal Brief (F54), para. 310.
[1098] Case 002/01 Appeal Judgment (F36), para. 90.
[1099] KHIEU Samphân's Appeal Brief (F54), para. 311, fn. 481.

witness statements recorded by DC-Cam to support the Trial Chamber's findings on: (1) differences in access to food;[1100] (2) matrilineal ethnicity;[1101] (3) the communication channels for the CPK's policy;[1102] and (4) the existence of "at least 200 security centres".[1103] KHIEU Samphân contends that the Trial Chamber failed to "specify the source of said documents nor […] demonstrate their relevance and reliability".[1104]

438. The Co-Prosecutors respond that KHIEU Samphân's arguments should be dismissed because he failed to establish an error in the Trial Chamber's legal framework for assessing out-of-court statements, its application of that framework, or its assessment of the evidence referenced.[1105]

439. The Supreme Court Chamber recalls that it addressed this point of law in its judgment in Case 002/01, where it noted that:

> the written evidence of a witness who has not appeared before the Trial Chamber and who was not examined by the Chamber and the Parties must generally be afforded lower probative value than the evidence of a witness testifying before the Chamber. Even lower probative value must, in principle, be assigned to evidence that – unlike the interview records produced by the Office of the Co-Investigating Judges – was not collected specifically for the purpose of a criminal trial.[1106]

Relying on persuasive jurisprudence of the ECtHR, this Chamber held that "a conviction may not be based solely or to a decisive degree on evidence by a witness whom the defence has had no opportunity to examine, unless there are sufficient counterbalancing factors in place, so that an accused is given an effective opportunity to challenge the evidence against him."[1107]

440. KHIEU Samphân does not point to any legal authority inconsistent with this standard. Indeed, the decisions he discusses confirm that particular care must be exercised when assessing the reliability of out-of-court statements and it is preferable that the court fully sets out its reasoning in that regard. Much like in Case 002/01,[1108] in the present case the Trial Chamber was cognisant of the need to base its findings on evidence subjected to adversarial

[1100] KHIEU Samphân's Appeal Brief (F54), para. 731.
[1101] KHIEU Samphân's Appeal Brief (F54), paras 1044-1045.
[1102] KHIEU Samphân's Appeal Brief (F54), paras 1429-1430.
[1103] KHIEU Samphân's Appeal Brief (F54), para. 1525.
[1104] KHIEU Samphân's Appeal Brief (F54), para. 311.
[1105] Co-Prosecutors' Response (F54/1), paras 170-173.
[1106] Case 002/01 Appeal Judgment (F36), para. 296.
[1107] Case 002/01 Appeal Judgment (F36), para. 296.
[1108] See Case 002/01 Appeal Judgment (F36), para. 296.

debate, heard detailed submissions by the parties in this regard.[1109] The Trial Chamber was aware that the defence had not had the opportunity to examine the authors of written statements and that this had to have an effect on the weight accorded to them.[1110] KHIEU Samphân has thus failed to establish an error of law.

441. The Supreme Court Chamber turns next to KHIEU Samphân's second contention, that the Trial Chamber based convictions solely on out-of-court statements "[w]ithout conducting any rigorous legal analysis and a detailed assessment" on four occasions.[1111] The Trial Chamber's conclusion that New People received less food than Base People is based on the testimony of seven civil parties, whose accounts were merely corroborated by RIEL Son's DC-Cam interview.[1112] Similarly, the finding regarding matrilineal ethnicity is primarily based on testimony from a number of witnesses and civil parties.[1113] KHIEU Samphân thus fails to show that either was based solely or decisively on out-of-court statements. With respect to the Trial Chamber's reliance on CPK telegrams provided by DC-Cam, the Supreme Court Chamber recalls that it has dealt exhaustively with defence challenges to the presumption of reliability accorded to documents provided by DC-Cam in both this appeal and that in Case 002/01;[1114] and the Trial Chamber additionally assessed the reliability of telegrams provided by DC-Cam.[1115] Finally, although the Trial Chamber's conclusion that there were at least 200 security centres is based to a significant degree on a DC-Cam report,[1116] the Trial Chamber indeed provided an assessment of its reliability.[1117] The Supreme Court Chamber considers that both of these assessments are reasonable and notes, in any event, that KHIEU Samphân has failed to specify what conviction rests upon them. These arguments are therefore dismissed.

d. Propaganda

442. The Trial Chamber held that "statements made for propagandistic purposes may diminish their reliability."[1118] The Trial Chamber considered that radio broadcasts and *Revolutionary Flag* and *Revolutionary Youth* magazines were CPK materials intended for

[1109] Trial Judgment (E465), para. 61.
[1110] Trial Judgment (E465), para. 69.
[1111] KHIEU Samphân's Appeal Brief (F54), para. 311.
[1112] KHIEU Samphân's Appeal Brief (F54), para. 731; Trial Judgment (E465), para. 1016.
[1113] KHIEU Samphân's Appeal Brief (F54), paras 1044-1045; Trial Judgment (E465), para. 3424, fn. 11547.
[1114] See *supra* Section V.E.2.a.ii.
[1115] Trial Judgment (E465), para. 455. See KHIEU Samphân's Appeal Brief (F54), paras 1429-1430.
[1116] Trial Judgment (E465), para. 3949. See KHIEU Samphân's Appeal Brief (F54), para. 1525.
[1117] Trial Judgment (E465), paras 3948-3949, 3951.
[1118] Trial Judgment (E465), para. 65.

public dissemination and may contain propaganda, and stated that it would keep this in mind when assessing such evidence.[1119]

443. KHIEU Samphân agrees with the approach set out by the Trial Chamber for assessing material containing propaganda, but argues that it erred in law by not properly applying to the evidence before it.[1120] He submits that the Trial Chamber "contradicted itself by not considering that propaganda documents were less reliable by interpreting propagandistic speech literally, where negative findings could be drawn."[1121] As specific examples, KHIEU Samphân refers to (1) "a speech delivered by [him] regarding Vietnamese at a celebration during DK",[1122] and (2) the Trial Chamber's dismissal as propaganda of "the rule published in a [Revolutionary Flag publication] that partners could freely consent to marriage […] even though this rule was one of the 12 moral principles that all CPK members had to abide by."[1123] He concludes that the Trial Chamber "relied only on propagandistic documents to convict, which means that it committed numerous errors of law and that such findings must be invalidated."[1124]

444. The Supreme Court Chamber concurs with the Co-Prosecutors that KHIEU Samphân did not demonstrate that the Trial Chamber failed take into account that statements made for propagandistic purposes may diminish their reliability.[1125] The Trial Chamber consistently noted that its assessment would take into account the propagandistic nature of certain evidence.[1126] Moreover, the Supreme Court Chamber notes that it was within the Trial Chamber's discretion to assess whether the source of the statement in fact did diminish its credibility, as indicated by the word "may", taking into account the circumstances, source and motive of the sources of the evidence.[1127]

445. KHIEU Samphân's purported specific examples do not demonstrate that the Trial Chamber failed to apply its stated approach. He does not identify with sufficient particularity the "speech delivered by KHIEU Samphân regarding Vietnamese at a celebration during

[1119] Trial Judgment (E465), paras 472, 479.
[1120] KHIEU Samphân's Appeal Brief (F54), para. 292.
[1121] KHIEU Samphân's Appeal Brief (F54), para. 292.
[1122] KHIEU Samphân's Appeal Brief (F54), para. 292, referring to paras 1551-1560.
[1123] KHIEU Samphân's Appeal Brief (F54), para. 292, referring to para. 1193.
[1124] KHIEU Samphân's Appeal Brief (F54), para. 292.
[1125] Co-Prosecutors' Response (F54/1), para. 186.
[1126] Trial Judgment (E465), paras 65, 282, 472, 479, 3747.
[1127] Trial Judgment (E465), para. 61.

DK"[1128] and the Supreme Court Chamber's review of the cited paragraphs does not reveal to what speech KHIEU Samphân refers or why the Trial Chamber erred by relying on it. With respect to his second example, KHIEU Samphân rather argues that the Trial Chamber should have found the content of a November 1978 issue of *Revolutionary Flag* to be probative despite it being considered a propaganda material.[1129] In the Supreme Court Chamber's view, this example serves rather to disprove KHIEU Samphân's assertion that the Trial Chamber failed to assess whether statements made for propaganda purposes were unreliable. The Trial Chamber carefully considered a range of available evidence, including this *Revolutionary Flag*, and reached the nuanced conclusion that "[w]hile the individual's consent was part of the marriage principles of the Party, in practice, the agreement of both parties was less important than the adherence by future spouses to *Angkar*'s directives".[1130] KHIEU Samphân has not demonstrated an error in the Trial Chamber's assessment of this propaganda material.

446. KHIEU Samphân's claim that the Trial Chamber "relied only on propagandistic documents to convict" is self-evidently preposterous in light of the Trial Chamber's careful consideration of the evidence over hundreds of pages of the Trial Judgment. He also fails to specify which convictions are based on propaganda, but merely argues that the Trial Chamber "committed numerous errors of law and […] such findings must be invalidated."[1131] Furthermore, this submission is not borne out by his concrete examples of findings relying on his unspecified speech regarding Vietnamese and the November 1978 *Revolutionary Flag*. In both instances, the Trial Chamber relied on a range of evidence, including propaganda.[1132] These arguments are therefore dismissed.

e. Evidence Obtained through Torture

447. The Trial Chamber held that "torture-tainted evidence cannot be used for the truth of its contents".[1133] Where there was a risk of torture-tainted evidence, the Trial Chamber underlined that "such evidence was excluded from the proceedings unless: (1) a party rebutted

[1128] KHIEU Samphân's Appeal Brief (F54), para. 292, fn. 438, referring to paras 1551-1560.
[1129] KHIEU Samphân's Appeal Brief (F54), paras 292, 1193.
[1130] Trial Judgment (E465), para. 3548.
[1131] KHIEU Samphân's Appeal Brief (F54), para. 292.
[1132] KHIEU Samphân's convictions of the crime against humanity of persecution of the Vietnamese and genocide of the Vietnamese relied on various sources of evidence aside from his unspecified speech and propaganda. Trial Judgment (E465), pp. 1714-1742. See KHIEU Samphân's Appeal Brief (F54), para. 292, fn. 438, referring to KHIEU Samphân's Appeal Brief (F54), para. 1555, referring to Trial Judgment (E465), para. 3513; KHIEU Samphân's Appeal Brief (F54), para. 292, fn. 438, referring to KHIEU Samphân's Appeal Brief (F54), para. 1556, referring to Trial Judgment (E465), para. 3517.
[1133] Trial Judgment (E465), para. 74.

this presumption with other evidence; or (2) the use of the evidence fell within the exception noted in Article 15 [of the Convention Against Torture ("CAT")].[1134] According to the Trial Chamber, torture-tainted evidence is admissible if its use does not circumvent the prohibition against invoking the contents to establish its truth.[1135] The Trial Chamber further determined that, although there was a real risk that confessions obtained at security centres during DK were torture-tainted, certain objective information contained within confessions is not a part of the statement and therefore not excluded.[1136] The permissible information includes the detainees' identities and dates of arrest, incarceration or execution, which is recorded either during registration at the security centre or at the beginning of a document containing a confession, but not in the confession itself.[1137] The Trial Chamber also stated, Judge FENZ dissenting, that torture-tainted evidence may be used to prove facts other than the truth of the statement, but only to identify what action was taken in response to the confession.[1138]

448. KHIEU Samphân submits that the Trial Chamber erred in law in its interpretation of Article 15 of the CAT when it permitted evidence from notebooks or prisoner logbooks from security centres to be received and then relied on such evidence to make findings in relation to the deportation of the Vietnamese and the first wave of East Zone purges.[1139] He contends that while this error invalidates "some findings" related to the "political notion of policy of the elimination of enemies",[1140] the Supreme Court Chamber "must necessarily address it given its general significance to the ECCC's jurisprudence".[1141] He argues that the Trial Chamber erred in law by finding that the use of torture-tainted evidence is permissible as long as it is not used to establish the truth of its contents,[1142] which contradicts international jurisprudence prohibiting the use of statements obtained through torture.[1143] He further contends that the Trial Chamber erroneously relied on notebooks or prisoner logbooks from security centres, finding that such documents containing observations of torturers are permissible as long as they are not used to establish the truth of torture victims' confessions.[1144] He alleges that the Trial

[1134] Trial Judgment (E465), para. 74.
[1135] Trial Judgment (E465), para. 75.
[1136] Trial Judgment (E465), para. 76.
[1137] Trial Judgment (E465), para. 76.
[1138] Trial Judgment (E465), para. 77.
[1139] KHIEU Samphân's Appeal Brief (F54), para. 258. See also KHIEU Samphân's Appeal Brief (F54), paras 259-287, 289-290. T. 16 August 2021, F1/9.1, pp. 43-45.
[1140] T. 16 August 2021, F1/9.1, p. 45.
[1141] KHIEU Samphân's Appeal Brief (F54), para. 258. See also KHIEU Samphân's Appeal Brief (F54), para. 288.
[1142] KHIEU Samphân's Appeal Brief (F54), paras 263-287.
[1143] KHIEU Samphân's Appeal Brief (F54), para. 269.
[1144] KHIEU Samphân's Appeal Brief (F54), para. 289.

Chamber erroneously relied on a Kraing Ta Chan Security Centre notebook to corroborate the deportation of the Vietnamese and POU Phally's S-21 notebook to support the arrest and interrogation of SUOS Neou *alias* Chhouk, the Secretary of Sector 24 of the East Zone, at S-21 in August-September 1976,[1145] hence the findings based on such evidence should be reversed.[1146]

449. The Co-Prosecutors respond that KHIEU Samphân has not demonstrated that the Trial Chamber erred in law, nor has he sufficiently described the harm suffered.[1147] They argue that the Trial Chamber's interpretation of Article 15 of the CAT is consistent with the object and purpose of the CAT and the Supreme Court Chamber's conclusion that "information originating from persons other than the torture victims [for example] from the torturer may be used".[1148] They further contend that the Trial Chamber correctly considered that the jurisprudence is not clear regarding use of torture-tainted evidence coerced directly by others as a part of a JCE that formed the basis for the Accused's torture conviction.[1149] They argue that KHIEU Samphân fails to establish that the Trial Chamber erred in law by using contested notebooks and prison logbooks, and that they are "even more removed from the interrogations than annotations on the interrogations".[1150]

450. The Lead Co-Lawyers agree with the Co-Prosecutors' Response.[1151]

451. The Supreme Court Chamber reaffirms its previous ruling that "subject only to the exception set out in the second sentence of Article 15 of the CAT, information obtained as a result of torture is inadmissible as evidence".[1152] As per the exclusionary rule in Article 15, such evidence is admissible against a person accused of inflicting torture as evidence that the statement was made.[1153] Notably, this exception applies only if one qualifies as "a person

[1145] KHIEU Samphân's Appeal Brief (F54), para. 290, referring to Trial Judgment (E465), paras 1115, 2274; Kraing Ta Chan Notebook, E3/5827, ERN (EN) 00866424-00866425, 00866436, 00866440-00866441, 00866446, 00866451, 00866456, 00866460, 00866462; POU Phally S-21 Notebook, E3/8368.
[1146] KHIEU Samphân's Appeal Brief (F54), para. 290.
[1147] Co-Prosecutors' Response (F54/1), paras 203-218. See also T. 16 August 2021, F1/9.1, p. 70
[1148] Co-Prosecutors' Response (F54/1), paras 205-207.
[1149] Co-Prosecutors' Response (F54/1), paras 209-210.
[1150] Co-Prosecutors' Response (F54/1), para. 211.
[1151] Lead Co-Lawyers' Response (F54/2), paras 181-183.
[1152] Decision on Objections to Document Lists Full Reasons, 31 December 2015, F26/12, para. 47 ("Decision on Objections (F26/12)").
[1153] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51, 10 December 1984, *entered into force* 26 June 1987, Art. 15.

accused of torture", and the statement can only be used to prove that it was made under torture.[1154]

452. The Supreme Court Chamber also reaffirms that, in light of the object and purpose of the CAT, it rejects any interpretation of Article 15 that would weaken the absolute and non-derogable nature of the prohibition and prevention of torture,[1155] and further reiterates that the exclusionary rule should be interpreted narrowly.[1156] Nevertheless, this narrow interpretation of Article 15 does not mandate "the sweeping exclusion of the whole documentation surrounding the interrogation of the torture victim".[1157] Accordingly, if an interrogation record contains information from persons other than the victim, it may be used to establish "questions posed, persons present, or the course of events and the application of torture in particular".[1158]

453. The Supreme Court Chamber considers that the Trial Chamber's finding is consistent with the CAT and the Supreme Court Chamber's ruling that "torture-tainted evidence cannot be used for the truth of its contents".[1159] The Trial Chamber clarified that evidence derived from torture-tainted statements is permissible as long as its use does not circumvent the prohibition against invoking the contents of torture-tainted confessions to establish their truth.[1160] In other words, the degree of inflicted pain could produce a false statement from the tortured prisoner. For instance, there were countless occasions where prisoners with no possible connection to those institutions *confessed* to being agents of the CIA, the KGB and of Vietnam. That *confession* could reasonably be viewed as a statement made under torture or following coercion in its many guises from physical cruelty and the infliction of pain, from sleep deprivation to loud noise, mind manipulation and fear. The statement thus obtained is used by the authorities to prove the truth of his confession that he was an agent of the CIA, the KGB or of Vietnam and broadcast over radio. Such confessions can never be used in any court of law to prove that what the victim of torture admitted was true. However, the fact that the victim was tortured and *confessed* is receivable and can be relevant evidence of a regime's maltreatment of opponents. The Trial Chamber clarified, Judge FENZ dissenting, that information contained in torture-tainted evidence could be used to establish facts other than the

[1154] Lene Wendland, *A Handbook on the State Obligation under the UN Convention Against Torture* (2002), p. 56.
[1155] Decision on Objections (F26/12), para. 40.
[1156] Decision on Objections (F26/12), para. 67.
[1157] Decision on Objections (F26/12), para. 68.
[1158] Decision on Objections (F26/12), para. 68.
[1159] Trial Judgment (E465), para. 74.
[1160] Trial Judgment (E465), para. 75.

truth of the statement, but only to determine what action resulted from the fact that a statement was made.[1161] KHIEU Samphân therefore fails to demonstrate an error of law in the Trial Chamber's approach in assessing evidence derived from torture-tainted statements.

454. In response to allegations that the Trial Chamber's relied on torture-tainted evidence, the Supreme Court Chamber notes that some objective information contained in notebooks and prisoner logbooks that were entered to record date time and identification of the prisoner is not tainted by torture and thus does not fall under the exclusionary rule and is permissible as evidence, including information originating from persons other than the torture victim.[1162] In the same way, photographs of prisoners who entered S-21 would be permissible as evidence as they were photographs of record and not contaminated by torture. Information such as the victims' biographies, with their names, age, residence, former occupation, and other details may well be excluded if included within a confession as it may well have been obtained by coercive means.[1163] Having reviewed KHIEU Samphân's allegation regarding the Trial Chamber's reliance on the Kraing Ta Chan notebook,[1164] the Supreme Court Chamber finds that a narrative sentence "[i]n January 1976 *Angkar* rounded up the *Yuon* [Vietnamese] people and sent them back to Vietnam" was used to corroborate the Trial Chamber's finding and lacks biographical information about the detainee.[1165] This is not information obtained from a prisoner but is a statement of a prison official recording facts. It is not torture-tainted. Accordingly, KHIEU Samphân fails to demonstrate any errors in the Trial Chamber's use of the Kraing Ta Chan notebook for corroboration and dismisses this argument. The Supreme Court Chamber also considers that KHIEU Samphân's reference to the Trial Chamber's reliance on POU Phally's S-21 notebook in addressing the arrest of SUOS Neou, the Secretary of Sector 24 of the East Zone,[1166] falls short of the standard of appellate review. Mere allegations of errors that have no demonstrable impact on the Trial Chamber's verdict are generally inadmissible for appellate review on the merits.[1167] For the foregoing reasons, the Supreme Court Chamber finds that KHIEU Samphân does not show any error warranting

[1161] Trial Judgment (E465), para. 77.
[1162] Decision on Objections (F26/12), para. 68.
[1163] Decision on Objections (F26/12), para. 68.
[1164] Trial Judgment (E465), para. 1115.
[1165] Kraing Ta Chan Notebook, E3/5827, ERN (EN) 00866430.
[1166] KHIEU Samphân's Appeal Brief (F54), para. 290, fn. 434, referring to Trial Judgment (E465), paras 2274; POU Phally S-21 Notebook, E3/8368.
[1167] Case 002/01 Appeal Judgment (F36), para. 364.

appellate intervention in the Trial Chamber's approach in assessing torture-tainted evidence and, accordingly dismisses his contention.

f. Witness and Civil Party Evidence

i. Written Statements whose Authors Could not Testify

455. In laying out its approach to the assessment of evidence, the Trial Chamber stated that evidence may be given less weight if the source or author cannot be examined.[1168] The Trial Chamber further held that statements taken outside the framework of the judicial process, including DC-Cam statements and Civil Party Applications, have low probative value.[1169] It recalled that if a finding is based in part on such statements, it must explain why.[1170] When testing the accuracy of a witness statement, the Trial Chamber may consider corroboration by other evidence and the nature of such evidence.[1171]

456. According to KHIEU Samphân, the Trial Chamber erred by applying a legal "framework which violates the principle of adversarial proceedings" to the probative value of written statements whose authors could not testify[1172] before the Trial Chamber by: (1) relying solely on them in relation to the acts and conduct of the Accused;[1173] and (2) using such statements *in lieu* of oral testimony,[1174] resulting in repeated errors in Cases 002/01 and 002/02.[1175]

457. First, he argues that the Trial Chamber "flippantly and in very broad language" applied the legal framework on the probative value of written statements by basing convictions on written statements without providing rigorous reasoning and indicating that the witness or civil party applicant had not testified in court.[1176] Second, he contends that the Trial Chamber erred in law by basing convictions on untested evidence in relation to the acts and conduct of the Accused "without counterbalancing it with respect for the principle of adversarial proceedings".[1177] He criticises the correctness of the Supreme Court Chamber's alleged

[1168] Trial Judgment (E465), para. 69.
[1169] Trial Judgment (E465), para. 69.
[1170] Trial Judgment (E465), para. 69.
[1171] Trial Judgment (E465), para. 69.
[1172] KHIEU Samphân's Appeal Brief (F54), paras 293-295.
[1173] KHIEU Samphân's Appeal Brief (F54), paras 296-300.
[1174] KHIEU Samphân's Appeal Brief (F54), paras 301-302.
[1175] KHIEU Samphân's Appeal Brief (F54), paras 303-305.
[1176] KHIEU Samphân's Appeal Brief (F54), paras 293-295.
[1177] KHIEU Samphân's Appeal Brief (F54), paras 296-300.

permissive approach to the use of untested evidence in contrast to international practice, which has continuously emphasised the importance of oral proceedings and the need to preserve the rights of the Accused.[1178] He alleges that he was convicted based on untested written statements, which violated his procedural rights and resulted in unfairness.[1179] He cites five of the Trial Chamber's findings that are purportedly based solely on untested written statements, namely: (1) murder at Phnom Kraol Security Center in relation to the deaths of two prisoners named Heus and Touch;[1180] (2) murder and extermination relating to the executions of six Vietnamese;[1181] (3) murder of Cham in Wat Au Trakuon;[1182] (4) KHIEU Samphân's involvement in the execution of the policy concerning the regulation of marriage;[1183] and (5) and the deportation of the Vietnamese from Anlong Trea village.[1184]

458. The Co-Prosecutors submit that KHIEU Samphân has not demonstrated that the Trial Chamber erred in its overall approach to written evidence and that it clearly addressed the issues relating to out-of-court statements after affording the parties an opportunity to rebut the evidence.[1185] They argue that KHIEU Samphân misrepresents the Trial Chamber's findings and fails to state the alleged harm to the requisite appellate standard.[1186] They also contend that he mischaracterises the Supreme Court Chamber's assessment regarding the Trial Chamber's reliance on written statements in Case 002/01.[1187] Concerning the framework set out by the Supreme Court Chamber for the assessment of written evidence, particularly out-of-court statements, the Co-Prosecutors respond that KHIEU Samphân simply disagrees with its ruling and is seemingly seeking a reconsideration without fulfilling the required standard.[1188] The Co-Prosecutors state that he fails to establish that any convictions were solely based on written statements absent sufficient counterbalancing factors.[1189] Finally, they argue that KHIEU

[1178] KHIEU Samphân's Appeal Brief (F54), para. 299.
[1179] KHIEU Samphân's Appeal Brief (F54), para. 300.
[1180] KHIEU Samphân's Appeal Brief (F54), para. 304, referring to KHIEU Samphân's Appeal Brief (F54), paras 863-873.
[1181] KHIEU Samphân's Appeal Brief (F54), para. 304, referring to KHIEU Samphân's Appeal Brief (F54), paras 842-847.
[1182] KHIEU Samphân's Appeal Brief (F54), para. 304, referring to KHIEU Samphân's Appeal Brief (F54), paras 899-910.
[1183] KHIEU Samphân's Appeal Brief (F54), para. 304.
[1184] KHIEU Samphân's Appeal Brief (F54), para. 304, fns 468, 469, referring to KHIEU Samphân's Appeal Brief (F54), paras 686-718; Trial Judgment (E465), para. 3430.
[1185] Co-Prosecutors' Response (F54/1), paras 222-223.
[1186] Co-Prosecutors' Response (F54/1), para. 221.
[1187] Co-Prosecutors' Response (F54/1), para. 224.
[1188] Co-Prosecutors' Response (F54/1), paras 221, 226.
[1189] Co-Prosecutors' Response (F54/1), paras 227, 229-230.

Samphân's concerns about reliance on untested evidence are without merit due to his "piecemeal approach to selectively citing paragraphs of the […] Judgment".[1190]

459. The Lead Co-Lawyers support the Co-Prosecutors' Response[1191] and point out that ECCC case law permits the use of written statements with legal safeguards.[1192] They argue that at hearings where relevant evidence is read out, parties have the opportunity to subject written statements to adversarial debate. The Trial Chamber thus correctly identified the applicable legal framework.[1193]

460. The Supreme Court Chamber notes that KHIEU Samphân raises two central questions: whether the Trial Chamber (1) applied the correct legal standard in assessing written statements whose authors could not testify; and (2) erred in its assessment and reliance on such written statements to convict him. These issues will be addressed sequentially below.

461. This Chamber understands KHIEU Samphân's first issue as a challenge to the Trial Chamber's legal framework, which he claims resulted in conviction solely or decisively based on untested evidence.[1194]

462. The Supreme Court Chamber observes that as a general rule, the written statements of witnesses who have not appeared before the Trial Chamber and have not been cross-examined in court are afforded less weight.[1195] The out-of-court statements collected outside of the judicial process framework, such as Civil Party Applications, reports and newspaper articles, must also be afforded low probative value.[1196] If the chamber relies solely on such evidence, it is incumbent on it to provide an explanation of the circumstances that enable it to make a factual conclusion based on the evidence in question, which will be of great significance for the determination of whether that conclusions reached was reasonable.[1197]

463. The Supreme Court Chamber notes that in the Trial Judgment, the Trial Chamber acknowledged the lower probative value of the written statements whose authors did not testify in court:

[1190] Co-Prosecutors' Response (F54/1), paras 229-230.
[1191] Lead Co-Lawyers' Response (F54/2), paras 181-183, 240-241.
[1192] Lead Co-Lawyers' Response (F54/2), paras 229-231.
[1193] Lead Co-Lawyers' Response (F54/2), paras 233-239.
[1194] KHIEU Samphân's Appeal Brief (F54), paras 297, 300, 302, 305, 843.
[1195] Case 002/01 Appeal Judgment (F36), para. 296.
[1196] Case 002/01 Appeal Judgment (F36), para. 296.
[1197] Case 002/01 Appeal Judgment (F36), para. 90.

> The Chamber further admitted statements of deceased or otherwise unavailable witnesses, including for the purpose of proving the acts and conduct of the Accused, noting however that they have limited probative value and that a conviction may not be based solely or decisively thereupon. Although such statements have lower probative value than the testimony of witnesses appearing before the Chamber, they may still be an important source of evidence, particularly where the statement was obtained by a judicial entity.[1198]

The Supreme Court Chamber concurs with the preceding approach and notes that the Trial Chamber's Judgment also expressly reflected that: "[w]here a finding relies in part on such statements, the reasons for the finding must be clearly explained, particularly if a conviction depends wholly or decisively on such evidence."[1199] The Trial Chamber evidently took cognisance of the requirement to treat with caution out-of-court statements and laid out its procedures when relying on untested written statements. If a finding relies solely on them, the chamber must explain the circumstances which justify the exception to the general rule.

464. In support of KHIEU Samphân's argument that this approach of the Trial Chamber "violates the principle of adversarial proceedings", he alleges that it failed to "rigorously reason its decision, and sometimes […] indicat[e] that the witnesses and civil parties in question had not been heard in court".[1200] The Supreme Court Chamber observes that the ECCC legal framework does not require the Trial Chamber to provide reasons for the assessment of each individual piece of evidence,[1201] nor is it practical to do so. This Chamber considers that KHIEU Samphân fails to demonstrate an overall error in the Trial Chamber's approach to untested evidence. His challenge does, however, alert this Chamber to the possibility of factual error in respect to specific factual conclusions.

465. The Supreme Court Chamber commences this assessment with the observation that international practice recognises the best evidence rule in that the evidence of witnesses who are subject to cross-examination is preferred over the submission of untested statements. It is a fair trial right guaranteed in Cambodian and ECCC Law by the adoption of Article 14 of the International Covenant on Civil and Political Rights ("ICCPR").[1202] KHIEU Samphân appears to contest the Supreme Court Chamber's Case 002/01 position on this issue, in criticising what he calls its *permissive holding on the use of untested evidence*[1203] which he submits contradicts

[1198] Trial Judgment (E465), para. 71, referring to Case 002/01 Appeal Judgment (F36), para. 296.
[1199] Trial Judgment (E465), para. 69.
[1200] KHIEU Samphân's Appeal Brief (F54), paras 295-300.
[1201] Case 002/01 Appeal Judgment (F36), para. 297, fn. 718.
[1202] International Covenant on Civil and Political Rights, *entered into force* 23 March 1976, 999 U.N.T.S. 171 and 1057 U.N.T.S 407 ("ICCPR"), Art. 14.
[1203] KHIEU Samphân's Appeal Brief (F54), para. 299.

the ICTY and ICC decisions.[1204] The Supreme Court Chamber notes that the ECCC legal framework has not established the standard for admission of untested evidence found in Rule 68 of the ICC's Rules of Procedure and Evidence and Rule 92 *bis* of the ICTY's Rules of Procedure and Evidence. Accordingly, the holding in *Prosecutor v. Bemba* where the Appeals Chamber of the ICC found an error in the ICC's Trial Chamber admission of "all prior recorded statements without a cautious item-by-item analysis"[1205] and the ICTY Appeals Chamber's determination in *Prosecutor v. Karadžić* regarding the admission of evidence without cross-examination pursuant to Rule 92 *bis* of the ICTY Rules[1206] are not applicable to the present case.

466. In this regard, the Supreme Court Chamber notes that a trial chamber *may* use untested evidence to convict *as long as* there are sufficient counterbalancing factors in place. This accords with the common law evidentiary norms that have evolved over centuries and are reflected in human rights conventions. The statement's provenance and the circumstances surrounding its creation are important. It must be considered if it was self-serving or whether a conflict of interest exists and whether there is a cogent reason why the author could not testify in court to be examined on the truth of the contents. Such statements must be viewed in the context of other evidence for consistency when weighing the probative value to be accorded to them on a case-by-case basis. If, for instance other witnesses give similar evidence then further deliberation might be warranted. All of these are important factors for consideration when weighing the value of such untested evidence.

467. Turning to KHIEU Samphân's allegations that the Trial Chamber erred in convicting him based solely on written statements "without taking the care to rigorously reason its decision",[1207] as determined above, the Trial Chamber's general concern about the probative value of out-of-court evidence is reflected in the Trial Judgment. It noted KHIEU Samphân's contention that written statements without the opportunity for confrontation have little

[1204] KHIEU Samphân's Appeal Brief (F54), para. 299.
[1205] *Prosecutor v. Bemba*, Appeals Chamber (ICC), ICC-01/05-01/08, Judgment on the Appeals 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", 3 May 2011, paras 78-81.
[1206] *Prosecutor v. Karadžić*, Appeals Chamber (IRMCT), MICT-13-55-A, Judgement, 20 March 2019, para. 162.
[1207] KHIEU Samphân's Appeal Brief (F54), para. 295. See also KHIEU Samphân's Appeal Brief (F54), para. 302.

probative value and may not be used to prove the Accused's acts and conduct.[1208] It further recalled that:

> [S]tatements taken outside of the framework of judicial process […] are of inherently low probative value. Where a finding relies in part on such statements, the reasons for the finding must be clearly explained […]. To test the accuracy of a witness statement, the Chamber may consider whether the statement is corroborated by other evidence and, if so, the nature of that evidence. The Chamber may also consider whether the prior statements of a witness are mutually consistent and whether inconsistencies are explained adequately.[1209]

468. This was the general context for the findings it made regarding two deaths at Phnom Kraol Prison: inmate "Heus", who was assaulted and killed by prison guards, and "Touch", who died as a result of the conditions he was exposed to.[1210] KHIEU Samphân's conviction for murder as a crime against humanity at the Phnom Kraol Security Centre was based solely on these facts.[1211]

469. This Chamber questions whether untested written statements were the only evidence leading to those findings of culpability for the murders of Heus and Touch within the JCE, and if so, did the Trial Judgment provide reasons for such findings. This Chamber notes that the Trial Chamber relied on the Written Records of Interview of UONG Dos and SOK El[1212] when considering the death of Heus and established that their respective Civil Party Applications cross-corroborated "[i]mportant aspects of the incident, including the victim's identity, the nature of the attack against him, the manner of his death and subsequent treatment of his corpse".[1213] Ultimately, the Trial Chamber was satisfied that UONG Dos and SOK El witnessed the same attack and found their accounts to be credible.[1214] Regarding the specific instance of death of "Touch", the Trial Chamber relied solely on the Written Record of Interview of SOK El.[1215] The Trial Chamber found his evidence to be credible and representative of a pattern of mistreatment at Phnom Kraol Prison.[1216] It considered the *actus reus* and *mens rea* of murder to be established on this basis.[1217]

[1208] Trial Judgment (E465), para. 68, fn. 170, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), paras 525-535, 541-551.
[1209] Trial Judgment (E465), para. 69.
[1210] Trial Judgment (E465), paras 3110, 3115-3117.
[1211] Trial Judgment (E465), paras 3115-3117.
[1212] Trial Judgment (E465), paras 3100, 3110.
[1213] Trial Judgment (E465), para. 3100.
[1214] Trial Judgment (E465), paras 3100, 3115.
[1215] Trial Judgment (E465), para. 3101.
[1216] Trial Judgment (E465), paras 3101, 3116.
[1217] Trial Judgment (E465), paras 3115, 3102, 3116, fn. 10522.

470. The Supreme Court Chamber observes that in reviewing the evidence before it, the Trial Chamber acknowledged that "[a]s a result of the paucity of evidence regarding executions at Trapeang Pring, the Chamber is unable to conclude that it served as an execution site".[1218] The Supreme Court Chamber notes that the conviction for the crime against humanity of murder at Phnom Kraol regarding deaths of prisoners Heus and Touch is based solely on two Written Records of Interview of UONG Dos and SOK El cross-corroborated by their respective Civil Party Applications.[1219] Despite the Trial Chamber's general acknowledgment that this evidence has inherently low probative value, it explained that UONG Dos' and SOK El's accounts are corroborated by their respective Civil Party Applications and contain "[i]mportant aspects of the incident, including the victim's identity, the nature of the attack against him, the manner of his death and subsequent treatment of his corpse".[1220] While the Supreme Court Chamber recognises that these accounts suggest the possibility of specific and first-hand evidence of killings at Phnom Kraol Security Centre, deceased UONG Dos and SOK El never testified in court, and in the absence of other evidence, their written statements corroborated only by their respective Civil Party Applications are incapable of proving murder beyond reasonable doubt. Therefore, the Supreme Court Chamber finds that the killings of prisoners Heus and Touch at Phnom Kraol could not be reasonably established to the requisite evidentiary standard.

471. It is the Supreme Court Chamber's view that, contrary to KHIEU Samphân's argument that the Trial Chamber erred in convicting him for murder as a crime against humanity of six Vietnamese nationals based solely on one written statement that lacked sufficient reasoning,[1221] witness CHHAOM Sé testified in Case 002/01 in court for two days and provided evidence concerning the murder of six Vietnamese. Specifically, he testified that "regarding the group of six people, I receive instructions from Sao Saroeun for them to be executed".[1222] Although he did not specifically mention the Vietnamese in his testimony, the Trial Chamber compared his statement in the Written Records of Interview and his in-court testimony before determining that he offered "consistent accounts" of the execution of the six people.[1223] The Trial Chamber

[1218] Trial Judgment (E465), para. 3114.
[1219] Trial Judgment (E465), paras 3100-3101, 3115-3116.
[1220] Trial Judgment (E465), para. 3100.
[1221] KHIEU Samphân's Appeal Brief (F54), paras 295, fn. 444, referring to KHIEU Samphân's Appeal Brief (F54), paras 842-847. See also KHIEU Samphân's Appeal Brief (F54), para. 302, fn. 461, referring to KHIEU Samphân's Appeal Brief (F54), paras 842-847, 1055.
[1222] T. 11 January 2013 (CHHAOM Sé), E1/159.1, p. 104.
[1223] Trial Judgment (E465), para. 2926, referring to T. 11 January 2013 (CHHAOM Sé), E1/159.1, p. 104; T. 8 April 2013 (CHHAOM Sé), E1/177.1, p. 16; Written Record of Interview of CHHAOM Sé, 31 October 2009, E3/405, ERN (EN) 00406215, p. 7.

concluded that CHHAOM Sé was referring to "the same group of Vietnamese people referred to in his statement as having been 'finished off' in accordance with the orders of the Division 801 Commander."[1224] The Supreme Court Chamber considers that the Trial Chamber did not err in relying on CHHAOM Sé's Written Records of Interview and Case 002/01 testimony to establish that six Vietnamese were killed at Au Kanseng.[1225]

472. Furthermore, the Supreme Court Chamber notes that KHIEU Samphân misinterpreted the Trial Judgment in arguing that the Trial Chamber erred in convicting him for deportation of the Vietnamese from Anlong Trea village based solely on two written statements.[1226] The Trial Chamber's recitation of the evidence concerning deportation of the Vietnamese from Anlung Trea village was based on the testimony of SAO Sak and the statement of EM Bunnim to the Co-Investigating Judges.[1227] The Supreme Court Chamber considers that the Trial Chamber relied on corroborated evidence, KHIEU Samphân thus fails to establish an error in the Trial Chamber's approach. This argument is accordingly dismissed.[1228]

473. The Supreme Court Chamber further considers that KHIEU Samphân's argument that the Trial Chamber erred in finding that his "involvement 'in the execution of [the policy of regulation of marriage] was corroborated by SIHANOUK'" is undeveloped.[1229] The Supreme Court Chamber observes that NORODOM Sihanouk's book is one piece of corroborative evidence on which the Trial Chamber relied in reaching its finding regarding marriages between disabled soldiers and young women.[1230] The Supreme Court Chamber rejects this contention because KHIEU Samphân has not clarified the nature of the Trial Chamber's error or how any such error resulted in a miscarriage of justice.

474. The Supreme Court Chamber observes that KHIEU Samphân's allegation about two Written Records of Interview of SOR Chheang and THONG Kim Khun that were used to corroborate the Trial Chamber's finding on murder of the Cham at Wat Au Trakuon does not substantiate how the Trial Chamber erred in its findings beyond asserting the "very low"

[1224] Trial Judgment (E465), para. 2926.
[1225] See *supra* Section V.C.3. See *infra* Section VII.B.2.f.; and *infra* Section VII.F.4.C.
[1226] KHIEU Samphân's Appeal Brief (F54), para. 304, fns 468, 469, referring to KHIEU Samphân's Appeal Brief (F54), paras 686-718.
[1227] Trial Judgment (E465), para. 3430.
[1228] See *infra* Section VII.D.2.
[1229] KHIEU Samphân's Appeal Brief (F54), para. 304.
[1230] Trial Judgment (E465), paras 3586-3590, referring to, *inter alia*, T. 29 August 2016 (SENG Soeun), E1/465.1, pp. 15-18, 22, 36; T. 5 September 2016 (NOP Ngim); Written Record of Interview of SENG Ol, 2 December 2009, E3/5833, pp. 6-7.

probative value of this evidence.[1231] This Chamber recalls that the Trial Chamber assessed evidence from seven villagers and members of the security forces operating at Wat Au Trakuon at the time of the killing of the Cham at the pagoda.[1232] It also considered other Written Records of Interview and documents that corroborated the killing of the Cham at Wat Au Trakuon.[1233] Accordingly, the Supreme Court Chamber considers that KHIEU Samphân has failed to articulate the Trial Chamber's error in assessing evidence concerning murder of the Cham at Wat Au Trakuon and dismisses this argument.[1234]

ii. Assessment of Civil Party Applicants' Statements

475. The Trial Chamber held that "civil party applications are not created by a judicial entity and are accordingly not accorded a presumption of reliability and are accorded little, if any, probative value".[1235]

476. KHIEU Samphân argues that, despite this recognition, "the Chamber was unafraid to rest convictions on civil party applications and even on simple annexes."[1236] Specifically, he contends that the Trial Chamber relied on an annex of a Civil Party Application to find that the Vietnamese from Angkor Yuos village were expelled.[1237] He argues that the Trial Chamber breached its own evidence assessment standards when it stated that the annex to Civil Party Application was used solely to "corroborate[s] the existence of a pattern of displacements of Vietnamese", but then exceeded this limited use in its findings.[1238] He further avers that the annex was insufficient to corroborate the finding regarding displacements of the Vietnamese in Prey Veng province in 1975.[1239] In this regard, he challenges the Trial Chamber's ruling that "separate and distinct facts can be used to corroborate each other" in order to establish facts that individuals in other villages in Prey Veng province were expelled and deported to Vietnam.[1240] KHIEU Samphân argues that the relevant findings must be invalidated and the trial declared unfair.[1241]

[1231] KHIEU Samphân's Appeal Brief (F54), para. 909.
[1232] Trial Judgment (E465), fns 11160-11220.
[1233] Trial Judgment (E465), fns 11215-11220 (referencing various Written Records of Interview).
[1234] See *infra* Section VII.B.1.b.
[1235] Trial Judgment (E465), para. 73.
[1236] KHIEU Samphân's Appeal Brief (F54), para. 315.
[1237] KHIEU Samphân's Appeal Brief (F54), paras 316, 978.
[1238] KHIEU Samphân's Appeal Brief (F54), para. 978.
[1239] KHIEU Samphân's Appeal Brief (F54), paras 979-980.
[1240] KHIEU Samphân's Appeal Brief (F54), paras 979-980.
[1241] KHIEU Samphân's Appeal Brief (F54), para. 316.

477. The Co-Prosecutors accept that the Trial Chamber's reliance on a Civil Party Application about deportation in Angkor Yuos village "may have been in error".[1242] They submit, however, that KHIEU Samphân was charged and convicted of deportation in Prey Veng province as a whole, and this conviction rests on the Trial Chamber's finding of deportations from two other villages, Anlong Trea and Pou Chentam.[1243] As such KHIEU Samphân has failed to establish that this error invalidates the judgment or occasions a miscarriage of justice.[1244]

478. The Lead Co-Lawyers agree with the Co-Prosecutors that KHIEU Samphân was charged and convicted with deportation of Vietnamese from Prey Veng province as a whole.[1245] They add that the Trial Chamber noted the limited probative value of the evidence and explicitly indicated that it was relied on only insofar as it "corroborates the existence of a pattern of displacements of Vietnamese in Prey Veng province in 1975."[1246] This reference was not critical to the verdict reached.[1247]

479. The Supreme Court Chamber notes that although KHIEU Samphân submits that multiple "convictions"[1248] were entered based on Civil Party Applications, his arguments pertain to one "example".[1249] This Chamber declines to consider unsubstantiated assertions and will therefore examine only the specific instance alleged. The Trial Chamber initially declined to enter a finding beyond a reasonable doubt with respect to deportations of Vietnamese from Angkor Yuos village. It noted that while some evidence "suggests" these may have occurred, "this results from an annex to a Civil Party Application and therefore bears very limited probative value".[1250] It therefore found that this account only "corroborates the existence of a pattern of displacements of Vietnamese in Prey Veng province in 1975."[1251] The Supreme Court Chamber sees no error in this approach, which accords with the limited probative value of the evidence.

[1242] Co-Prosecutors' Response (F54/1), para. 236.
[1243] Co-Prosecutors' Response (F54/1), para. 236.
[1244] Co-Prosecutors' Response (F54/1), para. 236.
[1245] Lead Co-Lawyers' Response (F54/2), para. 212.
[1246] Lead Co-Lawyers' Response (F54/2), para. 212, referring to Trial Judgment (E465), para. 3432.
[1247] Lead Co-Lawyers' Response (F54/2), para. 212.
[1248] KHIEU Samphân's Appeal Brief (F54), para. 315.
[1249] KHIEU Samphân's Appeal Brief (F54), para. 316.
[1250] Trial Judgment (E465), para. 3432.
[1251] Trial Judgment (E465), para. 3432.

480. On the other hand, in its finding of deportations in Prey Veng province, the Trial Chamber mentioned Angkor Yuos village as a location from which deportation had been "found" that is, beyond a reasonable doubt.[1252] The Supreme Court Chamber accepts KHIEU Samphân's submission that this phrasing was an error. Nevertheless, the Co-Prosecutors and Lead Co-Lawyers are correct that this error did not occasion a miscarriage of justice. KHIEU Samphân's conviction concerning deportations from Prey Veng province rests on the Trial Chamber's findings of deportations from two other villages; this was corroborated by the Civil Party Application of PEOU Hong which suggests a pattern of displacements. This argument is therefore dismissed.

481. KHIEU Samphân disagrees with the legal framework adopted by the Trial Chamber for assessing the weight of civil party testimony, but concedes that this was upheld by the Supreme Court Chamber in Case 002/01.[1253] The Supreme Court Chamber considers that KHIEU Samphân has not discharged his burden to seek its reconsideration and these submissions are not further considered.

482. KHIEU Samphân also submits that the Trial Chamber relied on civil party evidence that "was neither reliable nor credible"[1254] and failed to assess reliability and credibility having regard to all the circumstances in the case.[1255] To demonstrate this error, KHIEU Samphân submits that "[t]he example of the admission of EM Oeun's inculpatory evidence attributing to him statements he allegedly made at a training session, is a perfect illustration of the way in which the Trial Chamber erred in its assessment of civil party credibility. This is also true of civil party CHEA Deap concerning the alleged content of a speech made by the Appellant on the subject of marriage."[1256] The Supreme Court Chamber observes that KHIEU Samphân merely incorporates by reference other sections of his Appeal Brief, which are assessed in detail elsewhere in this Judgment.

g. Documents Benefitting from Presumption

483. The Trial Chamber accorded a rebuttable presumption of *prima facie* relevance and reliability, including authenticity to documents obtained from DC-Cam and documents cited

[1252] Trial Judgment (E465), para. 3505.
[1253] KHIEU Samphân's Appeal Brief (F54), paras 317-318.
[1254] KHIEU Samphân's Appeal Brief (F54), para. 319.
[1255] KHIEU Samphân's Appeal Brief (F54), para. 318.
[1256] KHIEU Samphân's Appeal Brief (F54), para. 319.

in the Case 002 Closing Order.[1257] Relying on the legal framework stated in the Case 002/01 Trial Judgment and upheld by this Chamber in the Case 002/01 Appeal Judgment, the Trial Chamber adopted the same approach in Case 002/02.[1258] The Trial Chamber emphasised that it is incumbent upon the party contesting the reliability or authenticity of evidence to identify it and proffer reasons to rebut the presumption.[1259] Such concerns would be addressed on a case-by-case basis.[1260]

484. KHIEU Samphân submits that the Trial Chamber's approach in this regard constitutes an error of law as it did not "include sufficient safeguards to respect evidentiary standards in criminal law".[1261] Such safeguards, he says, should have been "even more scrupulously respected, as the evidence adduced was particularly fallible" due to the passage of time since the events in question.[1262] He argues that the ICTY's Appeals Chamber in *Prlić* "established a more rigorous framework for assessing authenticity in order to ensure evidentiary standards", and that this showed that it "was not enough to admit a rebuttable presumption of authenticity that was not justified by an objective criteria, but established an analytical process based on a specific set of indicia."[1263] He submits specifically that the Trial Chamber did not provide reasons to his numerous challenges to the authenticity of the GOSCHA documents and the S-21 Logbook,[1264] and generally that other unspecified findings based on evidence admitted pursuant to this framework must be invalidated.[1265]

485. The Co-Prosecutors respond that KHIEU Samphân's arguments should fail as he is merely resurrecting unsuccessful arguments from the Case 002/01 appeal without providing new reason for reconsidering the previous conclusion.[1266] They argue that KHIEU Samphân misapprehends the *Prlić* Appeal Judgment.[1267] Finally, the Co-Prosecutors respond that the

[1257] Trial Judgment (E465), para. 46; Decision on Objections to Documents (E185), para. 20.
[1258] Trial Judgment (E465), para. 46, referring to Case 002/01 Trial Judgment (E313), para. 34; Case 002/01 Appeal Judgment (F36), para. 375.
[1259] Trial Judgment (E465), para. 46.
[1260] Trial Judgment (E465), para. 46.
[1261] KHIEU Samphân's Appeal Brief (F54), para. 321.
[1262] KHIEU Samphân's Appeal Brief (F54), para. 321.
[1263] KHIEU Samphân's Appeal Brief (F54), para. 322, referring to *Prosecutor v. Prlić et al.*, Appeals Chamber (ICTY), IT-04-74-A, Judgement, 29 November 2017 ("*Prlić et al.* Appeal Judgment (ICTY)"), para. 375.
[1264] KHIEU Samphân's Appeal Brief (F54), para. 322, referring to KHIEU Samphân's Appeal Brief (F54), paras 217-226.
[1265] KHIEU Samphân's Appeal Brief (F54), para. 322.
[1266] Co-Prosecutors' Response (F54/1), para. 238.
[1267] Co-Prosecutors' Response (F54/1), paras 238-239.

Trial Chamber provided reasoned responses for its decisions on the admissibility of these documents.[1268]

486. The Supreme Court Chamber notes that it previously upheld the Trial Chamber's approach in Case 002/01.[1269] This Chamber again rejects KHIEU Samphân's sweeping and unsubstantiated submission that the nature of the evidence in the case is "particularly fallible" and warrants a different analytical framework from that applied in any other case. He also incorrectly extrapolates the legal principles relating to the authenticity of a contested series of documents provided in the *Prlić* Appeal Judgment. As the Co-Prosecutors rightly point out, in rejecting one appellant's challenge to the admission of the "*Mladić* Diaries", the ICTY Appeals Chamber observed that the Trial Chamber had considered the issue of authenticity at length and noted the various factors that the Trial Chamber had considered.[1270] It specifically noted that "proving authenticity is not a separate threshold requirement for the admissibility of documentary evidence" and held that the appellant had failed to show an error in the Trial Chamber's exercise of discretion in admitting the "*Mladić* Diaries" into evidence without a graphological analysis or further information about the circumstances in which they were written.[1271] This new argument is therefore dismissed.

487. The Supreme Court Chamber has duly considered KHIEU Samphân's specific submissions pertaining to Standing Committee meeting minutes obtained from DC-Cam, the GOSCHA documents, and the S-21 Logbook elsewhere in this Judgment.[1272]

h. Expert Evidence

488. Concerning evidence provided by experts, the Trial Chamber noted that it would carefully scrutinise the sources used by the experts in making their conclusions, and explained that where factual findings rely upon an expert's work, it would seek precise indications as to the specific and verifiable sources of the information underpinning the expert's opinion.[1273] It would attribute less weight to expert evidence where these sources are not fully accessible or verifiable.[1274]

[1268] Co-Prosecutors' Response (F54/1), para. 240.
[1269] Case 002/01 Appeal Judgment (F36), paras 369-376.
[1270] *Prlić et al.* Appeal Judgment (ICTY), para. 121.
[1271] *Prlić et al.* Appeal Judgment (ICTY), para. 121.
[1272] KHIEU Samphân's Appeal Brief (F54), para. 322, fn. 509, referring to KHIEU Samphân's Appeal Brief (F54), paras 217-225, 226.
[1273] Trial Judgment (E465), para. 66.
[1274] Trial Judgment (E465), para. 66.

489. While KHIEU Samphân agrees with the Trial Chamber's stated approach for assessing evidence provided by experts, he argues that it did not properly apply this framework, "in particular by arbitrarily disregarding relevant evidence when it was exculpatory."[1275] He asks the Supreme Court Chamber to invalidate the affected findings and declare his trial unfair.[1276] As KHIEU Samphân's arguments on this point are more fully developed in relation to the Trial Chamber's treatment of the evidence of experts Peg LEVINE and NAKAGAWA Kasumi in relation to the charges of a policy of forced marriage,[1277] the Supreme Court Chamber has addressed them in that section of the Judgment.

VI. ALLEGED ERRORS IN THE SCOPE OF THE JUDICIAL INVESTIGATION AND TRIAL

A. THE SCOPE OF THE JUDICIAL INVESTIGATION

1. The Law

490. In his Closing Brief, KHIEU Samphân argued that the Trial Chamber was improperly seised of seven sets of facts in the Closing Order that were not within the scope of the judicial investigation as defined by the Introductory and Supplementary Submissions.[1278]

491. The Trial Chamber stated that the purpose of preliminary objections under Rule 89 is "to clarify the scope of the trial prior to the start of hearing evidence" and that "any request concerning [its] authority to deal with parts of the Closing Order which is raised after the expiry of the time limit for the filing of the preliminary objections shall be considered untimely and denied."[1279] The Trial Chamber characterised KHIEU Samphân's objections as "challenges to its jurisdiction to adjudicate [a number of] facts"[1280] and held that these objections were subject to the deadline set by Rule 89(1).[1281] KHIEU Samphân's objections to the seven sets of facts were rejected by the Trial Chamber, with the exception of his challenge relating to the charge of deportation of Vietnamese[1282] which was raised in a timely fashion and as a preliminary

[1275] KHIEU Samphân's Appeal Brief (F54), para. 330; See also T. 16 August 2021, F1/9.1, p. 22.
[1276] KHIEU Samphân's Appeal Brief (F54), para. 330.
[1277] KHIEU Samphân's Appeal Brief (F54), paras 1209-1210.
[1278] Trial Judgment (E465), paras 158-159; KHIEU Samphân's Closing Brief (E457/6/4/1), para. 217. The facts generally related to: (1) Tram Kak District; (2) the Trapeang Thma Dam; (3) the 1st January Dam; (4) Phnom Kraol; (5) Kraing Ta Chan; (6) Au Kanseng; (7) purges; and (8) the treatment of Buddhists in the Tram Kak Cooperatives.
[1279] Trial Judgment (E465), para. 161.
[1280] Trial Judgment (E465), para. 165.
[1281] Trial Judgment (E465), para. 165.
[1282] Trial Judgment (E465), para. 159(a), referring to KHIEU Samphân's Closing Brief (E457/6/4/1), paras 219-276.

objection.[1283] The Trial Chamber examined the merits of this objection but rejected KHIEU Samphân's remaining objections as belated because they were submitted after the time limit prescribed by Rule 89(1).[1284]

492. In his appeal, KHIEU Samphân argues that the Trial Chamber erred in law by characterising his requests as belated preliminary objections under Rule 89 and finding them inadmissible.[1285] In particular, he submits that: (1) Rule 89(1)(a) concerns the legal jurisdiction of the ECCC within the meaning of the ECCC Law and does not apply to the Trial Chamber's jurisdiction with respect to facts;[1286] (2) the Trial Chamber's characterisation of requests as preliminary objections was opportunistic and selective;[1287] and (3) the Trial Chamber committed a miscarriage of justice by failing to address the merits of his requests.[1288] The Supreme Court Chamber addresses each of these submissions in turn.

a. Alleged Error in Characterisation of Requests Relating to the Scope of the Investigation as Preliminary Objections

493. The Trial Chamber held that KHIEU Samphân's objections amounted to "challenges to its jurisdiction to adjudicate a number of facts" and were therefore subject to the time-limit prescribed by Rule 89.[1289] KHIEU Samphân argues that Rule 89(1)(a) concerns the legal jurisdiction of the ECCC as defined by the ECCC Law, and that this Rule and its deadline do not apply to objections to the Chamber's jurisdiction over facts.[1290] In support, he argues that when Rules 89(3) and 98 are read together, they demonstrate that Rule 89(1) only concerns jurisdiction under the law and is in compliance with the principle of legality.[1291] He submits that "no one at the ECCC" has ever interpreted the jurisdiction referred to in Rules 89(1) and 98 differently, citing the Pre-Trial Chamber's jurisprudence to support his claim.[1292]

494. In response to the finding that his requests were belated, KHIEU Samphân contends that he has the standing to raise these challenges before the Supreme Court Chamber.[1293] In

[1283] Trial Judgment (E465), paras 163-164 (The objection related to the charge of deportation of Vietnamese was raised initially by IENG Sary and, upon his death, adhered to by KHIEU Samphân).
[1284] Trial Judgment (E465), para. 165, in relation to the sets of facts listed in para. 159 (b) to (g).
[1285] KHIEU Samphân's Appeal Brief (F54), para. 334; T. 16 August 2021, F1/9.1, pp. 109-111.
[1286] KHIEU Samphân's Appeal Brief (F54), paras 335-342; T. 16 August 2021, F1/9.1, p. 115.
[1287] KHIEU Samphân's Appeal Brief (F54), paras 335, 343-346.
[1288] KHIEU Samphân's Appeal Brief (F54), paras 335, 347-350.
[1289] Trial Judgment (E465), para. 165.
[1290] KHIEU Samphân's Appeal Brief (F54), para. 336.
[1291] KHIEU Samphân's Appeal Brief (F54), paras 337-338.
[1292] KHIEU Samphân's Appeal Brief (F54), paras 339-342.
[1293] T. 16 August 2021, F1/9.1, pp. 115-116.

any case, he submits that the Rules do not allow him to raise the challenges prior to the commencement of the trial.[1294] He argues that neither Rule 74, which governs appeals against the Closing Order during the pre-trial phase, nor Rule 89 provided him with such recourse.[1295] Furthermore, he submits that Rule 76(7), which addresses procedural defects, applies to the investigation but not to the Closing Order.[1296] KHIEU Samphân submits that due to the severance of Cases 002/01 and 002/02, these cases were subject to an indefinite framework in which jurisdiction was not final until the day before the close of hearings on the substance. He, therefore, refutes the Co-Prosecutors' submission that all matters related to the scope of the trial must be resolved prior to trial.[1297]

495. The Co-Prosecutors respond that KHIEU Samphân has failed to establish that the Trial Chamber erred in law by determining that his allegations were time-barred under Rule 89(1).[1298] The Co-Prosecutors aver that KHIEU Samphân has misinterpreted the Rules and overlooked the Supreme Court Chamber's jurisprudence.[1299] They submit that, when read in its context, and in contrast to Rules 74(3)(a) and 98, the term "jurisdiction" in Rule 89(1)(a) refers to the broader "jurisdiction of the Chamber" and is not limited to the legal jurisdiction of the ECCC.[1300] According to the Co-Prosecutors, the Supreme Court Chamber has held that the time limit in Rule 89(1)(a) applies to "procedural jurisdictional" challenges that are otherwise cured by the progression of the proceedings, not to "legal" or "absolute jurisdictional challenges".[1301] The Co-Prosecutors submit that such an interpretation is consistent with the purpose of preliminary objections, which is to clarify the *saisine* before the commencement of the trial and to ensure an orderly and efficient process.[1302] They cite Rule 79(1), which mandates that the Trial Chamber be seised by an indictment and Rule 76(7), which determines that the Closing Order cures all procedural defects in the investigation.[1303] Nevertheless, the Co-Prosecutors submit that Rule 76(7) does not apply to the Closing Order itself where the

[1294] T. 16 August 2021, F1/9.1, pp. 95-97, 106-108, 117.
[1295] T. 16 August 2021, F1/9.1, pp. 97-98, 108-110, 112-116, 122.
[1296] T. 16 August 2021, F1/9.1, pp. 112-114.
[1297] T. 16 August 2021, F1/9.1, pp. 124-125, referring to Case 002, Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 19 March 2012, E95/8/1/4, para. 10.
[1298] Co-Prosecutors' Response (F54/1), paras 273-274; T. 16 August 2021, F1/9.1, pp. 137-138.
[1299] Co-Prosecutors' Response (F54/1), paras 274-275; T. 16 August 2021, F1/9.1, pp. 137, 142.
[1300] Co-Prosecutors' Response (F54/1), para. 276.
[1301] Co-Prosecutors' Response (F54/1), paras 276-277.
[1302] Co-Prosecutors' Response (F54/1), para. 278; T. 16 August 2021, F1/9.1, pp. 138-139, 142.
[1303] T. 16 August 2021, F1/9.1, pp. 139-140.

matter is not open to appeal, and that this is why the preliminary objections mechanism in Rule 89(1) exists to ensure that the scope of the trial is clear before it begins.[1304]

496. According to the Lead Co-Lawyers, KHIEU Samphân has failed to demonstrate that "the Trial Chamber based its admissibility determinations on an erroneous interpretation of the law",[1305] and they point to omissions in KHIEU Samphân's contention that he was unable to raise his objections prior to the start of the trial pursuant to Rule 89.[1306] They argue that KHIEU Samphân ignored: (1) Rule 76, which envisages that certain challenges must be brought during the investigation phase;[1307] and (2) ECCC jurisprudence, which demonstrates that he was not procedurally barred from raising his objections before the Co-Investigating Judges, the Pre-Trial Chamber, or even at the start of the trial proceedings.[1308]

497. The Lead Co-Lawyers refute KHIEU Samphân's argument that Rule 74(3) expressly prohibits him from appealing the Closing Order on questions of scope, arguing that: (1) it is unclear what is meant by jurisdiction under Rule 74(3)(a); (2) the Pre-Trial Chamber expanded its appellate powers beyond Rule 74(3) where necessary to prevent serious fair trial rights violations; and (3) the Pre-Trial Chamber took the position that procedural defects in the investigation must be dealt with by the Pre-Trial Chamber.[1309] On this basis, they argue that Rule 74(3)(a) must be interpreted as allowing appeals on these issues when read in conjunction with Rule 76(7), which states that defects in the indictment are cured and cannot be raised before the Trial Chamber or Supreme Court Chamber.[1310] In any case, they submit that even if the matter is not appealable before the Pre-Trial Chamber, KHIEU Samphân should have raised this issue as a preliminary objection before the Trial Chamber, and as soon as he became aware of it.[1311]

498. The Supreme Court Chamber recalls the applicable law and observes that pursuant to Rule 89(1) a preliminary objection concerning: (1) the jurisdiction of the Trial Chamber; (2) any issue requiring the termination of prosecution; or (3) nullity of procedural acts made after the indictment is filed, "shall be raised no later than 30 (thirty) days after the Closing Order

[1304] T. 16 August 2021, F1/9.1, pp. 140-141.
[1305] Lead Co-Lawyers' Response (F54/2), paras 139 (heading), 147.
[1306] Lead Co-Lawyers' Response (F54/2), paras 139-140.
[1307] Lead Co-Lawyers' Response (F54/2), para. 141.
[1308] Lead Co-Lawyers' Response (F54/2), paras 142-145.
[1309] T. 17 August 2021, F1/10.1, pp. 7-8.
[1310] T. 17 August 2021, F1/10.1, pp. 8-9.
[1311] T. 17 August 2021, F1/10.1, p. 10.

becomes final, failing which it shall be inadmissible."[1312] Rule 89(3) allows the Trial Chamber to issue its decision on a preliminary objection "either immediately or at the same time as the judgment on the merits",[1313] and Rule 98, which governs the Judgment, states, *inter alia*, that "[t]he Chamber shall examine whether the acts amount to a crime falling within the jurisdiction of the ECCC".[1314]

499. Turning to KHIEU Samphân's submissions,[1315] the Supreme Court Chamber is unconvinced that a combined reading of Rules 89(3) and 98 demonstrates that Rule 89(1) concerns the legal jurisdiction of the ECCC only.[1316] At the outset, the Supreme Court Chamber observes that Rule 89(1)(a) refers to *the jurisdiction of the Trial Chamber* whereas Rule 98 concerns the *jurisdiction of the ECCC*.[1317] In addition, this Chamber considers that Rule 89(3) enables the Trial Chamber to issue its decision on a preliminary objection "at the same time as the judgment on the merits", when a jurisdictional objection is based on the Trial Chamber's findings of fact or entails a mixed assessment of fact and law.[1318] This Rule does not preclude the Trial Chamber from issuing its decision on a preliminary objection "immediately", for example, where a challenge to its legal jurisdiction is raised prior to the commencement of the trial.[1319] It follows that Rule 89(3) lends insufficient support to KHIEU Samphân's claim that both Rules 98 and 89(1) concern "jurisdiction pursuant to the law and in compliance with the principle of legality".[1320]

500. Instead, the Supreme Court Chamber considers that the different wording of Rules 89(1)(a) and 98 is intentional, and that a plain reading of these Rules must lead to the conclusion that the *jurisdiction of the Trial Chamber* referred to in Rule 89(1)(a) is distinct from the *jurisdiction of the ECCC* in Rules 74(3)(a) and 98. The Supreme Court Chamber considers that Rule 89(1)(a) refers broadly to the jurisdiction of the Trial Chamber, including its legal and

[1312] Internal Rules, Rule 89(1).
[1313] Internal Rules, Rule 89(3).
[1314] Internal Rules, Rule 98(3).
[1315] KHIEU Samphân's Appeal Brief (F54), paras 336-342.
[1316] KHIEU Samphân's Appeal Brief (F54), paras 337-338.
[1317] Internal Rules, Rules 89(1)(a), 98(3), 98(7).
[1318] Internal Rules, Rule 89(3); Case 001 Appeal Judgment (F28), para. 29; Case 002, Trial Chamber Memorandum, Directions to parties concerning Preliminary Objections and related issues, 5 April 2011, E51/7, p. 3; Case 002/01, Trial Chamber Memorandum, Further information regarding remaining preliminary objections, 25 April 2014, E306("Case 002/01 Trial Chamber Memorandum (E306)"), para. 2 .
[1319] See, *e.g.*, Case 002, Decision on IENG Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem and Amnesty and Pardon*), 3 November 2011, E51/15; Case 002, Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 22 September 2011, E122 ("Case 002 Decision on Preliminary Objections (E122)").
[1320] KHIEU Samphân's Appeal Brief (F54), paras 337-338.

factual jurisdiction, whereas Rules 74(3)(a) and 98 concern the legal jurisdiction of the Court as defined by the ECCC Law. Such an interpretation is consistent with the purpose of Rule 89 to "promote […] the orderly and efficient administration of justice"[1321] and to "clarify the scope of the trial prior to the start of hearing evidence", as held by the Trial Chamber.[1322]

501. The Supreme Court Chamber considers that the procedural framework of the ECCC foresees a separation between the judicial investigation and the trial stage as evidenced by Rules 76(2) and 76(7). Rule 76(2) enables the parties to request annulment of any part of the proceedings during the judicial investigation,[1323] while Rule 76(7) bars the parties from raising such alleged defects before the Trial Chamber or Supreme Court Chamber because "[s]ubject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation."[1324] The Supreme Court Chamber agrees with the Trial Chamber that the purpose of these provisions "is to ensure that parties […] act diligently in order to solve procedural matters at the pre-trial stage so that these matters do not impede the course of the trial."[1325] Where such matters relating to defects in the Closing Order have not been resolved during the pre-trial stage, Rule 89(1) may serve a similar purpose to resolve any outstanding objections to the Trial Chamber's factual jurisdiction "no later than 30 (thirty) days after the Closing Order becomes final".[1326] It follows that challenges pertaining to the scope of the Trial Chamber's factual jurisdiction arising from an alleged defect in the Closing Order may fall under the remit of Rule 89(1)(a).

502. In response to KHIEU Samphân's allegation that prior to the issuance of the Trial Judgment, "no one at the ECCC had ever interpreted the jurisdiction referred to in Internal

[1321] Case 001 Appeal Judgment (F28), para. 28, referring to *Prosecutor v. Milutinović et al.*, Trial Chamber (ICTY), IT-05-87-T, Decision on Nebojša Pavković's Motion for a Dismissal of the Indictment Against Him on Grounds that the United Nations Security Council Illegally Established the International Criminal Tribunal for the Former Yugoslavia, 21 February 2008, para. 15.
[1322] Trial Judgment (E465), para. 161.
[1323] Internal Rules, Rule 76(2). See also Case 003, Decision on MEAS Muth's Request for the Pre-Trial Chamber to Take a Broad Interpretation of the Permissible Scope of Appeals against the Closing Order & to Clarify the Procedure for Annulling the Closing Order, or Portions thereof, if Necessary, 28 April 2016, D158/1 ("Case 003 Decision on MEAS Muth's Request (D158/1)"), para. 20 (In respect of MEAS Muth's submission that the he may not be able to know prior to the issuance of a Closing Order whether he will be sent to trial on the basis of facts that were not set out in the Introductory Submission, the Pre-Trial Chamber held that "the Defence has ample opportunity to detect, before the issuance of Closing Orders, any irregularities occurring during the investigative proceedings and also have explicit procedural rights to request annulment of such irregularities.").
[1324] Internal Rules, Rule 76(7); Criminal Procedure Code of Cambodia, Art. 256; Case 002/01 Appeal Judgment (F36), para. 252.
[1325] Trial Judgment (E465), para. 160.
[1326] Internal Rules, Rule 89.

Rules 89(1) and 98 differently",[1327] the Supreme Court Chamber recalls its Case 001 Appeal Judgment. Therein, in respect of Rule 89(1)(a), the Supreme Court Chamber held that "[t]he concept of a preliminary objection must be understood, firstly, according to the knowledge of the parties" and that this Rule "presupposes that the parties are able to discover the alleged lack of jurisdiction by the prescribed deadline".[1328] It further distinguished between alleged jurisdictional defects that do not "preclude proceedings *in limine*" and absolute jurisdictional challenges that, if successful, would nullify the proceedings.[1329] The Supreme Court Chamber envisaged a broader interpretation of Rule 89(1)(a), not strictly limited to objections to the Trial Chamber's "legal" jurisdiction, which would necessarily fall under the category of absolute jurisdictional challenges. The Supreme Court Chamber will consider the parties' submissions on the nature of KHIEU Samphân's objections below.

503. Other authorities invoked by KHIEU Samphân are of little relevance.[1330] KHIEU Samphân relies on a Trial Chamber decision that concerned a request pursuant to Rule 98(2), not a Rule 89 preliminary objection.[1331] Accordingly, the Trial Chamber's ruling that pursuant to Rule 98(3), it "has a duty to examine whether the acts committed by the Accused amount to a crime"[1332] does not concern the correct interpretation of Rule 89(1). Furthermore, the Pre-Trial Chamber's holding that "challenges alleging defects in the form of the indictment [are] 'clearly non-jurisdictional'"[1333] must be read in light of Rule 74(3)(a), which provides that the accused may appeal orders or decisions "confirming *the jurisdiction of the ECCC*."[1334] As opposed to Rule 89, Rule 74(3)(a) addresses jurisdiction as defined in Chapter II of the ECCC Law, which outlines the personal, temporal, and subject matter jurisdiction of the ECCC.[1335] In light of this specific rule, challenges alleging defects in the indictment are thus non-jurisdictional.

[1327] KHIEU Samphân's Appeal Brief (F54), para. 339.
[1328] Case 001 Appeal Judgment (F28), para. 30.
[1329] Case 001 Appeal Judgment (F28), para. 31.
[1330] KHIEU Samphân's Appeal Brief (F54), paras 340-342.
[1331] Case 002, Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 15 June 2011, E95 ("Case 002 Co-Prosecutors' Request on Nexus Requirement (E95)"), para. 6; Case 002, Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26 October 2011, E95/8 ("Case 002 Decision on Co-Prosecutors' Request on Nexus Requirement (E95/8)").
[1332] Case 002 Decision on Co-Prosecutors' Request on Nexus Requirement (E95/8), para. 9, fn. 31.
[1333] KHIEU Samphân's Appeal Brief (F54), para. 341.
[1334] Internal Rules, Rule 74(3)(a) (emphasis added).
[1335] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea, 10 August 2001, NS/RKM/1004/006 ("ECCC Law"), Chapter II; Internal Rules, Rule 74(3)(a).

504. For these reasons, this Chamber is unpersuaded by KHIEU Samphân's submission that Rule 89(1)(a) concerns "jurisdiction pursuant to the law and in compliance with the principle of legality" only.[1336] The Supreme Court Chamber, however, disagrees with the Trial Chamber where it held that "*any request* concerning [its] authority to deal with parts of the Closing Order *which is raised after the expiry of the time limit* for the filing of the preliminary objections *shall be considered untimely and denied*".[1337] While the parties may be restricted from raising objections to alleged jurisdictional defects that do not preclude proceedings *in limine* after the deadline prescribed by Rule 89(1), the Supreme Court Chamber reiterates that, practically, Rule 89(1)(a) may only be utilised to deal with a patent lack of jurisdiction, that is, a lack of jurisdiction that is apparent on its face,[1338] and that the accused has a right to raise an objection that could nullify the trial "at whatever time s/he decides safeguards his/her interest".[1339] The Supreme Court Chamber must therefore consider the nature of KHIEU Samphân's objections.

505. The Trial Chamber defined KHIEU Samphân's objections to the scope of the investigation as challenges to its jurisdiction to adjudicate a number of facts, which, if granted, would result in the termination of charges based on them.[1340] KHIEU Samphân submits that his challenges are absolute, with the intent of ending prosecution and reducing the legal grounds for conviction.[1341] He submits that his challenges are not of a procedural jurisdictional nature, *inter alia*, citing issues such as an incorrectly served summons to appear, which, according to him, is distinguishable from his objections to the scope of the investigation.[1342] Citing the Case 001 Appeal Judgment, he argues that, whether his challenges were tardy or not, the Trial Chamber could not have been conferred with jurisdiction that it did not have.[1343] He thus submits that his challenge may be raised at any time.[1344] Conversely, the Co-Prosecutors submit that KHIEU Samphân's objections are clearly procedural since they challenge the

[1336] KHIEU Samphân's Appeal Brief (F54), para. 338.
[1337] Trial Judgment (E465), para. 161 (emphasis added).
[1338] Case 001 Appeal Judgment (F28), para. 30.
[1339] Case 001 Appeal Judgment (F28), para. 35.
[1340] Trial Judgment (E465), para. 162.
[1341] T. 16 August 2021, F1/9.1, pp. 119-122 (The transcript of the Appeals Hearing uses the term "fundamental", a clear reference to what the Supreme Court Chamber previously considered absolute).
[1342] T. 16 August 2021, F1/9.1, pp. 120-122 (KHIEU Samphân argues that the challenges he raised do not concern procedural jurisdiction as interpreted by the Supreme Court Chamber. In the Case 001 Appeal Judgment (F28), the Supreme Court Chamber gave as examples of procedural jurisdiction issues where a summons to appear was served to the Accused in an incorrect manner or that another court may be competent to try the case. KHIEU Samphân submits that his challenges have nothing to do with such matters and are therefore fundamental (absolute)).
[1343] T. 16 August 2021, F1/9.1, pp. 121-122.
[1344] T. 16 August 2021, F1/9.1, pp. 120, 123-124.

"*saisine* of the [Trial Chamber]" based on alleged defects in the Closing Order rather than the ECCC's jurisdiction.[1345]

506. At the outset, this Chamber observes that KHIEU Samphân's submission that absolute jurisdictional challenges may be raised at any time, contradicts his position in his written submissions that Rule 89(1)(a) *and its deadline* concern the legal jurisdiction of the ECCC.[1346] In addition, this Chamber considers that KHIEU Samphân's objections to the scope of the investigation were apparent on the face of the proceedings and discoverable before the Rule 89 deadline elapsed. To the extent that KHIEU Samphân alleges that the facts in the Closing Order exceed those contained in the Introductory or Supplementary Submissions, the Supreme Court Chamber considers that this was discoverable, if not during the judicial investigation,[1347] then at the very least by the issuance of the Closing Order on 15 September 2010, several months before the Rule 89 deadline expired.[1348]

507. Moreover, the Supreme Court Chamber is of the view that objections of an absolute nature involve challenges to the ECCC's jurisdiction, including personal and subject matter jurisdiction, as outlined in Chapter II of the ECCC Law. In addition, challenges of an absolute character are challenges that require termination of prosecution as provided in Article 7 of the Criminal Procedure Code of Cambodia regarding the extinction of criminal actions, including the expiration of the statute of limitations, amnesty, and *res judicata*.[1349] This Chamber agrees with the Co-Prosecutors that since KHIEU Samphân "challenge[s] the '*saisine* of the [Trial Chamber]' based on alleged defects in the Closing Order and not the jurisdiction of the ECCC itself", his challenges do not fall within the remit of absolute jurisdiction and are subject to cure through adequate notice of the charges.[1350] Accordingly, the Trial Chamber did not err in holding that KHIEU Samphân's objections were subject to the deadline prescribed by Rule 89(1).[1351]

[1345] Co-Prosecutors' Response (F54/1), para. 276; T. 16 August 2021, F1/9.1, pp. 141-142.
[1346] KHIEU Samphân's Appeal Brief (F54), paras 335-342 (emphasis added).
[1347] Case 003 Decision on MEAS Muth's Request (D158/1), para. 20.
[1348] Case 002 Closing Order (D427).
[1349] Case 001 Appeal Judgment (F28), para. 31; Case 002, Decision on NUON Chea Motions regarding Fairness of Judicial Investigations (E51/3, E82, E88 and E92), 9 September 2011, E116; Criminal Procedure Code of Cambodia, Art. 7; Internal Rules, Rule 89(1)(b).
[1350] See, *e.g.*, *Prosecutor v. Renzaho*, Appeals Chamber (ICTR), ICTR-97-31-A, Judgment, 1 April 2011, para. 55; *Karera* Appeal Judgment (ICTR), para. 293; *Muvunyi* Appeal Judgment (ICTR), para. 20; *Prosecutor v. Ntagerura et al.*, Appeals Chamber (ICTR), ICTR-99-46-A, Judgment, 7 July 2006, para. 29.
[1351] Trial Judgment (E465), paras 161, 165.

b. Alleged Expediency in Characterising Requests as Preliminary Objections

508. In respect of its earlier decision to reject KHIEU Samphân's submissions concerning the charge of deportation of Vietnamese,[1352] the Trial Chamber reasoned that it had failed to take "into account that the Pre-Trial Chamber had decided not to rule on this ground of appeal" and that a "failure to consider the issue at trial under these circumstances could leave the Accused without effective recourse to challenge procedural defects in the Closing Order."[1353] The Trial Chamber thus examined the merits of the objection against the charge of deportation of Vietnamese "[g]iven that the matter was raised in a timely fashion at trial as a preliminary objection pursuant to Internal Rule 89".[1354]

509. KHIEU Samphân argues that the Trial Chamber "attache[d] the characterisation of preliminary objection selectively" because: (1) the Trial Chamber, in Case 002/01, considered the merits of certain requests by the Co-Prosecutors submitted pursuant to Rule 98 concerning JCE III liability and whether crimes against humanity required a nexus with armed conflict, while recognising in Case 002/02 that they were preliminary objections;[1355] (2) the motion related to the charge of deportation of Vietnamese was not based on Rule 89 and was filed separately from other preliminary objections and after the Rule 89 deadline had passed; and (3) the Trial Chamber examined a similar request in Case 002/01 in view of the Accused's fair trial rights and should have done the same with KHIEU Samphân's requests.[1356] In response, the Co-Prosecutors argue that KHIEU Samphân has misrepresented "the procedurally identical Deportation Application" filed by the IENG Sary Defence, which, they submit, the Trial Chamber consistently referred to as a preliminary objection.[1357]

510. First, with regard to the Co-Prosecutors' request concerning JCE III liability,[1358] the Supreme Court Chamber observes that this motion concerned a request for recharacterisation

[1352] Decision on Defence Preliminary Objection Regarding Jurisdiction over the Crime against Humanity of Deportation, 29 September 2014, E306/5 ("Decision on Defence Preliminary Objection (E306/5)"), paras 9-10, disposition. The Trial Chamber originally rejected KHIEU Samphân's submissions concerning the Chamber's jurisdiction over the crime against humanity of deportation on the basis that he "had the opportunity to detect the alleged irregularity here at issue" and that he did "not demonstrate […] any additional fair trial issue warranting intervention of the Chamber at this stage".
[1353] Trial Judgment (E465), para. 164.
[1354] Trial Judgment (E465), para. 164.
[1355] KHIEU Samphân's Appeal Brief (F54), para. 344.
[1356] KHIEU Samphân's Appeal Brief (F54), paras 343-345.
[1357] Co-Prosecutors' Response (F54/1), para. 279.
[1358] Case 002, Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 17 June 2011, E100 ("Case 002 Co-Prosecutors' JCE III Request (E100)").

of the facts pursuant to Rule 98(2).[1359] In respect of its admissibility, the Trial Chamber held that "subject only to the overriding requirements of a fair trial", it could "at any time change the legal characterisation of facts contained in the Amended Closing Order",[1360] thereby declaring the request admissible pursuant to Rule 98.[1361] Similarly, the Co-Prosecutors' request to exclude the armed conflict nexus requirement from the definition of crimes against humanity[1362] concerned a request, pursuant to Rule 98(2), to correct the definition of crimes against humanity.[1363] The Trial Chamber held that such a determination fell "squarely within the Trial Chamber's inherent powers" and that it could "at any time determine the applicable law in this case."[1364] The Supreme Court Chamber observes that, at the material time, these Co-Prosecutors' requests were neither based on, nor admitted as a preliminary objections pursuant to Rule 89. While the Trial Chamber thus erroneously referred to them as preliminary objections in a 2014 memorandum,[1365] this is insufficient to demonstrate that the Trial Chamber "recognised that they were preliminary objections" pursuant to Rule 89,[1366] as KHIEU Samphân contends.[1367] The Supreme Court Chamber considers that a reference in a Trial Chamber memorandum cannot, after the fact, change the basis of admissibility of a prior Trial Chamber Decision.

511. Second, turning to the objection concerning the charge of deportation of Vietnamese raised originally by IENG Sary,[1368] the Supreme Court Chamber agrees with KHIEU Samphân that this objection was not based on Rule 89. Rather, as KHIEU Samphân argues, the objection was part of a motion to strike or amend portions of the Closing Order due to procedural defects ("IENG Sary's Motion") and was filed separately from IENG Sary's consolidated list of preliminary objections. In respect of its admissibility, IENG Sary argued that "Cambodian law and the ECCC [Rules] are silent on the timing and procedure for moving to strike or amend portions of the Closing Order due to procedural defect"[1369] but that "the appropriate time to address these issues is […] *before the trial begins* […] because [of his] right to be informed in

[1359] Case 002 Co-Prosecutors' JCE III Request (E100), para. 1.
[1360] Case 002, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, E100/6 ("Case 002 JCE Decision (E100/6)"), para. 25.
[1361] Case 002 JCE Decision (E100/6), p. 16 (disposition).
[1362] Case 002 Co-Prosecutors' Request on Nexus Requirement (E95).
[1363] Case 002 Co-Prosecutors' Request on Nexus Requirement (E95), para. 6.
[1364] Case 002 Decision on Co-Prosecutors' Request on Nexus Requirement (E95/8), para. 9.
[1365] Case 002/01 Trial Chamber Memorandum (E306).
[1366] KHIEU Samphân's Appeal Brief (F54), para. 344.
[1367] KHIEU Samphân's Appeal Brief (F54), para. 344.
[1368] Case 002, IENG Sary's Motion to Strike Portions of the Closing Order Due to Defects, 24 January 2011 (filed on 24 February 2011), E58 ("Case 002 IENG Sary's Motion (E58)").
[1369] Case 002 IENG Sary's Motion (E58), para. 1.

detail of the charge(s)".[1370] At the time, the Co-Prosecutors objected to the admissibility of this motion on the basis that the Rules "do not allow for a Motion to strike or amend portions of the Closing Order once it has become final."[1371] Since IENG Sary had filed his definitive list of preliminary objections and the Deportation Motion was not asserted to be a preliminary objection, the Co-Prosecutors contended that it should be dismissed.[1372]

512. This Chamber is of the view that prior to the commencement of the trial preparations in Case 002/02, the Trial Chamber did not consistently refer to IENG Sary's Motion as a preliminary objection under Rule 89, as submitted by the Co-Prosecutors.[1373] At the Initial Hearing in Case 002, the Trial Chamber heard oral arguments in relation to all matters that it considered to be the preliminary objections within the scope of Rule 89.[1374] IENG Sary's objection to the charge of deportation was not among preliminary objections discussed during this hearing.[1375] Neither did the Trial Chamber refer to IENG Sary's Motion as a preliminary objection when it deferred its decision to a later date "in view of the subject matter of the first trial", while explicitly attributing the characterisation of preliminary objections to other motions.[1376]

513. Additionally, the Supreme Court Chamber observes that the Trial Chamber, prior to the commencement of Case 002/01, decided on the part of IENG Sary's Motion "requesting that portions of the Closing Order be struck out due to defects" relating to offences contained in the 1956 Penal Code.[1377] While considering that "motions to strike or amend the Closing Order do not generally form part of the ECCC's legal framework",[1378] the Trial Chamber determined the merits of this part of his request in view of IENG Sary's fair trial rights, including his right to be informed of the nature of the charges against him and to have adequate opportunity to prepare his defence.[1379] KHIEU Samphân argues that "this is what it ought to have done with

[1370] Case 002 IENG Sary's Motion (E58), para. 2 (emphasis added).
[1371] Case 002, Co-Prosecutors' Response to "IENG Sary's Motion to Strike Portions of the Closing Order Due to Defects", 16 March 2011, E58/1 ("Case 002 Co-Prosecutors' Response to IENG Sary's Motion (E58/1)"), para. 3.
[1372] Case 002 Co-Prosecutors' Response to IENG Sary's Motion (E58/1), para. 4.
[1373] Co-Prosecutors' Response (F54/1), para. 279.
[1374] Case 002 JCE Decision (E100/6). See also Case 002/01 Trial Chamber Memorandum (E141).
[1375] T. 27 June 2011, E1/4.1; T. 28 June 2011, E1/5.1; T. 29 June 2011, E1/6.1, T. 30 June 2011, E1/7.1.
[1376] Case 002 Severance Order (E124), para. 9, fn. 7 (compare IENG Sary's Motion v. "resolution of the following preliminary objections").
[1377] Case 002 IENG Sary's Motion (E58), paras 3-7; Case 002 Decision on Preliminary Objections (E122), para. 2.
[1378] Case 002 Decision on Preliminary Objections (E122), para. 16.
[1379] Case 002 Decision on Preliminary Objections (E122), para. 16.

all [his] requests, whether characterised as preliminary objections or not",[1380] whereas the Co-Prosecutors submit that KHIEU Samphân relied on a "misrepresentation of the [Trial Chamber's] characterisation"[1381] and that the Trial Chamber's decision relates "to a different challenge by IENG Sary in a different part of" his Motion.[1382]

514. With regards to the foregoing, the Supreme Court Chamber observes that, while the Trial Chamber's decision was limited to the part of IENG Sary's Motion objecting to offences contained in the 1956 Penal Code and not to his objections concerning the charge of deportation of Vietnamese,[1383] this part of IENG Sary's Motion similarly alleged a procedural defect in that portion of the Closing Order referring to crimes under Article 3 new as it failed to sufficiently inform the Accused of the nature of the charges against him and is therefore void for procedural defect.[1384] Moreover, the Supreme Court Chamber observes that it was not until 25 April 2014 that the Trial Chamber and, notably, KHIEU Samphân,[1385] started referring to the Deportation Motion as a preliminary objection,[1386] while the Co-Prosecutors confirmed their prior position concerning the admissibility of the request, that "litigation at trial concerning *alleged procedural defects* in the Closing Order are expressly barred by Internal Rule 76(7)".[1387] Additionally, while the Trial Chamber characterised the Deportation Motion as a preliminary objection in its Decision,[1388] it did not examine this objection pursuant Rule 89(1)(a) as a challenge to the Trial Chamber's jurisdiction to adjudicate facts. Instead, the Trial Chamber used a test for "specific and reasoned procedural challenges related to alleged irregularities occurring during the pre-trial phase."[1389]

515. On this basis, the Supreme Court Chamber concludes that the Trial Chamber was entirely consistent in dealing with motions or preliminary objections stemming from alleged procedural defects in the pre-trial phase and throughout different stages of the proceedings in Cases 002/01 and 002/02. Moreover, this Chamber is mindful that it rendered its Case 001

[1380] KHIEU Samphân's Appeal Brief (F54), para. 346.
[1381] Co-Prosecutors' Response (F54/1), para. 279.
[1382] Co-Prosecutors' Response (F54/1), fn. 969.
[1383] Case 002 Decision on Preliminary Objections (E122), para. 2.
[1384] Case 002 IENG Sary's Motion (E58).
[1385] Conclusions de la Défense de M. KHIEU Samphân sure les exceptions préliminaires sur lesquelles la Chambre n'a pas encore statué, 20 May 2014, E306/2, title & paras 1, 3.
[1386] Case 002/01 Trial Chamber Memorandum (E306), para. 5. See further Decision on Defence Preliminary Objection (E306/5), para. 5.
[1387] Co-Prosecutors' Joint Response to NUON Chea and KHIEU Samphan's Submissions concerning Preliminary Objections, 30 May 2014, E306/4, para. 6 (emphasis added).
[1388] Decision on Defence Preliminary Objection (E306/5).
[1389] Decision on Defence Preliminary Objection (E306/5), para. 6.

Appeal Judgment on 3 February 2012, whereas the deadline for preliminary objections in Case 002 expired in early 2011.[1390] This Chamber observes that while the Accused in Case 002 raised preliminary objections pursuant to Rule 89(1)(a) and (b) concerning issues such as the statute of limitations for domestic and international crimes, amnesty and pardon, *ne bis in idem*, the principle of legality, subject matter and personal jurisdiction,[1391] none of the Accused challenged the Trial Chamber's factual jurisdiction pursuant to Rule 89(1)(a).

516. Nevertheless, the Supreme Court Chamber considers that IENG Sary's objection to the charge of deportation of Vietnamese, later adopted by KHIEU Samphân, is distinguishable from any of KHIEU Samphân's other objections, whether originally filed pursuant to Rule 89 or not. This Chamber observes that this objection was filed prior to the commencement of the trial proceedings and within the extended deadline for preliminary objections.[1392] Therefore, having previously found that the jurisdiction in Rule 89(1)(a) may encompass objections to the Trial Chamber's jurisdiction over facts, the Trial Chamber did not err in later characterising the deportation challenge as a preliminary objection and considering its merits on this basis. In contrast, KHIEU Samphân's other objections were raised for the first time in his Closing Brief of 2 May 2017 or on appeal, years after the issuance of the Closing Order on 15 September 2010. KHIEU Samphân does not support the admissibility of these objections with any other procedural rule, except for his fair trial rights and right to be informed of the charges against him.[1393] This Chamber addresses this argument below.

c. Alleged Miscarriage of Justice

517. Alternatively, KHIEU Samphân submits that the Trial Chamber committed a miscarriage of justice by failing to recognise that his objections to the scope of the investigation were of such importance that it had to address them on their merits, regardless of their

[1390] Case 001 Appeal Judgment (F28).
[1391] Case 002, IENG Sary's Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches), 14 February 2011, E43; Case 002, IENG Thirith Defence's Preliminary Objections, 14 February 2011, E44; Case 002, Preliminary Objections Concerning Jurisdiction, 14 February 2011, E46; Case 002, Preliminary Objections Concerning Termination of Prosecution (Domestic Crimes), 14 February 2011, E47; Case 002, Consolidated Preliminary Objections, 25 February 2011, E51/3; Case 002, Summary of IENG Sary's Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in Lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011, E51/4.
[1392] *Contra* KHIEU Samphân's Appeal Brief (F54), para. 345 and fn. 550. See Case 002, Trial Chamber Memorandum, Preliminary Objections, 18 February 2011, E51/1, p. 2 (This memorandum mistakenly refers to 25 *January* 2011 as the deadline and is supposed to state 25 *February* 2011); Case 002, Trial Chamber Memorandum, Preliminary Objections, 22 February 2011, E51/5.
[1393] KHIEU Samphân's Appeal Brief (F54), paras 346, 349.

characterisation or whenever they were raised.[1394] He argues that preliminary motions must be considered even if filed out of time in view of "fundamental fairness and due process" and, given the importance of his right to be informed of the charges against him, he should not be foreclosed from raising a defect in the indictment even on appeal.[1395] Thus, KHIEU Samphân argues that the Trial Chamber's decision to find his objections inadmissible should be invalidated. Had it examined his objctions' merits, the Trial Chamber would not have convicted him on charges of which it had been improperly seised.[1396]

518. The Co-Prosecutors argue that the procedural framework of the ECCC envisages that all pre-trial matters will be resolved before the beginning of the trial and that KHIEU Samphân failed to support the admissibility of his claim with any procedural rule or jurisprudence.[1397] They contend that legal systems are "replete with rules requiring that certain matters be raised at particular times" and that KHIEU Samphân's failure to raise his claims in a timely fashion reflects his lack of due diligence.[1398] Finally, the Co-Prosecutors refute KHIEU Samphân's claim that the Trial Chamber violated his right to adequate notice of the charges since he was able to monitor the scope of the investigation as soon as he gained access to the Case File on 19 November 2007 and still failed to raise his objections until 2 May 2017.[1399]

519. The Lead Co-Lawyers submit that KHIEU Samphân has failed to demonstrate that the Trial Chamber exercised its discretion based on "a patently incorrect conclusion of fact" or that its decision was "so unfair and unreasonable as to constitute an abuse of discretion".[1400] According to them, KHIEU Samphân does not point to incorrect factual matters,[1401] does not explain why his challenges were not brought at an earlier stage and provides no reason as to why his late objections should be permitted to safeguard the fairness of the proceedings.[1402] While the Lead Co-Lawyers submit that the burden is on KHIEU Samphân to demonstrate that the Trial Chamber erred in the exercise of its discretion,[1403] they submit that the assessment of fairness in the proceedings must (1) "balance the rights of the various parties",[1404] and (2)

[1394] KHIEU Samphân's Appeal Brief (F54), paras 347, 350.
[1395] KHIEU Samphân's Appeal Brief (F54), paras 348-349 ; T. 16 August 2021, F1/9.1, p. 117.
[1396] KHIEU Samphân's Appeal Brief (F54), para. 350.
[1397] Co-Prosecutors' Response (F54/1), paras 278-279.
[1398] Co-Prosecutors' Response (F54/1), para. 279.
[1399] Co-Prosecutors' Response (F54/1), para. 280; T. 16 August 2021, F1/9.1, pp. 137-139.
[1400] Lead Co-Lawyers' Response (F54/2), paras 148-149.
[1401] Lead Co-Lawyers' Response (F54/2), para. 149.
[1402] Lead Co-Lawyers' Response (F54/2), para. 150.
[1403] Lead Co-Lawyers' Response (F54/2), para. 151.
[1404] Lead Co-Lawyers' Response (F54/2), para. 152.

"consider the extreme nature of the delay in bringing forward the arguments in question".[1405] Based on these factors, they submit that allowing KHIEU Samphân to raise his arguments at the end of the trial was not necessary to ensure his fair trial rights because the scope of the case was not, or should not have been, a surprise to him.[1406] Instead, it would have prejudiced the civil parties' rights to fair and certain proceedings.[1407]

520. KHIEU Samphân argues that the Trial Chamber committed a miscarriage of justice by failing to address the merits of his objections.[1408] He thus challenges the Trial Chamber's implicit decision *not to use* its discretion to address the merits of his untimely objections. In this regard, the Supreme Court Chamber considers that the Trial Chamber's discretionary power to entertain untimely preliminary objections is limited due to the mandatory language of Rule 89(1)(a) that any objection "*shall* be raised no later than 30 (thirty) days after the Closing Order becomes final."[1409] Rule 39(4)(b), however, provides that "the Chambers may, at the request of the concerned party or on their own motion […] recognise the validity of any action executed after the expiration of a time limit prescribed in these [Rules] on such terms, if any, as they see fit."[1410] Moreover, the Trial Chamber previously examined certain motions alleging procedural defects in view of a defendant's fair trial rights.[1411] The Supreme Court Chamber will therefore consider whether the Trial Chamber erred by deciding not to exercise its discretion to address KHIEU Samphân's untimely preliminary objections on their merits.

521. The Supreme Court Chamber recalls that it adopts a deferential approach in respect of discretionary decisions, and will intervene in the Trial Chamber's exercise of discretion only: (1) where the exercise of discretion is based on an erroneous interpretation of the law; (2) where it is exercised on a patently incorrect conclusion of fact; or (3) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.[1412] This Chamber observes that KHIEU Samphân does not point to legal or factual errors and instead bases his submissions on fundamental fairness and his right to be informed of the charges against him.[1413]

[1405] Lead Co-Lawyers' Response (F54/2), paras 146, 153.
[1406] Lead Co-Lawyers' Response (F54/2), paras 154-155.
[1407] Lead Co-Lawyers' Response (F54/2), paras 154, 156-159 ; T. 17 August 2021, F1/10.1, p. 11 (witnesses who testified in relation to charges related to Tram Kak District).
[1408] KHIEU Samphân's Appeal Brief (F54), paras 347, 350.
[1409] Internal Rules, Rule 89(1) (emphasis added).
[1410] Internal Rules, Rule 39(4)(b).
[1411] Case 002 Decision on Preliminary Objections (E122), para. 16.
[1412] Internal Rules, Rule 104(1); Case 002/01 Appeal Judgment (F36), paras 96-98.
[1413] KHIEU Samphân's Appeal Brief (F54), para. 349.

522. First, KHIEU Samphân relies on the jurisprudence of the *ad hoc* tribunals in support of his submission that "preliminary motions must be considered even if filed out of time" in view of fundamental fairness and due process.[1414] In respect of this submission, the Supreme Court Chamber agrees with the Lead Co-Lawyers that the decision invoked offers little guidance on the circumstances of the present case.[1415] The Single Judge's consideration that "preliminary motions […] concern issues of fundamental fairness and due process and that such motions will be considered even if filed out of time"[1416] concerned a request for a 20-day extension of time to submit preliminary objections during the pre-trial phase and is not comparable to the present situation where objections stemming from the pre-trial phase are lodged years later and at the end of the trial.[1417] Moreover, this decision is not in line with prevalent jurisprudence that time-limits must be observed unless good cause is shown that justifies a late filing.[1418]

523. Additional authorities invoked by KHIEU Samphân[1419] merely reflect the well-established doctrine that, in the absence of special circumstances, a party is under an obligation to raise any issue of contention before the pre-trial chamber or trial chamber "when it could have reasonably done so"[1420] and that "a failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on grounds of waiver."[1421] While certain chambers have also held that "the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal",[1422] the burden is on the

[1414] KHIEU Samphân's Appeal Brief (F54), para. 349, referring to *Prosecutor v. Turinabo et al*., Single Judge (IRMCT), MICT-18-116-PT, Decision on Motions for Extension of Time to File Preliminary Motions, 14 December 2018 ("*Turinabo et al.* Decision (IRMCT)"), p. 2.
[1415] Lead Co-Lawyers' Response (F54/2), para. 146 and fn. 301.
[1416] *Turinabo et al.* Decision (IRMCT), p. 2.
[1417] *Turinabo et al.* Decision (IRMCT), pp. 1-2.
[1418] See, *e.g.*, *Prosecutor v. Baton Haxhiu*, Appeals Chamber (ICTY), IT-04-84-R77.5-A, Decision on Admissibility of Notice of Appeal against Trial Judgement, 4 September 2008, para. 16; *Prosecutor v. Munyarugarama*, Appeals Chamber (IRMCT), MICT-12-09-AR14, Decision on Appeal against the Referral of Phénéan Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012, para. 16; *Prosecutor v. Kayishema & Ruzindana*, Appeals Chamber (ICTR), ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema & Ruzindana* Appeal Judgment (ICTR)"), paras 46-48.
[1419] KHIEU Samphân's Appeal Brief (F54), para. 349, fn. 556.
[1420] *Šainović et al.* Appeal Judgment (ICTY), para. 223; *Prosecutor v. Simić et al.*, Appeals Chamber (ICTY), IT-95-9-A, Judgement, 28 November 2006 ("*Simić et al.* Appeal Judgment (ICTY)"), para. 25; *Prosecutor v. Orić*, Appeals Chamber (IRMCT), MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016, para. 14; *Prosecutor v. Nyiramasuhuko et al*., Appeals Chamber (ICTR), ICTR-98-42-A, 14 December 2015 ("*Nyiramasuhuko et al*. Appeal Judgment (ICTR)"), para. 63; *Prosecutor v. Kambanda*, Appeals Chamber (ICTR), ICTR-97-23-A, Judgement, 19 October 2000, paras 25, 26, 41.
[1421] *Prosecutor v. Niyitegeka*, Appeals Chamber (ICTR), ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgment (ICTR)"), para. 199; *Simić et al.* Appeal Judgment (ICTY), para. 25. See further *Prosecutor v. Boškoski et al*., Appeals Chamber (ICTY), IT-04-82-A, Judgement, 19 May 2010, para. 185; *Prosecutor v. Naletilić & Martinović*, Appeals Chamber (ICTY), IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić & Martinović* Appeal Judgment (ICTY)"), para. 21.
[1422] *Niyitegeka* Appeal Judgment (ICTR), para. 200.

appellant to demonstrate that serious prejudice resulted from the alleged lack of adequate notice to the extent that it materially impaired his/her ability to prepare his/her defence.[1423] The Supreme Court Chamber concludes that KHIEU Samphân fails to demonstrate such prejudice.

524. KHIEU Samphân was able to monitor the scope of the investigation when he gained access to the Case File on 19 November 2007 and was informed of the nature and the cause of the charges against him through the Indictment and the Severance Order.[1424] He, therefore, had adequate time and facilities to prepare his defence, even in respect of any facts that allegedly exceeded the Introductory or Supplementary Submissions. Furthermore, the Supreme Court Chamber is of the view that KHIEU Samphân could have reasonably raised his objections at an earlier stage, for example, through a request for annulment pursuant to Rule 76(4), because charged persons with access to the case file had "ample opportunity to detect, before the issuance of Closing Orders, any irregularities occurring during the investigative proceedings and also have explicit procedural rights to request annulment of such irregularities."[1425]

525. Furthermore, Rule 21 provides that the "applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of […] Accused *and* Victims", that "ECCC proceedings shall be fair and adversarial and preserve a *balance between the rights of the parties*", and that "[p]roceedings before the ECCC shall be brought to a conclusion within a reasonable time."[1426] The Supreme Court Chamber considers that allowing challenges to the scope of the investigation to be raised at the end of the trial, without proper justification, would cause undue delay in the proceedings and prejudice the civil parties. Therefore, having considered the parties' submissions, the Supreme Court Chamber concludes that KHIEU Samphân fails to demonstrate that the Trial Chamber's decision was so unfair and unreasonable as to constitute an abuse of discretion.

2. Challenges to the Jurisdiction of the Trial Chamber to Adjudicate Certain Facts and the Related Findings

526. KHIEU Samphân submits that the Trial Chamber erred in determining the scope of the Co-Investigating Judges' jurisdiction based on its reasoning that: (1) "the degree of detail"

[1423] *Simić et al.* Appeal Judgment (ICTY), para. 25.
[1424] Case 002 Additional Severance Decision (E301/9/1); Case 002, Annex to Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014, E301/9/1.1 ("Case 002 Severance Decision Annex (E301/9/1.1)").
[1425] Case 003 Decision on Meas Muth's Request (D158/1), para. 20.
[1426] Internal Rules, Rule 21 (emphasis added).

differs between the Introductory Submission and the Closing Order; and (2) the Introductory Submission should be considered "in the light of all supporting documents".[1427] He argues that the scope of the judicial investigation is based only on the facts that have been legally characterised by the Co-Prosecutors and not the facts mentioned in the supporting evidence.[1428] He adds that pursuant to Rules 53(1) and 67(2), both the Introductory Submission and the Closing Order must include a summary of the facts and their legal characterisation, otherwise both shall be null and void.[1429]

527. The Co-Prosecutors respond that KHIEU Samphân misinterprets the level of detail required in introductory and supplementary submissions in determining the scope of judicial investigation.[1430] They allege that the Trial Chamber was reasonable in determining that the scope of the Co-Investigating Judges' jurisdiction is defined by the facts provided in introductory or supplementary submissions together with its footnotes and annexes.[1431]

528. The Lead Co-Lawyers agree with the Co-Prosecutors that any of the challenges which are not dismissed due to their belatedness should be rejected on their merits.[1432]

529. In terms of KHIEU Samphân's argument that the Closing Order exceeds the facts in the Introductory Submission and the Trial Chamber was improperly presented with those facts, the Trial Chamber stated that the degree of detail required in the Introductory Submission and the Closing Order is different.[1433] In making this determination, it recalled the Pre-Trial Chamber's reasoning that "while only a summary of facts and type of offence alleged are required at the stage of the Introductory Submission, a more complete 'description of the material facts' and their legal characterisation is required in the Closing Order".[1434] The Trial Chamber noted that in determining the scope of the facts before the Co-Investigating Judges, it considered the facts in the Introductory Submission "in the light of all supporting documents which are either referenced in its footnotes or in its annexes."[1435]

[1427] KHIEU Samphân's Appeal Brief (F54), para. 351.
[1428] KHIEU Samphân's Appeal Brief (F54), paras 352-366.
[1429] KHIEU Samphân's Appeal Brief (F54), paras 354-356.
[1430] Co-Prosecutors' Response (F54/1), paras 253-254.
[1431] Co-Prosecutors' Response (F54/1), paras 255-256.
[1432] Lead Co-Lawyers' Response (F54/2), para. 112, referring to Co-Prosecutors' Response (F54/1), paras 245-359.
[1433] Trial Judgment (E465), para. 166.
[1434] Trial Judgment (E465), para. 166, referring to Case 002, Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9 ("Case 002 JCE Decision (D97/15/9)"), para. 92.
[1435] Trial Judgment (E465), para. 167.

530. The Supreme Court Chamber notes that KHIEU Samphân raises two issues: (1) whether the Trial Chamber applied the correct legal standard for determining the merits of the case; and (2) whether it erred in considering that it had jurisdiction to adjudicate certain facts and make related findings. This Chamber addresses these issues in turn.

a. Legal Standard for Determining the Merits of a Case

531. Rules 53(1)-(2), and 55(1)-(3) define the scope of the Co-Investigating Judges' judicial investigation. Under Rule 53(1), an Introductory Submission shall contain:

> a) a summary of the facts; b) the type of offence(s) alleged; c) the relevant provisions of the law that defines and punishes the crimes; d) the name of any person to be investigated, if applicable; and e) the date and signature of both Co-Prosecutors.

Rule 55(2) provides that "[t]he Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission".

532. It is worth noting that KHIEU Samphân elects to resurrect issues that were previously decided by the Co-Investigating and Pre-Trial Chamber Judges, who had the mandate to adjudicate these issues during the investigation stage. Besides, KHIEU Samphân had ample opportunity to raise these issues as preliminary objections during the trial stage, in a timely manner. As the final instance court at the ECCC, the Supreme Court Chamber will address these issues in the interest of justice and in order to provide legal certainty and finality.

533. The Supreme Court Chamber recalls that the Pre-Trial Chamber in Case 001 held that the Co-Investigating Judges are aware of the circumstances surrounding the acts mentioned in the Introductory or Supplementary Submission.[1436] The Pre-Trial Chamber defined such circumstances as the ones in "which the alleged crime was committed and that contribute to the determination of its legal characterisation".[1437] The Pre-Trial Chamber further determined that those circumstances are "not considered as being new facts and are thus parts of the investigation".[1438]

534. The Supreme Court Chamber reiterates that the right to receive notice of charges is a fundamental right of a charged person.[1439] It recalls the Pre-Trial Chamber's finding that

[1436] Case 001, Decision on Appeal against Closing Order Indicting KAING Guek Eav *alias* "Duch", 5 December 2008, D99/3/42 ("Case 001 Decision on Closing Order Appeal (D99/3/42)"), para. 35.
[1437] Case 001 Decision on Closing Order Appeal (D99/3/42), para. 35.
[1438] Case 001 Decision on Closing Order Appeal (D99/3/42), para. 35.
[1439] Internal Rule 21(1)(d); ICCPR, Art. 9(2); Case 002 JCE Decision (D97/15/9), para. 92.

"particulars of facts summarized in the Introductory Submission can validly and in fact must be pleaded in the Closing Order so as to provide the Defence sufficient notice of the charges based on which the Trial shall proceed".[1440] The Supreme Court Chamber is of the view that facts provided in footnotes and annexes, attached to an introductory submission, fall within the scope of the judicial investigation.[1441] Thus, KHIEU Samphân's submission that "the degree of detail" between the Introductory Submission and the Closing Order should not differ[1442] is unfounded. The Supreme Court Chamber, therefore, finds that the Trial Chamber did not err in considering the Introductory Submission "in the light of all supporting documents" and rejects KHIEU Samphân's arguments in this regard.

b. Challenges to the Trial Chamber's Jurisdiction to Adjudicate Certain Facts and the Related Findings

535. The Supreme Court Chamber will now address KHIEU Samphân's arguments concerning the Trial Chamber's jurisdiction over certain facts regarding: (1) Tram Kak District; (2) the Trapeang Thma Dam; (3) the 1st January Dam; (4) Phnom Kraol; (5) Kraing Ta Chan; (6) Au Kanseng; (7) Kampong Chhnang Airfield Construction Site; (8) purges; and (9) treatment of Buddhists in the Tram Kak Cooperatives.

536. Regarding Tram Kak, KHIEU Samphân submits that the Trial Chamber erred in law when it determined that the geographic scope of the charges in the Closing Order included all cooperatives in Tram Kak district, resulting in an illegal widening of the scope of the trial.[1443] He argues that the Introductory Submission lists only the communes of (1) Kus; (2) Samraong; (3) Trapeang Thum South; (4) Tram Kak; (5) Trapeang Thum North; (6) Nhaeng Nhang; (7) Sre Ronoung; and (8) Ta Phem as within the scope of the judicial investigation.[1444]

[1440] Case 002 JCE Decision (D97/15/9), para. 92.
[1441] This Chamber observes that the International Judges of the Pre-Trial Chamber adopted a similar approach in addressing the scope of the judicial investigation. See Case 004/2, Considerations on AO An's Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigation of Tuol Beng and Wat Angkuonh Dei and Charges relating to Tuol Beng, Opinion of Judges BEAUVALLET and BAIK, 14 December 2016, D299/3/2, para. 52; Case 003, Decision related to (1) MEAS Muth's Appeal against Decision on Nine Applications to Seize the Pre-Trial Chamber with Requests for Annulment and (2) the Two Annulment Requests Referred by the International Co-Investigating Judge, Opinion of Judges BEAUVALLET and BAIK, 13 September 2016, D165/2/26, para. 150; Case 003, Decision on MEAS Muth's Appeal against Co-Investigating Judge HARMON's Decision on MEAS Muth's Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, Opinion of Judges BEAUVALLET and BWANA, 23 December 2015, D134/1/10, para. 4.
[1442] KHIEU Samphân's Appeal Brief (F54), para. 351.
[1443] KHIEU Samphân's Appeal Brief (F54), paras 367-369.
[1444] KHIEU Samphân's Appeal Brief (F54), para. 368.

537. The Co-Prosecutors respond that KHIEU Samphân's arguments were based on an erroneous reading of the Introductory Submission and that the Co-Investigating Judges were properly seised of the alleged facts.[1445]

538. The Lead Co-Lawyers support the Co-Prosecutors' submissions.[1446]

539. The Trial Chamber held that "when read in a holistic way", the facts charged in the Closing Order concern all the cooperatives in the whole of Tram Kak district, not only eight communes.[1447] The Trial Chamber rejected this challenge to its jurisdiction on the basis that it was belated because it was not raised before the Pre-Trial Chamber or as a preliminary objection under Rule 89.[1448]

540. The Supreme Court Chamber notes that KHIEU Samphân raised this objection in his Closing Brief for the first time and did not challenge the scope of the charges in the Closing Order before the Pre-Trial Chamber or as a preliminary objection before the Trial Chamber. This Chamber reiterates that KHIEU Samphân failed to demonstrate that the Trial Chamber committed an error of law by concluding that his requests to find that it had been improperly seised of facts not within the scope of the investigation should have been raised under Rule 89.[1449] This Chamber recalls that "[a]rguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed […] and need not be considered on the merits".[1450] Accordingly, the Supreme Court Chamber will not consider the challenge regarding the eight communes in Tram Kak district any further and dismisses it.

541. KHIEU Samphân also submits that the Trial Chamber erred in law by widening the scope of the judicial investigation to include forced displacement or forced deportation of the Vietnamese from Cambodia, and thus the conviction for the crime against humanity of deportation and persecution on racial grounds in Tram Kak and in Prey Veng must be reversed.[1451] He argues that the Trial Chamber partially analysed paragraph 12 of the Introductory Submission, which described a policy of discrimination and assassination of the

[1445] Co-Prosecutors' Response (F54/1), para. 281.
[1446] Lead Co-Lawyers' Response (F54/2), paras 118-120.
[1447] Trial Judgment (E465), para. 808.
[1448] Trial Judgment (E465), para. 809.
[1449] See *supra* Section II.B.
[1450] Case 001 Appeal Judgment (F28), para. 20.
[1451] KHIEU Samphân's Appeal Brief (F54), paras 380-385.

Vietnamese without mentioning deportation.[1452] He submits that facts pertaining to the deportation of the Vietnamese were based on the documents in the Annex to the Introductory Submission, including the "Livre Noir"[1453] and Ben KIERNAN's book, but were not expressly mentioned in the Introductory Submission.[1454] KHIEU Samphân contends that the Trial Chamber erred in considering that the mention of "deportation" among the crimes to investigate in the Introductory Submission seised the Co-Investigating Judges with the deportation of the Vietnamese from Cambodia.[1455] He adds that this legal characterisation concerns the three phases of forced displacement of the entire population and not "transfer to Vietnam" of the Vietnamese.[1456]

542. The Co-Prosecutors respond that the Introductory Submission seised the Co-Investigating Judges with a policy on the removal of Vietnamese that later evolved into destruction.[1457] They argue that KHIEU Samphân ignores the supporting documents to the Introductory Submission which describe, *inter alia*, a speech "to expel the entire Vietnamese minority population" and a list of families that were exchanged with Vietnam.[1458]

543. Concerning the deportation of the Vietnamese living in Cambodia, the Trial Chamber observed that IENG Sary first raised this challenge as a ground of appeal against the Closing Order, and then as a preliminary objection before the opening of Case 002.[1459] Upon his death and following the Trial Chamber's enquiry, KHIEU Samphân adhered to the objection to the deportation charges.[1460] Given that the preliminary objection against deportation was timely raised at trial, the Trial Chamber examined its merits.[1461] It found that the "factual allegations provided adequate notice to the Accused that the Co-Investigating Judges were to investigate facts committed in furtherance of a CPK policy of discrimination against the Vietnamese, including by subjecting them to […] deportation" and rejected KHIEU Samphân's claim that facts constituting deportation were not included within the scope of the judicial investigation.[1462]

[1452] KHIEU Samphân's Appeal Brief (F54), para. 380.
[1453] *See infra* "Livre Noir", para. 541, also referred to as "Black Paper".
[1454] KHIEU Samphân's Appeal Brief (F54), para. 381.
[1455] KHIEU Samphân's Appeal Brief (F54), para. 384.
[1456] KHIEU Samphân's Appeal Brief (F54), para. 385.
[1457] Co-Prosecutors' Response (F54/1), para. 284.
[1458] Co-Prosecutors' Response (F54/1), para. 284.
[1459] Trial Judgment (E465), para. 163.
[1460] Trial Judgment (E465), para. 163.
[1461] Trial Judgment (E465), paras 164, 166-168.
[1462] Trial Judgment (E465), para. 168.

544. The Supreme Court Chamber observes that the Co-Investigating Judges are seised "*in rem*" of the facts, rather than their legal characterisation. Accordingly, the proposed charge of deportation in paragraph 122 of the Introductory Submission concerning facts described in paragraphs 37-42 of the Introductory Submission does not affect the Co-Investigating Judges' *saisine*. The Supreme Court Chamber, therefore, concludes that the Trial Chamber's assertion that the Introductory Submission "expressly lists 'deportation' among the crimes subject to the investigation"[1463] is erroneous.

545. The Supreme Court Chamber considers that KHIEU Samphân's contention that the Trial Chamber erroneously extended the scope of the Introductory Submission to include new facts[1464] is unsupported by a proper reading of the said document. After reviewing the relevant parts of the Introductory Submission and its Annexes, the Supreme Court Chamber observes that paragraphs 37-72 of the Introductory Submission, which concern the three phases of forcible transfer of the population and the treatment of the Vietnamese, do not mention deportation of the Vietnamese from Cambodia.[1465] The Trial Chamber's assessment is based on paragraph 12(f) of the Introductory Submission, which describes "a policy of discriminating against and killing ethnic Vietnamese".[1466] The Supreme Court Chamber notes that the Trial Chamber also considered the supporting documents mentioned in the footnotes of paragraphs 12 and 70 of the Introductory Submission and its Annexes. Annex C, for instance, includes the list of evidentiary materials analysed by the Co-Prosecutors, along with a description of the documents and references to page numbers that support the alleged facts in the Introductory Submission.[1467] Regarding factual allegations on the deportation of the Vietnamese, the Trial Chamber relied upon two books provided in Annex C, namely "Black Paper: Facts and Evidences of the Acts of Aggression and Annexation of Vietnam Against Kampuchea", which assists in proving "[d]iscriminatory intent against Vietnamese", and Ben KIERNAN's "The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79", which assists in establishing, *inter alia*, "Forced Movement of ethnic Vietnamese and discriminatory intent".[1468] After reviewing the references to the mentioned evidentiary materials, the Supreme Court Chamber agrees with the Trial Chamber's conclusion that Ben

[1463] Trial Judgment (E465), para. 168.
[1464] KHIEU Samphân's Appeal Brief (F54), paras 380-385.
[1465] Case 002, Introductory Submission, 18 July 2007, D3 ("Case 002 Introductory Submission (D3)"), paras 37-72.
[1466] Case 002 Introductory Submission (D3), para. 12 (f).
[1467] Annex C: Other Evidentiary Material, 18 July 2007, D3/IV.
[1468] Annex C: Other Evidentiary Material, 18 July 2007, D3/IV, ERN (EN) 00141530, 00141532-00141533.

KIERNAN's book clearly refers to "a policy to 'expel' the Vietnamese minority living on Cambodian territory".[1469] The Supreme Court Chamber considers that the content of the documents mentioned in Annex C to the Introductory Submission, rather than constituting new facts, is evidence of facts of forced displacement of the Vietnamese from Cambodia with which the Co-Investigating Judges were seised. Therefore, this Chamber finds that Trial Chamber did not err in law by adjudicating the deportation of the Vietnamese from Cambodia and rejects KHIEU Samphân's arguments in this regard.

546. Next, KHIEU Samphân raises challenges pertaining to the facts of (1) deaths resulting from living conditions in Tram Kak district;[1470] (2) persecution on political grounds against former Khmer Republic people in Tram Kak district;[1471] (3) persecution on political grounds against New People in Tram Kak district;[1472] (4) deaths not related to starvation in Tram Kak;[1473] (5) other inhumane acts in the form of enforced disappearances at the Trapeang Thma Dam;[1474] (6) executions carried out at the Baray Choan Dek pagoda;[1475] (7) accidental deaths at the 1st January Dam Worksite;[1476] (8) "discrimination" against New People on political grounds and against the Cham on religious grounds at the 1st January Dam Worksite;[1477] (9) disappearances from the 1st January Dam Worksite;[1478] (10) punitive forced labour at Phnom Kraol prison and K-17;[1479] (11) interrogations or physical or mental torture at Phnom Kraol;[1480] (12) disappearances related to the K-11 and Phnom Kraol sites;[1481] (13) deaths resulting from detention conditions at Kraing Ta Chan;[1482] (14) enslavement at Kraing Ta Chan;[1483] (15) torture at Kraing Ta Chan;[1484] (16) ill-treatment by the guards and interrogators at Kraing Ta

[1469] Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79* (2nd ed. 2008), E3/1593, pp. 55-56 (discussing points made by POL Pot during the May 1975 assembly, including orders to "[e]xpel the entire Vietnamese minority population"), p. 58 ("[POL Pot] stressed the importance of the issue of evacuating all of the Vietnamese people out of Cambodian territory."), p. 107 ("The CPK ordered [the entire Vietnamese minority from Cambodia] out before July 1975. By late September, over 150,000 Vietnamese residents of Cambodia had been rounded up and sent to Vietnam"), p. 296 ("The CPK had expelled perhaps 150,000 ethnic Vietnamese civilians from Cambodia by September 1975 […]").
[1470] KHIEU Samphân's Appeal Brief (F54), paras 370-371.
[1471] KHIEU Samphân's Appeal Brief (F54), paras 372-373.
[1472] KHIEU Samphân's Appeal Brief (F54), paras 374-377.
[1473] KHIEU Samphân's Appeal Brief (F54), paras 378-379.
[1474] KHIEU Samphân's Appeal Brief (F54), paras 386-387.
[1475] KHIEU Samphân's Appeal Brief (F54), paras 388-389.
[1476] KHIEU Samphân's Appeal Brief (F54), para. 391.
[1477] KHIEU Samphân's Appeal Brief (F54), paras 393, 395.
[1478] KHIEU Samphân's Appeal Brief (F54), para. 396.
[1479] KHIEU Samphân's Appeal Brief (F54), paras 397-398.
[1480] KHIEU Samphân's Appeal Brief (F54), paras 399-400.
[1481] KHIEU Samphân's Appeal Brief (F54), paras 401-403.
[1482] KHIEU Samphân's Appeal Brief (F54), paras 404-407.
[1483] KHIEU Samphân's Appeal Brief (F54), paras 408-409.
[1484] KHIEU Samphân's Appeal Brief (F54), paras 410-411.

Chan;[1485] (17) disappearances at Kraing Ta Chan;[1486] (18) persecution on racial grounds against Vietnamese at Au Kanseng;[1487] (19) attacks against human dignity due to "the lack of medical assistance" and "physical and psychological ill-treatment inflicted on detainees" at Au Kanseng;[1488] (20) deaths in connection with work-related accidents at Kampong Chhnang Airfield Construction Site;[1489] (21) purges beyond those that occurred in the Northwest Zone in 1976 and the East Zone in 1978;[1490] and (22) treatment of Buddhists at the Tram Kak Cooperatives.[1491]

547. The Supreme Court Chamber observes that KHIEU Samphân raised these objections for the first time in his Closing Brief of 2 May 2017 or on appeal. Recalling that KHIEU Samphân failed to demonstrate that Trial Chamber erred in law by considering these challenges as preliminary objections which should have been raised within the 30-day limit set by Rule 89 and rejecting them,[1492] the Supreme Court Chamber summarily dismisses them and will not consider them on the merits.

B. INSUFFICIENTLY SUPPORTED CHARGES IN THE CLOSING ORDER

548. KHIEU Samphân submits that the Trial Chamber erred in summarily dismissing his arguments concerning insufficiently supported charges against him due to the alleged lack of clarity.[1493] He states that his arguments were sufficiently clear and precise for the Trial Chamber to consider and respond to them under Rule 101(4).[1494] The facts used to prosecute him did not meet the standard of proof of "sufficient evidence of the charges".[1495]

549. The Co-Prosecutors respond that KHIEU Samphân has failed to demonstrate that the Trial Chamber "ignored" his arguments regarding the Chamber's jurisdiction over certain facts in the Closing Order.[1496] They argue that the Trial Chamber may have misunderstood the arguments in his Closing Brief due to inaccuracies in the English translation of the

[1485] KHIEU Samphân's Appeal Brief (F54), paras 412-413.
[1486] KHIEU Samphân's Appeal Brief (F54), paras 414-415.
[1487] KHIEU Samphân's Appeal Brief (F54), paras 416-417.
[1488] KHIEU Samphân's Appeal Brief (F54), paras 418-419.
[1489] KHIEU Samphân's Appeal Brief (F54), para. 818.
[1490] KHIEU Samphân's Appeal Brief (F54), paras 420-424.
[1491] KHIEU Samphân's Appeal Brief (F54), paras 426-434.
[1492] See *supra* Section VI.A.1.
[1493] KHIEU Samphân's Appeal Brief (F54), paras 439-440.
[1494] KHIEU Samphân's Appeal Brief (F54), paras 441-443.
[1495] KHIEU Samphân's Appeal Brief (F54), paras 443-444.
[1496] Co-Prosecutors' Response (F54/1), paras 306-309.

document.[1497] They argue that these challenges to the Trial Chamber's jurisdiction are time-barred since he did not raise them within the 30-day period under Rule 89(1).[1498] They further contend that the Trial Chamber examined each instance of alleged insufficiency of evidence and determined whether the fact had been proven "beyond reasonable doubt" under Rule 87(1).[1499] They note that, based on this examination, the Trial Chamber did not enter any findings regarding two instances of killings of the Vietnamese in the Tram Kak cooperatives and executions at the airfield or at nearby sites.[1500]

550. The Lead Co-Lawyers respond that KHIEU Samphân did not show any error by the Trial Chamber's summary dismissal of his arguments.[1501] They contend that the Trial Chamber would have treated his arguments as preliminary objections and dismissed them for being out of time.[1502]

551. In response to KHIEU Samphân's arguments that the Co-Investigating Judges failed to collect facts sufficient to prove the charges in the Closing Order, the Trial Chamber held that KHIEU Samphân failed to substantiate which deficient charges he referred to, or explain whether the Pre-Trial Chamber was seised of any challenges in this regard.[1503]

552. The Supreme Court Chamber recalls that a party is expected to provide precise references to relevant transcript pages or paragraphs in the decision being challenged.[1504] The Chamber is not obliged to give detailed consideration to submissions which are obscure, contradictory, or vague, or that suffer from other formal and obvious insufficiencies.[1505] This Chamber notes that, in alleging the insufficient charges, KHIEU Samphân referred only to portions of his Closing Brief in a single footnote, without providing paragraphs in the Closing

[1497] Co-Prosecutors' Response (F54/1), para. 307.
[1498] Co-Prosecutors' Response (F54/1), para. 308.
[1499] Co-Prosecutors' Response (F54/1), para. 309.
[1500] Co-Prosecutors' Response (F54/1), para. 309 and fn. 1112.
[1501] Lead Co-Lawyers' Response (F54/2), paras 161-163.
[1502] Lead Co-Lawyers' Response (F54/2), para. 164.
[1503] Trial Judgment (E465), paras 179-180.
[1504] Case 002, Decision on Appeals against Co-Investigating Judges' Combined Order D250/3/3 dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5 ("Case 002 Admissibility of Civil Parties Decision (D250/3/2/1/5)"), para. 22; *Prosecutor v. Blaškić,* Appeals Chamber (ICTY), IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgment (ICTY)"), para. 13; *Prosecutor v. Rutaganda*, Appeals Chamber (ICTR), ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgment (ICTR)"), para. 19.
[1505] Case 002 Admissibility of Civil Parties Decision (D250/3/2/1/5), para. 22, referring *Prosecutor v. Kunarac et al.*, Appeals Chamber (ICTY), IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgment (ICTY)"), para. 43.

Order that he considered "defective".[1506] He cited only the facts of discriminatory treatment regarding New People and former Khmer Republic members in the Tram Kak cooperatives as the challenges regarding the sufficiency of charges in a footnote in his Closing Brief.[1507] In his Appeal, he challenged the facts concerning the deaths from starvation in the Tram Kak cooperatives, claiming that they were not supported by the sufficient charges.[1508] If KHIEU Samphân intended to challenge the facts regarding the deaths from starvation in the Tram Kak District in his Closing Brief at trial as being unsupported by sufficient evidence, he failed to do so.[1509] Correspondingly, the Supreme Court Chamber considers that the Trial Chamber did not commit an error in summarily dismissing his arguments in this regard as unsubstantiated.

553. Nonetheless, the Supreme Court Chamber observes that, despite the dismissal of this submission, the Trial Chamber proceeded to considered the facts that allegedly were not supported by sufficient evidence for the Indictment, namely facts concerning: (1) deaths from starvation in the Tram Kak cooperatives; (2) "discriminatory treatment" regarding New People in the Tram Kak cooperatives; and (3) "discriminatory treatment" regarding former Khmer Republic members in the Tram Kak cooperatives.[1510] The Supreme Court Chamber will sequentially address the parties' submissions and the Trial Chamber's findings in this regard.

1. Deaths from Starvation in the Tram Kak Cooperatives

554. KHIEU Samphân submits that the Trial Chamber erred in law by finding that it was seised of deaths from starvation that occurred in the Tram Kak cooperatives.[1511] He argues that the incriminating evidence regarding deaths from starvation in Tram Kak district concerned events limited to Samrong and Ta Phem communes and was insufficient to support the charge of the crime against humanity of extermination.[1512] He argues that the Trial Chamber erred in law by extending the scope of the trial to include deaths due to starvation in all the Tram Kak cooperatives.[1513]

[1506] KHIEU Samphân's Closing Brief (E457/6/4/1), paras 294-299.
[1507] KHIEU Samphân's Closing Brief (E457/6/4/1), para. 298, fn. 270, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), paras 942-948, 1022-1028 (concerning discriminatory treatment regarding New People), 1254-1271 (concerning discriminatory treatment regarding former Khmer Republic officials).
[1508] KHIEU Samphân's Appeal Brief (F54), paras 445-447.
[1509] KHIEU Samphân's Closing Brief (E457/6/4/1), paras 294-299.
[1510] Trial Judgment (E465), paras 179-180, 811-813.
[1511] KHIEU Samphân's Appeal Brief (F54), paras 445-447.
[1512] KHIEU Samphân's Appeal Brief (F54), para. 446.
[1513] KHIEU Samphân's Appeal Brief (F54), para. 447.

555. The Co-Prosecutors respond that KHIEU Samphân's argument is flawed as it is based on an improper interpretation of the Closing Order.[1514] They argue that he ignores evidence of deaths from starvation within Tram Kak District but not in Samrong and Ta Phem communes.[1515] They argue that evidence of "many deaths […] from starvation" and "lack of food in the cooperatives" in the district, as well as evidence of the scale of deaths from starvation in Samrong and Ta Phem communes, demonstrates that the Co-Investigating Judges met the requisite standard of proof for indictments under Rule 67(3).[1516]

556. The Trial Chamber held that the Closing Order charged the crime against humanity of extermination in relation to the deprivation of food, accommodation, medical care and hygiene, and the consequences of hard labour in Tram Kak district "as a whole" and accordingly rejected KHIEU Samphân's arguments.[1517]

557. The Supreme Court Chamber observes that, contrary to KHIEU Samphân's allegation that the evidence of deaths from starvation in Tram Kak is limited to two communes,[1518] the Closing Order includes relevant evidence from Cheang Tong, Kus, and Trapeang Thum communes in Tram Kak district.[1519] Furthermore, the Supreme Court Chamber is not convinced that the evidence in the Closing Order concerning deaths from starvation in the Tram Kak district is "extremely meagre" and thus cannot support KHIEU Samphân's referral for the prosecution of the crimes against humanity of extermination.[1520] This Chamber recalls that the crime against humanity of extermination can occur even when the number of victims is limited and there is no numerical minimum.[1521] Nonetheless, the Closing Order refers to multiple witness statements describing the scale of deaths from starvation as well as a lack of food in the cooperatives in Tram Kak District.[1522]

[1514] Co-Prosecutors' Response (F54/1), para. 311.
[1515] Co-Prosecutors' Response (F54/1), para. 311.
[1516] Co-Prosecutors' Response (F54/1), para. 311.
[1517] Trial Judgment (E465), para. 811.
[1518] KHIEU Samphân's Appeal Brief (F54), para. 446.
[1519] Case 002 Closing Order (D427), para. 313, fn. 1287, referring to Written Record of Interview of SOK Soth, 31 October 2007, E3/5835, ERN (EN) 00223504-00223505, 00223508, pp. 2-3, 6.
[1520] KHIEU Samphân's Appeal (F54), paras 446-447.
[1521] *Prosecutor v. Ntakirutimana & Ntakirutimana*, Appeals Chamber (ICTR), ICTR-96-10-A & ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana & Ntakirutimana* Appeal Judgment (ICTR)"), para. 516; *Prosecutor v. Krstić*, Trial Chamber (ICTY), IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgment (ICTY)"), para. 501; *Stakić* Appeal Judgment (ICTY), paras 260-261.
[1522] Case 002 Closing Order (D427), para. 312, fns 1282-1283, referring to, *inter alia*, Written Record of Interview of SIM Chheang, 27 November 2007, E3/7980, ERN (EN) 00231694, p. 4 ("This commune chief did not care for his people. He let them die of starvation."); Written Record of Interview of SOK Sim, 23 November 2009, E3/5519, ERN (EN) 00414078 ("Q. When the food was not sufficient for people, did people fell sick or die of

558. The Supreme Court Chamber does not consider it erroneous that the Trial Chamber considered the charge of the crime against humanity of extermination based on the facts of deaths due to deprivation of food, accommodation, medical care, hygiene, and the consequences of hard labour.[1523] This Chamber finds no error in the Trial Chamber's assessment and, in light of KHIEU Samphân's failure to demonstrate that the Trial Chamber was not seised of deaths from starvation that occurred in the Tram Kak cooperatives, rejects his contention.

2. "Discriminatory Treatment" Regarding New People in the Tram Kak Cooperatives

559. KHIEU Samphân submits that the Trial Chamber erred in law when it stated that it was properly seised of the facts of discriminatory treatment regarding New People in the Tram Kak cooperatives.[1524] He argues that the evidence in paragraph 305 of the Closing Order supporting the allegation of a suppression of New People's "political rights" was insufficient.[1525] He argues that Written Records of Interview of PHNEOU Yav and PIL Khieng, both residents of Samrong commune, do not support the Co-Investigating Judges' conclusion in paragraph 305 of the Closing Order because only PIL Khieng stated that New People "had no right to be the unit chief or group," and that this single piece of evidence is insufficient.[1526] KHIEU Samphân also contends that his conviction for "discriminatory treatment" of New People as persecution on political grounds of New People is erroneous and must be reversed.[1527]

560. The Co-Prosecutors respond that KHIEU Samphân is mistaken in believing that the only discriminatory treatment of New People in the Tram Kak cooperatives in the Closing Order is the suppression of their political rights due to their inability to act as unit chiefs.[1528] They argue that KHIEU Samphân overlooks other evidence supporting facts of discriminatory treatment of New People in the Tram Kak cooperatives, demonstrating that if New People were

starvation? A42. Many people were sick and died of diseases. […] Q. Do you know anyone who died of starvation? A43. Yes, I do. They are: *TA* Bin, *TA* Mak, *YEAY* Tang and so on."); Written Record of Interview of PIL Kheang, 27 November 2007, E3/5135, ERN (EN) 00233132, p. 2 ("[Food] was not sufficient. […] I saw the hungry people and those whose bodies were swollen.").

[1523] Trial Judgment (E465), para. 811.
[1524] KHIEU Samphân's Appeal Brief (F54), paras 448-450.
[1525] KHIEU Samphân's Appeal Brief (F54), para. 449.
[1526] KHIEU Samphân's Appeal Brief (F54), para. 449.
[1527] KHIEU Samphân's Appeal Brief (F54), para. 450.
[1528] Co-Prosecutors' Response (F54/1), para. 312.

"controlled" by Base People, they could not hold a position superior to Base People, including unit chief.[1529]

561. In the Trial Judgment, the Trial Chamber rejected KHIEU Samphân's submissions in this regard, finding that the Closing Order states that New People were subjected to harsher treatment and living conditions than other people in the cooperatives, including the militia's close observation of evacuees that could lead to their arrests and frequent suffering from health issues.[1530]

562. In response to the allegation that discriminatory treatment regarding New People was limited to a suppression of their political rights, the Supreme Court Chamber observes that the Closing Order contains additional evidence of discriminatory treatment regarding New People, such as their subordination to Base People, separation into different labour units, suffering from health problems, and re-education.[1531] In assessing the evidence of discriminatory treatment of New People in the Tram Kak cooperatives as a whole, the Supreme Court Chamber finds that KHIEU Samphân has failed to demonstrate that the Trial Chamber's conclusions in this regard were erroneous.

3. "Discriminatory Treatment" Regarding Former Khmer Republic Members in the Tram Kak Cooperatives

563. KHIEU Samphân submits that the Trial Chamber erred in law by declaring that it was seised to consider facts of discriminatory treatment regarding former Khmer Republic members in the Tram Kak cooperatives.[1532] In particular, he argues that the Trial Chamber erred in rejecting his argument that the allegations in paragraph 319 of the Closing Order that former Khmer Republic members were under close surveillance were insufficient to charge him with the crime against humanity of persecution on political grounds.[1533] He also argues that the Trial Chamber erred in classifying the facts of disappearance of former Khmer Republic members in Tram Kak district as persecution on political grounds.[1534] He submits that the allegations in paragraph 498 of the Closing Order were not supported by sufficient evidence, and therefore he did not have to respond to them.[1535] He adds that the Trial Chamber erred in law by

[1529] Co-Prosecutors' Response (F54/1), para. 312.
[1530] Trial Judgment (E465), para. 813, referring to Case 002 Closing Order (D427), paras 306, 313, 319, 1418.
[1531] Case 002 Closing Order (D427), paras 305-306, 313, 315.
[1532] KHIEU Samphân's Appeal Brief (F54), para. 451.
[1533] KHIEU Samphân's Appeal Brief (F54), paras 452-453.
[1534] KHIEU Samphân's Appeal Brief (F54), para. 454.
[1535] KHIEU Samphân's Appeal Brief (F54), paras 454-456.

incorporating facts of surveillance and disappearance of former Khmer Republic members into a policy characterised as the crime against humanity of persecution on political grounds, and that the respective conviction should be reversed.[1536]

564. The Co-Prosecutors respond that KHIEU Samphân misinterprets the Closing Order and fails to recognise that the Co-Investigating Judges were seised with facts throughout the entire Tram Kak district.[1537] They argue that he disputes the probative value of evidence of disappearances of former Khmer Republic members and ignores contextual and corroborative evidence in this regard.[1538] They add that KHIEU Samphân fails to show that the evidence of disappearances of former Khmer Republic members could not reasonably meet the standard of proof under Rule 67(3).[1539]

565. In this regard, the Trial Chamber rejected KHIEU Samphân's arguments, concluding that the Closing Order described purges of those "who had tendency for the LON Nol people".[1540] The Trial Chamber further stated that the section on the Tram Kak cooperatives must be read in conjunction with the section on Kraing Ta Chan Security Centre, which described the treatment of former Khmer Republic officials throughout Tram Kak district.[1541]

566. The Supreme Court Chamber observes that, contrary to KHIEU Samphân's allegations about insufficient evidence that former Khmer Republic officials were under surveillance,[1542] additional evidence in the Closing Order supports the contested fact. The Report on the Enemy's Actions specifically informed *Angkar* about the exposure of seven former LON Nol officials, captains, and first or second lieutenants resulting in *Angkar's* order to arrest this group in Kus commune, Tram Kak district.[1543] Concerning KHIEU Samphân's submission that the evidence in paragraph 319 of the Closing Order is weak and that the alleged surveillance is unsupported by any evidence, the Supreme Court Chamber recalls that "[t]here is no general rule that a finding beyond reasonable doubt cannot be reasonably entered unless there is more

[1536] KHIEU Samphân's Appeal Brief (F54), para. 457.
[1537] Co-Prosecutors' Response (F54/1), para. 313.
[1538] Co-Prosecutors' Response (F54/1), para. 313.
[1539] Co-Prosecutors' Response (F54/1), para. 314.
[1540] Trial Judgment (E465), para. 812, referring to, *inter alia*, Case 002 Closing Order (D427), para. 309.
[1541] Trial Judgment (E465), para. 812.
[1542] KHIEU Samphân's Appeal Brief (F54), paras 452-453.
[1543] Case 002 Closing Order (D427), para. 498, fn. 2160, referring to, *inter alia*, Report on the Enemy's Actions, E3/2441, ERN (EN) 00369480-00369481 ("[A]nother one named Thim Svat, a first lieutenant, has also been arrested. […] Please, Angkar, be informed that we have subsequently found others as follow: […] You are requested to contact Kus commune to arrest this [illegible] group").

than one item of evidence to support it. Rather, the reasonableness of the finding will have to be determined in light of the relevance and reliability of the evidence".[1544]

567. This Chamber notes that the Closing Order referred to the Written Record of Interview of CHEANG Sreimom, a resident of Nhaeng Nhang commune, Tram Kak district, who described the arrest of approximately 10 people, including former Khmer Republic policemen and soldiers, and mentioned occasional eavesdropping at people's houses by the militiamen, who were tasked with conducting arrests.[1545] This Chamber observes that KHIEU Samphân does not contest the credibility and reliability of CHEANG Sreimom's statement,[1546] which is generally credible and may reasonably be relied on in reaching the conclusions. Accordingly, the Supreme Court Chamber does not consider that the Trial Chamber's assessment and reliance on the evidence of treatment of former Khmer Republic officials in the Tram Kak district was erroneous.

568. In reviewing the substance of the impugned evidence concerning the alleged disappearances of former Khmer Republic officials, this Chamber notes that the Written Record of Interview of IEP Duch states that "anyone whose biography said that they had been a soldier would disappear" instead of "had to disappear", as alleged by KHIEU Samphân.[1547] Contrary to KHIEU Samphân's allegation that the facts of disappearance of former Khmer Republic members in the Tram Kak District was supported by only one person, the Supreme Court Chamber observes that two other witnesses mentioned in the Closing Order confirmed this finding.[1548] This Chamber also notes that KHIEU Samphân acknowledged that the allegation regarding purges of former Khmer Republic officials after 1975 was supported by the reports which he deemed consistent.[1549]

[1544] Case 002/01 Appeal Judgment (F36), para. 424.
[1545] Written Record of Interview of CHEANG Sreimom, 11 November 2009, E3/5832, ERN (EN) 00410266.
[1546] KHIEU Samphân's Appeal Brief (F54), paras 452-453.
[1547] Written Record of Interview of IEP Duch, 30 October 2007, E3/4627, ERN (EN) 00223476-00223477, pp. 5-6.
[1548] Written Record of Interview of SÃO Hean, 21 November 2009, E3/5518, ERN (EN) 00413899, p. 5 ("They went around researching to discover who had been teachers or soldiers or workers. Those discovered to have been soldiers or teachers were arrested and taken away and never reappeared. Q: Do you remember the names of those who were arrested? A.23: I remember some of them: LUON Hâm (my older brother) was a soldier; […] they were told that they were being sent away study and never reappeared."); Written Record of Interview of PHĂN Chhen, 9 December 2009, E3/5524, ERN (EN) 00426304, p. 8 ("Q: I want to ask you about when you visited Kraing Ta Chan in late 1975. At that time how had Kraing Ta Chan changed? A.44: The site had not expanded, but there were more prisoners than before.")
[1549] Report on Enemy's Actions for Tram Kak District Police, 5 March 1977, E3/2048, ENR (EN) 01454945 (informing Angkar about two former Khmer Republic officials identified in Cheang Torng commune in the Tram Kak District and requesting to submit these people to the police); 01454946 (Report to District *Angkar* informing

569. Accordingly, the Supreme Court Chamber considers that KHIEU Samphân failed to demonstrate that the Trial Chamber erred in law by treating facts of surveillance and disappearances of former Khmer Republic officials in Tram Kak district as the crime against humanity of persecution on political grounds.

570. In light of the foregoing, the Supreme Court Chamber holds that the Trial Chamber did not err in considering itself seised of the facts concerning deaths from starvation or "discriminatory treatment" regarding New People and former Khmer Republic members in the Tram Kak Cooperatives because they were supported by sufficient evidence for the Indictment. Consequently, this Chamber rejects KHIEU Samphân's arguments in this regard.

C. LACK OF LEGALLY QUALIFIED MATERIAL FACTS CHARGED IN CASE 002/02

571. KHIEU Samphân raises challenges to (1) the Trial Chamber's articulation of the legal standard regarding notice of the charges and scope of the trial; (2) the scope of the trial in relation to certain crime sites; and (3) the Trial Chamber's *saisine* in relation to certain groups. These arguments will be considered in turn below.

1. Alleged Error in the Legal Standard Regarding Notice of Charges

572. KHIEU Samphân makes statements regarding the legal standard which could, in the view of the Supreme Court Chamber, be read as alleging errors in the legal standard regarding notice of charges and scope of the trial as applied by the Trial Chamber. The Supreme Court Chamber considers these submissions to be unparticularised and unclear, but will briefly consider them in order to clarify the standard that applies.[1550]

573. KHIEU Samphân argues that the determination of criminal responsibility must be guided by the legal characterisation of the facts and assessed only with reference to the facts identified by the Co-Investigating Judges as those most likely to give rise to the criminal responsibility of the accused.[1551] He submits that the Trial Chamber erred in stating that it

that "2. The 106 military families smashed by Angkar including those who died totaled 393 persons. 3. 231 military families remain […] Request to confirm to the Party that there are some additional families for which it has not yet been determined if they are military or not."); 01454947 (informing *Angkar* that the Base branch in the Ta Phem Subdistrict "have examined and purged the enemies who held ranks after having received the instructions of the Party.").

[1550] KHIEU Samphân's Appeal Brief (F54), para. 458.

[1551] KHIEU Samphân's Appeal Brief (F54), para. 460.

would examine the Closing Order "in its entirety", observing that there is a requirement that charges be set out with sufficient particularity.[1552]

574. The Co-Prosecutors respond that the Trial Chamber confirmed, with reference to the conditions set out in Rule 67(2), that a trial chamber is obliged to limit its findings to those facts included within the indictment.[1553] The Co-Prosecutors also respond that the Trial Chamber was entitled to undertake a holistic, as opposed to piecemeal, reading of the Closing Order.[1554]

575. The Lead Co-Lawyers submit that KHIEU Samphân specifically raises seven objections for the first time on appeal without justification or explanation, and that these objections should not be permitted pursuant to Rule 89.[1555]

576. The Supreme Court Chamber interprets Rule 67(2) in light of Rule 21(1) and recalls that the indictment shall set out the identity of the accused and contain a description of the material facts and their legal characterisation by the Co-Investigating Judges. The indictment must consistently set out the material facts of the case with enough detail to inform an accused of the nature and cause of the charges against him or her to enable preparation of defence effectively and efficiently.[1556] This Chamber notes that the Criminal Procedure Code of Cambodia contains a similar provision in Article 247.[1557] This Chamber further notes that international standards require that an indictment set out the material facts of the case with enough detail to inform the defendant clearly of the charges against him so that he may prepare his defence.[1558]

577. The Trial Chamber considered arguments at trial raised by KHIEU Samphân regarding notice of the charges and scope of the trial.[1559] The Trial Chamber took account of KHIEU Samphân's trial submission that only facts which underpinned the criminal responsibility of

[1552] KHIEU Samphân's Appeal Brief (F54), paras 461-462, referring to, *inter alia*, Trial Judgment (E465), para. 173.
[1553] Co-Prosecutors' Response (F54/1), para. 263.
[1554] Co-Prosecutors' Response (F54/1), para. 315.
[1555] Lead Co-Lawyers' Response (F54/2), paras 168-180.
[1556] See Case 004, Considerations on Appeals against Closing Orders, Opinion of Judges BAIK and BEAUVALLET, 17 September 2021, D381/45 and D382/43, para. 182.
[1557] See Cambodian Code of Criminal Procedure, Art. 247.
[1558] Case 002 Decision on Preliminary Objections (E122), referring to *Kupreškić et al.* Appeal Judgment (ICTY), para. 18; Case 001 Decision on Closing Order Appeal (D99/3/42), para. 47, referring *Blaškić* Appeal Judgment (ICTY), para. 209.
[1559] Trial Judgment (E465), para. 149.

the accused may be relied upon by the Trial Chamber.[1560] Considering these arguments, the Trial Chamber observed that Rule 67(2) provides that a Closing Order must set out a description of material facts and their legal characterisation.[1561] The Trial Chamber further considered KHIEU Samphân's submission, at trial, that there is a general legal principle that a Trial Chamber should limit its findings to facts included in the indictment, and concluded that this was not in dispute.[1562] Having found no real source of contention, the Trial Chamber concluded that where the Accused particularised specific allegations in relation to this principle, they would be considered. In the view of the above, the Supreme Court Chamber finds no error in the Trial Chamber's formulation of the standard and will consider KHIEU Samphân's specific submissions on its application below.

578. As to the Trial Chamber's alleged statement that it would examine the Closing Order in its entirety, the Supreme Court Chamber notes that the Trial Chamber did not use the language quoted by KHIEU Samphân, but instead stated that "[t]he Closing Order must be examined holistically when determining the charges and the supporting material facts."[1563] With its obligation to safeguard the fundamental rights of the Accused pursuant to Rule 21(1) duly in mind and recalling the consistent jurisprudence of the Chambers of the ECCC,[1564] as well as the established legal approach adopted by international tribunals,[1565] the Supreme Court Chamber reaffirms that in assessing an indictment and determining whether an accused was adequately put on notice of the nature and cause of the charges against him or her in order to prepare a defence, the indictment must be considered as a whole, and thus, each paragraph therein should not be read in isolation, but rather should be considered in the context of the

[1560] Trial Judgment (E465), para. 150 ("The KHIEU Samphan Defence submits that only facts in the Closing Order which are material and characterised as criminally implicating the Accused may be considered by the Chamber in its Judgement, citing in support Internal Rule 67(2) and French jurisprudence.")
[1561] Trial Judgment (E465), para. 151.
[1562] Trial Judgment (E465), para. 150.
[1563] Trial Judgment (E465), para. 173.
[1564] Case 002/01 Appeal Judgment (F36), para. 35; Case 002/01 Trial Judgment (E313), fn. 1682; Case 002, Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30 ("Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30)"), para. 296; Case 002, Decision on IENG Sary's Appeal Against the Closing Order's Extension of His Provisional Detention, 21 January 2011, D427/5/10 ("Case 002 Decision on Provisional Detention (D427/5/10)"), para. 31.
[1565] *Prosecutor v. Ngirabatware*, Appeals Chamber (IRMCT), MICT-12-29-A, Judgement, 18 December 2014 ("*Ngirabatware* Appeal Judgment (IRMCT)"), para. 249; *Prosecutor v. Ngirabatware*, Trial Chamber (ICTR), ICTR-99-54-T, Decision on Defence Motion to Dismiss Based Upon Defects in Amended Indictment, 8 April 2009 ("*Ngirabatware* Decision on Motion to Dismiss (ICTR)"), para. 21; *Rutaganda* Appeal Judgment (ICTR), para. 30; *Prosecutor v. Mrkšič et al.*, Appeals Chamber (ICTY), IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić et al.* Appeal Judgment (ICTY)"), para. 138; *Gacumbitsi* Appeal Judgment (ICTR), para. 123; *Prosecutor v. Taylor*, Trial Chamber (Special Court for Sierra Leone ("SCSL")), SCSL-2003-01-T, Decision on Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE, 27 February 2009 ("*Taylor* Decision on Motion Pleading of JCE (SCSL)"), para. 76.

other paragraphs in the indictment.[1566] Therefore, the Supreme Court Chamber finds no error in the Trial Chamber's decision to look at the Closing Order holistically.

2. Alleged Errors Related to Charged Crime Sites

579. KHIEU Samphân makes numerous submissions regarding the charged crime sites. He argues that certain facts fall outside the Trial Chamber's *saisine* due to the Co-Investigating Judges' alleged failure to identify them in the Closing Order as legally characterised material facts.

(a) In relation to Tram Kak, KHIEU Samphân submits that the Trial Chamber erred in law by finding that it was properly seised of (1) deaths other than those from starvation, including the "poor living conditions, hygiene, lack of medical care together with the consequences of hard labour the victims were put to";[1567] (2) deaths due to starvation outside of Samraong and Ta Phem;[1568] and (3) acts of discrimination other than restrictions on political rights against New People.[1569] He also disputes that the acts pointed to by the Trial Chamber were actually discriminatory, given that they occurred widely,[1570] and argues that there were no findings in the Closing Order to demonstrate that persecution occurred.[1571]

(b) As to the Trapeang Thma Dam Worksite, KHIEU Samphân submits that the Trial Chamber erred in law when finding that the crime against humanity of persecution on political grounds at the Trapeang Thma Dam site was charged in relation to "real or perceived enemies of the CPK", rather than the three groups which were identified in the Closing Order, namely former Khmer Republic soldiers and officials, New People and Cambodians returning from abroad.[1572]

(c) In relation to the 1st January Dam Worksite, KHIEU Samphân submits that the Trial Chamber erred in law by finding that it was properly seised of (1) deaths

[1566] Case 002/01 Appeal Judgment (F36), para. 35; Case 002/01 Trial Judgment (E313), fn. 1682.
[1567] KHIEU Samphân's Appeal Brief (F54), paras 465-470.
[1568] KHIEU Samphân's Appeal Brief (F54), paras 471-474.
[1569] KHIEU Samphân's Appeal Brief (F54), paras 475, 479-480, referring to Case 002 Closing Order (D427), paras 304-306, 319, 1418.
[1570] KHIEU Samphân' Appeal Brief (F54), paras 477-478, 480.
[1571] KHIEU Samphân's Appeal Brief (F54), para. 480.
[1572] KHIEU Samphân's Appeal Brief (F54), para. 482, referring to Case 002 Closing Order (D427), para. 1417.

that occurred outside of the 1st January Dam Worksite;[1573] (2) accidental deaths;[1574] and (3) discriminatory acts charged in relation to former Khmer Republic soldiers and officials.[1575]

(d) Concerning Kampong Chhnang Airfield Constuction Site, KHIEU Samphân submits that the charge of persecution on political grounds at the Kampong Chhnang Airfield in the Closing Order was unfounded because it did not make reference to any of the three groups, namely former Khmer Republic soldiers and officials, New People and Cambodians returning from abroad.[1576] He also argues that the Trial Chamber did not have jurisdiction in relation to deaths as a result of work-related accidents.[1577]

(e) As to Kraing Ta Chan, KHIEU Samphân argues that the Trial Chamber erred because it (1) made findings on "enemies", rather than the three groups specified in the Closing Order,[1578] and that this group was insufficiently defined;[1579] (2) was not seised of facts of political discrimination against New People, former Khmer Republic officials and soldiers;[1580] (3) should only have made findings on specifically charged discriminatory acts at security centres, namely arrests, re-education and elimination and that as arrests occurred in relation to all people, the groups in question were not treated more harshly than others.[1581]

(f) In relation to Au Kanseng Security Centre, KHIEU Samphân submits that the Trial Chamber erred (1) by finding that it was properly seised of facts of

[1573] KHIEU Samphân's Appeal Brief (F54), paras 484-486.
[1574] KHIEU Samphân's Appeal Brief (F54), paras 487-489, referring to Case 002 Closing Order (D427), paras 1381-1383, 1387.
[1575] KHIEU Samphân's Appeal Brief (F54), para. 492.
[1576] KHIEU Samphân's Appeal Brief (F54), paras 493-494, referring to Case 002 Closing Order (D427), paras 1416-1417.
[1577]KHIEU Samphân's Appeal Brief (F54), para. 818. KHIEU Samphân raises this argument in the section of his Appeal Brief dealing with alleged errors pertaining to the crime of murder at Kampong Chhnang Airfield Construction Site, not with his other arguments related to the scope of the investigation and trial. This argument will be addressed here because it is related to the Trial Chamber's *saisine* rather than whether murders occurred at Kampong Chhnang Airfield.
[1578] KHIEU Samphân's Appeal Brief (F54), paras 505-507, 509, referring to Case 002 Closing Order (D427), paras 1416-1417.
[1579] KHIEU Samphân's Appeal Brief (F54), paras 508-510.
[1580] KHIEU Samphân's Appeal Brief (F54), paras 496-499 (New People), 500, 504 (former Khmer Republic officials and soldiers).
[1581] KHIEU Samphân's Appeal Brief (F54), paras 497-498 (New People), 501-502 (former Khmer Republic officials and soldiers).

persecution on political grounds with regard to the group consisting of "adversaries of the CPK […] real or perceived" because these groups were not legally characterised as one of the three defined groups subject to persecution, namely former Khmer Republic soldiers, New People and Cambodians returning from abroad;[1582] and (2) because the target group of "real or perceived enemies of the CPK" was not sufficiently discernible.[1583]

(g) As to Phnom Kraol, KHIEU Samphân submits that the Trial Chamber erred in law by finding that it was properly seised of facts of persecution on political grounds since the detainees at the site do not fall within the three groups defined as the targets of political persecution in the Closing Order.[1584]

580. According to KHIEU Samphân, all of the findings that Trial Chamber reached in breach of its *saisine* must be reversed.

581. The Co-Prosecutors respond that KHIEU Samphân merely repeats his rejected trial arguments without showing how the Trial Chamber erred.[1585] Further, concerning Trapeang Thma Dam, the Kampong Chhnang Airfield Construction Site, Kraing Ta Chan, Au Kanseng and Phnom Kraol, the Co-Prosecutors argue that the Trial Chamber was seised of facts establishing "real or perceived enemies" as a persecuted group based on a correct reading of the Closing Order and that "real or perceived enemies" constitutes a sufficiently discernible group.[1586] They submit that the Closing Order fully explains the numerous groups considered to be "enemies" at Kraing Ta Chan, Au Kanseng and Phom Kraol.[1587]

582. The Lead Co-Lawyers respond that KHIEU Samphân raises new submissions on appeal without justification or explanation, and that these objections should therefore not be permitted pursuant to Rule 89.[1588]

a. Tram Kak Cooperatives

[1582] KHIEU Samphân's Appeal Brief (F54), paras 511-513, referring to Case 002 Closing Order (D427), paras 589-623.
[1583] Trial Judgment (E465), para. 2982.
[1584] KHIEU Samphân's Appeal Brief (F54), paras 514-516.
[1585] Co-Prosecutors' Response (F54/1), paras 323-327.
[1586] Co-Prosecutors' Response (F54/1), paras 315, 328-330, 332-333, 338-337.
[1587] Co-Prosecutors' Response (F54/1), paras 333-335, 337.
[1588] Lead Co-Lawyers' Response (F54/2), paras 168-180.

583. The Supreme Court Chamber observes that the Trial Chamber considered KHIEU Samphân's submission that the charge of extermination should be limited to deaths from starvation, health issues, and executions of the Vietnamese.[1589] The Trial Chamber rejected the distinction KHIEU Samphân attempted to draw between deaths stemming from starvation on the one hand, and disease or medical conditions on the other. It held that the Closing Order expressly referred to deaths from starvation in the Tram Kak cooperatives,[1590] and considered that the Closing Order also referred to people dying following inadequate treatment.[1591] The Trial Chamber therefore rejected KHIEU Samphân's trial argument and held that the Closing Order charged extermination in the Tram Kak Cooperatives on the basis of the overall conditions imposed there.

584. This Chamber is satisfied that Trial Chamber accurately described and interpreted the Closing Order.[1592] It recalls its finding that on appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Supreme Court Chamber.[1593] KHIEU Samphân merely repeats trial arguments regarding his interpretation of these sections of the Closing Order without showing error in the Trial Chamber's reasoning, and these arguments are accordingly dismissed.[1594]

585. Similarly, as to argument that the charge of deaths by starvation was restricted to only two communes, Samraong and Ta Phem, the Trial Chamber considered KHIEU Samphân's identical submission at trial.[1595] It found, however, that the Closing Order "describe[d] conflicting accounts of deaths from starvation."[1596] In the paragraph of the Closing Order

[1589] Trial Judgment (E465), para. 1138, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), paras 858-863, 924-931.
[1590] Trial Judgment (E465), para. 1141, referring to Case 002 Closing Order (D427), para. 312.
[1591] Trial Judgment (E465), para. 1141, referring to Case 002 Closing Order (D427), para. 313 (describing inadequate medical treatment then continuing: "When people died they were buried without the family being informed").
[1592] See Case 002 Closing Order (D427), paras 1381, 1387. See also Case 002 Closing Order (D427), paras 302-321. In particular, KHIEU Samphân mischaracterises paragraph 313 of the Closing Order when he asserts that it did not refer to deaths through health problems. This Chamber is satisfied that that paragraph expressly provided that many people living in the cooperatives had health problems, and also referred to individuals dying in that context.
[1593] Case 001 Appeal Judgment (F28), para. 20.
[1594] *See supra* Section II.A. See also, *e.g.*, *Galić* Appeal Judgment (ICTY), para. 290; *Prosecutor v. Vasiljević,* Appeals Chamber (ICTY), IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgment (ICTY)"), para. 16 ("The Appeals Chamber will not consider those arguments where the Appellant has failed to argue an alleged error and instead merely offers an alternative reading of the evidence"); *Prosecutor v. Gatete*, Appeals Chamber (ICTR), ICTR-00-61-A, Judgement, 9 October 2012, para. 156.
[1595] Trial Judgment (E465), paras 811, 1140-1141.
[1596] Trial Judgment (E465), para. 811.

highlighted by the Trial Chamber, the Co-Investigating Judges described how "nearly all witnesses" described a lack of food.[1597] It stated that the evidence was that witnesses recalled people dying of starvation, or did not deny its occurrence.[1598] The Supreme Court Chamber considers that the Trial Chamber accurately summarised the Closing Order findings, and offered a reasonable interpretation of those findings.[1599] KHIEU Samphân merely disagrees with this interpretation, and his submission fails to meet the standard of review on appeal. This argument is dismissed.

586. At trial, the Trial Chamber also considered KHIEU Samphân's assertion that it erred in its assessment of the charges of political discrimination against New People at Tram Kak.[1600] It considered that the Closing Order contained a number of findings on political rights, namely that: (1) the population in the Tram Kak district was divided into three categories, Full-Rights, Candidates, and Depositees, with people separated further into various work units;[1601] (2) there were fewer rights for the Depositees, who were also called New People or 17 April People, and whose units were controlled by Base People; [1602] and (3) New People lacked political rights, could not be unit chiefs, and were controlled by Full-Rights or Candidate Persons.[1603] The Trial Chamber also found, however, that the Closing Order established that New People suffered from particular health problems due to newly living in rural areas,[1604] and that those identified as enemies were re-educated.[1605] Accordingly, the Trial Chamber rejected KHIEU Samphân's submission that the scope of persecutory acts against New People should be narrowed as he claimed.[1606]

587. The Supreme Court agrees with the Trial Chamber's reading of the Closing Order. Even the findings specifically pointed to by KHIEU Samphân demonstrate that New People were subject to acts of discrimination beyond restricted political rights.[1607] This Chamber also observes that the charges are based on the Co-Investigating Judges' conclusions: that political persecution occurred at "nearly all the sites within the scope of the investigation", including

[1597] Case 002 Closing Order (D427), para. 312.
[1598] Case 002 Closing Order (D427), para. 312.
[1599] See Case 002 Closing Order (D427), paras 312, 1381, 1387. This Chamber in particular rejects the proposition that, in referring to two pieces of evidence, the Co-Investigating Judges intended to limit its scope to those areas.
[1600] Trial Judgment (E465), para. 1171.
[1601] Trial Judgment (E465), para. 1171, referring to Case 002 Closing Order (D427), paras 305-306.
[1602] Trial Judgment (E465), para. 1171, referring to Case 002 Closing Order (D427), paras 305-306.
[1603] Trial Judgment (E465), para. 1171, referring to Case 002 Closing Order (D427), paras 305-306.
[1604] Trial Judgment (E465), para. 1171, referring to Case 002 Closing Order (D427), para. 313.
[1605] Trial Judgment (E465), para. 1171, referring to Case 002 Closing Order (D427), para. 315.
[1606] Trial Judgment (E465), para. 1171, referring to Case 002 Closing Order (D427), para. 315.
[1607] See Case 002 Closing Order (D427), para. 304, providing that New People were forcibly displaced *en masse*.

Tram Kak,[1608] as well as findings that the New People suffered *de facto* discrimination nationwide;[1609] that the New People were closely monitored and would be arrested for speaking against the CPK at Tram Kak;[1610] that upon the arrival of the New People in Tram Kak District, the districts and commune secretaries attended a meeting "at which they were advised that there would be a purge of the evacuees" from Phnom Penh;[1611] and that the New People were considered "[s]erious offence prisoners" and treated worse than "light" offenders.[1612] The Supreme Court Chamber therefore finds that KHIEU Samphân merely disagrees with the Trial Chamber's interpretation of the charges in the Closing Order without showing any error and is satisfied that the Trial Chamber reasonably found that broader acts of discrimination were charged against New People. This argument is dismissed.

588. The Supreme Court Chamber further rejects as baseless KHIEU Samphân's submission that the fact that other people experienced poor treatment meant that the New People were not subject to discrimination. That other groups of individuals beyond the New People were also treated as enemies and as such discriminated against is not disputed and indeed was expressly the conclusion of the Trial Chamber, which found that the Closing Order charged persecution on political grounds against "real or perceived enemies of the CPK".[1613] This Chamber strongly rejects KHIEU Samphân's illogical and hardly convincing proposition, which, rather, directs the Chamber's attention to the findings of many groups' suffering of difficult conditions in Tram Kak District.

b. Trapeang Thma Dam Worksite

589. The Trial Chamber concluded that the Closing Order charged '"the identification of people as targets for persecution, on the basis that anyone who disagreed with the CPK ideology was excluded, amounts to persecution on political grounds."'[1614] In reaching this conclusion, the Trial Chamber considered KHIEU Samphân's argument that the Trial Chamber was restricted by the Closing Order to acts committed against former Khmer Republic officials, New People, and Cambodians returning from abroad.[1615] In rejecting this argument, the Trial

[1608] Case 002 Closing Order (D427), para. 1416.
[1609] See, *e.g.*, Case 002 Closing Order (D427), paras 1363, 1417, 1424.
[1610] See, *e.g.*, Case 002 Closing Order (D427), para. 319.
[1611] Case 002 Closing Order (D427), para. 498.
[1612] Case 002 Closing Order (D427), para. 524.
[1613] Trial Judgment (E465), para. 1170, referring to Case 002 Closing Order (D427), paras 1417-1418.
[1614] Trial Judgment (E465), para. 1403, referring to Case 002 Closing Order (D427), para. 1417.
[1615] See Trial Judgment (E465), para. 1404, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), para. 1009, citing Case 002 Closing Order (D427), para. 1417.

Chamber recalled its earlier and more general finding that while the Closing Order referred to the three groups KHIEU Samphân described, it did so for illustrative purposes, and non-exhaustively.[1616] It further found that the Closing Order established that these three categories continued to expand over time, and that it would consider, where relevant, KHIEU Samphân's challenges to the specific categories of enemies identified by the Closing Order.[1617] The Supreme Court Chamber considers that KHIEU Samphân merely repeats his trial submissions without showing error and this argument is dismissed.

590. The Supreme Court Chamber also takes the opportunity to reiterate its prior findings on persecution on political grounds. This Chamber has consistently found, in its jurisprudence on the object of discrimination on political grounds, that while the group that is the object of persecution must be discernible, it is the perpetrator who defines the group,[1618] and that "[t]he group or groups persecuted on political grounds may include various categories of persons, such as: officials and political activists; persons of certain opinions, convictions and beliefs; persons of certain ethnicity or nationality; or persons representing certain social strata ('intelligentsia', clergy, or bourgeoisie, for example)".[1619] In particular, in respect of the latter groups, they may be made the object of political persecution not because all, or even the majority, of their members hold political views opposed to those of the perpetrator, but because they are perceived by the perpetrator as potential opponents or otherwise as obstacles to the implementation of the perpetrator's political agenda.[1620] This Chamber reiterates that there are grounds to find persecution on political grounds as a crime against humanity against aggregated groups without any common identity or agenda as long as political enemies were defined pursuant to a policy employing some kind of general criteria, while other members of the population enjoyed a degree of freedom.[1621] Accordingly, the Supreme Court Chamber, recalling its previous findings, reaffirms that "real or perceived enemies of the CPK" constitutes a sufficiently discernible group.[1622] KHIEU Samphân's submissions to the contrary are dismissed.

591. Further, this Chamber notes that the Trial Chamber also considered KHIEU Samphân's contention that the relevant sections of the Closing Order contained findings on persecution

[1616] See Trial Judgment (E465), para. 170.
[1617] See Trial Judgment (E465), para. 170.
[1618] Case 002/01 Appeal Judgment (F36), para. 669; Case 001 Appeal Judgment (F28), para. 272.
[1619] Case 002/01 Appeal Judgment (F36), para. 669; Case 001 Appeal Judgment (F28), para. 272.
[1620] Case 002/01 Appeal Judgment (F36), para. 669; Case 001 Appeal Judgment (F28), para. 272.
[1621] Case 002/01 Appeal Judgment (F36), para. 678; Case 001 Appeal Judgment (F28), para. 282.
[1622] See Case 002/01 Appeal Judgment (F36), para. 669; Case 001 Appeal Judgment (F28), paras 273, 282.

against only one of the groups, namely New People,[1623] as well as his submission that the only relevant charged discriminatory conduct was harsher working conditions, bigger quotas and unjustified punishments.[1624] The Trial Chamber found that the Closing Order clearly indicated that, with respect to cooperatives and worksites, the '"real or perceived enemies of the CPK were subjected to harsher treatment and living conditions than the rest of the population."'[1625] The Trial Chamber was also satisfied that the Closing Order charged '"the identification of people as targets for persecution, on the basis that anyone who disagreed with the CPK ideology was excluded, amounts to persecution on political grounds."'[1626] Considering the entirety of persecution charges as set out in the Closing Order, the Trial Chamber rejected KHIEU Samphân's arguments.[1627] KHIEU Samphân merely disagrees with the Trial Chamber's findings without showing error, and these arguments are dismissed.

c. 1st January Dam Worksite

592. In the finding highlighted by KHIEU Samphân regarding deaths which occurred outside the 1st January Dam Worksite, the Trial Chamber found that "few people died of illness or injury at the 1st January Dam Worksite, but usually individuals who were seriously sick were sent back to their villages or to local clinics where they died when treatments failed."[1628] The latter finding demonstrates that, in the Trial Chamber's view, many of the deaths caused by the conditions in the 1st January Dam Wroksite did not take place on site. Contrary to KHIEU Samphân's submission, however, this finding is entirely consistent with the Closing Order and the Trial Chamber's findings thereon. The Trial Chamber accurately summarised the Closing Order when finding that people died as a result of the "conditions" in worksites and security centres, including the 1st January Dam Worksite.[1629] The Closing Order did not, contrary to KHIEU Samphân's assertion, specify that the deaths in question occurred at the 1st January Dam; but merely that the deaths were caused by the conditions at the worksite. KHIEU Samphân's argument is therefore dismissed.

[1623] Trial Judgment (E465), para. 1405, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), para. 1011.
[1624] Trial Judgment (E465), para. 1405, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), paras 1013-1016.
[1625] Trial Judgment (E465), para. 1405, referring to Case 002 Closing Order (D427), para. 1418.
[1626] Trial Judgment (E465), para. 1405, referring to Case 002 Closing Order (D427), para. 1417.
[1627] Trial Judgment (E465), para. 1405.
[1628] Trial Judgment (E465), para. 1629.
[1629] See Case 002 Closing Order (D427), paras 359, 363, 1381, 1387, 1389.

593. This Chamber similarly rejects KHIEU Samphân's submission that the Trial Chamber was not seised of "accidental deaths" at the 1st January Dam Worksite. In the paragraph of the Trial Judgment he points to, the Trial Chamber describes the charges regarding the conditions at the Dam as including the "deprivation of food, accommodation, medical care and hygiene as well as exhaustion due to hard labour and the unsafe working conditions."[1630] The Supreme Court Chamber is satisfied that this statement summarises the charges as set out in the Closing Order. The Co-Investigating Judges made the factual finding that "[a]ccidents such as collapsing stones or soil killed others" at the 1st January Dam Worksite[1631] and then found in general terms that "conditions" at the worksites caused deaths.[1632] KHIEU Samphân's argument is dismissed.

594. As to KHIEU Samphân's assertion that no facts of discrimination were charged in relation to former Khmer Republic soldiers and officials at the 1st January Dam Worksite, this Chamber observes that the Trial Chamber considered that the Closing Order charged KHIEU Samphân with the crime against humanity of persecution on political grounds at worksites, including the 1st January Dam Worksite, against "real or perceived enemies of the CPK."[1633] It further found that the Closing Order enumerated, as an example of a perceived enemy, "former ranking civilian and military personnel of the Khmer Republic".[1634] In relation to the 1st January Dam Worksite specifically, the Trial Chamber found that former Khmer Republic officials or soldiers were identified through biographies, arrested and taken to the security office,[1635] and that guards attempted to identify those who had held a certain rank and families of former civil servants and policeman were identified to be arrested.[1636] The Supreme Court Chamber considers these findings, albeit not always accompanied by specific Closing Order citations, to be entirely consistent with the charges outlined in the Closing Order. The Closing Order found that former ranking civilian and military personnel of the Khmer Republic were generally subjected to harsher treatment and living conditions in worksites;[1637] and that many persons who disappeared at the 1st January Dam Worksite had links with the former Khmer

[1630] Trial Judgment (E465), para. 1668, referring to Case 002 Closing Order (D427), paras 359, 363, 1381, 1387, 1389.
[1631] Case 002 Closing Order (D427), para. 363.
[1632] Case 002 Closing Order (D427), para. 1387.
[1633] Trial Judgment (E465), para. 1685, referring to Case 002 Closing Order (D427), para. 1418.
[1634] Case 002 Closing Order (D427), paras 1416-1418.
[1635] Trial Judgment (E465), paras 1660, 1687.
[1636] Trial Judgment (E465), paras 1660, 1687.
[1637] Case 002 Closing Order (D427), para. 1419.

Republic regime.[1638] The Supreme Court Chamber finds no error in the Trial Chamber's approach and KHIEU Samphân's submission to the contrary is dismissed.

d. Kampong Chhnang Airfield Construction Site

595. As established previously, the Trial Chamber rejected KHIEU Samphân's general assertion that the charge of persecution was limited to the three groups he highlights, namely former Khmer Republic soldiers, New People and Cambodians returning from abroad, and this Chamber has upheld this position.[1639] Regarding the specifics of the charges of political persecution at Kampong Chhnang Airfield Construction Site, the Trial Chamber recalled its finding and dismissed KHIEU Samphân's trial argument that there was a deficiency in the Closing Order due to the omission to specify one of these three groups.[1640] The Trial Chamber also found that, with respect to the Kampong Chhnang Airfield, the targeted group of enemies included all people perceived as traitors or "bad elements" who were transferred to the worksite to labour in very hard conditions in order to be tempered, as their conduct was considered as contravening the Party line, or punished for their alleged traitorous affiliations, as described in the sections of the Closing Order related to Kampong Chhnang Airfield Construction Site.[1641] KHIEU Samphân merely disagrees with the Trial Chamber's conclusion without showing error, and his argument is therefore dismissed.

e. Kraing Ta Chan

596. The Trial Chamber found that the Closing Order charged the Accused with the crime against humanity of persecution on political grounds of "real or perceived enemies of the CPK", which it defined as those whose real or perceived political beliefs were contrary to the CPK, or who were opposed to those wielding power within the Party.[1642] According to the Closing Order, such people were "arrested *en masse* for re-education and elimination" at security centres including Kraing Ta Chan.[1643] In its analysis, the Trial Chamber considered, and dismissed, KHIEU Samphân's arguments that, in relation to Kraing Ta Chan, the Trial Chamber should have considered only three groups for the purposes of the crime of persecution on political grounds: former Khmer Republic officials, New People and Cambodians returning

[1638] Case 002 Closing Order (D427), para. 366.
[1639] See *supra* paras 589-590.
[1640] Trial Judgment (E465), para. 1819.
[1641] Trial Judgment (E465), para. 1820, referring to Case 002 Closing Order (D427), paras 389-392.
[1642] Trial Judgment (E465), para. 2833, referring to Case 002 Closing Order (D427), paras 1416-1418.
[1643] Trial Judgment (E465), para. 2833, referring to Case 002 Closing Order (D427), para. 1418.

from abroad.[1644] As outlined previously, the Supreme Court Chamber has found no error in the Trial Chamber's approach.[1645] KHIEU Samphân merely challenges the Trial Chamber's findings without demonstrating error, and his submission is dismissed.

597. Regarding the allegation that the Trial Chamber erred in failing to consider that the charged conduct at security centres was limited to arrests, re-education and elimination, the Supreme Court Chamber finds that KHIEU Samphân again raises an argument which was considered and dismissed at trial.[1646] The Trial Chamber found that the Closing Order distinguished between "harsher treatment and living conditions" in cooperatives and worksites, and various acts of arrest, re-education, and elimination at security centres.[1647] The Trial Chamber found, however, that nothing material turned on this distinction.[1648] This Chamber finds that KHIEU Samphân merely rehashes his arguments once more without showing any error, and this is dismissed. Further, as previously held, the Supreme Court Chamber considers the fact that other individuals suffered abuse underlines the existence of discriminatory conduct, rather than the contrary. This submission is also rejected.

598. Regarding the submission that the Closing Order did not contain any factual findings on discrimination against New People and the former Khmer Republic officials and soldiers at Kraing Ta Chan, this Chamber observes that the Co-Investigating Judges concluded that political persecution occurred at "nearly all the sites within the scope of the investigation", including Kraing Ta Chan.[1649] The Closing Order also contains findings that the New People suffered *de facto* discrimination nationwide;[1650] that the New People were specifically arrested, brought to Kraing Ta Chan to be detained, and killed at Kraing Ta Chan;[1651] that biographies were recorded in Tram Kak District to allow for the CPK to purge the New People and send them to Kraing Ta Chan;[1652] and that the New People were considered "[s]erious offence prisoners" and treated worse than "light" offenders.[1653] Furthermore, the Closing Order established that a nationwide policy targeting the former Khmer Republic officials and soldiers

[1644] Trial Judgment (E465), para. 2834, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), para. 1255.
[1645] See *supra* paras 589-590, 595.
[1646] See Trial Judgment (E465), para. 2835.
[1647] See Trial Judgment (E465), para. 2835, referring to Case 002 Closing Order (D427), para. 1418.
[1648] See Trial Judgment (E465), para. 2835.
[1649] Case 002 Closing Order (D427), para. 1416.
[1650] See, *e.g.*, Case 002 Closing Order (D427), paras 1363, 1417, 1424.
[1651] See, *e.g.*, Case 002 Closing Order (D427), paras 500, fn. 2167.
[1652] Case 002 Closing Order (D427), para. 498.
[1653] See, *e.g.*, Case 002 Closing Order (D427), paras 500, fn. 2167.

existed throughout the DK;[1654] that the former Khmer Republic officials and soldiers disappeared on arrival in Tram Kak District and were sent to Kraing Ta Chan;[1655] and that those who were arrested and sent to security centres, such as Kraing Ta Chan, faced discrimination before being subject to arrest, re-education and elimination which continued to be committed against them at Kraing Ta Chan.[1656] The Supreme Court Chamber is satisfied therefore that the Closing Order contains multiple findings demonstrating the existence of political discrimination against New People and the former Khmer Republic officials and soldiers, including at Kraing Ta Chan, and KHIEU Samphân's argument is therefore dismissed.

f. Au Kanseng

599. In making its findings on Au Kanseng, the Trial Chamber considered, and dismissed, KHIEU Samphân's trial argument that the charge of persecution on political grounds at Au Kanseng should be restricted to the three categories of enemies particularised in the Closing Order namely, former Khmer Republic officials, New People, and Cambodians returning from abroad.[1657] As previously established, the Supreme Court Chamber considers that KHIEU Samphân rehashes his trial submissions on this point without showing error, and rejects this submission. This Chamber observes that the Trial Chamber held that the Closing Order clearly identified a group consisting of adversaries of the CPK or its ideology who, as perceived count-revolutionaries, were broadly cast as real or perceived enemies.[1658] The Trial Chamber found that, according to the Closing Order, the group included detractors of the socialist revolution and critics or opponents of the Party, including those connected with feudalistic practices or accused of immorality, and individuals suspected of or implicated in complicity with Party enemies, as well as the Vietnamese and suspected Vietnamese collaborators.[1659] The Trial Chamber was satisfied, in relation to Au Kanseng, that the target group of "real or perceived enemies of the CPK" was sufficiently discernible in order to determine whether the requisite consequences occurred for the group.[1660] The Supreme Court Chamber is satisfied that the findings outlined in the Closing Order, as accurately summarised by the Trial Chamber,[1661]

[1654] Case 002 Closing Order (D427), paras 208-209.
[1655] Case 002 Closing Order (D427), para. 498, fn. 2159.
[1656] Case 002 Closing Order (D427), para. 1418.
[1657] Trial Judgment (E465), para. 2982.
[1658] Trial Judgment (E465), para. 2982.
[1659] Trial Judgment (E465), para. 2982, referring to Case 002 Closing Order (D427), paras 591, 600-601, 613-614, 620, 622.
[1660] Trial Judgment (E465), para. 2983.
[1661] Trial Judgment (E465), para. 2982, referring to Case 002 Closing Order (D427), paras 591, 600-601, 613-614, 620, 622.

fully explain the targeted group at Au Kanseng. KHIEU Samphân's submission is again dismissed.

g. Phnom Kraol

600. In making its findings on Phnom Kraol, the Trial Chamber found that the Closing Order charged the Accused with the crime against humanity of persecution on political grounds of "real or perceived enemies of the CPK" at Phnom Kraol Security Centre.[1662] The Trial Chamber considered, and dismissed, KHIEU Samphân's trial argument that the charge of persecution on political grounds at Phnom Kraol should be restricted to the three categories of enemies particularised in the Closing Order: namely, former Khmer Republic officials, New People, and Cambodians returning from abroad.[1663] The Trial Chamber then determined that it must satisfy itself that the targeted group of "real or perceived enemies of the CPK" referred to in the Closing Order was sufficiently discernible.[1664] It considered that, to assess the scope of the group, it was necessary to read the Closing Order's ultimate disposition and legal characterisation of facts referable to that crime site in conjunction with the factual findings of the Co-Investigating Judges.[1665] In this regard, it was satisfied that the Closing Order clearly identified a group consisting of adversaries of the CPK or its ideology who, as perceived counter-revolutionaries and external adversaries, could broadly be characterised as real or perceived threats. The Trial Chamber also found that according to the Closing Order, this group included spies, traitors of the revolution, the Vietnamese and collaborators of the Vietnamese, and CIA.[1666] This Chamber is satisfied that real or perceived political enemies included, but were not limited to, the three groups particularised in the Closing Order.

601. As previously established, the Supreme Court Chamber considers that KHIEU Samphân rehashes his trial submissions regarding the restriction of the category of "enemies" without showing error, and similarly rejects this submission. This Chamber is also satisfied that the Trial Chamber fully explained the category of "enemies" at Phnom Kraol, based on a full and accurate reading of the Closing Order.[1667] These submissions are therefore dismissed.

[1662] Trial Judgment (E465), para. 3136, referring to Case 002 Closing Order (D427), paras 1416-1418.
[1663] Trial Judgment (E465), para. 3137, referring to Trial Judgment (E465), para. 170.
[1664] Trial Judgment (E465), para. 3138.
[1665] Trial Judgment (E465), para. 3138.
[1666] Trial Judgment (E465), para. 3138, referring to Case 002 Closing Order (D427), paras 632, 634, 640.
[1667] See Case 002 Closing Order (D427), paras 632, 634, 640.

3. Alleged Errors Regarding Specific Groups

602. The Trial Chamber found that the Closing Order charged the existence of a targeting policy by the CPK to establish "an atheistic and homogenous society without class divisions, abolishing all ethnic, national, religious, racial, class and cultural differences", as a means of achieving the common purpose. The Trial Chamber found that according to the Closing Order, Cham, Vietnamese, and Buddhist groups, as well as former Khmer Republic officials including civil servants and former military personnel and their families, were targeted in a pattern that began before 1975 and continued until at least 6 January 1979.[1668]

a. The Cham

603. The Trial Chamber considered that the Closing Order identified the Cham as one of the objects of the CPK's targeting policy.[1669] It further found that, regarding the treatment of the Cham, the Trial Chamber was seised of facts concerning genocide by killing members of this group from 1977 at Trea Village Security Centre and Wat Au Trakuon; murder and extermination as a crime against humanity within the same temporal and geographic scope for extermination, with murder limited to Wat Au Trakuon, Trea Village Security Centre, and widespread killings from 1977; and imprisonment and torture both from mid-1978 at Trea Village Security Centre.[1670]

604. KHIEU Samphân submits that the Trial Chamber erred in finding it was seised of the crime against humanity of murder through the executions of Cham that took place at Trea Village, given that the Closing Order restricted its scope to the security centres at Kroch Chhmar and Wat Au Trakuon.[1671] KHIEU Samphân also alleges an error in the Trial Chamber's finding that it was seised of the crime against humanity of persecution on political grounds targeting the Cham through a joint criminal enterprise, given he was not charged with this mode of responsibility.[1672]

605. The Co-Prosecutors respond that the killings of the Cham at Trea Village were subsumed within the crime against humanity of extermination; the *saisine* of which is undisputed by KHIEU Samphân.[1673] The Co-Prosecutors further respond that the Closing

[1668] Trial Judgment (E465), para. 3988, referring to Case 002 Closing Order (D427), paras 205, 207. See also Trial Judgment (E465), para. 3728.
[1669] Trial Judgment (E465), para. 3989, referring to Trial Judgment (E465), para. 3728.
[1670] Trial Judgment (E465), para. 3991, referring to Trial Judgment (E465), para. 3182.
[1671] KHIEU Samphân's Appeal Brief (F54), paras 517-518.
[1672] KHIEU Samphân's Appeal Brief (F54), para. 519.
[1673] Co-Prosecutors' Response (F54/1), para. 340.

Order explicitly stated that the crime of persecution on political grounds was implemented through a joint criminal enterprise, and the Additional Severance and Scope Decision also stated that political persecution against the Cham fell within the *saisine* of Case 002/02.[1674]

606. The Lead Co-Lawyers submit that KHIEU Samphân's arguments should be excluded by Rule 89.[1675] They further state that KHIEU Samphân expressly accepts that the Closing Order charged him with "factual allegations of extermination of Cham beginning in 1977, notably in respect of the Trea security centre in the East Zone and the Wat Au Trakuon security centre in the Central Zone".[1676]

607. The Trial Chamber found that in 1978, a great number of Cham from the Kroch Chhmar district were arrested and taken to Trea Village Security Centre, where those who were deemed to be Cham were executed.[1677] The Trial Chamber also found, reading the Closing Order and Severance Decision holistically,[1678] that the facts regarding the executions of Cham at Trea Village were encompassed within the crimes of genocide, murder as a crime against humanity and extermination.[1679]

608. The Supreme Court Chamber observes that in the Closing Order, the Co-Investigating Judges separately outlined the findings on the crime against humanity of murder,[1680] and the crime against humanity of extermination.[1681] In the findings on the crime against humanity of murder, the Co-Investigating Judges did not expressly list the executions at Trea Village,[1682] although they did provide that the crime against humanity of murder extended to "the treatment of Buddhists, Vietnamese, and the Cham."[1683] Elsewhere in the Closing Order, the Co-Investigating Judges also made factual findings regarding the killing and mistreatment of the Cham at Trea Village.[1684] Reading the Closing Order as a whole, the Supreme Court Chamber finds no error in the Trial Chamber's finding that the killings at Trea Village were charged as part of the crime against humanity of murder. The Supreme Court Chamber also recalls that in

[1674] Co-Prosecutors' Response (F54/1), para. 341, referring to Case 002 Additional Severance Decision (E301/9/1), para. 43.
[1675] Lead Co-Lawyers' Response (F54/2), paras 168-180.
[1676] Lead Co-Lawyers' Response (F54/2), para. 177 (vi).
[1677] Trial Judgment (E465), para. 3306, referring to the factual findings summarised in Trial Judgment (E465), para. 3302.
[1678] Trial Judgment (E465), para. 3184.
[1679] Trial Judgment (E465), para. 3184 (i)-(iii).
[1680] Case 002 Closing Order (D427), paras 1373-1380.
[1681] Case 002 Closing Order (D427), paras 1381-1390.
[1682] Case 002 Closing Order (D427), para. 1373.
[1683] Case 002 Closing Order (D427), para. 1373.
[1684] See Case 002 Closing Order (D427), paras 784-789.

any event, the Trial Chamber found that the killings of the Cham were subsumed within the crime of extermination.[1685] Accordingly, KHIEU Samphân's argument does not go to a finding which underpins his conviction and his submissions are therefore dismissed.

609. As to KHIEU Samphân's assertion that the Trial Chamber erred in finding that the crime against humanity of political persecution against the Cham was charged as part of a joint criminal enterprise, the Trial Chamber found that it was seised of facts relevant to the implementation of a policy through a joint criminal enterprise, which included, with regard to the Movement of the Population Phase Two, the crime against humanity of persecution on political and religious grounds in relation to the treatment of the Cham.[1686] In support, the Trial Chamber referred to its earlier legal findings on the treatment of the Cham.[1687] There, the Trial Chamber considered that the legal findings of the Closing Order combined with the Severance Decision charged KHIEU Samphân with the crime against humanity of persecution on political grounds in the Movement of the Population Phase Two.[1688]

610. The Supreme Court Chamber observes that in the Closing Order, the Co-Investigating Judges found, as one of the five policies of the criminal plan, that specific groups including the Cham were targeted, and that this conduct amounted to "persecution on racial grounds" and "persecution on religious grounds".[1689] In addition, the Annex to the Severance Decision included reference to political persecution in relation to the treatment of the Cham.[1690] The Co-Investigating Judges further found that the crime of political persecution occurred in nearly all sites within the scope of the investigation.[1691] Accordingly, the Supreme Court Chamber is satisfied that KHIEU Samphân was on notice that he was charged with political persecution as a crime against humanity in relation to the Cham as part of a joint criminal enterprise. KHIEU Samphân's submission to the contrary is dismissed.

b. The Vietnamese

[1685] See Trial Judgment (E465), paras 4337, 4341 (i).
[1686] Trial Judgment (E465), para. 3991.
[1687] Trial Judgment (E465), para. 3991, referring to Trial Judgment (E465), Section 13.2.10: Treatment of the Cham: Legal Findings (specifically Sections 13.2.10.2, 13.2.10.7, 13.2.10.9).
[1688] Trial Judgment (E465), para. 3180 (vi), referring to Case 002 Closing Order (D427), paras 1416, 1418. See also Case 002 Severance Decision Annex (E301/9/1.1), para. 5(ii)(b)(7).
[1689] Case 002 Closing Order (D427), para. 1525 (iv)(f)-(g).
[1690] Case 002 Severance Decision Annex (E301/9/1.1), para. 5 (ii)(b)(7) & 5 (ii)(b)(8) & 5 (ii)(b)(13), referring to Case 002 Closing Order (D427), paras 1415-1418, 1448-1469.
[1691] Case 002 Closing Order (D427), paras 1416, 1418.

611. The Trial Chamber found that the Closing Order identified the Vietnamese as one of the objects of the CPK's targeting policy.[1692] Regarding the treatment of the Vietnamese, the Trial Chamber found that it was seised of facts concerning genocide by killing nationwide from April 1977; the crimes against humanity of murder of Vietnamese who resisted deportation in 1975-1976 and nationwide from April 1977, extermination nationwide from April 1977, deportation from Prey Veng, Svay Rieng, and Tram Kak Cooperatives in 1975 and 1976, and persecution on racial grounds in Prey Veng, Svay Rieng, Tram Kak Cooperatives and the S-21, Kraing Ta Chan, and Au Kanseng Security Centres throughout the indictment period; as well as grave breaches of the Geneva Conventions at S-21.[1693]

612. KHIEU Samphân submits that the Trial Chamber erred by finding that it was properly seised of facts pertaining to Vietnamese within the territorial waters of DK, when no facts regarding measures taken at sea were included in the Closing Order.[1694] He argues that the Trial Chamber relied on one document to make this finding, referenced at the end of the Closing Order, and in so doing failed to comply with the legal requirement that any charges are full, detailed and accurate.[1695] Accordingly, KHIEU Samphân argues, he must be acquitted of the crime of genocide through murder, as well as the crimes against humanity of extermination and murder, in respect of facts relating to the treatment of Vietnamese at sea.[1696]

613. The Co-Prosecutors submit that KHIEU Samphân's arguments reiterate his claim, which was dismissed by the Trial Chamber, that the Introductory Submission excludes territorial waters.[1697] They observe that the Closing Order expressly cited a contemporaneous record of the capture and killing of Vietnamese at sea when setting out the evidence of implementation of the CPK policy against the Vietnamese.[1698]

614. The Trial Chamber considered KHIEU Samphân's submission that it was not properly seised of facts concerning the treatment of Vietnamese in territorial waters.[1699] The Trial Chamber referred to its previous finding, in 2016, that "[f]acts concerning the treatment of

[1692] Trial Judgment (E465), para. 3999, referring to Trial Judgment (E465), para. 3728.
[1693] Trial Judgment (E465), para. 4001, referring to Trial Judgment (E465), para. 3351.
[1694] KHIEU Samphân's Appeal Brief (F54), para. 520.
[1695] KHIEU Samphân's Appeal Brief (F54), para. 521.
[1696] KHIEU Samphân's Appeal Brief (F54), para. 521.
[1697] Co-Prosecutors' Response (F54/1), para. 342.
[1698] Co-Prosecutors' Response (F54/1), para. 342, referring to Trial Judgment (E465), para. 3357, fn. 11321.
[1699] Trial Judgment (E465), para. 3357, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), para. 1934.

Vietnamese at sea likewise form part of the facts set out in the Closing Order".[1700] It reiterated that finding and rejected KHIEU Samphân's argument.[1701] The Supreme Court Chamber also observes that a complete reading of the Closing Order shows various facts concerning the implementation of the CPK policy on the treatment of the Vietnamese.[1702] The Supreme Court Chamber finds that KHIEU Samphân again merely challenges the Trial Chamber's finding without demonstrating error, and this submission is therefore dismissed.

c. Former Khmer Republic Soldiers and Officials

615. The Trial Chamber found that the Closing Order collectively identified former Khmer Republic officials (including civil servants and former military personnel) and their families as objects of the CPK's targeting policy.[1703] It considered that the Closing Order charged that this policy came into existence before 1975 and continued until at least 6 January 1979. The Trial Chamber also held that, according to the Closing Order, public declarations of intent to execute the most senior Khmer Republic figures were evident in February 1975 and, following 17 April 1975, a secret decision to kill many other members of the Khmer Republic elite had been made. As charged, this led to the arrest and execution of high-ranking officials, during the evacuation of Phnom Penh and during population movements throughout Cambodia.[1704]

616. KHIEU Samphân submits that the Trial Chamber erred in finding that the Closing Order contained factual allegations targeting former Khmer Republic soldiers and officials as part of a criminal policy.[1705] He contends that the Trial Chamber misread the Closing Order in reaching this conclusion, observing that these individuals were not listed as a defined group in the section of the Closing Order entitled "Treatment of Targeted Groups."[1706] He also submits that findings on former officials were limited only to the movement of the population from Phnom Penh.[1707] KHIEU Samphân further argues that the Trial Chamber further erred in allowing the Prosecution to lead questions regarding former Khmer Republic soldiers and officials at the

[1700] Trial Judgment (E465), para. 3357, referring to Decision on Motion to Hear Additional Witnesses on the Topic of the Treatment of the Vietnamese and to Admit Related Written Records of Interview (E380, E381, E382) (Full Reasons), 25 May 2016, E380/2 ("Decision on Motion to Hear Additional Witnesses (E380/2)"), para. 21 referring in footnote 37 to DK Military Report from Division 164, E3/929, 1 April 1978, ERN (En) 00143507-00143508.
[1701] Trial Judgment (E465), para. 3357, referring to Decision on Motion to Hear Additional Witnesses (E380/2), para. 21 referring in footnote 37 to DK Military Report from Division 164, E3/929, 1 April 1978, ERN (En) 00143507-00143508.
[1702] Case 002 Closing Order (D427), paras 214-215, 816.
[1703] Trial Judgment (E465), para. 4012, referring to Trial Judgment (E465), para. 3728.
[1704] Trial Judgment (E465), para. 4012, referring to Case 002 Closing Order (D427), paras 205-206, 208-209.
[1705] KHIEU Samphân's Appeal Brief (F54), paras 524-527.
[1706] KHIEU Samphân's Appeal Brief (F54), paras 523-524.
[1707] KHIEU Samphân's Appeal Brief (F54), paras 526-527.

Trapeang Thma Dam worksite.[1708] By consequence of this impermissibly expanded jurisdiction, KHIEU Samphân submits that his conviction on the charge of persecution on political grounds targeting former Khmer Republic soldiers and officials should be reversed.[1709]

617. The Co-Prosecutors respond that KHIEU Samphân misrepresents the Closing Order.[1710] While former Khmer Republic soldiers and officials are not identified as a group under the findings outlined in "Treatment of Targeted Groups", the Closing Order contains multiple findings demonstrating their mistreatment as enemies.[1711] The Co-Prosecutors respond further that KHIEU Samphân does not substantiate his claim that the Trial Chamber erred in allowing the Co-Prosecutors to lead questions on former Khmer Republic soldiers and officials.[1712]

618. The Supreme Court Chamber observes that the Trial Chamber considered KHIEU Samphân's assertion that the Closing Order charged the existence of a targeting policy only in relation to the evacuation of Phnom Penh.[1713] It found, however, that in the section of the Closing Order highlighted by KHIEU Samphân, the Co-Investigating Judges made clear that the movement of the population from Phnom Penh was "*only one of several occurrences* of a pattern of targeting former officials of the Khmer Republic."[1714] It further considered his argument regarding the failure to specifically enumerate former Khmer Republic officials in the Closing Order, and, while acknowledging that the Closing Order did not include reference to former Khmer Republic officials in that section, found that it plainly contemplated facts referable to their (mis)treatment under sub-sections relating to crime sites under examination in Case 002/02.[1715] The Trial Chamber therefore rejected KHIEU Samphân's submission.[1716] The Supreme Court Chamber considers that KHIEU Samphân merely repeats his trial arguments without showing any error, and these allegations are dismissed. Furthermore, KHIEU Samphân does not substantiate his assertion that the Trial Chamber erred in allowing

[1708] KHIEU Samphân's Appeal Brief (F54), paras 528-529.
[1709] KHIEU Samphân's Appeal Brief (F54), para. 530.
[1710] Co-Prosecutors' Response (F54/1), paras 343-344.
[1711] Co-Prosecutors' Response (F54/1), para. 343.
[1712] Co-Prosecutors' Response (F54/1), para. 345.
[1713] Trial Judgment (E465), para. 4024, referring to KHIEU Samphân's Closing Brief (F54), paras 2310-2311.
[1714] Trial Judgment (E465), para. 4024, referring to KHIEU Samphân's Closing Brief (F54), para. 2310 quoting Case 002 Closing Order (D427), para. 206 (emphasis added in Trial Judgment).
[1715] Trial Judgment (E465), para. 4023, referring to Case 002 Closing Order (D427), paras 319 (Tram Kak Cooperatives), 366 (1st January Dam Worksite), 432 (S-21 Security Centre), 498, 506 (Kraing Ta Chan Security Centre).
[1716] Trial Judgment (E465), para. 4024.

the Co-Prosecutors to lead evidence on former Khmer Republic officials. This argument is therefore also dismissed.

D. FACTS EXCLUDED FROM CASE 002/02 UPON SEVERANCE OF THE CASE

619. KHIEU Samphân submits that, in light of Rules 89 *ter* and 89 *quater*,[1717] the Trial Chamber erred in delivering judgment on facts that it had already adjudicated in Case 002/01 or on facts that it excluded from Case 002/02 and for which the proceedings were terminated.[1718] He contends that under 89 *ter*, the Trial Chamber temporarily relinquished its jurisdiction to consider facts it excluded through severance and permanently relinquished its jurisdiction to consider facts it excluded following the reduction of the scope of the trial under Rule 89 *quater*.[1719] He argues that any consideration of such facts, whether under the same or a different legal consideration, constitutes a breach of the Rules and the principle of *non bis in idem*.[1720]

620. In response, the Co-Prosecutors submit that the scope of Case 002/02 was delimited by the severance of Case 002 as set out in the Case 002 Additional Severance Decision and its Annex.[1721] They argue that KHIEU Samphân has failed to demonstrate that the Trial Chamber erred in interpreting the Case 002 Additional Severance Decision, which provided him with adequate notice of the scope of the case.[1722] The Lead Co-Lawyers agree with the Co-Prosecutors.[1723]

621. The Supreme Court Chamber recalls that Rule 89 *ter* provides, in relevant part, that "[w]hen the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges contained in an Indictment."[1724] Pursuant to Rule 89 *quater*, "the Trial Chamber may decide to reduce the scope of the trial by excluding certain facts set out in the Indictment".[1725] The Supreme Court Chamber observes that the Trial Chamber severed Case

[1717] Internal Rules, Rule 89 *ter* (concerning the severance); Rule 89 *quater* (concerning the reduction of the scope of the trial).
[1718] KHIEU Samphân's Appeal Brief (F54), paras 531-537. See further T. 16 August 2021, F1/9.1, p. 134.
[1719] KHIEU Samphân's Appeal Brief (F54), paras 535-536.
[1720] KHIEU Samphân's Appeal Brief (F54), paras 534, 537.
[1721] Co-Prosecutors' Response (F54/1), paras 346, 349-350.
[1722] Co-Prosecutors' Response (F54/1), para. 346.
[1723] Lead Co-Lawyers' Response (F54/2), para. 167.
[1724] Internal Rules, Rule 89 *ter*.
[1725] Internal Rules, Rule 89 *quater* (1), (3).

002/02 from Case 002 through the Case 002 Additional Severance Decision and its Annex[1726] and that the proceedings were subsequently terminated in respect of all facts set out in the Case 002 Closing Order that were not included in Cases 002/01 and 002/02.[1727]

622. As a preliminary matter, the Supreme Court Chamber observes that under Rule 89 *quater*, the Trial Chamber is obliged to terminate the proceedings concerning the excluded facts, and that once such a decision becomes final, the excluded facts shall not form the basis for proceedings against the same accused.[1728] This Rule, however, states that "[e]vidence relating to the facts excluded may be relied upon to the extent it is relevant to the remaining facts."[1729] This Chamber thus concurs with KHIEU Samphân only insofar as he submits that by reducing the scope of the trial, the Trial Chamber "has decided that it will never consider the [excluded] facts"[1730] as the *basis for proceedings* against him. Under the express provisions of Rule 89 *quater*, evidence pertaining to excluded facts may be relied on where relevant to the remaining facts that are within the scope of the case. The Supreme Court Chamber observes that KHIEU Samphân provides no concrete examples of the Trial Chamber's alleged reliance on facts that were excluded through a scope reduction under Rule 89 *quater*. Hence, this submission is summarily dismissed. The Supreme Court Chamber will address his submissions concerning Rule 89 *quater* to the extent they are substantiated in the relevant parts of this judgment.

1. Alleged Absence of *Saisine* for Facts of Persecution on Political Grounds and the Other Inhumane Act of Forcible Transfer

623. Based on a holistic reading of the Closing Order and the Case 002 Additional Severance Decision, the Trial Chamber held that the scope of the charges relating to the Cham encompassed facts relating, *inter alia*, to persecution on religious and political grounds, as well as other inhumane acts through conduct characterised as forcible transfer as a crime against humanity during Population Movement Phase Two.[1731]

624. KHIEU Samphân contends that the Trial Chamber committed a legal error by failing to limit the scope of the proceedings concerning Population Movement Phase Two: (1) to the

[1726] Case 002 Additional Severance Decision (E301/9/1); Case 002 Severance Decision Annex (E301/9/1.1).
[1727] Case 002, Decision on Reduction of the Scope of Case 002, 27 February 2017, E439/5.
[1728] Internal Rules, Rule 89 *quater* (1), (3).
[1729] Internal Rules, Rule 89 *quater* (3).
[1730] KHIEU Samphân's Appeal Brief (F54), para. 535.
[1731] Trial Judgment (E465), para. 3184 (vi), (viii).

facts constituting the crime against humanity of persecution on religious grounds; and (2) by convicting him in respect of facts that fell outside of that scope.[1732] He specifically argues that the Trial Chamber erred by omitting paragraph 43 of the Case 002 Additional Severance Decision, which "clearly defines the scope of the trial as regards the forcible transfers of the Cham in [Population Movement Phase Two] under the legal characterisation of the [crime against humanity] of persecution on religious grounds."[1733] He submits that the Trial Chamber erred in law by declaring itself competent to try facts of persecution on political grounds and facts of forced transfer committed in the course of Population Movement Phase Two.[1734] According to KHIEU Samphân, all findings reached by the Trial Chamber in breach of its *saisine* must be reversed, including findings pertaining to the incorporation of such facts into a CPK policy and his conviction through a joint criminal enterprise.[1735]

625. The Co-Prosecutors respond that KHIEU Samphân's claims are based on an inaccurate reading of the Case 002 Additional Severance Decision. They argue that the Trial Chamber's reference to religious persecution in relation to the forced transfer of the Cham during Population Movement Phase Two is "neither exclusive nor exclusionary" and did not confine its *saisine* to facts that could be legally characterised as religious persecution.[1736] They submit that the Case 002 Additional Severance Annex included charges of political persecution of the Cham and other inhumane acts through forced transfer during Population Movement Phase Two as well as the Closing Order's underlying factual findings applicable to all three charges.[1737] The Lead Co-Lawyers concur with the Co-Prosecutors.[1738]

626. The Supreme Court Chamber observes that KHIEU Samphân raises two interconnected issues. The first issue is whether paragraph 43 of the Additional Severance Decision limited the scope of Case 002/02 in relation to Population Movement Phase Two regarding the treatment of the Cham to facts of persecution on religious grounds.

627. The Supreme Court Chamber observes that paragraph 43 of the Case 002 Additional Severance Decision reads:

[1732] KHIEU Samphân's Appeal Brief (F54), para. 538; T. 16 August 2021, F1/9.1, p. 134.
[1733] KHIEU Samphân's Appeal Brief (F54), paras 539-540, referring to Case 002 Additional Severance Decision (E301/9/1), para. 43.
[1734] KHIEU Samphân's Appeal Brief (F54), paras 541-543.
[1735] KHIEU Samphân's Appeal Brief (F54), paras 541-543.
[1736] Co-Prosecutors' Response (F54/1), para. 349; T. 16 August 2021, F1/9.1, p. 147.
[1737] Co-Prosecutors' Response (F54/1), para. 349.
[1738] Lead Co-Lawyers' Response (F54/2), paras 165-167.

> In particular, the Chamber notes that movement of the Cham minority forms the basis of religious persecution charges, as well as a means of implementing policies concerning movement of population (phase two) and treatment of targeted groups. The Chamber excluded the charges based on the policy concerning the treatment of the Cham, including charges of religious persecution, from the scope of Case 002/01. However, treatment of the Cham and charges of religious persecution, including in the course of population movement (phase two), have been included within the scope of Case 002/02.[1739]

This paragraph is found in Section 5.3 of the Case 002 Additional Severance Decision, where the Trial Chamber explained the inclusion of certain sections of the Closing Order relating to crime sites, policies, background, and context in Case 002/02, which formed a part of Case 002/01.[1740] The Trial Chamber clarified that it attached to the Case 002 Additional Severance Decision "an annex *inclusive of all relevant paragraphs* of the Closing Order".[1741] As a result, the Supreme Court Chamber concurs with the Co-Prosecutors that the reference to religious persecution in relation to the forced transfer of the Cham during Population Movement Phase Two in paragraph 43 of the Case 002 Additional Severance Decision is "neither exclusive nor exclusionary"[1742] and that the Case 002 Additional Severance Decision must be read in conjunction with its Annex.

628. The second issue is whether the Trial Chamber erred by convicting KHIEU Samphân for facts characterised as persecution on political grounds and forced transfer of the Cham that were outside the scope of the case.

629. The Supreme Court Chamber notes that the Case 002 Additional Severance Annex includes paragraphs of the Closing Order relevant to the scope of Case 002/02 and, as held, must be read in conjunction with the Case 002 Additional Severance Decision.[1743] Persecution on religious and political grounds as well as other inhumane acts through forced transfer limited to the treatment of the Cham, are explicitly mentioned as underlying offences constituting crimes against humanity.[1744] In addition, the Case 002 Additional Severance Annex lists the relevant paragraphs of the Closing Order as well as the underlying factual findings that apply to these charges, those being paragraphs 266, 268 and 281.[1745]

[1739] Case 002 Additional Severance Decision (E301/9/1), para. 43.
[1740] Case 002 Additional Severance Decision (E301/9/1), para. 41.
[1741] Case 002 Additional Severance Decision (E301/9/1), para. 41 (emphasis added).
[1742] Co-Prosecutors' Response (F54/1), para. 349.
[1743] Case 002 Additional Severance Decision (E301/9/1), para. 41; Case 002 Severance Decision Annex (E301/9/1.1), heading ("List of paragraphs and portions of the Closing Order relevant to Case 002/2").
[1744] Case 002 Severance Decision Annex (E301/9/1.1), para. 5 (ii)(b)(7) & 5 (ii)(b)(8) & 5 (ii)(b)(13), referring to Case 002 Closing Order (D427), paras 1415-1418, 1448-1469.
[1745] Case 002 Severance Decision Annex (E301/9/1.1), para. 3 (i).

630. Accordingly, the Supreme Court Chamber is not persuaded by KHIEU Samphân's contention that the Trial Chamber was only seised of the facts relating to Population Movement Phase Two "insofar as they pertained to the crime of persecution on religious grounds directed against the Cham".[1746] This Chamber holds that the Trial Chamber did not err in interpreting the Case 002 Additional Severance Decision and determining that the scope of the charges regarding the treatment of the Cham included facts relating to persecution on political grounds and other inhumane acts through forced transfer.[1747] On this basis, the Supreme Court Chamber rejects KHIEU Samphân's related submissions that the Trial Chamber's findings of forced transfer and political persecution, their inclusion in a CPK policy, and his conviction based on those factual findings must be annulled or reversed.[1748]

2. Alleged Absence of *Saisine* for Facts Relating to the Other Inhumane Act of Forcible Transfer of Population in the Course of Population Movement Phase Two

631. The Trial Chamber determined that the scope of the charges regarding the treatment of the Cham encompassed facts relating, *inter alia*, to the crime against humanity of other inhumane acts through conduct characterised as forced transfer,[1749] that this crime was established in relation to the forced transfer of the Cham population during Population Movement Phase Two,[1750] and that KHIEU Samphân committed this crime as part of a joint criminal enterprise.[1751]

632. KHIEU Samphân submits that the Trial Chamber committed a legal error in relation to facts constituting the crime against humanity of other inhumane acts through forced transfer of the Cham population during Population Movement Phase Two.[1752] He argues that in adjudicating these facts, the Trial Chamber breached the principle of *res judicata*, an established principle of international criminal law that prevents "the same matter from being re-litigated by the same parties in the course of another trial."[1753] He states that the Supreme Court Chamber convicted and sentenced him for the other inhumane act of forced transfer in

[1746] KHIEU Samphân's Appeal Brief (F54), para. 540.
[1747] Trial Judgment (E465), para. 3184 (vi), (viii).
[1748] *Contra* KHIEU Samphân's Appeal Brief (F54), paras 542-543.
[1749] Trial Judgment (E465), para. 3184 (vi), (viii).
[1750] Trial Judgment (E465), para. 3340. See further Trial Judgment (E465), paras 3997-3998.
[1751] Trial Judgment (E465), para. 4306.
[1752] KHIEU Samphân's Appeal Brief (F54), para. 544; T. 16 August 2021, F1/9.1, p. 134.
[1753] KHIEU Samphân's Appeal Brief (F54), paras 544-545.

respect of the facts of Population Movement Phase Two in Case 002/01. Therefore, the final decision in Case 002/01 is *res judicata* in respect of those facts.[1754]

633. In response, the Co-Prosecutors state that this allegation fails because the forced transfer of the Cham was not included in Case 002/01 as part of Population Movement Phase Two. In Case 002/01, the Trial Chamber considered that the charges of forced transfer of Cham were inextricably linked with the charges of religious persecution, which fell outside the scope of the case. Consequently, the Trial Chamber decided not to make findings on allegations of forced movement of the Cham, which were also charged as religious persecution, and declined to hear any witnesses in Case 002/01 on this issue. The Co-Prosecutors submit that because the forced transfer of the Cham was never litigated, the Trial Chamber could not have breached *res judicata*.[1755] The Lead Co-Lawyers endorse the Co-Prosecutors' response.[1756]

634. The Supreme Court Chamber observes that the legal compendium of the ECCC[1757] does not refer to the principle of *res judicata*. In applying this principle, Article 12 of the Criminal Procedure Code of Cambodia, nevertheless, provides that, "any person who has been finally acquitted by a court judgment cannot be prosecuted once again for the same *act*, even if such *act* is subject to different legal qualification."[1758] This Chamber considers that the principle of *res judicata*, as defined in Cambodian procedural law, reflects the principle of *non bis in idem* in other jurisdictions which protects against multiple prosecutions for the same set of facts or acts in civil law, or the same offence in common law. At the international level, the doctrine of *res judicata*, while closely related to *non bis in idem*, applies more broadly to a situation in which a specific issue or matter has already been judicially resolved. The *ad hoc* tribunals have held that in criminal cases, *res judicata* is limited "to the question of whether, when the previous trial of a particular individual is followed by another of the same individual, a specific matter has already been fully litigated"[1759] and that *res judicata* arises only "when there is an

[1754] KHIEU Samphân's Appeal Brief (F54), para. 546.
[1755] Co-Prosecutors' Response (F54/1), para. 544; T. 16 August 2021, F1/9.1, p. 147.
[1756] Lead Co-Lawyers' Response (F54/2), paras 165-167.
[1757] Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, *entered into force* 29 April 2005, 2329 U.N.T.S. 117 ("ECCC Agreement"); ECCC Law; Internal Rules.
[1758] Criminal Procedure Code of Cambodia, Art. 12 (emphasis added).
[1759] *Prosecutor v. Delalić et al*., Trial Chamber (ICTY), IT-96-21-T, Judgment, 16 November 1998 ("*Čelebići* Trial Judgment (ICTY)"), para. 228.

identity of parties, identity of issues, and importantly a final determination of those issues in the previous decision by a court competent to decide them."[1760]

635. The Supreme Court Chamber observes that KHIEU Samphân endorses the latter "international" interpretation of *res judicata* by referring to the principle as precluding the re-litigation of identical issues by the same parties in the course of another trial.[1761] Under this interpretation, the Supreme Court Chamber agrees with the Co-Prosecutors that "*res judicata* does not prohibit the use of facts but the re-litigation of conclusively determined issues."[1762] Moreover, the Supreme Court Chamber recalls that:

> the [Criminal Procedure Code of Cambodia] defines *res judicata* too narrowly by limiting it only to an acquittal, the normative scope of *ne bis in idem* must be brought in light with an international standard, that of the [ICCPR], where *idem* concerns issues of criminal responsibility, that is, acquittal or conviction related to the crime charged.[1763]

Accordingly, as long as there is no sameness of the offence in question, evidentiary base is immaterial for the purpose of *ne bis in idem*.[1764]

636. In this case, KHIEU Samphân claims that the Appeal Judgment in Case 002/01 has the authority of *res judicata* in respect of the facts of Population Movement Phase Two, which he argues included the transfer of the Cham,[1765] whereas the Co-Prosecutors claim that the Trial Chamber "in effect, excluded any consideration of the forced movement of Cham from Case 002/1".[1766] Regarding KHIEU Samphân's contention that the transfer of the Cham population was the subject of a final decision in the Case 002/01 Appeal Judgment under the characterisation of other inhumane acts through forced transfer,[1767] the Supreme Court Chamber is of the view that in Case 002/01, the Trial Chamber excluded the charges based on the policy concerning the treatment of the Cham, including the charges of religious persecution, from the scope of Case 002/01.[1768] In the Case 002/01 Judgment, the Trial Chamber subsequently held that:

[1760] *Prosecutor v. Uwinkindi*, Appeals Chamber (IRMCT), MICT-12-25-AR14.1, Decision on an Appeal Concerning a Request for Revocation of Referral, 4 October 2016, para. 29.
[1761] KHIEU Samphân's Appeal Brief (F54), para. 545.
[1762] Co-Prosecutors' Response (F54/1), para. 459.
[1763] Case 002 Additional Severance Appeal Decision (E301/9/1/1/3), para. 82.
[1764] Case 002 Additional Severance Appeal Decision (E301/9/1/1/3), para. 82.
[1765] KHIEU Samphân's Appeal Brief (F54), para. 546.
[1766] Co-Prosecutors' Response (F54/1), para. 544.
[1767] KHIEU Samphân's Appeal Brief (F54), paras 544, 546.
[1768] Case 002, Annex: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/01, Amended Further to the Trial Chamber's Decision on IENG Thirith's Fitness to Stand Trial (E138) and the Trial Chamber's

> [the] [m]ovement of the Cham Muslim minority forms the basis of both forced transfer and religious persecution charges in connection with movement of the population (phase two). The latter charges of religious persecution do not fall within the scope of Case 002/01. As the factual basis for these two charges is the same and the charges are inextricably linked, *the Chamber will not make findings in this judgement concerning allegations of the forced movement of the Cham that are also charged as religious persecution*.[1769]

As a result, while the Trial Chamber in Case 002/02 acknowledged that "the transfer of 50,000 Cham from the East Zone to the Central (old North) Zone was part of a broader movement of populations aimed at distributing the population throughout Cambodia"[1770], the Trial Chamber in Case 002/01 made no specific findings on the forced transfer and treatment of the Cham and did not hear witnesses on this specific topic.

637. Furthermore, this Chamber is not persuaded by KHIEU Samphân's submission that the movement of the Cham was subject to final judgment in Case 002/01 because the Supreme Court Chamber in that Case concluded that the discriminatory nature of the population transfer had not been established.[1771] The Supreme Court Chamber's ruling that the population transfers during Population Movement Phase Two were not discriminatory pertained exclusively to the facts of Case 002/01, which involved political persecution of New People, not the Cham.[1772] Finally, this Chamber observes that KHIEU Samphân's arguments on this issue are related to his allegations elsewhere in his Appeal that the Trial Chamber erred in finding that the crime of persecution on political grounds was established in relation to the forced transfer of the Cham when there is "no evidence of discrimination in fact against the Cham during [Population Movement Phase Two]".[1773] The Supreme Court Chamber considers that this submission fails since this Chamber held that the Trial Chamber did not err in concluding that the forced movement of the Cham was discriminatory.[1774]

638. In sum, the Supreme Court Chamber concludes that the forced movement of the Cham was not the subject of a final decision in Case 002/01 as KHIEU Samphân's conviction for the crime against humanity of other inhumane acts through forced transfer in Case 002/01 was not

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Decision's on Co-Prosecutor's Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163), 8 October 2012, E124/7.3.

[1769] Case 002/01 Trial Judgment (E313), para. 627 (emphasis added).

[1770] Trial Judgment (E465), paras 3212, 3262.

[1771] KHIEU Samphân's Appeal Brief (F54), para. 546, referring to Case 002/01 Appeal Judgment (F36), paras 705-706.

[1772] Case 002/01 Appeal Judgment (F36), paras 698-706.

[1773] KHIEU Samphân's Appeal Brief (F54), para. 964.

[1774] See *infra* Section VII.F.2.a.i.

based on acts of forced transfer against the Cham.[1775] Consequently, the Trial Chamber did not breach the principle of *res judicata*.

3. Alleged Absence of *Saisine* for Facts Relating to the Other Inhumane Act Through Enforced Disappearances of the Vietnamese at the Tram Kak Cooperatives

639. In terms of the scope of Case 002/02, the Trial Chamber held that the crime against humanity of other inhumane acts through enforced disappearances was charged in relation to the Tram Kak Cooperatives, and that this crime might concern Vietnamese victims.[1776] The Trial Chamber found that Vietnamese persons disappeared from Tram Kak in 1975 and 1976,[1777] that the crime against humanity of other inhumane acts through conduct characterised as enforced disappearances was established at the Tram Kak Cooperatives,[1778] and that KHIEU Samphân committed this crime through a JCE.[1779]

640. According to KHIEU Samphân, the Trial Chamber acknowledged that, as a result of the severance, the Vietnamese were excluded from the examination of the facts constituting other inhumane acts through enforced disappearances.[1780] He claims that the Trial Chamber erred in law in determining it was competent to consider such facts at the Tram Kak Cooperatives.[1781] He argues that the Closing Order clearly distinguished between the facts relating to the "Treatment of Specific Groups" and other facts.[1782] He cites the evidence of RIEL Son, which leads him to believe that the section concerning the "Treatment of Specific Groups" addressed the facts relating to Vietnamese victims, and that other facts of enforced disappearance at the Tram Kak Cooperatives did not pertain to Vietnamese victims.[1783] Hence, he submits that Trial Chamber breached its *saisine* in relying on the "other facts" to determine that Vietnamese victims were within its purview. The Trial Chamber's findings of enforced

[1775] Case 002/01 Trial Judgment (E313), disposition; Case 002/01 Appeal Judgment (F36), disposition ("The Supreme Court Chamber […] affirms […] KHIEU Samphân's convictions for the crime against humanity of other inhumane acts").
[1776] Trial Judgment (E465), para. 3352.
[1777] Trial Judgment (E465), para. 1201.
[1778] Trial Judgment (E465), paras 1204, 3927.
[1779] Trial Judgment (E465), para. 4306, p. 2230.
[1780] KHIEU Samphân's Appeal Brief (F54), para. 547.
[1781] KHIEU Samphân's Appeal Brief (F54), para. 547.
[1782] KHIEU Samphân's Appeal Brief (F54), para. 548, referring to Case 002 Closing Order (D427), paras 319-321 (facts pertaining to the "treatment of specific groups"), 310-318 (concerning other facts).
[1783] KHIEU Samphân's Appeal Brief (F54), paras 548-549.

disappearances of Vietnamese victims at Tram Kak must therefore be reversed and he must be acquitted of this crime.[1784]

641. Elsewhere in his Appeal,[1785] KHIEU Samphân submits that the Trial Chamber's Case 002 Additional Severance Annex contains inconsistencies regarding the charges about the Vietnamese.[1786] He argues that, even though the treatment of the Vietnamese, including enforced disappearances of Vietnamese, fell within the scope of Case 002/02, the Trial Chamber did not list this charge in the Case 002 Additional Severance Annex.[1787] He argues that he subsequently requested the exclusion of evidence about the treatment of Vietnamese, and that the Trial Chamber "unlawfully" reintroduced these issues in relation to sites where the crime was alleged.[1788]

642. In response, the Co-Prosecutors argue that KHIEU Samphân misinterprets the Trial Chamber's findings and the Case 002 Additional Severance Annex. They note that the Trial Chamber did not find that the Vietnamese were excluded from consideration of the facts constituting other inhumane acts through enforced disappearances, but rather that "this legal characterisation had either been excluded through severance, or may have never been charged, with respect to facts included in 'the treatment of Vietnamese' segment."[1789] The Trial Chamber correctly recognised that Case 002/02 included Tram Kak Cooperatives, and that the potential legal characterisation included the other inhumane act of enforced disappearance. They conclude that a plain reading of the Case 002 Additional Severance Annex contradicts KHIEU Samphân's attempt to carve out facts pertaining to Vietnamese victims at Tram Kak.[1790]

643. The Lead Co-Lawyers concur with the Co-Prosecutors.[1791] They contend that this argument is untimely as it was raised for the first time on appeal without justification.[1792] KHIEU Samphân was required to present his arguments at the earliest opportunity and is barred from doing so now unless he can demonstrate that "inadequate notice of the charges materially

[1784] KHIEU Samphân's Appeal Brief (F54), para. 549.
[1785] KHIEU Samphân's Appeal Brief (F54), paras 113-114.
[1786] KHIEU Samphân's Appeal Brief (F54), para. 113.
[1787] KHIEU Samphân's Appeal Brief (F54), para. 114.
[1788] KHIEU Samphân's Appeal Brief (F54), para. 114.
[1789] Co-Prosecutors' Response (F54/1), para. 350.
[1790] Co-Prosecutors' Response (F54/1), para. 350.
[1791] Lead Co-Lawyers' Response (F54/2), para. 167.
[1792] Lead Co-Lawyers' Response (F54/2), para. 168.

impaired his ability to prepare a defence".[1793] According to the Lead Co-Lawyers, he has not explained why he should be permitted to raise this argument relating to the scope of the case for the first time on appeal.[1794] They note that KHIEU Samphân raised robust objections to other issues, such as evidence that he deemed to be outside of the scope of the trial, either during the trial or in his Closing Brief.[1795] Besides, the Lead Co-Lawyers argue that KHIEU Samphân previously accepted that the scope of the case included enforced disappearances in Tram Kak district, and made no claims that Vietnamese victims were excluded.[1796] While the Lead Co-Lawyers submit that KHIEU Samphân bears the burden of demonstrating prejudice by showing a lack of adequate notice of the charges, they observe: (1) that KHIEU Samphân fails to explain why, upon reaching his incorrect conclusion that crimes against Vietnamese had been excised, he did not complain that evidence was being heard on matters which he believed to fall outside of the case;[1797] and (2) that there would be clear prejudice to civil party rights and interest if these objections were permitted out of time.[1798]

644. Regarding the issue of timeliness, the Supreme Court Chamber considers that KHIEU Samphân's challenges concern the Trial Chamber's interpretation of the Case 002 Additional Severance Decision and related findings in the Trial Judgment. The Lead Co-Lawyers submit that this challenge was raised for the first time on appeal, and that KHIEU Samphân, in his Closing Brief, "accepted that the scope of the case included enforced disappearance in Tram Kak district […] and made no claims that this excluded cases where the victim was Vietnamese."[1799] The Supreme Court Chamber observes that while KHIEU Samphân accepted that the crime of other inhumane acts of enforced disappearance was within the scope of the case in relation to the Tram Kak Cooperatives,[1800] he also alleged that "evidence concerning the Vietnamese in Tram Kak is out of scope."[1801] Moreover, KHIEU Samphân submitted to the Trial Chamber that the Case 002 Additional Severance Decision "[did] not include the factual allegations concerning Vietnamese people" and that it should therefore omit evidence it heard in relation to the crime of enforced disappearances of Vietnamese people.[1802] The Lead Co-

[1793] Lead Co-Lawyers' Response (F54/2), paras 169-173, 178.
[1794] Lead Co-Lawyers' Response (F54/2), para. 175.
[1795] Lead Co-Lawyers' Response (F54/2), para. 176.
[1796] Lead Co-Lawyers' Response (F54/2), para. 177 (vii).
[1797] Lead Co-Lawyers' Response (F54/2), para. 179.
[1798] Lead Co-Lawyers' Response (F54/2), para. 180.
[1799] Lead Co-Lawyers' Response (F54/2), para. 177 (vii).
[1800] KHIEU Samphân's Closing Brief (E457/6/4/1), para. 912, referring to Case 002 Closing Order (D427), para. 1470.
[1801] KHIEU Samphân's Closing Brief (E457/6/4/1), para. 964.
[1802] KHIEU Samphân's Closing Brief (E457/6/4/1), paras 1930-1931.

Lawyers' submission that this argument was raised for the first time on appeal is meritless and thus rejected.

645. In any case, the Supreme Court Chamber considers that KHIEU Samphân's submissions concerning the alleged exclusion of Vietnamese victims of enforced disappearances from the Tram Kak Cooperatives are without merit. The Trial Chamber held that "the crime against humanity of other inhumane acts through enforced disappearances in relation to the treatment of Vietnamese has been excluded from Case 002/2 by the Additional Severance Decision."[1803] The Trial Chamber further noted that it was unclear whether enforced disappearances had ever been charged "as part of the treatment of Vietnamese in the Closing Order".[1804]

646. The Supreme Court Chamber observes that the factual findings of the crimes segment of the Closing Order includes separate sections on the Population Movement, Worksites and Cooperatives, including the Tram Kak Cooperatives, Security Centres and Execution Sites, and the Treatment of Specific Groups, including the treatment of Vietnamese. The Case 002 Additional Severance Annex limits the relevant factual findings of crimes to paragraphs 791-831 of the Closing Order, excluding the crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory,[1805] under the legal characterisation of the crimes against humanity of murder,[1806] extermination,[1807] deportation,[1808] and persecution on racial grounds.[1809] The Supreme Court Chamber considers that whether originally charged in the Closing Order or not, the crime of other inhumane acts through enforced disappearances in relation to the treatment of the Vietnamese section of the Closing Order paragraphs 791-831 was excluded by the Case 002 Additional Severance Decision, as held by the Trial Chamber.[1810]

647. The Trial Chamber did not, however, state that the Vietnamese had been excluded from the examination of the facts constituting other inhumane acts through enforced disappearances

[1803] Trial Judgment (E465), para. 3352, referring to Case 002 Severance Decision Annex (E301/9/1.1), para. 5 (ii)(b)(14).
[1804] Trial Judgment (E465), fn. 11305.
[1805] Case 002 Severance Decision Annex (E301/9/1.1), para. 3 (xii).
[1806] Case 002 Severance Decision Annex (E301/9/1.1), para. 5 (ii)(b)(1).
[1807] Case 002 Severance Decision Annex (E301/9/1.1), para. 5 (ii)(b)(2).
[1808] Case 002 Severance Decision Annex (E301/9/1.1), para. 5 (ii)(b)(4).
[1809] Case 002 Severance Decision Annex (E301/9/1.1), para. 5 (ii)(b)(9).
[1810] Trial Judgment (E465), para. 3352, referring to Case 002 Severance Decision Annex (E301/9/1.1), para. 5(ii)(b)(14).

in all locations.[1811] The Trial Chamber held that the other inhumane act of enforced disappearance had been charged in relation to the Tram Kak Cooperatives and "may concern Vietnamese victims among others, even if these last have not been particularised as such."[1812] Likewise, the Supreme Court Chamber observes that in relation to the Tram Kak Cooperatives, the Case 002 Additional Severance Annex includes the factual findings of crimes contained in paragraphs 302-321 of the Closing Order[1813] under the legal characterisation of, *inter alia*, the crime against humanity of other inhumane acts through enforced disappearance.[1814] The Trial Chamber was therefore seised of the facts related to the Tram Kak Cooperatives, including the paragraphs in the Closing Order addressing the "Treatment of Specific Groups" (paragraphs 319-321)[1815] and the facts forming the basis of enforced disappearances of Vietnamese in the Tram Kak Cooperatives (paragraph 320).[1816]

648. KHIEU Samphân acknowledges that the factual part of the section concerning the Treatment of Specific Groups in the Tram Kak Cooperatives addresses facts that "might be constitutive of the disappearance of Vietnamese persons".[1817] On the basis of the foregoing, the Supreme Court Chamber disagrees with KHIEU Samphân insofar as he alleges that these facts were excluded from the scope of the case, and instead considers that the Trial Chamber was seised of the facts in the section entitled "Treatment of Specific Groups" within the Tram Kak Cooperatives.[1818] Accordingly, the Supreme Court Chamber does not address KHIEU Samphân's related submissions concerning the cited evidence of RIEL Son and whether or not other facts included in this section of the Closing Order concern Vietnamese victims.[1819] KHIEU Samphân's allegation that the Trial Chamber erred in law in determining it was competent to consider facts of enforced disappearances of Vietnamese at the Tram Kak Cooperatives is thus dismissed.

[1811] *Contra* KHIEU Samphân's Appeal Brief (F54), para. 547.
[1812] Trial Judgment (E465), para. 3352. See also Trial Judgment (E465), para. 805, referring to Case 002 Closing Order (D427), paras 1470-1478.
[1813] Case 002 Severance Decision Annex (E301/9/1.1), para. 3 (ii).
[1814] Case 002 Severance Decision Annex (E301/9/1.1), para. 5 (ii)(b)(14).
[1815] Case 002 Closing Order (D427), paras 319-321.
[1816] Case 002 Closing Order (D427), para. 320.
[1817] KHIEU Samphân's Appeal Brief (F54), para. 548, referring to Case 002 Closing Order (D427), para. 320.
[1818] Case 002 Severance Decision Annex (E301/9/1.1), para. 3 (ii); Case 002 Closing Order (D427), paras 319-321.
[1819] KHIEU Samphân's Appeal Brief (F54), para. 548, referring to Case 002 Closing Order (D427), paras 310-318.

4. An Ill-Defined Marathon Trial

649. In relation to a discrepancy between the French and the Khmer and English versions of the Case 002 Additional Severance Annex where the French version omitted the charge of deportation at Tram Kak which appeared in the Khmer and English versions, the Trial Chamber considered it apparent that the French translation contained an error and was not convinced "that any unfairness was occasioned by the error in the French version of the Annex."[1820]

650. KHIEU Samphân argues that the charge of deportation in relation to Tram Kak did not appear in the French version of the Case 002 Additional Severance Annex. He submits that he was cautious in raising the charge during his closing statement after discovering that it appeared in both the English and Khmer versions of the same Annex.[1821] He states that the Trial Chamber disregarded his closing statement as well as the fact that the Case 002 Additional Severance Decision and its Annex were issued in three languages as originals. Hence, he claims that the French version is as authentic as the English and Khmer versions, and that the Trial Chamber should have paid greater attention to the information it provided on the delineation of the charges.[1822]

651. The Co-Prosecutors respond that KHIEU Samphân's claim is misplaced and relies on a translation error. They submit that the relevant statement that the charges of deportation were limited to Prey Veng and Svay Rieng appeared only in the French version of the Case 002 Additional Severance Annex, whereas the English and Khmer versions indicate that the charge of deportation at Tram Kak is within the scope of Case 002/02.[1823] They further argue that the Trial Chamber previously confirmed that the English and Khmer versions of the Case 002 Additional Severance Annex are originals, and that all language versions refer to the paragraph confirming the charges of deportation at Tram Kak.[1824] Additionally, they submit that KHIEU Samphân has failed to show that the translation error was critical to the verdict reached, occasioning a miscarriage of justice. According to the Co-Prosecutors, KHIEU Samphân: (1) could have raised the discrepancy since April 2014 when the Trial Chamber issued the Severance Annex; (2) exercised his right to be heard regarding all deportation charges,

[1820] Trial Judgment (E465), para. 169.
[1821] KHIEU Samphân's Appeal Brief (F54), para. 115.
[1822] KHIEU Samphân's Appeal Brief (F54), para. 115.
[1823] Co-Prosecutors' Response (F54/1), para. 347.
[1824] Co-Prosecutors' Response (F54/1), para. 347.

including in Tram Kak; and (3) failed to make further submissions regarding deportations from Tram Kak specifically during his closing arguments, despite noting the translation error.[1825]

652. The Supreme Court Chamber observes that the French version of the Case 002 Additional Severance Annex appears to limit the charge of deportation as a crime against humanity to Prey Veng and Svay Rieng,[1826] whereas the English and Khmer versions include the charge of deportation at the Tram Kak Cooperatives.[1827] In response to this discrepancy, KHIEU Samphân makes two main claims, that the Trial Chamber disregarded: (1) his closing argument about the omission of the charge of deportation at Tram Kak;[1828] and (2) that the Case 002 Additional Severance Decision and the Annex were issued in three languages as original and that the French version is equally authentic.[1829]

653. In relation to the first submission, the Supreme Court Chamber observes that the Trial Chamber clearly considered the discrepancy between the different language versions in its Judgment and therefore did not "disregard" KHIEU Samphân's closing argument.[1830] It was noted that the charge of deportation at Tram Kak was included in the English and French versions, that all three-language versions of the Case 002 Additional Severance Annex refer to paragraph 1397 of the Closing Order, which concerns deportation in Tram Kak,[1831] and that KHIEU Samphân could have raised the discrepancy at any time since the issuance of the Case 002 Additional Severance Decision in April 2014 but elected not to do so in ample time.[1832] The Supreme Court Chamber, therefore, considers that the Trial Chamber duly examined the discrepancy between the different language versions of the Case 002 Additional Severance Annex and rejects KHIEU Samphân's allegations in this regard. In relation to KHIEU Samphân's second submission concerning the discrepancy between the different language versions of the Case 002 Additional Severance Annex, the Supreme Court Chamber observes

[1825] Co-Prosecutors' Response (F54/1), para. 348.
[1826] Case 002 Severance Decision Annex (E301/9/1.1), ERN (FR) 00982092, para. 5 (ii)(b)(4).
[1827] Case 002 Severance Decision Annex (E301/9/1.1), ERN (EN) 00981687; ERN (KH) 00981692, para. 5 (ii)(b)(4).
[1828] KHIEU Samphân's Appeal Brief (F54), para. 115, referring to T. 20 June 2017, E1/525.1, pp. 44-45. The Supreme Court Chamber observes that KHIEU Samphân, in his closing statement, indicates that he only looked at the French version of the Severance Annex, which does not mention the charge of deportation at Tram Kak and that this does not change the overall problem that the facts in relation to the charge of deportation fell outside the scope of the judicial investigation.
[1829] KHIEU Samphân's Appeal Brief (F54), para. 115.
[1830] Trial Judgment (E465), para. 169.
[1831] Trial Judgment (E465), para. 169, referring to Case 002 Severance Decision Annex (E301/9/1.1), para. 5 (ii)(b)(4). See also Case 002 Closing Order (D427), para. 1397 ("The legal elements of the crime against humanity of deportation have been established in Prey Veng and Svay Rieng as well as at the Tram Kok Cooperatives.").
[1832] Trial Judgment (E465), para. 169.

that the French corrected version of the Case 002 Additional Severance Annex is marked as a translation in ZyLab. Moreover, as correctly pointed out by the Co-Prosecutors, the Trial Chamber held "that the English and the Khmer versions are accurate."[1833] In light of this, the Supreme Court Chamber herein rejects KHIEU Samphân's allegation.

E. OUT OF SCOPE BUT RELEVANT EVIDENCE

654. KHIEU Samphân submits that the Trial Chamber erred in law by (1) taking a "historical" approach to considering the "out-of-scope but relevant evidence" about facts of which it was not seised;[1834] and (2) making "gratuitous" findings that were "*obiter dicta*" and irrelevant to the outcome of the case on facts for which the Trial Chamber recognised that there was insufficient evidence, resulting in undue delay and demonstrating its bias.[1835]

655. KHIEU Samphân argues that the Trial Chamber erred in law and violated his rights to be informed of the nature and cause of the charge against him, to adequate time and facilities for the preparation of his defence, to an impartial tribunal that respects the scope of its jurisdiction, to legal and procedural certainty, and to be tried without undue delay taking into account and employing the "out-of-scope but relevant evidence" about facts not seised.[1836] In a footnote of his Appeal Brief,[1837] KHIEU Samphân takes issue with the Trial Chamber's findings that it may (1) rely on evidence outside the temporal or geographic scope of the Closing Order;[1838] (2) use evidence of the treatment of Buddhists outside the Tram Kak Cooperatives;[1839] (3) use evidence concerning the Khmer Krom;[1840] and (4) use evidence pertaining to crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory.[1841]

656. KHIEU Samphân contends that the Trial Chamber's approach is inconsistent with its role and the purpose of criminal proceedings as stated in the Internal Rules, as well as a violation of the guiding and fundamental principles of criminal law. He argues that the Trial Chamber must examine whether the charges against the Accused for which he was indicted

[1833] Trial Chamber Memorandum on Khieu Samphân's Request for Clarification and Modification to the Annex of the Decision on Additional Severance of Case 002 and Scope of Case 002/02, 19 August 2014, E301/9/1.1/2.
[1834] KHIEU Samphân's Appeal Brief (F54), paras 119-123.
[1835] KHIEU Samphân's Appeal Brief (F54), para. 126.
[1836] KHIEU Samphân's Appeal Brief (F54), paras 120-125.
[1837] KHIEU Samphân's Appeal Brief (F54), fn. 134.
[1838] Trial Judgment (E465), para. 60.
[1839] Trial Judgment (E465), paras 177-178.
[1840] Trial Judgment (E465), paras 181-185, 816.
[1841] Trial Judgment (E465), paras 189-190, 778.

amount to a crime and whether he is liable for it, and that the judgment shall be limited to these facts, and the Accused shall only be required to defend himself against these facts.[1842] Citing his Closing Brief, KHIEU Samphân opines that he previously discussed at length the principles and factual scope of the jurisdiction of a trier of fact that determines the information to be provided about the charges against him and denounces the resulting confusion.[1843]

657. In a footnote,[1844] KHIEU Samphân cites the Trial Chamber's findings about his visit to Tram Kak district;[1845] the Standing Committee's visit to the Northwest Zone;[1846] and his 17 April 1978 speech.[1847] KHIEU Samphân argues that these "*obiter dicta*" findings were gratuitous, given that he has been in detention since 2007, that the substantive hearings had lasted for two years, with the closing statements in June 2017, and that the Trial Judgment was announced on 16 November 2018 without the written reasons, which were issued four and a half months later.[1848]

658. The Co-Prosecutors respond that KHIEU Samphân has failed to establish that the Trial Chamber erred in law by relying on evidence pertaining to facts outside the scope of Case 002/02.[1849] They contend that he fails to provide justification for his argument that the Trial Chamber committed a legal error by concluding that it may rely on evidence outside the temporal or geographic scope of the Closing Order, in order to: (1) to clarify a given context; (2) to establish interference with the elements, particularly the *mens rea* of criminal conduct occurring during the relevant period; and (3) to demonstrate a deliberate pattern of conduct.[1850] They note that KHIEU Samphân merely in a generic manner cross-references in his Closing Brief, which is devoid of reasoned objections.[1851] They argue that as KHIEU Samphân acknowledged in his Closing Brief,[1852] the principles relied upon by the Trial Chamber are "well-known" and "widely applied" and accepted at the *ad hoc* tribunals as well as at the ECCC.[1853] Relatedly, they contest KHIEU Samphân's "unsubstantiated" claim that the Trial

[1842] KHIEU Samphân's Appeal Brief (F54), paras 121, 123-124.
[1843] KHIEU Samphân's Appeal Brief (F54), para. 122, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), paras 59-299.
[1844] KHIEU Samphân's Appeal Brief (F54), fn. 137.
[1845] Trial Judgment (E465), para. 1137.
[1846] Trial Judgment (E465), fn. 4289.
[1847] Trial Judgment (E465), para. 2173.
[1848] KHIEU Samphân's Appeal Brief (F54), para. 126.
[1849] Co-Prosecutors' Response (F54/1), para. 351.
[1850] Co-Prosecutors' Response (F54/1), para. 352, citing Trial Judgment (E465), para. 60.
[1851] Co-Prosecutors' Response (F54/1), para. 352.
[1852] Co-Prosecutors' Response (F54/1), para. 352, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), paras 52-53.
[1853] Co-Prosecutors' Response (F54/1), paras 352-353.

Chamber made "gratuitous" findings that were "*obiter dicta*", resulting in undue delay, since he merely referred to three passages of the Trial Judgment and failed to show how the Trial Chamber's consideration of potentially exculpatory evidence caused him any prejudice.[1854]

659. According to the Co-Prosecutors, KHIEU Samphân's argument alleging a legal error in the Trial Chamber's use of evidence regarding the treatment of Buddhists outside the Tram Kak Cooperatives must fail. The Trial Chamber did not overstep its *saisine* in entering a conviction for religious persecution committed against Buddhists in the Tram Kak Cooperatives and relying on evidence of their treatment nationwide to establish CPK policy, as both were clearly within the scope of Case 002/02, as defined by the Case 002 Additional Severance Decision and its Annex, as well as the factual findings on the treatment of Buddhists nationwide in order to establish a CPK policy.[1855] They submit that the Case 002 Additional Severance Decision and the Trial Chamber's declarations during trial provided KHIEU Samphân with adequate notice of this scope and the Trial Chamber's intention to use evidence of the treatment of Buddhists at sites other than the Tram Kak Cooperatives.[1856]

660. The Co-Prosecutors also contend that KHIEU Samphân's argument alleging a legal error in the Trial Chamber's use of evidence concerning the Khmer Krom must fail because he misconstrues the Trial Chamber's finding.[1857] The Co-Prosecutors state that the Trial Chamber made a specific finding that it was not properly seised of the targeting of the Khmer Krom either as a specific group or as a sub-group of the Vietnamese, which does not preclude it from relying on evidence concerning the Khmer Krom to prove facts that are within the scope of Case 002/02, such as the existence of the Khmer Krom victims at Case 002/02 crime sites.[1858] They also point out that the Closing Order makes multiple references to the Khmer Krom.[1859]

661. The Co-Prosecutors argue that KHIEU Samphân, therefore, conflates the facts falling outside the scope of Case 002/02 with evidence used to prove facts within the scope.[1860] They concur with KHIEU Samphân's assertion that the Trial Chamber is seised of facts, not evidence, pursuant to Rules 67(2), 98(2) and 98(3), and that, because evidence may relate to more than one fact, evidence that could also relate to facts outside the scope can legitimately

[1854] Co-Prosecutors' Response (F54/1), fn. 1322.
[1855] Co-Prosecutors' Response (F54/1), para. 354.
[1856] Co-Prosecutors' Response (F54/1), para. 354, referring to T. 19 May 2015, E1/301.1, pp. 94-95.
[1857] Co-Prosecutors' Response (F54/1), paras 355-356, citing KHIEU Samphân's Appeal Brief (F54), para. 757.
[1858] Co-Prosecutors' Response (F54/1), paras 355-357.
[1859] Co-Prosecutors' Response (F54/1), para. 357.
[1860] Co-Prosecutors' Response (F54/1), para. 355.

be used to prove facts within the scope.[1861] They add that KHIEU Samphân has been regularly notified of the Trial Chamber's proposed use of evidence relating to the Khmer Krom.[1862]

662. Finally, the Co-Prosecutors aver that KHIEU Samphân's argument alleging a legal error in the Trial Chamber's use of evidence pertaining to crimes committed in Vietnam must fail because the Trial Chamber's findings were within the scope of Case 002/02 as defined by the Case 002 Additional Severance Decision and its Annex.[1863] They submit that the scope of Case 002/02 did not include facts amounting to crimes committed by Revolutionary Army of Kampuchea forces, but did include facts establishing the existence of an international armed conflict. They submit that these were required to establish the *chapeau* elements of the charges of grave breaches of the Geneva Conventions and that the Trial Chamber entered no convictions for crimes committed on the territory of Vietnam, using the evidence pertaining to incursions of the DK forces into Vietnam only to establish the existence of an international armed conflict.[1864]

663. The Lead Co-Lawyers concur with the Co-Prosecutors with respect to KHIEU Samphân's general arguments alleging the use of "out-of-scope but relevant evidence".[1865]

664. At the outset, the Supreme Court Chamber recalls that the fundamental principles of the ECCC procedure, as enshrined in Articles 33 new and 35 new of the ECCC Law, Article 13(1) of the ECCC Agreement and Rule 21, as well as Article 14 of the ICCPR, require that the law shall be interpreted so as to always "safeguard the interests of all" the parties involved, that care must be taken to "preserve a balance between the rights of the parties", and that "proceedings before the ECCC shall be brought to conclusion within a reasonable time."[1866]

665. The Supreme Court Chamber notes that the applicable law before the ECCC does not preclude the admission or the consideration of evidence on facts falling outside of the temporal or geographic jurisdiction of the Court. On the contrary, Rule 87(1) directs that "all evidence is admissible" unless otherwise provided in the Internal Rules, and Rule 89 *quater* generally

[1861] Co-Prosecutors' Response (F54/1), para. 357, referring to, *inter alia*, KHIEU Samphân's Appeal Brief (F54), paras 121, 352-353; KHIEU Samphân's Closing Brief (E457/6/4/1), paras 66, 73, 76, 84, 87-89, 99; Case 002/01 Appeal Judgment (F36), paras 227, 236; Internal Rules, Rules 66 *bis* (5), 89 *quater*.
[1862] Co-Prosecutors' Response (F54/1), para. 357.
[1863] Co-Prosecutors' Response (F54/1), para. 358.
[1864] Co-Prosecutors' Response (F54/1), para. 359.
[1865] Lead Co-Lawyers' Response (F54/2), para. 182.
[1866] See also Case 002, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4 & D411/3/6, para. 35.

grants the Trial Chamber the discretion to reduce the scope of the trial. Rule 89 *quater* (1) permits the Trial Chamber to exercise this discretion by excluding certain facts set out in the Indictment while ensuring the remaining facts are representative of the scope of the Indictment. Rule 89 *quater* (3) explicitly provides that "[e]vidence relating to the facts excluded [from the scope of the trial] may be relied upon to the extent it is relevant to the remaining facts".[1867]

666. In the same vein, the Supreme Court Chamber reaffirms the well-established principle, widely accepted at *ad hoc* tribunals,[1868] and adopted by the Co-Investigating Judges[1869] and the Chambers of the ECCC,[1870] that a trial chamber may validly admit and rely on evidence that falls outside of the temporal or geographic scope of the Closing Order and the jurisdiction of the Court in the three circumstances listed herein: (1) to clarify a given context; (2) to establish by inference the elements, particularly the *mens rea*, of criminal conduct occurring during the material period; or (3) to demonstrate a deliberate pattern of conduct. In this case, the Trial Chamber expressly stated its intention to limit the scope of the trial with the issuance of the Case 002 Additional Severance Decision[1871] and Annex, and in the course of the trial, further assured the parties that "[t]he Chamber [would] therefore only rely on this evidence for these limited purposes and exclusively when the out-of-scope evidence is consistent with other evidence."[1872]

667. In addition, with its obligation to safeguard the fundamental rights of the accused pursuant to Rule 21(1) duly in mind, and recalling the consistent jurisprudence of the Chambers of the ECCC,[1873] as well as the established legal approach adopted by *ad hoc* tribunals,[1874] the Supreme Court Chamber reaffirms that in assessing an indictment and determining whether an accused was adequately put on notice of the nature and cause of the charges against him or her

[1867] See also Internal Rules, Rule 66 *bis* (5).
[1868] *Prosecutor v. Nahimana et al.*, Appeals Chamber (ICTR), ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgment (ICTR)"), para. 315. See also *Prosecutor v. Prlić et al.*, Trial Chamber III (ICTY), IT-04-74-T, Decision on Slobodan Praljak's Motion for Clarification of the Time Frame of the Alleged Joint Criminal Enterprise, 15 January 2009 ("*Prlić et al*. Trial Decision (ICTY)"), p. 9; *Prosecutor v. Taylor*, Trial Chamber II (SCSL), SCSL-03-01-T, Judgement, 18 May 2012 ("*Taylor* Trial Judgment (SCSL)"), paras 101, 110.
[1869] Case 002, Order on Requests D153, D172, D173, D174, D178 & D284, 12 January 2010, D300, paras 9-10.
[1870] Trial Judgment (E465), para. 60; Case 002/01 Appeal Judgment (F36), paras 227, 236; Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 88.
[1871] Case 002 Additional Severance Decision (E301/9/1).
[1872] Trial Judgment (E465), para. 60.
[1873] Case 002/01 Appeal Judgment (F36), para. 35; Case 002/01 Trial Judgment (E313), fn. 1682; Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 296; Case 002 Decision on Provisional Detention (D427/5/10), para. 31.
[1874] *Ngirabatware* Appeal Judgment (IRMCT), para. 249; *Ngirabatware* Decision on Motion to Dismiss (ICTR), para. 21; *Rutaganda* Appeal Judgment (ICTR), para. 30; *Mrkšić et al.* Appeal Judgment (ICTY), para. 138; *Gacumbitsi* Appeal Judgment (ICTR), para. 123; *Taylor* Decision on Motion Pleading of JCE (SCSL), para. 76.

in order to prepare a defence, the indictment must be considered as a whole, and thus each paragraph therein should not be read in isolation, but rather should be considered in the context of the other paragraphs in the indictment.[1875]

668. Given the foregoing, the Supreme Court Chamber finds no error in the Trial Chamber's conclusion that it may rely on the evidence outside the temporal or geographic scope of the Closing Order for the limited purposes of clarifying a given context, establishing by inference the elements of criminal conduct occurring during the material period, or demonstrating a deliberate pattern of conduct. Consequently, this Chamber rejects KHIEU Samphân's challenge in this regard.

669. With regard to the Trial Chamber's consideration and use of "out-of-scope but relevant" evidence, the Supreme Court Chamber will examine whether the facts relating to the treatment of Buddhists outside the Tram Kak Cooperatives, the Khmer Krom, and crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory fall within in the scope of Case 002/02, following the severance of Case 002.[1876]

670. It is the view of the Supreme Court Chamber that the parties were sufficiently notified of the inclusion of the treatment of Buddhists outside the Tram Kak Cooperatives in the scope of Case 002/02 by the Case 002 Additional Severance Decision. In this Decision, the Trial Chamber found that:

> [T]he inclusion of general allegations [in the Closing Order] concerning the treatment of Buddhists and the Tram Kok Cooperative as one example crime site reasonably reflects the scale and nature of the alleged acts […].[1877]

671. Upon a request for clarification from KHIEU Samphân's International Co-Lawyer, Ms. Anta GUISSÉ, the President of the Trial Chamber and Judge LAVERGNE informed the parties during trial that as the allegations regarding a state-wide policy of the CPK targeting a certain number of groups including Buddhists throughout Cambodia were raised, the Trial Chamber would consider evidence of the treatment of Buddhists that is relevant to the development of the CPK policy on the treatment of Buddhists in the general context in order to determine what

[1875] Case 002/01 Appeal Judgment (F36), para. 35; Case 002/01 Trial Judgment (E313), fn. 1682; Case 002 Decision on Provisional Detention (D427/5/10), para. 31.
[1876] Case 002 Severance Order (E124); Case 002 Second Severance Decision (E284); Case 002 Additional Severance Decision (E301/9/1).
[1877] Case 002 Additional Severance Decision (E301/9/1), para. 38.

this CPK policy entailed.[1878] Consequently, the Supreme Court Chamber finds that the Trial Chamber did not err in considering the evidence regarding the treatment of Buddhists outside the Tram Kak Cooperatives and dismisses KHIEU Samphân's argument in this regard.

672. In relation to the evidence concerning the Khmer Krom and the crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory, recalling Rules 87(1) and 89 *quater* (3), the Supreme Court Chamber reaffirms that, while the Trial Chamber is prohibited from attributing criminal responsibility for crimes that fall outside the scope of the charges, it is within the Trial Chamber's discretion to determine which facts are relevant for determining the charges at hand, even if they also pertain to the factual foundation of other charges.[1879]

673. As regards the evidence concerning the Khmer Krom, the Supreme Court Chamber recalls the Trial Chamber's ruling in this case that:

> issues specific to the alleged persecution of Khmer Krom as a targeted group fall outside the scope of Case 002/02 […] since the Chamber is not properly seised of the targeting of Khmer Krom, either as a specific group or as a sub-group of the Vietnamese.[1880]

Nonetheless, evidence relating to the Khmer Krom "may be relevant to […] other issues in Case 002/02, such as the historical and political context of the case or to other crimes which are charged, and certain of the victims happen to be Khmer Krom, […] is therefore admissible".[1881] This Chamber also observes that the Closing Order contains numerous references to evidence concerning the Khmer Krom, particularly in relation to the treatment of the Vietnamese.[1882] As a result, the Supreme Court Chamber finds that the Trial Chamber did not err in considering the evidence regarding the Khmer Krom, and thus rejects KHIEU Samphân's argument herein.

674. The Supreme Court Chamber is equally unpersuaded by KHIEU Samphân's claim concerning the Trial Chamber's consideration of the evidence pertaining to the crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory. It is this Chamber's view that while the Trial Chamber may not attribute criminal responsibility for crimes based on facts concerning crimes committed by the Revolutionary Army of Kampuchea

[1878] T. 19 May 2015, E1/301.1, pp. 87-88.
[1879] Case 002/01 Appeal Judgment (F36), para. 227.
[1880] Trial Judgment (E465), paras 184-185.
[1881] Trial Judgment (E465), paras 183-184; T. 25 May 2015, E1/304.1, pp. 60-62; Decision on Requests to Admit Documents (E319/52/4), para. 18; Decision on Request to Admit Written Records of Interview (E319/47/3), para. 25.
[1882] Case 002 Closing Order (D427), paras 111, 265, 320, 818, 1468, 1586.

on Vietnamese territory that do not fall within the scope of Case 002/02, it was within the Trial Chamber's discretion to consider such facts:

> for other purposes, including assessing the credibility of witnesses, understanding the context of the international armed conflict, or the grave breaches charges related to civilians or soldiers *hors de combat* who were arrested during such skirmishes on Vietnamese territory and who were sent to S-21 thereafter.[1883]

Therefore, the Supreme Court Chamber finds that the Trial Chamber did not err in considering the evidence regarding the crimes committed by the Revolutionary Army of Kampuchea on Vietnamese territory, and thus rejects KHIEU Samphân's argument.

675. In response to the allegation of undue delay resulting from the Trial Chamber's "gratuitous" findings, as a preliminary note, the Supreme Court Chamber recalls its inherent discretion in determining which submissions merit a detailed reasoned opinion in writing.[1884] This Chamber iterates that arguments merely claiming that a given decision or finding of the Trial Chamber was erroneous, without substantiating why the decision or finding was in error, and which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by this Chamber and need not be considered on the merits.[1885]

676. In line with this Chamber's inherent discretion, the Supreme Court Chamber concludes that KHIEU Samphân's citation in a footnote merely refers to the Trial Chamber's findings concerning his visit to Tram Kak district,[1886] the Standing Committee's visit to the Northwest Zone[1887] and his 17 April 1978 speech,[1888] without proffering any substantiation to support his contentions nor does he demonstrate any error that may potentially cause the Trial Chamber's Judgment to be reversed or altered. Accordingly, the Supreme Court Chamber dismisses his allegation of undue delay.

VII. ALLEGED ERRORS IN THE UNDERLYING CRIMES

[1883] See Trial Judgment (E465), para. 190.
[1884] Case 001 Appeal Judgment (F28), para. 20; Case 002/01 Appeal Judgment (F36), para. 101.
[1885] Case 001 Appeal Judgment (F28), para. 20; Case 002/01 Appeal Judgment (F36), paras 101-102.
[1886] Trial Judgment (E465), para. 1137.
[1887] Trial Judgment (E465), fn. 4289.
[1888] Trial Judgment (E465), para. 2173.

A. MURDER AS A CRIME AGAINST HUMANITY

677. As it relates to the scope of Case 002/02 and this section,[1889] the Closing Order charged KHIEU Samphân with the crime against humanity of murder based on killings with direct intent at Phnom Kraol Security Centre and based on deaths occurring as a result of detention conditions, including torture or ill-treatment at S-21, Kraing Ta Chan, Au Kanseng, and Phnom Kraol Security Centres.[1890] It also charged him with the crime against humanity of extermination at the Tram Kak Cooperatives and the Trapeang Thma Dam, 1st January Dam and Kampong Chhnang Airfield Construction Sites, based on the large-scale deaths resulting from the conditions imposed in the cooperatives and worksites, including the deprivation of food, accommodation, medical care, hygiene, and hard labour,[1891] but the Trial Chamber changed the legal characterisation from extermination to murder, as it did not find that the *mens rea* necessary for extermination had been established.[1892]

678. The Trial Chamber subsumed certain deliberate killings as the crime against humanity of extermination, resulting in KHIEU Samphân being found guilty[1893] of the crime against humanity of murder with *dolus eventualis* for the deaths resulting from the living, working, and detention conditions imposed at Tram Kak Cooperatives; Trapeang Thma Dam, 1st January Dam Worksite, and Kampong Chhnang Airfield Construction Site; and the S-21, Kraing Ta Chan, and Phnom Kraol Security Centres, as well as the deaths due to unsafe blood-

[1889] The Closing Order also charged KHIEU Samphân with murder as a crime against humanity in respect of the killing of Buddhists, Cham, and Vietnamese, and based on executions and other killings at, *inter alia*, the Trapeang Thma Dam, 1st January Dam Worksite, and Kampong Chhnang Airfield Construction Worksites and the S-21, Kraing Ta Chan, and Au Kanseng Security Centres. Case 002 Closing Order (D427), paras 1373-1380. However, the Case 002 Severance Order limited the scope concerning the Buddhists to Tram Kak Cooperatives, and the Trial Chamber did not find that these murders had been established. Trial Judgment (E465), para. 1138. The Trial Chamber subsumed the crimes against humanity of murder of the Cham and Vietnamese and in relation to the intentional killings at S-21, Kraing Ta Chan, and Au Kanseng Security Centres under the crime against humanity of extermination and with respect to the Cham and Vietnamese when based on the same killings. Trial Judgment (E465), para. 4337.
[1890] See Case 002 Closing Order (D427), paras 1373-1380.
[1891] See Case 002 Closing Order (D427), paras 1381-1382, 1387. Other exterminations were charged as well, but these were not recharacterised to the crime against humanity of murder and are thus not relevant to this section.
[1892] Trial Judgment (E465), paras 1143-1145 (Tram Kak Cooperatives), 1387-1389 (Trapeang Thma Dam Worksite), 1671-1673 (1st January Dam Worksite), 1803-1805 (Kampong Chhnang Airfield Construction Site).
[1893] KHIEU Samphân's form of liability for these crimes will be addressed in Section VIII.B.

drawing and surgical experimentation at S-21.[1894] The Trial Chamber also found him guilty of a murder committed with direct intent at Phnom Kraol Security Centre.[1895]

679. KHIEU Samphân claims his conviction for murder as a crime against humanity was based on several legal and factual errors. He argues that (1) the *mens rea* of murder as a crime against humanity under customary international law in 1975 did not include *dolus eventualis*;[1896] (2) a *mens rea* that includes *dolus eventualis* was not foreseeable and accessible to him;[1897] (3) the Trial Chamber made errors in finding culpable omissions as part of the *actus reus* of murder as a crime against humanity at Tram Kak Cooperatives, Trapeang Thma Dam, 1st January Dam, and Kampong Chhnang Airfield Worksites;[1898] (4) the Trial Chamber erred in its analysis of the *mens rea* with respect to temporality at Tram Kak Cooperatives, Trapeang Thma Dam, 1st January Dam and Kampong Chhnang Airfield Worksites;[1899] and (5) the Trial Chamber erred in its factual findings that the murders committed with *dolus eventualis* had been established at Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam and Kampong Chhnang Airfield Construction Site, and it further erred in finding that two murders, one committed with direct intent and one murder with *dolus eventualis* were perpetrated at Phnom Kraol Security Centre.[1900] These arguments will be addressed in turn.

1. Whether the *Mens Rea* of *Dolus Eventualis* Was Part of Customary International Law by 1975

680. The Trial Chamber, in setting out the *mens rea* of murder as a crime against humanity, stated that it had previously found that "the *mens rea* of murder requires proof of intent of the accused or of the person or persons for whom he is criminally responsible to either kill or cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to

[1894] Trial Judgment (E465), paras 1145 (Tram Kak Cooperatives), 1389-1390 (Trapeang Thma Dam Worksite), 1672-1673 (1st January Dam Worksite), 1805-1806 (Kampong Chhnang Airfield Construction Site), 2565, 2568-2569 (S-21 Security Centre), 2815, 2817 (Kraing Ta Chan Security Centre), 3116-3117 (Phnom Kraol Security Centre), 4318 (KHIEU Samphân's aiding and abetting liability for the murders committed with *dolus eventualis*). Although the Trial Chamber found that deaths had occurred due to conditions of detention at Au Kanseng Security Centre as well as through executions, it did not consider whether the deaths due to conditions of detention were committed with *dolus eventualis*. See Trial Judgment (E465), paras 2965, 2967.
[1895] Trial Judgment (E465), paras 3115, 4306. The Trial Chamber erroneously stated in paragraph 4337 that it would enter a conviction "only for extermination in relation to […] Phnom Kraol Security Centre[]"; however, the Trial Chamber made no finding that extermination occurred at Phnom Kraol Security Centre, nor could such a finding have been made on the basis of a single killing done with direct intent.
[1896] KHIEU Samphân's Appeal Brief (F54), paras 575-632.
[1897] KHIEU Samphân's Appeal Brief (F54), paras 633-636.
[1898] KHIEU Samphân's Appeal Brief (F54), paras 673-675, 759, 769-771, 821.
[1899] KHIEU Samphân's Appeal Brief (F54), paras 685, 761, 785, 823.
[1900] KHIEU Samphân's Appeal Brief (F54), paras 678-685 (Tram Kak Cooperatives), 758-762 (Trapeang Thma Dam Worksite), 772-786 (1st January Dam Worksite), 819-824 (Kampong Chhnang Airfield Construction Site), 863-879 (Phnom Kraol Security Centre).

death."[1901] It noted that the Supreme Court Chamber had dismissed a challenge to this definition, holding that the *mens rea* of murder as a crime against humanity in 1975 "must be defined *largo sensu* to encompass *dolus eventualis*"[1902] and had adopted the definition set out by the ICTY in the *Stakić* Trial Judgment:

> The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or "makes peace" with the likelihood of death. Thus, if the killing is committed "with manifest indifference to the value of human life", even conduct of minimal risk can qualify as intentional homicide. Large scale killings that would be classified as reckless murder in the United States would meet the continental criteria of *dolus eventualis*. […] [T]he concept of *dolus eventualis* does not include a standard of negligence or gross negligence.[1903]

681. The Trial Chamber noted that KHIEU Samphân challenged this definition, claiming that it violated the principle of legality by applying a *mens rea* lower than direct intent to kill, and that such definition was neither foreseeable nor accessible in 1975, and that he relied on arguments raised before and rejected by the Supreme Court Chamber in Case 002/01.[1904] The Trial Chamber stated that current jurisprudence of the *ad hoc* tribunals accepts that the *mens rea* for murder encompasses *dolus eventualis*, though the jurisprudence is not always consistent, and that the Trial Chamber and the Supreme Court Chamber in Case 002/01 had therefore conducted their own assessments concerning the state of customary international law in 1975.[1905] The Trial Chamber explained that the Supreme Court Chamber interpreted post-World War II jurisprudence, particularly the *Medical Case*, as including the notion of *dolus eventualis*, pointing out that while the Nazi doctors had a complete disregard for the lives of the individuals subjected to their experiments, and even considered the death of many of them as an expected outcome, in some instances the objective was to see if it was possible to survive extreme conditions or severe disease; in such situations the intent involved taking the risk of endangering life with the knowledge this would likely cause death.[1906] The Trial Chamber was thus satisfied that, notwithstanding the absence of any explicit reference to the *mens rea*

[1901] Trial Judgment (E465), para. 630, referring to Case 002/01 Trial Judgment (E313), para. 412 and also citing Case 001 Trial Judgment (E188), para. 333; *Prosecutor v. Kvočka et al*., Appeals Chamber (ICTY), IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al*. Appeal Judgment (ICTY)"), paras 259, 261; *Prosecutor v. Milošević*, Appeals Chamber (ICTY), IT-98-29/1-A, Judgement, 12 November 2009 ("*Milošević* Appeal Judgment (ICTY)"), para. 108.
[1902] Trial Judgment (E465), para. 631, quoting Case 002/01 Appeal Judgment (F36), para. 410.
[1903] Trial Judgment (E465), para. 631, quoting Case 002/01 Appeal Judgment (F36), para. 390, quoting *Prosecutor v. Stakić*, Trial Chamber II (ICTY), IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgment (ICTY)"), para. 587.
[1904] Trial Judgment (E465), para. 632.
[1905] Trial Judgment (E465), para. 635.
[1906] Trial Judgment (E465), para. 636.

criterion, the *Medical Case* could be considered as an authority for attributing criminal responsibility for intentional killing even if the perpetrator acted with less than direct intent.[1907] The Trial Chamber noted that the Supreme Court Chamber also found domestic practice further reinforced its conclusion that murder as a crime against humanity included the notion of *dolus eventualis*, and the Trial Chamber also stated that, as recognised by the Pre-Trial Chamber, general principles of law can assist when defining elements of an international crime.[1908] The Trial Chamber then conducted further analysis into domestic jurisdictions, identifying several jurisdictions that support that the *mens rea* could include *dolus eventualis*, but noting that pre-1975 French and Cambodian law are notable exceptions.[1909] It found that:

> while the precise definition of this crime may vary, and while French and Cambodian law may differ from other approaches, the vast majority of these domestic systems recognise that a standard of *mens rea* lower than direct intent may apply in relation to murder, the lowest being *dolus eventualis*. This encompasses the case of an individual who willingly engages in conduct with the knowledge that his or her act or omission would likely lead to the death of the victim(s) and who, at a minimum, accepts or reconciles him or herself with the possibility of this fatal consequence.[1910]

The Trial Chamber was therefore satisfied that a general principle of law existed that when an individual knowingly and willingly participated in conduct that was likely to result in death, that conduct would amount to murder or a crime of comparable gravity in each domestic legal system.[1911] The Trial Chamber found this to be consistent with the Supreme Court Chamber's Case 002/01 conclusion that "the *mens rea* of murder as a crime against humanity as it stood in 1975 must be defined *largo sensu* so as to encompass *dolus eventualis*".[1912]

682. KHIEU Samphân submits that the Trial Chamber erred by finding that the *mens rea* of murder as a crime against humanity in 1975 encompassed *dolus eventualis*, because: (1) customary international law did not include *dolus eventualis* in the *mens rea* of murder as a crime against humanity in 1975; (2) recourse to general principles of law is not a valid means of defining and lowering the standard of intent required by customary international law; and (3) alternatively, that there is no evidence to prove that a general principle existed showing that the *mens rea* of murder in 1975 was *dolus eventualis*.[1913]

[1907] Trial Judgment (E465), para. 636.
[1908] Trial Judgment (E465), paras 637-638.
[1909] Trial Judgment (E465), paras 640-649.
[1910] Trial Judgment (E465), para. 650.
[1911] Trial Judgment (E465), para. 650.
[1912] Trial Judgment (E465), para. 650.
[1913] KHIEU Samphân's Appeal Brief (F54), paras 575-576.

683. KHIEU Samphân submits that customary international law did not include *dolus eventualis* in the *mens rea* of murder as a crime against humanity in 1975, as (1) the *Medical Case* does not expressly provide a definition of the *mens rea* element of the crime against humanity of murder but direct intent to kill is clear from the extreme experimental methods used;[1914] (2) ICTY and ICTR jurisprudence, which post-dates 1975, cannot give an indication as to the state of customary international law in 1975 as it was not founded on earlier international decisions and is not consistent on this issue;[1915] and (3) contemporary customary international law, as codified in the Rome Statute, "confirm[s] a restrictive version of criminal intent".[1916] In the alternative, he argues that even if customary international law in 1975 allowed for *dolus eventualis*, the principle of applying the more lenient law (*lex mitior*) requires that only direct intent to kill applies.[1917]

684. According to KHIEU Samphân, the Trial Chamber erred by referring to general principles to define the *mens rea* of murder as a crime against humanity, since general principles (1) cannot establish or define a crime under customary international law, as this confuses sources of international law;[1918] (2) are not a primary source of law;[1919] (3) are subsidiary and cannot replace customary international law;[1920] and (4) are limited by the principle of legality and *in dubio pro reo*.[1921]

685. In the alternative, KHIEU Samphân submits that there is no evidence to prove that a general principle existed showing that the *mens rea* of murder as a crime against humanity included *dolus eventualis*, as (1) the Trial Chamber relied on superficial methodology and an inconsistent sample; (2) it erroneously excluded Cambodian law; and (3) it lowered the *mens rea* of murder as a crime against humanity even beyond what has been applied by the *ad hoc* tribunals.[1922]

686. The Co-Prosecutors respond that KHIEU Samphân repeats arguments previously rejected by the Trial Chamber and the Supreme Court Chamber in Case 002/01, and he fails to cite any authority for the *mens rea* of direct intent or to show any acquittals entered for lack of

[1914] KHIEU Samphân's Appeal Brief (F54), paras 584-586.
[1915] KHIEU Samphân's Appeal Brief (F54), para. 587.
[1916] KHIEU Samphân's Appeal Brief (F54), para. 593.
[1917] KHIEU Samphân's Appeal Brief (F54), paras 596-599.
[1918] KHIEU Samphân's Appeal Brief (F54), paras 577-580.
[1919] KHIEU Samphân's Appeal Brief (F54), paras 602-612.
[1920] KHIEU Samphân's Appeal Brief (F54), paras 613-619.
[1921] KHIEU Samphân's Appeal Brief (F54), paras 620-622.
[1922] KHIEU Samphân's Appeal Brief (F54), paras 623-632.

direct intent.[1923] They reject the contention that the *Medical Case* Judgment was misinterpreted, arguing that the lack of an explicit definition of the *mens rea* is irrelevant because the fact that it found murder despite the absence of direct intent to kill is clear from its reasoning.[1924] They point out that the German Supreme Court for the British Zone held twice in 1948 that *dolus eventualis* fulfils the *mens rea* of a crime against humanity, including murder.[1925] They note that the *ad hoc* tribunals' jurisprudence can provide guidance, and that the reference to a requirement for premeditation in some ICTR jurisprudence is misleading as the Chambers were not purporting to find customary international law, and it was not followed by the ICTY or some ICTR Appeals Chambers.[1926] They submit that domestic law was not a primary and independent source for identifying the *mens rea* for murder in 1975, but was rather used to demonstrate that the Trial Chamber's conclusions on the status of customary international law were underpinned by domestic law, and, therefore, the Trial Chamber was not even required to find a general principle of law.[1927] They consider that general principles are a legitimate, accessible source of international criminal law, and that the Trial Chamber's finding concerning domestic law in 1975 was correct, and cite additional jurisdictions that support the conclusion that the *mens rea* in 1975 encompassed *dolus eventualis*.[1928] KHIEU Samphân's *lex mitior* argument is rejected by the Co-Prosecutors as it relies on the fact that the Rome Statute is more favourable law, but the Rome Statute is not binding law at the ECCC.[1929] The Lead Co-Lawyers agree with the Co-Prosecutors' arguments concerning *dolus eventualis*.[1930]

687. The Supreme Court Chamber determines that the Trial Chamber correctly analysed customary international law in 1975 to determine that the *mens rea* of murder as a crime against humanity included *dolus eventualis*. This finding was based on the Supreme Court Chamber's review of the *Medical Case* in the Case 002/01 Appeal Judgment, as well as the Trial Chamber's own analysis of that case. KHIEU Samphân's disagreement with these analyses is insufficient to persuade the Supreme Court Chamber to reconsider its analysis. The Supreme Court Chamber adds that while KHIEU Samphân has contested these analyses of the *Medical Case*, by arguing that the *Medical Case* reveals a *mens rea* of direct intent, he has not cited any

[1923] Co-Prosecutors' Response (F54/1), paras 365-366.
[1924] Co-Prosecutors' Response (F54/1), para. 367.
[1925] Co-Prosecutors' Response (F54/1), para. 368.
[1926] Co-Prosecutors' Response (F54/1), para. 369.
[1927] Co-Prosecutors' Response (F54/1), para. 370.
[1928] Co-Prosecutors' Response (F54/1), paras 371-373.
[1929] Co-Prosecutors' Response (F54/1), para. 374.
[1930] Lead Co-Lawyers' Response (F54/2), para. 278.

other international jurisprudence to support his claim that the *mens rea* was limited to direct intent.

688. The Supreme Court Chamber does not consider that the Trial Chamber erred in referring to *ad hoc* tribunals' jurisprudence as providing guidance on the applicable *mens rea* of the crime against humanity of murder. The Trial Chamber recalled that, in order to accord with the principle of legality, the definition of murder must reflect the state of customary international law in 1975, and it relied on the Supreme Court Chamber's assessment in Case 002/01 as well as conducting its own assessment, noting that the *ad hoc* tribunals' jurisprudence was not completely consistent and simply provided guidance.[1931] The Trial Chamber was not bound by *ad hoc* tribunals' jurisprudence. There is no error in considering the jurisprudence as guidance. The Supreme Court Chamber also recalls that pursuant to Article 33 new of the ECCC Law, chambers may seek guidance at the international level.

689. The fact that the ICC does not include *dolus eventualis* in the *mens rea* of murder as a crime against humanity, or in the *mens rea* of other crimes within the ICC's jurisdiction, does not support a conclusion that the *mens rea* of murder under customary international law did not include *dolus eventualis*. The ICC is not regarded as having codified customary international law on *mens rea*.[1932]

690. Concerning KHIEU Samphân's *lex mitior* argument, the principle of *lex mitior* only concerns laws binding upon the Court.[1933] The ECCC Agreement states that the subject matter jurisdiction of the ECCC would include *inter alia* "crimes against humanity as defined in the 1998 Rome Statute of the [ICC]",[1934] but the Agreement itself is a document regulating the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of DK and those most responsible for crimes under the ECCC's jurisdiction.[1935] The ECCC's subject matter jurisdiction is set forth in the ECCC Law.[1936] The

[1931] Trial Judgment (E465), paras 634-635.
[1932] See generally Roger S. Clark, "The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences", *in* (2001) 12 *Crim. L. Forum*, 291, where the author, who participated in drafting the Rome Statute of the International Criminal Court, discusses trying to find common ground between different legal systems concerning the "Mental Element" or *mens rea* set out in Rome Statute, Art. 30.
[1933] See Case 004/2, Considerations on Appeals Against the Closing Orders, Opinion of Judges BAIK and BEAUVALLET, 19 December 2019, D359/24 & D360/33, para. 579. See also *Prosecutor v. Nikolić*, Appeals Chamber (ICTY), IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Nikolić* Appeal Judgment (ICTY)"), para. 81.
[1934] ECCC Agreement, Art. 9.
[1935] ECCC Agreement, Art. 1.
[1936] ECCC Agreement, Art. 2(1).

ECCC Law does not incorporate the Rome Statute and its provision on crimes against humanity is not identical to the Rome Statute's.[1937] The Rome Statute of the ICC is not binding law at the ECCC, thus the principle of *lex mitior* is inapplicable.

691. Concerning KHIEU Samphân's arguments on the application of general principles, the Supreme Court Chamber is of the view that he misunderstands both the Trial Chamber's and its own reasons for analysing domestic jurisprudence. The Trial Chamber noted that the Supreme Court Chamber in Case 002/01 had found that domestic practice "further reinforced" its conclusion that murder as a crime against humanity was governed by customary international law, which included the notion of *dolus eventualis*.[1938] This conclusion was based on a consideration of international jurisprudence, particularly the *Medical Case*. This Chamber and the Trial Chamber were not, as KHIEU Samphân seems to believe, identifying a general principle of domestic law and using it to establish the existence of a crime in international criminal law when reviewing domestic jurisprudence. As the Supreme Court Chamber explained in Case 002/01, "general domestic criminal practice cannot be the basis for *establishing* a rule of customary international law, given that it lacks an international element."[1939] It can however serve as a reference point for interpreting international crimes and attendant principles and concepts, given that "international criminal law concepts were developed based on domestic concepts of criminal law".[1940] Indeed, the Supreme Court Chamber referred to such domestic practice in Case 002/01,[1941] as did the Trial Chamber in the

[1937] Article 5 of the ECCC Law defines crimes against humanity as: "any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts." Article 7 of the Rome Statute defines crimes against humanity as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." See Rome Statute of the International Criminal Court, *entered into force* 1 July 2002, 2187 UNTS 3 ("Rome Statute"), art. 7.
[1938] Trial Judgment (E465), para. 637, quoting Case 002/01 Appeal Judgment (F36), para. 395.
[1939] Case 002/01 Appeal Judgment (F36), para. 805 (emphasis added).
[1940] Case 002/01 Appeal Judgment (F36), para. 805.
[1941] See Case 002/01 Appeal Judgment (F36), fn. 2126, referring to its earlier analysis of, *inter alia*, domestic practice in determining the *mens rea* of murder as a crime against humanity under customary international law in 1975.

instant case. KHIEU Samphân even recognises that seeking insight from general principles to clarify customary international law is permissible.[1942]

692. This interpretation is supported by Pre-Trial Chamber jurisprudence. The Pre-Trial Chamber "note[d] that it is unclear whether the 'general principles of the law recognised by civilized nations' should be recognised as a principal or auxiliary source of international law" but pointed out that "such general principles have been taken into account, notably by the ICTY, when defining the elements of an international crime or the scope of a form of responsibility *otherwise recognised in customary international law*."[1943] The ICTY *Furundžija* Trial Chamber, for example, noted that the prosecution of rape was provided for under the ICTY's Statute as a crime against humanity, a grave breach of the Geneva Conventions, a violation of the laws or customs of war, or an act of genocide, but that it could not find a definition of rape in international law including through general principles of international criminal law or international law.[1944] As a result, it deemed it necessary to seek out criminal law principles common to the major legal systems of the world, which could be derived with due caution from national laws.[1945] This approach is distinct from ascertaining whether a crime exists in international criminal law based on domestic practice.

693. KHIEU Samphân's submission that the principle of legality prohibits reliance on general principles to "widen" liability and requires that an "interpretation be both rigorous and favourable to the accused", is incorrect. The principle of legality requires that the crime charged existed in law at the time it was committed. It does not necessitate a favourable interpretation for the accused. It is a distinct concept from *in dubio pro reo*, which serves primarily to denote a default finding in the event that the evidence fails to dispel factual doubts. As previously stated by the Supreme Court Chamber, *in dubio pro reo* must be limited to doubts that remain

[1942] See KHIEU Samphân's Appeal Brief (F54), para. 616 ("It is only when there is no precise [customary internationa law] rule that one may perhaps seek an insight from the general principles of law.").
[1943] Case 002 JCE Decision (D97/15/9), para. 53 (emphasis added). The Pre-Trial Chamber has also explained, concerning rape as a crime against humanity, that "such principles may serve to assist in clarifying the *actus reus* and *mens rea* of rape once the existence of the chapeau elements for rape as a crime against humanity have already been established." Case 002, Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15 & D427/3/15 ("Case 002 Decision on Closing Order Appeals (D427/2/15 & D427/3/15)"), para. 153.
[1944] *Prosecutor v. Furundžija*, Trial Chamber (ICTY), IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundžija* Trial Judgment (ICTY)"), paras 172, 175, 177.
[1945] *Furundžija* Trial Judgment (ICTY), para. 178. See also *Blaškić* Appeal Judgment (ICTY), para. 34 ("In further examining the issue of whether a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute, the Appeals Chamber deems it useful to consider the approaches of national jurisdictions.").

after interpretation if it is to be applied to legal quandaries.[1946] There were no such doubts in this case, therefore there was no need to apply this principle.

694. In response to KHIEU Samphân's alternative argument that there is no evidence of a general principle that includes *dolus eventualis* in the *mens rea* of murder, the Supreme Court Chamber notes that he has criticised the Trial Chamber's analysis but offers no supporting reasons of his own. He objects to the Trial Chamber's alleged assimilation of complex notions of national criminal law taken out of their context,[1947] but determining general principles of domestic law must necessarily distil general concepts from complex notions. The Trial Chamber was cognisant of the fact that domestic jurisdictions differ and that "the precise definition of this crime may vary".[1948] It properly surveyed a variety of common law and civil law jurisdictions, as well as Russia and Japan. KHIEU Samphân argues that the Supreme Court and Trial Chambers erroneously interpreted the requisite intent in various jurisdictions, but his examples do not show any error. The finding was not that, as a general principle, the legal systems of the world employ a *mens rea* exactly equivalent to *dolus eventualis*; rather the Supreme Court Chamber found that "the causing of death with less than direct intent but more than mere negligence, such as *dolus eventualis* or recklessness, incurs criminal responsibility and is considered as intentional killing"[1949] and the Trial Chamber found that "the vast majority of these domestic systems recognise that a standard of *mens rea* lower than direct intent may apply in relation to murder, the lowest being *dolus eventualis*."[1950] The Supreme Court Chamber therefore sees no error in considering, for example, that section 18(a) of the New South Wales Crimes Act 1900 punishes acts committed with "reckless indifference to human life, or with intent to kill or inflict grievous bodily harm".[1951] Recklessness has a *mens rea* lower than direct intent.

695. Furthermore, the Trial Chamber recognised that Cambodian law is a "noticeable exception" to the legal systems it analysed, in which legislation or case law "clearly criminalised as intentional killing[] conduct where the perpetrator was acting with less than direct intent."[1952] Domestic practice need not be entirely uniform to establish a general

[1946] Case 002, Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31.
[1947] KHIEU Samphân's Appeal Brief (F54), para. 624.
[1948] Trial Judgment (E465), para. 650.
[1949] Case 002/01 Appeal Judgment (F36), para. 409.
[1950] Trial Judgment (E465), para. 650.
[1951] Trial Judgment (E465), fn. 2010. *Contra* KHIEU Samphân's Appeal Brief (F54), para. 626.
[1952] Trial Judgment (E465), paras 647-648. See also Trial Judgment (E465), paras 640-646.

principle,[1953] and contrary to KHIEU Samphân's assertion, there is no legal error in concluding that a general principle exists despite Cambodian law not being in conformity with the general principle.

696. KHIEU Samphân argues that the *mens rea* used by the Trial Chamber is lower than that at the *ad hoc* tribunals, where there must be either intent to kill the victim or intent to cause bodily harm with the reasonable knowledge that it will result in death,[1954] but this is a misunderstanding. KHIEU Samphân conflates the issue. The requirement is that the *act* causing death must be intentional and done with the reasonable knowledge that it will cause death. The requirement was not waived by the Trial Chamber. Regarding the deaths due to living and working conditions in Tram Kak Cooperatives, for example, the Trial Chamber considered that "the authorities in Tram Kak district willingly imposed such conditions";[1955] *i.e.*, they imposed the conditions intentionally. KHIEU Samphân argues that the Trial Chamber, unlike the *ad hoc* tribunals, did not characterise the foreseeability of death as "reasonable" nor did it specify whether an objective or subjective standard would be used, or indicate the level of probability required.[1956] Contrary to his assertion, the Trial Chamber did indicate the level of probability required: "would *likely* lead to deaths". The Supreme Court Chamber concludes that whether the Trial Chamber enunciated that an objective or subjective standard would be used does not constitute a legal error that would alter the Judgment.

697. Finally, the Supreme Court Chamber concludes that the Trial Chamber did not err in including *dolus eventualis* in the *mens rea* of murder as a crime against humanity in 1975. As KHIEU Samphân's argument concerning the *mens rea* of murder under customary international law in 1975 was rejected, his arguments that the Trial Chamber erred in failing to establish that the murders at Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam Worksite, Kampong Chhnang Airfield Construction Site, S-21 Security Centre, Kraing Ta Chan Security Centre, and Phnom Kraol Security Centre due to living, working and

[1953] For example, the *Furundžija* Trial Chamber noted that "[i]t is apparent from our survey of national legislation that, *in spite of inevitable discrepancies*, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus." *Furundžija* Trial Judgment (ICTY), para. 181 (emphasis added).
[1954] See KHIEU Samphân's Appeal Brief (F54), para. 631.
[1955] Trial Judgment (E465), para. 1145.
[1956] KHIEU Samphân's Appeal Brief (F54), para. 631.

detention conditions and blood-drawing at S-21[1957] had been committed with direct intent rather than *dolus eventualis*, fail and are accordingly dismissed.

2. Whether a *Mens Rea* that Includes *Dolus Eventualis* Was Foreseeable and Accessible

698. In terms of foreseeability and accessibility, the Trial Chamber stated that "what is important is to have regard to the purpose of the principle of legality, which is to ensure that an accused is not held responsible for conduct which he or she could not envisage was criminal when engaging in that conduct."[1958] The Trial Chamber found that, given the customary status and gravity of the crime, and KHIEU Samphân's position as a member of Cambodia's governing authority, "it was both foreseeable and accessible in general that the conduct described as murder in customary international law was punishable as a crime against humanity by 1975."[1959] The Trial Chamber noted that Article 503 of the 1956 Cambodian Penal Code considers "acts wilfully committed acts with intent to assault another person, but without intent to cause death" as severely punishable felonies and stated that the required *dolus* (*dolus praeter intentionem*) is lower than *dolus eventualis*.[1960] Therefore, it considered it was "unquestionable that it was foreseeable in 1975 that killing an individual with *dolus eventualis* was criminal and entailed individual criminal responsibility."[1961]

699. KHIEU Samphân submits that a definition of the *mens rea* of murder as a crime against humanity that includes *dolus eventualis* was not foreseeable and accessible to him since Cambodian law did not include *dolus eventualis*.[1962] He submits that:

> [I]t is not obvious that the *dolus eventualis* as defined is of a degree of intent greater than that prescribed in article 503 of the Criminal code of the Kingdom of Cambodia in 1956. According to the Chamber, article 503 of the criminal code which foresees the incrimination, not as the crime of murder, but of "acts voluntarily undertaken and accomplished, with the aim of an attempt to harm individuals, but without the intention of causing death", demands the intent to carry out the acts "with the intent to harm individuals". It is necessary to prove an intentional offence, and not simply that of taking a risk. This *dolus* is not lower than that of *dolus eventualis* as defined by the Chamber.[1963]

[1957] See KHIEU Samphân's Appeal Brief (F54), paras 637-640.
[1958] Trial Judgment (E465), para. 651.
[1959] Trial Judgment (E465), para. 651.
[1960] Trial Judgment (E465), para. 651.
[1961] Trial Judgment (E465), para. 651.
[1962] KHIEU Samphân's Appeal Brief (F54), para. 635.
[1963] KHIEU Samphân's Appeal Brief (F54), para. 636.

700. The Co-Prosecutors respond that murder with *dolus eventualis* was foreseeable and accessible to KHIEU Samphân, as the Supreme Court Chamber previously determined in Case 002/01.[1964] The Lead Co-Lawyers agree with the Co-Prosecutors.[1965]

701. The Supreme Court Chamber has indeed already addressed this issue, and KHIEU Samphân's arguments concerning the Trial Chamber's reference to Article 503 of the Criminal Code of Cambodia have no bearing on its previous conclusion. As explained in Case 002/01:

> As to the foreseeability and accessibility of the *mens rea* of murder and extermination, the Supreme Court Chamber has conducted an extensive review of the respective mental elements of these crimes. In respect of murder, this analysis led to the conclusion that a mental element less restrictive than direct intent formed part of customary international law in 1975. As noted above, as to foreseeability, it is sufficient that the accused was able to "appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision". Thus, what is required is not an analysis of the technical terms of the definition of the crimes, but whether it was generally foreseeable that the conduct in question could entail criminal responsibility. Accordingly, there is no need to show that it was foreseeable that criminal responsibility could arise in circumstances was acting with *dolus eventualis*, as opposed to *dolus directus*. The Supreme Court Chamber thus rejects the arguments raised in this regard.[1966]

702. For the same reasons, the Supreme Court rejects KHIEU Samphân's analogous argument raised in this appeal.

3. Whether the Trial Chamber Erred Concerning Culpable Omissions

703. In setting out the applicable law relating to the *actus reus* of the crime against humanity of murder, the Trial Chamber enunciated that an omission will be culpable only when there is a duty to act:

> The *actus reus* of murder is an act or omission of the accused, or of one or more persons for whose acts or omissions the accused bears criminal responsibility, that caused the death of the victim. […] The Chamber notes that none of the parties have contested that commission of murder as a crime against humanity through omission formed part of customary international law as at 1975. This Chamber has previously accepted the general principle applied consistently by the *ad hoc* tribunals that "a crime may be committed by culpable omission where there is a duty to act". While this observation was made in the context of individual criminal responsibility, the Chamber finds that the general principle that there needs to be a duty to act, applies to all culpable omissions. Accordingly, an omission will be culpable only where there is a duty to act.[1967]

704. KHIEU Samphân submits that the Trial Chamber correctly set out the law concerning culpable omissions, but in its findings that the *actus reus* was fulfilled at Tram Kak

[1964] Co-Prosecutors' Response (F54/1), para. 375.
[1965] Lead Co-Lawyers' Response (F54/2), para. 278.
[1966] Case 002/01 Appeal Judgment (F36), para. 765.
[1967] Trial Judgment (E465), para. 627.

Cooperatives,[1968] Trapeang Thma Dam Worksite,[1969] 1st January Dam Worksite,[1970] and Kampong Chhnang Airfield Construction Site[1971] with regard to murders resulting from the harsh living and working conditions, the Trial Chamber found that the *actus reus* was established partly through culpable omission without first determining that there was a duty to act. He submits that the Trial Chamber erred by failing to provide a legal definition of the nature and scope of the direct perpetrators' duty to act. He contends that criminal responsibility extends first and foremost to the physical perpetration of a crime by the offender, and that omissions are only culpable where mandated by a rule of criminal law, citing jurisprudence from the ICTY *Tadić* Appeals Chamber.[1972]

705. The Co-Prosecutors respond that KHIEU Samphân overlooks the interrelationship between positive acts, which underlie the Trial Chamber's findings on the *actus reus* of murder, and omissions.[1973] They contend that the perpetrators' failure to take appropriate measures to change or alleviate the conditions they imposed was not a separate omission that independently gave rise to criminal responsibility, but rather a continuation of their positive acts, and that there is a legal duty to abandon the commission of a crime; the perpetrators' duty to act arose from their positive criminal acts, from which they were obliged to desist.[1974] They explain that because the perpetrators were the ones who imposed the conditions, they were in a position to change or alleviate them and thus had a duty to do so.[1975] They consider the *actus rei* to be positive acts and argue that the authorities' unwillingness to adapt working hours or working

[1968] KHIEU Samphân's Appeal Brief (F54), paras 673-675.
[1969] KHIEU Samphân's Appeal Brief (F54), para. 759.
[1970] KHIEU Samphân's Appeal Brief (F54), paras 769-771.
[1971] KHIEU Samphân's Appeal Brief (F54), para. 821.
[1972] KHIEU Samphân's Appeal Brief (F54), para. 674, referring to *Prosecutor v. Tadić*, Appeals Chamber (ICTY), IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgment (ICTY)"), para. 188 ("This provision [Article 7(1) of the ICTY Statute] covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law."). KHIEU Samphân also cites and appears to quote, at KHIEU Samphân's Appeal Brief (F54), para. 674, from *Blaškić* Appeal Judgment (ICTY), para. 663: "[criminal responsibility] covers first and foremost the physical perpetration of a crime by the offender himself", but the quoted statement is not contained in the paragraph cited, which states: "Although criminal responsibility generally requires the commission of a positive act, this is not an absolute requirement, as is demonstrated by the responsibility of a commander who fails to punish a subordinate even though the commander himself did not act positively (i.e. under the doctrine of command responsibility). There is a further exception to the general rule requiring a positive act: perpetration of a crime by omission pursuant to Article 7(1), whereby a legal duty is imposed, inter alia as a commander, to care for the persons under the control of one's subordinates. Wilful failure to discharge such a duty may incur criminal responsibility pursuant to Article 7(1) of the Statute in the absence of a positive act.".
[1973] Co-Prosecutors' Response (F54/1), para. 764.
[1974] Co-Prosecutors' Response (F54/1), paras 765-766.
[1975] Co-Prosecutors' Response (F54/1), para. 766.

or living conditions was simply a failure to desist, and thus a continuation of the positive acts.[1976] The Lead Co-Lawyers concur with the Co-Prosecutors.[1977]

706. In finding that the *actus reus* of murder was established at the above-mentioned sites, the Trial Chamber found that:

i. "[t]he relevant acts and omissions are constituted by the imposition on the inhabitants of the Tram Kak Cooperatives of conditions that caused their death, by the absence of appropriate measures to change or alleviate such conditions and, in particular, the extreme levels of control exerted over the population which left them with no option other than to accept their fate, including when the result was foreseeably going to be fatal."[1978]

ii. "the relevant act or omission is constituted by the imposition on the workers [at Trapeang Thma Dam Worksite] of conditions described above that caused their death. This includes the unwillingness to adapt working hours and working or living conditions to the workers' needs, and to provide basic appropriate medical care."[1979]

iii. "the relevant act or omission is constituted by the imposition on the workers [at 1st January Dam Worksite] of conditions that caused their death and by the absence of appropriate measures to change or alleviate such conditions."[1980]

iv. "the relevant act or omission is constituted by the imposition on the workers [at Kampong Chhnang Airfield Construction Site] of conditions that caused their death and by the absence of appropriate measures to change or alleviate such conditions."[1981]

707. The Supreme Court Chamber observes that each of these findings relates to a positive action, the imposition of conditions that caused death, coupled with an omission, the failure to take measures to change or alleviate the conditions. The omission in question is simply a failure to cease positive action. It could instead be viewed as an ongoing positive action to maintain the conditions. This is not a case of a single culpable omission in which, as the Trial Chamber

[1976] Co-Prosecutors' Response (F54/1), paras 802, 828, 839.
[1977] Lead Co-Lawyers' Response (F54/2), para. 278.
[1978] Trial Judgment (E465), para. 1144.
[1979] Trial Judgment (E465), para. 1388.
[1980] Trial Judgment (E465), para. 1672.
[1981] Trial Judgment (E465), para. 1804.

held, there must first exist a duty to act. In this case, the perpetrators imposed the conditions and could be expected to change or alleviate them once it became apparent that they were in fact leading to death, but they elected not to do so. This challenge is thus dismissed.

4. Whether the Trial Chamber Erred in its Assessment of Temporality

708. In the case of murder caused by the imposition of harsh living and working conditions at Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam Worksite, and Kampong Chhnang Airfield Construction Site, the Trial Chamber found that the *mens rea* of *dolus eventualis* was established based on the fact that the conditions in question were maintained for an extended period, including after the effects on the workers and, at the Tram Kak Cooperatives, on the weakest inhabitants including the elderly, the infants, and the sick became apparent.[1982]

709. KHIEU Samphân submits that the Trial Chamber erred by failing to precisely analyse the evidence in terms of timing.[1983] He argues that the Trial Chamber was required to establish the link between the *actus reus* and *mens rea* at a specific moment concerning the deaths, stating that "[*m*]*ens rea* involves subjective analysis as it starts from the offender's point of view",[1984] "[c]riminal intent is determined before a crime is perpetrated, not afterwards",[1985] and "acceptance of risk depends on how it was perceived at the time".[1986]

710. The Supreme Court Chamber concurs with KHIEU Samphân that the requisite *mens rea* must exist at the time the crime is committed. Timing is relevant, as deaths may occur due to the conditions imposed, but it is often only when the perpetrators maintain the conditions despite being aware that the conditions are causing death that the perpetrators' *mens rea* can be inferred. Thus, when the initial death or deaths occur, it may be impossible to determine the perpetrators' *mens rea*, which will only be evident from their reaction to these deaths; for example, do they provide more food if they notice people starving, or reduce working hours if

[1982] Trial Judgment (E465), paras 1145, 1389, 1672, 1805. In finding that the *mens rea* was established at the 1st January Dam Worksite, the Trial Chamber did not explicitly state that it took into account the maintenance of the conditions for an extended period, or that those conditions were maintained after the effects became apparent, but made the finding based on "[t]he acceptance of the risk of the workers' death as a result of the poor and unsafe working and living conditions". Trial Judgment (E465), para. 1672. However, as KHIEU Samphân notes, this finding relied on "knowledge of the shortages and the maintenance of the production goals by the perpetrators in spite of everything". KHIEU Samphân's Appeal Brief (F54), para. 785.
[1983] KHIEU Samphân's Appeal Brief (F54), paras 685, 761, 785, 823.
[1984] KHIEU Samphân's Appeal Brief (F54), para. 684. See also KHIEU Samphân's Appeal Brief (F54), paras 785, 1672.
[1985] KHIEU Samphân's Appeal Brief (F54), paras 684, 761, 785.
[1986] KHIEU Samphân's Appeal Brief (F54), para. 684.

people are dying of exhaustion, or do they continue to impose the conditions despite the fact that they are leading to death. However, the issue of when it is possible to infer the requisite *mens rea* differs from the question of when that *mens rea* was held which must be at the time the *actus reus* occurred. KHIEU Samphân appears to confuse this distinction.

711. The Supreme Court Chamber determines that KHIEU Samphân has failed to demonstrate any error in the Trial Chamber's analysis of the *mens rea* element. A number of deaths occurred at each location, and the Trial Chamber found that despite being aware of these deaths, the harsh working and living conditions were maintained. While it may not have been possible to establish whether the perpetrators possessed the requisite *mens rea at the time* of the initial death or deaths, the fact that the perpetrators maintained the conditions even after becoming aware that they were likely to result in death demonstrates that they possessed the requisite *mens rea*, even at the time of the first death. These arguments are accordingly dismissed.

5. Whether Murder Was Established at the Following Sites

a. Tram Kak Cooperatives

712. In assessing whether the crime against humanity of murder was committed at Tram Kak Cooperatives, the Trial Chamber found that there were periods of acute food shortages in Tram Kak district and that people died as a result.[1987] The Trial Chamber also found that food remained insufficient until the 1976-1977 harvest, and that the period before harvests was particularly inadequate.[1988] People died from malnutrition, overwork, sickness, and inadequate medical treatment,[1989] with some indications of large-scale deaths.[1990] The Trial Chamber concluded that the *actus reus* of murder was established with respect to deaths caused by the working and living conditions, with the

> relevant acts and omissions [being] constituted by the imposition on the inhabitants of the Tram Kak Cooperatives of conditions that caused their death, by the absence of appropriate measures to change or alleviate such conditions and, in particular, the extreme levels of control exerted

[1987] Trial Judgment (E465), para. 1142.
[1988] Trial Judgment (E465), para. 1142.
[1989] Trial Judgment (E465), para. 1142.
[1990] Trial Judgment (E465), para. 1143. The Trial Chamber here was assessing whether the crime against humanity of extermination was established, prior to deciding to change the legal characterisation to murder. It considered that "the evidence was insufficiently precise in relation to any calculation to bring about the destruction of such large numbers of people."

> over the population which left them with no option other than to accept their fate, including when the result was foreseeably going to be fatal.[1991]

The Trial Chamber "allow[ed] for the possibility that some factors beyond the will of the authorities in Tram Kak district may have partly contributed to the lack of food and/or medical facilities at times", but found that the evidence "clearly establishe[d] that people were deliberately forced to work in a climate of control, threats, fear, hunger and discrimination, with the most extreme consequences for those who protested."[1992] The Trial Chamber found that the maintenance of the conditions for an extended period, including after the effects became apparent on the workers and on the weakest inhabitants, demonstrated that the authorities willingly imposed such conditions with the knowledge that they would likely lead to deaths or in the acceptance of the possibility of this fatal consequence, satisfying the *mens rea* of *dolus eventualis*.[1993]

713. KHIEU Samphân submits that the Trial Chamber erred in determining that deaths were due to, *inter alia*, starvation and rudimentary medical care.[1994] Concerning deaths due to starvation, he argues that the report from the Southwest Zone dated 3 June 1977, on which the Trial Chamber relied on to find that there were periods of great food shortages, does not support such a finding.[1995] He also submits that the Trial Chamber misinterpreted some witness testimony and relied on evidence of low probative value.[1996] Concerning the deaths due to rudimentary medical care, KHIEU Samphân claims that the Trial Chamber erred in finding that the *actus reus* was rudimentary medical care, malnutrition, and overwork because it relied exclusively on RIEL Son's testimony. RIEL Son became Deputy Chief of the Tram Kak District Hospital in late 1976[1997], and he did not state that deaths were due to rudimentary medical care.[1998] Finally, KHIEU Samphân raises two alleged errors concerning the *mens rea* that have not been addressed elsewhere in this Judgment: first, that the Trial Chamber did not establish the *mens rea* beyond reasonable doubt since it did not determine whether the Tram Kak authorities had deliberately imposed the conditions "with the knowledge that they would likely lead to deaths" or "in the acceptance of the possibility of this fatal consequence",[1999]

[1991] Trial Judgment (E465), para. 1144.
[1992] Trial Judgment (E465), para. 1145.
[1993] Trial Judgment (E465), para. 1145.
[1994] KHIEU Samphân's Appeal Brief (F54), paras 678-682.
[1995] KHIEU Samphân's Appeal Brief (F54), para. 678.
[1996] KHIEU Samphân's Appeal Brief (F54), paras 679-680.
[1997] Trial Judgment (E465), para. 820.
[1998] KHIEU Samphân's Appeal Brief (F54), para. 682.
[1999] KHIEU Samphân's Appeal Brief (F54), paras 676-677.

namely, it should have found either one of these alternatives beyond a reasonable doubt; and second, that the Trial Chamber erred in finding that the *mens rea* was satisfied in the form of *dolus eventualis* despite its conclusion that factors beyond the control of the authorities may have contributed to lack of food and medical resources in some cases.[2000] He submits that it is "impossible to establish the connection between the measures implemented by the authorities to redress the country, independent factors and pre-existing factors, and their impact on the population. Accordingly, there are questions about the factors that caused the humanitarian catastrophe".[2001]

714. The Co-Prosecutors respond that KHIEU Samphân's arguments are limited to single pieces of evidence and ignore additional evidence relating to the harsh living and working conditions that were imposed on the inhabitants, as well as the impact these conditions had on people's health and, ultimately, their death.[2002] They state that KHIEU Samphân misread the evidence and relevant Trial Chamber findings, highlighting his purported inaccuracies.[2003] Concerning *mens rea*, the Co-Prosecutors contend that the Trial Chamber's recognition of external factors possibly contributing to insufficient food and medical facilities does not prevent the establishment of the *mens rea*.[2004] They submit that the conditions extended beyond insufficient food and medical facilities to include inhabitants being forced to work in a climate of control, threats, fear, and discrimination, and that the evidence shows that the authorities willingly imposed the conditions for an extended period.[2005]

715. The Lead Co-Lawyers agree with the Co-Prosecutors that the Trial Chamber had considerable evidence before it to support its finding that deaths resulted from the living conditions, noting that the civil parties provided a significant amount of this material.[2006] They note that KHIEU Samphân does not appear to contest that Civil Party CHOU Koemlan's child died of starvation, and thus question how this is consistent with his position that the *actus reus* of murder was not established.[2007]

[2000] KHIEU Samphân's Appeal Brief (F54), para. 683.
[2001] KHIEU Samphân's Appeal Brief (F54), para. 684.
[2002] Co-Prosecutors' Response (F54/1), para. 778.
[2003] Co-Prosecutors' Response (F54/1), paras 779-786.
[2004] Co-Prosecutors' Response (F54/1), para. 775.
[2005] Co-Prosecutors' Response (F54/1), para. 775.
[2006] Lead Co-Lawyers' Response (F54/2), para. 282.
[2007] Lead Co-Lawyers' Response (F54/2), para. 283.

716. The Supreme Court Chamber notes that KHIEU Samphân has only challenged a few specific pieces of evidence out of the large amount of evidence relied on by the Trial Chamber to reach its findings concerning deaths caused by the living and working conditions. His assertions about this evidence are inaccurate and do not cast doubt on the Trial Chamber's findings. Each of his criticisms of particular pieces of evidence is analysed below.

i. KHIEU Samphân submits that the Southwest Zone Report relied on by the Trial Chamber does not support that there were periods of great food shortages.[2008] The Trial Chamber found that "[o]n 3 June 1977, the Southwest Zone similarly reported that some districts and communes had encountered shortages, but suggested that this could be addressed."[2009] This is what the Report states, under the heading "The people's living standard".[2010] The Supreme Court Chamber does not consider that the Trial Chamber erred in relying on this Report as evidence to support its finding of food shortages.

ii. KHIEU Samphân submits that Witness RIEL Son did not attribute deaths toward the end of the regime to a lack of food.[2011] This is incorrect. RIEL Son testified: "Toward the latter part of the regime, it became worse. People did not have anything to eat. For that reason, [they had] swollen bod[ies] and dysentery increased in a large number."[2012] He also stated:

> Toward the later regime of the Khmer Rouge -- that is, about one month before the collapse of the regime, many, many patients died and there were too many to count. And those who had to bury the corpses did not stay still because they had to dig pits to bury those dead patients, maybe 10 to 20 dead patients every day. This happened towards the end of Khmer Rouge regime.
>
> Q. Did you know the real cause of the so many deaths towards the later part of the regime?
>
> A. Yes, because initially we were provided with 25 to 50 cans of rice for more than 200 people at the hospital, but later on we were not given that rice, so I tried to collect rice from here and there until all patients were transferred to their respective bases. We also asked the patient's relatives to pick up those patients at the hospital, and for those whose house was far away, someone would take them to their house. When all patients were transferred out of the hospital, it was the time that we had to flee already.[2013]

[2008] KHIEU Samphân's Appeal Brief (F54), para. 678.
[2009] Trial Judgment (E465), para. 1013, referring to Report from the Southwest Zone to Respected and Beloved Angkar, 3 June 1977, E3/853, ERN (EN) 00185246.
[2010] Report from the Southwest Zone to Respected and Beloved Angkar, 3 June 1977, E3/853, ERN (EN) 00185246 ("Although at some Districts and Sub-districts have encountered the shortage, it can be addressed.").
[2011] KHIEU Samphân's Appeal Brief (F54), para. 679.
[2012] T. 17 March 2015 (RIEL Son), E1/278.1, p. 39. The brackets in the quote reflect changes to translation that were made to ensure consistency among the three language versions of the transcript. The corrections are based on the audio recordings in the source language.
[2013] T. 17 March 2015 (RIEL Son), E1/278.1, p. 90.

i. KHIEU Samphân submits that Witness NEANG Ouch, Ta Mok's brother-in-law who became District Secretary of Tram Kak District in 1977,[2014] did not "attribute the penury to bad administration",[2015] but the Trial Chamber stated that "NEANG Ouch attributed such a lack of food to failing by the heads of particular cooperatives, which meant that rations were not at the prescribed amount."[2016] Although Witness NEANG Ouch's testimony is not entirely clear, this appears to be an accurate statement of his testimony. The fact that he may not have attributed the problem to bad administration in general rather than particular heads of cooperatives, does not mean that the Trial Chamber could not properly rely on the testimony to show that there were shortages.

ii. KHIEU Samphân submits that CHANG Srey Mom's statement highlights the irregular nature of rations and the major difficulties in ration management and does not support a finding that some died of malnutrition because their daily ration was insufficient.[2017] He is mistaken in asserting that CHANG Srey Mom's testimony does not support a finding that some died of malnutrition. CHANG Srey Mom was an ethnic Chinese "candidate person" who worked in Tram Kak.[2018] The Trial Chamber stated that "CHANG Srey Mom testified that, although food was distributed equally, people died from malnutrition because the daily ration was insufficient."[2019] CHANG Srey Mom was questioned during her testimony about a statement she made in her Written Record of Interview that "some people died because they ate too much and some died of malnutrition".[2020] She responded to the question only insofar as regards the deaths by eating too much. She did not retract her previous statement about deaths caused by malnutrition. The Supreme Court Chamber does not consider that the Trial Chamber erred in making this statement.

iii. KHIEU Samphân submits that EK Hoeun, who worked at the Tram Kak District Office until sometime in 1976 and then oversaw land survey work for the District before leaving to work in another zone,[2021] did not confirm that workers were dying at

[2014] See Trial Judgment (E465), para. 818.
[2015] KHIEU Samphân's Appeal Brief (F54), para. 679.
[2016] Trial Judgment (E465), para. 1013, referring to T. 10 March 2015 (NEANG Ouch), E1/274.1, pp. 13, 23-24.
[2017] KHIEU Samphân's Appeal Brief (F54), para. 679.
[2018] Trial Judgment (E465), para. 823.
[2019] Trial Judgment (E465), para. 1015, referring to T. 29 January 2015 (CHANG Srey Mom), E1/254.1, pp. 11-12.
[2020] T. 29 January 2015 (CHANG Srey Mom), E1/254.1, pp. 11-12, referring to Written Record of Interview of CHANG Srey Mom, 11 November 2009, E3/5832, answer 11.
[2021] Trial Judgment (E465), para. 820.

worksites due to a lack of food.[2022] This assertion is incorrect. The Trial Chamber based its findings on EK Hoeun's testimony: "EK Hoeun confirmed that the district level received reports at the commerce office that communes were short of food. He recalled reports that in Leay Bour commune some 500 people died of hunger. Trapeang Thum commune was short of food supplies and had to ask for supplies from Nhaeng Nhang commune. But no matter how hard they tried, Nhaeng Nhang commune could not supply."[2023] The Supreme Court Chamber has reviewed EK Hoeun's testimony and considers that this is an accurate reflection of what he stated.

iv. KHIEU Samphân submits that SIM Chheang's Written Record of Interview and certain civil party applications are of inherently low probative value.[2024] This assertion is manifestly insufficient to cast doubt on this evidence which corroborates extensive witness testimony as well as other evidence on this issue. This Chamber notes that SIM Chheang stated that he saw one person die of hunger and that many people died as a result of bad health.[2025]

717. Concerning rudimentary medical care, KHIEU Samphân is correct that Witness RIEL Son did not state that deaths occurred as a result of rudimentary medical care,[2026] but the Supreme Court Chamber does not consider that this fact makes it unreasonable for the Trial Chamber to conclude that deaths occurred due to rudimentary medical care when RIEL Son clearly stated that deaths occurred in the hospitals and that the medical care was rudimentary.[2027]

718. Finally, the Supreme Court Chamber does not consider it an error of law that the Trial Chamber found that the *mens rea* was satisfied due to the fact that the authorities imposed the conditions "with the knowledge that they would likely lead to deaths *or* in the acceptance of the possibility of this fatal consequence".[2028] The Trial Chamber determined that the continuance of the conditions after the effects became apparent demonstrated that the authorities were aware that deaths were likely or accepted the possibility of deaths. It was therefore unnecessary to distinguish between them because either the authorities' knowledge or their acceptance would indicate that the *mens rea* had been satisfied and could be inferred.

[2022] KHIEU Samphân's Appeal Brief (F54), para. 680.
[2023] Trial Judgment (E465), para. 1012, referring to T. 8 May 2015 (EK Hoeun), E1/299.1, p. 17.
[2024] KHIEU Samphân's Appeal Brief (F54), para. 680.
[2025] Written Record of Interview of SIM Chheang, 27 November 2007, E3/7980, ERN (EN) 00231693 p. 3.
[2026] KHIEU Samphân's Appeal Brief (F54), para. 682.
[2027] Trial Judgment (E465), paras 1040-1042, 1045.
[2028] Trial Judgment (E465), para. 1145 (emphasis added).

The Supreme Court Chamber concludes that KHIEU Samphân has not demonstrated that the Trial Chamber reached a finding no reasonable trier of fact could reach simply by pointing to the factors beyond the control of authorities. The Trial Chamber acknowledged that factors beyond the control of authorities may have partly contributed to the lack of food and medical facilities,[2029] but considering the climate of control, threats, fear, hunger, and discrimination, and the persistence of the harsh conditions for an extended period of time including after the effects became so apparent, the Trial Chamber found that the conditions were wilfully imposed. Even if factors beyond the control of the authorities were entirely responsible for the lack of food and medicine, and the Supreme Court Chamber does not suggest that this is the case, this would not explain deaths caused by overwork and exhaustion. KHIEU Samphân's arguments concerning murder as a crime against humanity at Tram Kak Cooperatives are therefore dismissed.

b. Trapeang Thma Dam Worksite

719. The Trial Chamber found[2030] that food provided at Trapeang Thma Dam Worksite was generally insufficient and that the accessible water was not drinkable, causing workers to develop diarrhea as a result.[2031] The Trial Chamber established that workers slept in inadequate accommodation, frequently fell ill, and some died as a result of illness.[2032] Workers were also required to work long hours regardless of weather conditions, and they frequently died after collapsing.[2033] Those who fell ill were usually given ineffective medicine and had access only to medical staff who were incompetent.[2034] Taking these findings into account, the Trial Chamber was satisfied that the deaths of those who collapsed at the worksite were due to overwork, exhaustion, and lack of food, and that workers died of illnesses that developed as a result of these conditions, which were further aggravated by a lack of appropriate medical care, and that the imposition of these conditions caused the death of the workers at the construction site, satisfying the *actus reus* of murder.[2035] The Trial Chamber found that "the relevant act or omission is constituted by the imposition on the workers of conditions described above that

[2029] Trial Judgment (E465), para. 1145.
[2030] The Trial Chamber made findings concerning both executions (Trial Judgment (E465), paras 1378-1382) and deaths resulting from working and living conditions (Trial Judgment (E465), paras 1384-1390) at Trapeang Thma Dam Worksite. As KHIEU Samphân has limited his arguments to the deaths resulting from working and living conditions, only the relevant findings are summarised here.
[2031] Trial Judgment (E465), para. 1384.
[2032] Trial Judgment (E465), para. 1384.
[2033] Trial Judgment (E465), para. 1384.
[2034] Trial Judgment (E465), para. 1384.
[2035] Trial Judgment (E465), paras 1384, 1388.

caused their death. This includes the unwillingness to adapt working hours and working or living conditions to the workers' needs, and to provide basic appropriate medical care."[2036] The Trial Chamber further found that the *mens rea* of *dolus eventualis* was satisfied based on "[t]he maintenance of these conditions for an extended period of time, including after their effects on the workers became apparent to the worksite authorities," which the Trial Chamber found, "show[ed] that the worksite authorities willingly imposed such conditions with the knowledge that they would likely lead to the death of the victims or in the acceptance of the possibility of this fatal consequence."[2037]

720. KHIEU Samphân submits that the Trial Chamber erred in its assessment of the *mens rea* because "[a]ssessing *mens rea* is a subjective exercise and it was therefore incumbent to start from the offender's perspective", but "here, the causal connection between the measures willingly implemented by the authorities to rehabilitate the country, factors arising beyond their control not to mention those that were already in existence, and the impact upon the people is inexpressible."[2038] Accordingly, KHIEU Samphân argues that "there is a doubt as to the factors that caused the humanitarian catastrophe, and the acceptance of the risk was dependent on this assessment prior to the offence."[2039]

721. The Co-Prosecutors contend that KHIEU Samphân's assertions about factors beyond the control of authorities and pre-existing conditions are unsupported by the evidence and that he failed to identify any such factors or conditions.[2040] The Lead Co-Lawyers agree with the Co-Prosecutors.[2041]

722. The Supreme Court Chamber has concluded that KHIEU Samphân's argument concerning whether there was a causal link between the actions of the perpetrators and the deaths of the victims, and whether there could have been factors beyond the perpetrators' control, is unsupported by evidence and merely demonstrates disagreement with the Trial Chamber's findings. It is insufficient to demonstrate that the Trial Chamber reached a finding no reasonable trier of fact could have reached. Accordingly, this challenge is dismissed.

[2036] Trial Judgment (E465), para. 1388.
[2037] Trial Judgment (E465), para. 1389.
[2038] KHIEU Samphân's Appeal Brief (F54), para. 761.
[2039] KHIEU Samphân's Appeal Brief (F54), para. 761.
[2040] Co-Prosecutors' Response (F54/1), paras 830-831.
[2041] Lead Co-Lawyers' Response (F54/2), para. 278.

c. 1st January Dam Worksite

723. Based on the testimony of four witnesses and three civil parties, as well as three Written Records of Interview, the Trial Chamber found[2042] that "at least six to ten workers" at the 1st January Dam Worksite "died due to the imposition of hard labour, starvation rations, and inhospitable conditions, including an unhygienic environment and insufficient and ineffective medicine."[2043] The Trial Chamber determined that "[w]orkers were forced to exceed their human limits while being deprived of food and adequate treatment when they became ill. Others suffered the same fate at clinics and hospitals after enduring the harsh conditions" at the worksite.[2044] The Trial Chamber also found, based on the testimony of witnesses and civil parties, that several accidents precipitated by competition between workers occurred at the worksite where embankments of dirt fell and buried workers, killing a number of them.[2045] The Trial Chamber "further note[d] the sheer number of workers at the site, about 20,000, who were not afforded proper hygiene, food and medical treatment."[2046] The Trial Chamber concluded that "[t]he only reasonable inference is that a large number of workers died as a result of these conditions."[2047] The Trial Chamber found:

> that the *actus reus* of murder, namely an act or omission of the perpetrator that caused the death of the victim, is established with respect to the deaths resulting from the working and living conditions described above. In this respect, the relevant act or omission is constituted by the imposition on the workers of conditions that caused their death and by the absence of appropriate measures to change or alleviate such conditions. The acceptance of the risk of the workers' death as a result of the poor and unsafe working and living conditions satisfies the *mens rea* of murder in the form of *dolus eventualis*.[2048]

724. KHIEU Samphân submits that the Trial Chamber erred in fact in determining that the murders committed with *dolus eventualis* occurred. He specifically argues that the Trial Chamber erred in finding that six to ten workers died due to the living and working conditions imposed and the lack of effective medicine, because the paragraph of the Judgment to which this finding refers states that few people died of illness or injury at the worksite, stating instead that those who were sick were sent back to their villages or to local clinics, and the evidence

[2042] The Trial Chamber made findings concerning both executions (Trial Judgment (E465), para. 1666) and deaths resulting from working and living conditions (Trial Judgment (E465), paras 1670-1673) at the 1st January Dam Worksite. As KHIEU Samphân has limited his arguments to the deaths resulting from working and living conditions, only the relevant findings are summarised here.
[2043] Trial Judgment (E465), para. 1670.
[2044] Trial Judgment (E465), para. 1670.
[2045] Trial Judgment (E465), para. 1670.
[2046] Trial Judgment (E465), para. 1670.
[2047] Trial Judgment (E465), para. 1670.
[2048] Trial Judgment (E465), para. 1672.

cited merely refers to individuals being evacuated to their villages or a district hospital.[2049] He criticises the Trial Chamber's reliance on specific testimonies and Written Records of Interview.[2050] KHIEU Samphân also claims that the Trial Chamber erred by finding that several workers died in accidents, criticising the evidence relied on by the Trial Chamber.[2051] He further states that the Trial Chamber erred by finding that the only reasonable inference from the presence of 20,000 workers at the worksite who were not afforded proper hygiene, food, and medical treatment is that a large number died as a result of the conditions because this was an extrapolation and the Trial Chamber relied on no evidence and drew the least favourable finding without reason.[2052] He submits that the Trial Chamber further erred in finding that the perpetrators knew that there was a lack of sufficient food and medicine but continued to push them to complete the work regardless, because it relied on a *Revolutionary Flag* excerpt on the general situation in Cambodia and on a 9 May 1977 article by an unknown author that could not support that they continued to push the workers to complete the work after becoming aware of problems in October-November 1977.[2053]

725. The Co-Prosecutors respond that the evidence supports the Trial Chamber's finding as to six to ten deaths: one witness saw a worker after he became sick at the worksite and his condition deteriorated, another witness testified that two workers in his unit died from illness, and others stated that sick people were referred to the hospital and died there as authorities did not want dead bodies at the worksite.[2054] They argue that the Trial Chamber relied on sufficient evidence, and KHIEU Samphân merely disagrees with it.[2055] Concerning the accidental deaths, the Co-Prosecutors argue that KHIEU Samphân misrepresents the totality of the evidence.[2056] Concerning the *mens rea*, they respond that KHIEU Samphân ignores relevant factual findings; the 1st January Dam Worksite was a "hot battlefield"; CPK documents described workers labouring day and night with "shortcomings" in their living standards; and KE Pauk and other members of the upper echelon knew of conditions at the worksite, yet continued to impose the harsh working conditions.[2057]

[2049] KHIEU Samphân's Appeal Brief (F54), para. 773.
[2050] KHIEU Samphân's Appeal Brief (F54), paras 774-778.
[2051] KHIEU Samphân's Appeal Brief (F54), paras 779-781.
[2052] KHIEU Samphân's Appeal Brief (F54), para. 782.
[2053] KHIEU Samphân's Appeal Brief (F54), paras 783-784.
[2054] Co-Prosecutors' Response (F54/1), para. 804.
[2055] Co-Prosecutors' Response (F54/1), para. 805.
[2056] Co-Prosecutors' Response (F54/1), paras 806-807.
[2057] Co-Prosecutors' Response (F54/1), para. 810.

726. The Lead Co-Lawyers respond that the Trial Chamber's reasoning encompasses three sets of findings: (1) living and working conditions at the worksite were such that people became ill; (2) those who became seriously ill were sent away from the worksite; and (3) some of those who were sent away died as a result of their illnesses.[2058] They argue that some civil parties gave evidence as to one finding while other witnesses gave evidence as to another.[2059] Concerning deaths from workplace accidents, they respond that the Trial Chamber's findings are based on the combined evidence of five witnesses and civil parties.[2060]

727. The Supreme Court Chamber notes that KHIEU Samphân's arguments challenge the Trial Chamber's factual findings that *dolus eventualis* murders were committed at the 1st January Dam Worksite and recalls that he bears a high burden to overturn the Trial Chamber's factual findings. The Supreme Court Chamber will not lightly disturb findings of fact by the Trial Chamber and will only do so if the evidence relied on could not have been accepted by any reasonable trier of fact, or, if the evaluation of the evidence is wholly erroneous.[2061]

728. The Supreme Court Chamber has analysed the evidence relied on by the Trial Chamber and summarises the most directly relevant portions herein:

i. KONG Uth's Written Record of Interview states that "[a] number of people got sick because they overworked and became so exhausted. Some of the diseases include fever and stomach pain. There was no hospital. But there were mobile medics. There were medicines known as rabbit droppings medicine. When someone was seriously ill they would be sent to the far away hospital. No one was wanted to be left dead at the site."[2062]

ii. Witness MEAS Laihour agreed with what KONG Uth had said after the above-mentioned portion of KONG Uth's Written Record of Interview was read back to her.[2063] MEAS Laihour testified that there was no death at the worksite because when people were seriously ill, they were not allowed to stay and would be sent to the hospital.[2064]

[2058] Lead Co-Lawyers' Response (F54/2), para. 288.
[2059] Lead Co-Lawyers' Response (F54/2), para. 288.
[2060] Lead Co-Lawyers' Response (F54/2), para. 291.
[2061] See Case 002/01 Appeal Judgment (F36), paras 88-89.
[2062] Written Record of Interview of KONG Uth, 11 September 2008, E3/7775, ERN (EN) 00233534, p. 3.
[2063] T. 26 May 2015 (MEAS Laihour), E1/305.1, pp. 22-25.
[2064] T. 26 May 2015 (MEAS Laihour), E1/305.1, pp. 24-25.

iii. Civil Party UN Rann testified that two people became seriously ill and were sent to the hospital and did not return. She did not know whether they had recovered or had died.[2065]

iv. Civil Party SEANG Sovida testified that the sick were given a coining massage or allowed to take a short rest and those who did not recover after this massage or rest were taken care of in the village.[2066] She states that she never saw them return, but attributes this to the fact that the work period at the dam was set for only three months.[2067] As KHIEU Samphân submits,[2068] she would have been 11 years of age in 1975 because she was born in 1964,[2069] however the Supreme Court Chamber does not consider that her young age at the time impacts this observation.

v. Witness OM Chy testified that "Severely sick people were referred to the hospital at the district level. Some people recovered and some did not and died at the hospital."[2070] He was not questioned further on the source of his knowledge for this statement.

vi. IENG Chham's Written Record of Interview states that there were many sick people and that medics were young and "perhaps they did not have knowledge and experience". When asked whether he saw patients die because of the treatment received from these medics, he stated: "According to what came across I saw that there were many people working at some places; it lacked sanitation; there was no[t] enough food to eat; the medics did not have quality or knowledge. These were the reasons causing death of the patients."[2071] Although KHIEU Samphân submits that the Trial Chamber only selected inculpatory portions of this statement,[2072] he does not explain which portions of the statement are exculpatory or how they affect the statement that deaths occurred as a result of the conditions imposed.

[2065] T. 28 May 2015 (UN Rann), E1/307.1, p. 13.
[2066] T. 2 June 2015 (SEANG Sovida), E1/308.1, pp. 26-27, 70.
[2067] T. 2 June 2015 (SEANG Sovida), E1/308.1, p. 28.
[2068] KHIEU Samphân's Appeal Brief (F54), para. 775.
[2069] T. 2 June 2015 (SEANG Sovida), E1/308.1, p. 3.
[2070] T. 30 July 2015 (OM Chy), E1/326.1, p. 65.
[2071] Written Record of Interview of IENG Chham, 8 November 2009, E3/5513, ERN (EN) 00410238.
[2072] KHIEU Samphân's Appeal Brief (F54), para. 776.

vii. The Written Record of Interview of Witness VANN Theng states that at the worksite "[s]ome people died of exhaustion, insufficient food and medicines of no-quality and no effects."[2073]

viii. Witness SOU Soeurn testified that seriously ill workers were sent to the state hospital in Kampong Cham,[2074] but when asked this question again stated that she did not know about it: "I just knew that sick people in my district were sent to a hospital. I did not get hold of as to where the sick at the 1st January Dam site were sent. […] To my memory, sick people at the 1st January Dam site were returned their respective cooperatives after they had been hospitalised."[2075]

ix. Civil Party HUN Sethany testified that a man she knew well from her village died from overwork.[2076] He became sick at the worksite and returned to the village for about two weeks before he died.[2077]

x. Witness UTH Seng named some people in his unit at the 1st January Dam Worksite with whom he was close and stated that two of them died of illness.[2078] He was not asked any follow up questions concerning these deaths, although earlier in his testimony he had discussed the types of illnesses workers suffered in greater detail.[2079]

729. In addition, the Supreme Court Chamber notes that although the Trial Chamber did not refer to this evidence in its legal findings concerning the crime against humanity of murder, it also had before it the evidence of Witness KE Pich Vannak, the son of KE Pauk who was in charge of the Dam worksite, who "stated to [Office of the Co-Investigating Judges] investigators that he knew patients at the worksite were dying because of a lack of medicine and informed KE Pauk, but he did not specify how many had died."[2080]

730. Based on the evidence on the record, the Supreme Court Chamber does not consider that it is possible to reach the specific finding that the Trial Chamber made, that "at least six to ten workers" died due to the conditions imposed. OM Chy and IENG Chham mention deaths

[2073] Written Record of Interview of VANN Theng, 8 October 2008, E3/5249, ERN (EN) 00231859.
[2074] T. 4 June 2015 (SOU Soeurn), E1/310.1, p. 66.
[2075] T. 4 June 2015 (SOU Soeurn), E1/310.1, p. 73.
[2076] T. 27 May 2015 (HUN Sethany), E1/306.1, p. 9.
[2077] T. 27 May 2015 (HUN Sethany), E1/306.1, pp. 9, 60-62.
[2078] T. 3 June 2015 (UTH Seng), E1/309.1, p. 44.
[2079] T. 3 June 2015 (UTH Seng), E1/309.1, p. 32-35.
[2080] Trial Judgment (E465), para. 1670, referring to Written Record of Interview of KE Pich Vannak, 4 June 2009, E3/25, ERN (EN) 00346150, p. 6.

in general terms without referring to any specific numbers, whereas HUN Sethany refers to a man she knew who died from overwork and UTH Seng refers to two individuals who died of illness. Nonetheless, the Supreme Court Chamber does not consider that the inability to quantify the deaths based on the evidence presented affects the finding that workers died due to the conditions imposed, or even that many more deaths occurred. While much of the preceding evidence refers to sick or exhausted people rather than explicitly to deaths, it supports the conclusion that the conditions imposed were causing such sickness and ill-health. This evidence, together with the evidence specifically referring to deaths due to sickness and exhaustion as well as the other evidence heard by the Trial Chamber concerning the poor conditions could reasonably lead the Trial Chamber to conclude that deaths occurred. KHIEU Samphân's concerns about the evidence are insufficient to overturn the Trial Chamber's findings. Regarding the Trial Chamber's inference that "a large number of workers died as a result of these conditions",[2081] the Supreme Court Chamber is satisfied that the Trial Chamber is correct. However, the Supreme Court Chamber does not consider it necessary to address this issue since establishing the crime against humanity of murder does not require a specific number of deaths.

731. Turning to the evidence of deaths caused by accidents at the worksite, the Supreme Court Chamber has again analysed the evidence relied upon by the Trial Chamber:

i. MEAS Laihour testified that she witnessed a soil collapse that may have killed people.[2082] Upon giving additional evidence, she states that a soil collapse did kill people, although it is unclear whether she witnessed this event:

> When I was carrying earth at the worksite, soil collapsed on the worker who was digging soil at the bottom of the canal. It did not happen at my commune. It was in another commune. There was soil collapse on people who were digging soil, and they were killed. […] Some people died from soil collapse or rock falling over them while others were only injured or had their arms and legs broken. Some people got killed while others managed to survive. The earth fell and buried them. They had died before we could remove them from the earth.[2083]

ii. HUN Sethany testified that soil collapse happened because they dug the soil too deeply and competed to complete work faster than others. She stated that she did not witness this event but was told that someone died as result of it.[2084]

[2081] Trial Judgment (E465), para. 1624.
[2082] T. 25 May 2015 (MEAS Laihour), E1/304.1, pp. 64-65.
[2083] T. 26 May 2015 (MEAS Laihour), E1/305.1, p. 17.
[2084] See T. 26 May 2015 (HUN Sethany), E1/305.1, p. 95.

iii. UN Rann testified that she heard about it but did not witness a soil collapse in which soil covered three workers and one died on the spot.[2085]

iv. UTH Seng also testified that while he did not witness it, he heard about a soil collapse that resulted in a fatal accident. He did not know the number of workers who had died or who had been injured.[2086]

v. Civil Party NUON Narom testified that no one in her mobile unit died during her six to seven months of working at the Dam worksite, but she did witness a soil collapse.[2087] She was not asked any follow up questions concerning this.[2088]

vi. Witness OR Ho testified that some members of his unit died as a result of a landslide at the worksite, which buried them alive.[2089] He testified that workers were competing with one another and sometimes working at night, and that soil from the upper part of the dam collapsed onto the workers working on the lower part.[2090] He stated that one worker died on the spot, while two others died later as a result of this event.[2091]

732. The Supreme Court Chamber concludes that although much of the above testimony was hearsay, the Trial Chamber did not err in relying on it together with the direct evidence as the testimonies corroborate each other and the fact that there was at least one fatal soil collapse appears to have been a well-known event.

733. Turning to the *mens rea*, to find that the worksite leadership and the Party Centre knew that there was a lack of sufficient food and medicine at the 1st January Dam Worksite but nonetheless continued to push the workers to complete all of the dry season work as quickly as possible working night and day, the Trial Chamber relied on:

[2085] T. 28 May 2015 (UN Rann), E1/307.1, p. 14.
[2086] T. 3 June 2015 (UTH Seng), E1/309.1, pp. 54-55.
[2087] T. 1 September 2015 (NUON Narom), E1/339.1, pp. 31, 40.
[2088] T. 1 September 2015 (NUON Narom), E1/339.1, pp. 29, 38.
[2089] T. 19 May 2015 (OR Ho), E1/301.1, pp. 43-44, 76-77; T. 20 May 2015 (OR Ho), E1/302.1, pp. 25-26.
[2090] T. 19 May 2015 (OR Ho), E1/301.1, pp. 43-44, 76; T. 20 May 2015 (OR Ho), E1/302.1, pp. 25-26.
[2091] T. 19 May 2015 (OR Ho), E1/301.1, pp. 76-77.

i. the testimony of numerous witnesses who testified that the 1st January Dam Worksite was considered a "hot battlefield", which meant that there was a strict timetable and deadlines to be respected, which required working at night;[2092]

ii. an item in the *Revolutionary Flag*, stating that in some places the problem of meals and drink had not yet been achieved according to the ration and that there must be a resolution to the shortages;[2093]

iii. An article titled "Commentary on Completing Dry Season Irrigation Work" in the Foreign Broadcast Information Service collection dated 9 May 1977,[2094] which states, *inter alia*, that:

> Our cooperative peasants' key task in the current dry season is to build more waterworks than in 1976. Fully grasping the significance of this new orientation, our fraternal cooperative peasants throughout the country have become deeply involved in building irrigation projects day and night in a most vigorous, seething and active manner.[2095]

It also refers to "the great sacrifices filled with lofty revolutionary heroism made by our cooperative peasants".[2096]

The arguments advanced by KHIEU Samphân concerning the timing of the FBIS article are unclear. The Trial Chamber found that construction of the Dam began in late 1976 or early 1977 and continued until the beginning of 1978.[2097] This article demonstrates in very general terms that in May 1977 when the article was dated, the Party Centre was aware of "great sacrifices" and that people were "working day and night" at worksites such as the 1st January Dam.[2098]

734. The Supreme Court Chamber notes that the Trial Chamber's findings on *mens rea* are not supported by the above evidence alone. Although not cited by the Trial Chamber in its legal findings on *mens rea*, the Supreme Court Chamber recalls that the Trial Chamber also

[2092] Trial Judgment (E465), para. 1671, citing, *inter alia*, para. 1504, referring to 1st January Dam Worksite as a "hot battlefield" and also referring to witnesses cited in Section 11.2.11.3: Experience of workers at the 1st January Dam.
[2093] Trial Judgment (E465), para. 1671, citing, *inter alia*, para. 1639, referring to Revolutionary Flag, September-October 1977, E3/170, ERN (EN) 00182560.
[2094] Trial Judgment (E465), para. 1671, citing, *inter alia*, para. 1639, referring to *Commentary on Completing Dry Season Irrigation Work* (in FBIS collection), 9 May 1977, E3/287, ERN (EN) 00168139-00168140.
[2095] *Commentary on Completing Dry Season Irrigation Work* (in FBIS collection), 9 May 1977, E3/287, ERN (EN) 00168139.
[2096] *Commentary on Completing Dry Season Irrigation Work* (in FBIS collection), 9 May 1977, E3/287, ERN (EN) 00168139-00168140.
[2097] Trial Judgment (E465), para. 1447.
[2098] *Commentary on Completing Dry Season Irrigation Work* (in FBIS collection), 9 May 1977, E3/287, ERN (EN) 00168139-00168140.

considered the Written Record of Interview of KE Pich Vannak, who stated to Office of the Co Investigating Judges investigators that he informed his father KE Pauk that people were dying because of a lack of medicine,[2099] and it made the finding that "[d]ue to the close personal connection between KE Pich Vannak and KE Pauk, and due to his personal supervision of the worksite, […] KE Pauk was also aware of the lack of medicine at the 1st January Dam Worksite."[2100] Indeed, the Trial Chamber also devoted a section of the Judgment to "Knowledge of KE Pauk and the Upper Echelon of Living and Working Conditions at the 1st January Dam".[2101] This section refers to communications from KE Pauk to the Upper Echelon on the lack of food and medicine and the Trial Chamber inferred that "KE Pauk also informed the Party Centre about the specific difficulties encountered on the 1st January Dam Worksite."[2102] It is unclear why the Trial Chamber did not refer to this section of the Judgment in its legal findings on *mens rea*, but this Chamber considers that it is relevant and supports the Trial Chamber's findings, which do not appear to be findings no reasonable trier of fact could reach based on the evidence. KHIEU Samphân's arguments concerning the crime against humanity of murder at the 1st January Dam Worksite are therefore dismissed.

d. Kampong Chhnang Airfield Construction Site

735. The Trial Chamber found that "conditions were imposed which resulted in the death of many people, including by placing people in unsafe working conditions and forcing them to work extended hours without sufficient food."[2103] The Trial Chamber found that the *actus reus* of murder had been established with respect to deaths caused by the living and working conditions, based on "the imposition on the workers of conditions that caused their death and by the absence of appropriate measures to change or alleviate such conditions."[2104] It found that the *mens rea* of *dolus eventualis* was satisfied due to the maintenance of the conditions for an extended period of time, including after their negative effects on the workers became apparent, which shows that the worksite authorities willingly imposed the conditions with the knowledge that they would likely lead to death or in the acceptance of the possibility of this fatal consequence.[2105]

[2099] Trial Judgment (E465), para. 1624.
[2100] Trial Judgment (E465), para. 1631.
[2101] Trial Judgment (E465), section 11.2.20.
[2102] Trial Judgment (E465), para. 1633.
[2103] Trial Judgment (E465), para. 1800.
[2104] Trial Judgment (E465), para. 1804.
[2105] Trial Judgment (E465), para. 1805.

736. KHIEU Samphân submits that the Trial Chamber erred in its assessment of the *mens rea* because it should have started from the perspective of the perpetrators and "[t]he causal connection between the measures willingly implemented by the authorities to rehabilitate the country and factors arising beyond their control is inexpressible."[2106]

737. The Co-Prosecutors respond that worksite authorities were aware of the conditions at Kampong Chhnang Airfield throughout its construction, but were unwilling to adapt the conditions and were indifferent to the fate of the workers, thus satisfying the *mens rea*.[2107] They point out that the Trial Chamber found that deaths could have been avoided if the authorities had adapted the work schedule or improved the safety and living conditions but they deliberately did not do so.[2108] The Co-Prosecutors aver that KHIEU Samphân failed to identify any external factors that would render the causal link between the conditions and the deaths invalid.[2109]

738. The Supreme Court Chamber concludes that KHIEU Samphân's argument concerning whether there was a causal link between the actions of the perpetrators and the deaths of the victims, and whether there could have been factors beyond their control, is unsupported by evidence and merely demonstrates disagreement with the Trial Chamber's findings. It is insufficient to demonstrate that the Trial Chamber reached a finding no reasonable trier of fact could have reached. Thus, this allegation is dismissed.

e. Phnom Kraol Security Centre

739. The Trial Chamber found that two murders were established at Phnom Kraol Security Centre. The Trial Chamber found, on the basis of the Written Records of Interview of UONG Dos and SOK El, both former detainees at Phnom Kraol Prison who are now deceased,[2110] as well as their Civil Party Applications filed after being interviewed by the Co-Investigating

[2106] KHIEU Samphân's Appeal Brief (F54), para. 823. KHIEU Samphân also raises an argument related to the Trial Chamber's *saisine* over workplace accidents. See KHIEU Samphân's Appeal Brief (F54), para. 818. This argument has been addressed along with his other arguments concerning the scope of the investigation and trial. See *supra* Section VI.A.2.b.
[2107] Co-Prosecutors' Response (F54/1), para. 840.
[2108] Co-Prosecutors' Response (F54/1), para. 840.
[2109] Co-Prosecutors' Response (F54/1), para. 840.
[2110] UONG Dos and SOK El were on the Co-Prosecutors' proposed witness list to testify in Case 002/02, but in May 2014, the Co-Prosecutors were informed that UONG Dos had passed away and in February 2016 they were informed that SOK El had passed as well. Co-Prosecutors' Rule 87(4) Motion Regarding Proposed Trial Witnesses for Case 002/02, 28 July 2014, E307/3/2, para. 62; Co-Prosecutors' Request to Call Additional Witnesses During the Phnom Kraol Security Centre Trial Segment, 16 March 2016, E390, para. 2.

Judges, that the inmate Heus was killed by Phnom Kraol Prison guards.[2111] The Trial Chamber found that their respective Civil Party Applications cross-corroborated "[i]mportant aspects of the incident, including the victim's identity, the nature of the attack against him, the manner of his death and subsequent treatment of his corpse".[2112] It was satisfied that UONG Dos and SOK El witnessed the same attack and found their accounts to be consistent and credible.[2113] Taking into account the brutal nature of the attack preceding Heus's death as well as the infliction of grievous bodily harm by stabbing the victim with a bayonet, the Trial Chamber found that the prison guards intended to kill Heus.[2114] It was thus satisfied that the *actus reus* and *mens rea* of murder were established and accordingly found that the crime against humanity of murder was established with regard to Heus's death and that this killing had no lawful basis.[2115]

740. Concerning the second murder, the Trial Chamber found, on the basis of the Written Record of Interview of SOK El, that the detainee Touch died as a result of the substandard conditions to which he was exposed while imprisoned at Phnom Kraol Prison.[2116] It was satisfied that "the voluntary subjection of prisoners to abject conditions, or indeed the failure to remedy deleterious conditions of detention or hygiene, constitutes manifest indifference to human life by Security Centre personnel, thereby fulfilling the element of *dolus eventualis*."[2117] It was thus satisfied that the *actus reus* and *mens rea* of murder were established and accordingly found that the crime against humanity of murder was established with regard to Touch's death.[2118]

741. KHIEU Samphân submits that the Trial Chamber erred by finding that Heus's murder was established on the basis of two Written Records of Interview, despite the fact that he was unable to test this evidence in court.[2119] He considers that because the Written Records of Interview were prepared by the Co-Investigating Judges at the same time and place with one interview occurring at 10:10 a.m. and the other at 10:15 a.m., there is the possibility of collusion

[2111] Trial Judgment (E465), para. 3115, referring, *inter alia*, to para. 3100, citing Written Record of Interview of UONG Dos, 29 October 2008, E3/7703, pp. 3-4; Written Record of Interview of SOK El, 29 October 2008, E3/7702, p. 3; Civil Party Application of UONG Dos, 19 May 2009, E3/6260, pp. 3-4; Civil Party Application of SOK El, 22 January 2010, E3/6314, p. 3.
[2112] Trial Judgment (E465), para. 3100.
[2113] Trial Judgment (E465), paras 3100, 3115.
[2114] Trial Judgment (E465), para. 3115.
[2115] Trial Judgment (E465), paras 3115, 3117.
[2116] Trial Judgment (E465), para. 3116, referring to para. 3101, citing Written Record of Interview of SOK El, 29 October 2008, E3/7702, pp. 2-3.
[2117] Trial Judgment (E465), para. 3116.
[2118] Trial Judgment (E465), paras 3116-3117.
[2119] KHIEU Samphân's Appeal Brief (F54), para. 865.

or at least contamination between the two accounts.[2120] He further submits that the Trial Chamber breached the principles of adversarial proceedings and equality of arms by establishing murder on the basis of evidence he could not challenge, citing ECtHR jurisprudence demonstrating that the right to a fair trial is violated when a conviction is based on evidence that was not subject to adversarial argument and to Article 427 of the French Code of Criminal Procedure, which states that "[t]he judge may only base his decision on evidence which was submitted in the course of the hearing and adversarially discussed before him."[2121]

742. KHIEU Samphân next submits that the Trial Chamber erred in finding that Touch was murdered with *dolus eventualis* based on the Written Record of Interview of a deceased civil party.[2122] He argues that the Trial Chamber had clarified in the Case 002/01 Trial Judgment that it may use statements of deceased persons but would not base any conviction decisively on them, and that the Supreme Court Chamber validated this approach.[2123] He submits that the Trial Chamber failed to provide any reasons for deviating from this approach, instead simply stating that SOK El was credible, despite the fact that her 2008 statement was not corroborated by any other evidence.[2124]

743. Finally, KHIEU Samphân submits that in finding that these two murders had been established, the Trial Chamber appears to have deliberately disregarded exculpatory evidence, in particular the evidence of former detainee CHAN Touch, who indicated that to his knowledge those detained with him were not sent to be killed, and former detainee NET Savat, who said that he had not witnessed any executions.[2125]

744. The Co-Prosecutors respond that KHIEU Samphân has not demonstrated that the factual finding of Heus's murder was based on evidence no reasonable trier of fact could accept.[2126] They argue that the written records of interview mutually corroborate the victim's identity, nature of the attack against him, the manner of his death, and the treatment of his corpse.[2127] They argue that the Trial Chamber is presumed to have properly evaluated the evidence and his argument about collusion is merely conjecture.[2128] Concerning the arguments

[2120] KHIEU Samphân's Appeal Brief (F54), para. 866.
[2121] KHIEU Samphân's Appeal Brief (F54), para. 868.
[2122] KHIEU Samphân's Appeal Brief (F54), paras 870-875.
[2123] KHIEU Samphân's Appeal Brief (F54), para. 871.
[2124] KHIEU Samphân's Appeal Brief (F54), para. 872.
[2125] KHIEU Samphân's Appeal Brief (F54), paras 876-878.
[2126] Co-Prosecutors' Response (F54/1), para. 862.
[2127] Co-Prosecutors' Response (F54/1), para. 863.
[2128] Co-Prosecutors' Response (F54/1), para. 864.

related to Touch, the Co-Prosecutors state that there is no legal principle that direct corroboration of a death is required to prove murder and the circumstantial evidence of extremely poor conditions in the prison corroborated SOK El's account.[2129] They argue that there is no absolute rule of evidence that a written statement not subject to defence examination cannot serve as the basis for conviction.[2130] They further argue that the Trial Chamber's failure to explicitly refer to exculpatory evidence does not invalidate its findings and KHIEU Samphân has not identified evidence that would cast doubt on the findings regarding the two murders.[2131] They submit that any error regarding murder at Phnom Kraol would not invalidate the Judgment or determination of the sentence since KHIEU Samphân was found guilty of extermination at S-21, Kraing Ta Chan, and Au Kanseng, and murder at the Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam Worksite, and Kampong Chhnang Airfield Construction Site.[2132]

745. The Lead Co-Lawyers contend that although UONG Dos and SOK El both died before the Trial Chamber could hear them, the Trial Chamber relied on both their Written Records of Interview and their Victim Information Forms, finding them consistent and credible.[2133] They agree with the Co-Prosecutors, and limit their submissions to KHIEU Samphân's argument concerning the possible collusion of UONG Dos and SOK El or to the contamination of their Written Records of Interview.[2134] They state that it was usual for the Co-Investigating Judges to conduct multiple interviews during a single trip and that the two were interviewed largely at the same time by different investigators, with no evidence that the interviews took place within audible range of each other.[2135] They note that although the accounts given by UONG Dos and SOK El corroborate each other on material facts, they focused on different details, showing no unusual similarities that might give rise to a concern about contamination.[2136]

746. The Supreme Court Chamber will not entertain the speculative allusions by KHIEU Samphân to collusion between UONG Dos and SOK El based solely on the fact that they were interviewed at the same time frame in the same village. The Co-Investigating Judges are presumed to have conducted their investigation appropriately, and the Trial Chamber is

[2129] Co-Prosecutors' Response (F54/1), para. 868.
[2130] Co-Prosecutors' Response (F54/1), para. 869.
[2131] Co-Prosecutors' Response (F54/1), paras 865, 871-872.
[2132] Co-Prosecutors' Response (F54/1), para. 872.
[2133] Lead Co-Lawyers' Response (F54/2), para. 752.
[2134] Lead Co-Lawyers' Response (F54/2), paras 753-754.
[2135] Lead Co-Lawyers' Response (F54/2), para. 755.
[2136] Lead Co-Lawyers' Response (F54/2), para. 756.

entrusted with evaluating the evidence; if it was concerned that the accounts were tainted, it would have stated so. Mere speculation about possible collusion or tainted witness accounts is manifestly insufficient to call this evidence into question.

747. The Trial Chamber may admit any evidence that meets the requirements of Rule 87(3), namely, that is not irrelevant or repetitious; impossible to obtain within a reasonable time; unsuitable to prove the facts it purports to prove; not allowed under the law; or intended to prolong the proceedings or is frivolous. Written Records of Interviews and Civil Party Applications are therefore admissible, for example, they may be considered put before the Chamber regardless of whether the witnesses or civil parties testify or are deceased or otherwise unavailable.

748. A different issue is how much weight should be accorded to evidence when the witness is deceased or otherwise unavailable, given that the accused is prevented from exercising his right to confront the witness. The Supreme Court Chamber has previously explained that "in accordance with persuasive jurisprudence of the ECtHR, a conviction may not be based solely or to a decisive degree on evidence by a witness whom the defence has not had an opportunity to examine, unless there are sufficient counterbalancing factors in place, so that an accused is given an effective opportunity to challenge the evidence against him."[2137] The ICTY Appeals Chamber, citing ECtHR jurisprudence, has taken the same position:

> the jurisprudence of the ECtHR is valuable, as it has authoritatively stated the principle that "all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence." Unacceptable infringements of the rights of the defence, in this sense, occur when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial.[2138]

[2137] Case 002/01 Appeal Judgment (F36), para. 296.
[2138] *Prosecutor v. Prlić et al*., Appeals Chamber (ICTY), IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para. 53, quoting *A.M. v. Italy*, ECtHR, Application no. 37019/97, Judgment, 14 March 2000, para. 25, referring to *Saïdi v. France*, ECtHR, Application no. 14647/89, Judgment, 20 September 1993, paras 43-44; *Unterpertinger v. Austria*, ECtHR, Application no. 9120/80, Judgment, 24 November 1986, paras 31-33. See also *Martić* Appeal Decision on Evidence (ICTY), para. 20 ("The Appeals Chamber observes in any event that the two principles that the Trial Chamber derived from the jurisprudence of the ECHR, namely that (1) a complete absence of, or deficiency in, the cross-examination of a witness will not automatically lead to exclusion of the evidence, and (2) evidence which has not been cross-examined and goes to the acts and conduct of the Accused or is pivotal to the Prosecution case will require corroboration if used to establish a conviction, are consistent with the jurisprudence of the International Tribunal as well as that of national jurisdictions.").

749. While there is an explicit rule at the ICTY – Rule 92 *quater* – stating that the written statements or transcripts of a person who has subsequently died, or who can no longer be traced with reasonable diligence, or who is by reason of bodily or mental condition unable to testify orally may be admitted, such evidence may not form the basis of a conviction without corroboration.[2139]

750. In Case 002/01, the Trial Chamber stated that it would not base any conviction decisively upon the statement of a deceased witness if the Accused were denied the opportunity to confront the witness.[2140] However, in this case, the Trial Chamber relied on statements of deceased witnesses to base its findings on the murders of Heus and Touch. It did not explain why it was departing from its Case 002/01 position.

751. While the statements and Civil Party Applications of UONG Dos and SOK El corroborated each other concerning the death of Heus, the conviction was still based solely on evidence KHIEU Samphân was unable to test in court. While the statement of SOK El concerning the death of Touch was corroborated in general terms by other evidence demonstrating the poor conditions of detention, it was the sole piece of evidence relied on to prove Touch's death based on the detention conditions. The Supreme Court Chamber finds the Trial Chamber's findings concerning the deaths of Heus and Touch to be in error, given that they were based decisively on the written statements from witnesses KHIEU Samphân was unable to confront. Accordingly, it overturns the Trial Chamber's findings concerning the crime against humanity of murder with regard to the deaths of Heus and Touch.

B. EXTERMINATION AS A CRIME AGAINST HUMANITY

1. Extermination of the Cham

752. The Trial Chamber found that murder as a crime against humanity was established in relation to intentional killings of Cham at the Wat Au Trakuon Security Centre in 1977 and the Trea Village Security Centre in 1978.[2141] It stated that although it was unable to establish a definite number of victims, it was satisfied that "a great number of Cham civilians were taken

[2139] *Prosecutor v. Karadžić*, Trial Chamber (ICTY), IT-95-5/18-T, Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 *Quater*, 30 November 2009, para. 8 ("It is well-established that evidence in a case admitted pursuant to Rule 92 quater, and consequently not subject to cross-examination in that particular case, cannot form the basis of the conviction of an accused without corroboration. However, even if certain evidence cannot, by itself, form the basis of a conviction, it can still be admitted into evidence under Rule 92 quater if it fulfils the requirements of that Rule.").
[2140] Case 002/01 Trial Judgment (E313), para. 31.
[2141] Trial Judgment (E465), para. 3308.

to both security centres."[2142] It found that these murders satisfy the requirement of killings on a massive scale and "formed part of the same murder operation."[2143] It was therefore satisfied that the *actus reus* of the crime against humanity of extermination was established.[2144] In relation to the requisite *mens rea*, the Trial Chamber found that evidence demonstrated that the killings of Cham at these two security centres were organised and deliberate and were pursuant to a CPK policy targeting the Cham. CPK meetings and orders to identify and arrest enemies, including the Cham, showed that the perpetrators acted with intent to kill Cham on a massive scale.[2145] It therefore found that the crime against humanity of extermination was established in relation to the killings that occurred at Trea Village and Wat Au Trakuon.[2146]

753. Because KHIEU Samphân's challenges relating to the crime against humanity of murder at Trea Village[2147] and Wat Au Trakuon[2148] address the sufficiency of evidence that killings occurred at all, and because the Trial Chamber entered a conviction only for extermination,[2149] the arguments concerning murder will be addressed in this section on extermination.

a. Killing of Cham at Trea Village

754. Concerning the detention and killing of Cham at the Trea Village Security Centre in 1978, the Trial Chamber relied on the testimonies of Witness IT Sen, Civil Party NO Sates, and Witness MATH Sor.[2150] It described the key features of that evidence and found that IT Sen was detained at Trea Village Security Centre and that he escaped and while hiding in bushes, saw Cham who were blindfolded being led to the river, attached to a rope, put in boats, and taken out to the middle of the river where they were thrown off and drowned.[2151] It found that NO Sates was sent to Trea Village with approximately 40 other women and detained in a house there with several hundreds of other women.[2152] They were asked to identify themselves as Khmer or Cham and only the 30 who said they were Khmer (including NO Sates) remained,

[2142] Trial Judgment (E465), para. 3311.
[2143] Trial Judgment (E465), para. 3312.
[2144] Trial Judgment (E465), para. 3312.
[2145] Trial Judgment (E465), para. 3313.
[2146] Trial Judgment (E465), para. 3313.
[2147] KHIEU Samphân's Appeal Brief (F54), paras 894-898.
[2148] KHIEU Samphân's Appeal Brief (F54), paras 899-910.
[2149] Trial Judgment (E465), para. 4337.
[2150] Trial Judgment (E465), para. 3276.
[2151] Trial Judgment (E465), para. 3276.
[2152] Trial Judgment (E465), para. 3278.

while the others were escorted away by a soldier and never returned.[2153] It found that NO Sates later witnessed dead bodies floating in bags in the river, including a Cham woman she recognised.[2154]

755. The Trial Chamber found that NO Sates' testimony was corroborated by MATH Sor, who it found was also detained in Trea Village with a group of other women, who were all asked if they were Khmer or Cham. It found that MATH Sor saw those who admitted they were Cham taken to a pit, hit, and thrown into it[2155] and that she also testified that her family members were killed by the Khmer Rouge.[2156] The Trial Chamber explained why it disagreed with challenges to the credibility of these testimonies and noted that it placed more weight on evidence corroborated by NO Sates and MATH Sor while carefully scrutinising the evidence that came from only one of them. It found all three to be credible and their evidence to be generally reliable.[2157]

756. KHIEU Samphân argues that there was insufficient evidence for the Trial Chamber to find that killings occurred at Trea Village and this was done in error.[2158] He disputes the reliability of the witness testimonies, which, in his view, do not corroborate each other concerning deaths of Cham,[2159] and argues that IT Sen's testimony concerning where he was when he saw Cham being drowned was misconstrued.[2160] Further, he submits that even if NO Sates' testimony were credible, it would only show that 10 Cham women were taken away[2161] and that MATH Sor's testimony concerning executions is uncorroborated.[2162] Alternatively, he submits that even if these testimonies were credible and sufficient, the Trial Chamber unreasonably extrapolated that "in 1978, a large number of Cham people from Kroch Chhmar district were arrested and taken to Trea Village Security Centre, where they were arbitrarily detained […] and those who were deemed to be Cham were executed".[2163]

[2153] Trial Judgment (E465), para. 3278.
[2154] Trial Judgment (E465), para. 3278.
[2155] Trial Judgment (E465), para. 3279.
[2156] Trial Judgment (E465), para. 3279.
[2157] Trial Judgment (E465), para. 3280.
[2158] KHIEU Samphân's Appeal Brief (F54), paras 894-898.
[2159] KHIEU Samphân's Appeal Brief (F54), paras 894-897.
[2160] KHIEU Samphân's Appeal Brief (F54), para. 895.
[2161] KHIEU Samphân's Appeal Brief (F54), para. 896.
[2162] KHIEU Samphân's Appeal Brief (F54), para. 897.
[2163] KHIEU Samphân's Appeal Brief (F54), para. 898, quoting Trial Judgment (E465), para. 3281. This same statement is repeated in the Trial Judgment (E465), para. 3306.

757. The Co-Prosecutors respond that KHIEU Samphân has failed to demonstrate that the Trial Chamber made unreasonable findings or extrapolations;[2164] the Trial Chamber gave a reasoned explanation as to its assessment of the witness and civil carties, dismissing similar arguments raised concerning their credibility and reliability at trial;[2165] IT Sen stated that he could see what happened very clearly;[2166] and in any event, the Trial Chamber's findings were not extrapolated from one incident.[2167]

758. The Lead Co-Lawyers respond by pointing out the consistencies between the testimonies of IT Sen, NO Sates, and MATH Sor.[2168] They respond that the Trial Chamber appropriately considered KHIEU Samphân's submissions regarding discrepancies in the evidence, but was not convinced by them.[2169] They further respond that KHIEU Samphân is incorrect concerning the number of Cham women NO Sates said were taken away; she estimated that she was detained with 300 women and that only around 30 remained after claiming to be Khmer while the others were taken away.[2170] They respond that KHIEU Samphân is therefore incorrect that it was unreasonable extrapolation to find that a large number of Cham people were executed at Trea Village; the Trial Chamber was entitled to reasonably conclude that those taken away were executed as NO Sates testified that they were never seen again, and later saw bodies floating in the river.[2171]

759. This Chamber considers that the Trial Chamber is best placed to evaluate the credibility and reliability of these witnesses and the civil party, as it had benefit of observing them in court as their evidence was tested.[2172] An assessment of evidence is especially suited to judges who hear the testimony, observe the cross-examination, read the supportive documents and the rebuttal evidence, if any, and, most importantly, make their overall evaluation in the context of other evidence heard during the trial. Further, this Chamber considers that while the weight of a particular witness's recollections may be strengthened and enhanced by credible corroboration, there is no rule of law which requires such corroboration. This Chamber recalls that the Trial Chamber relied on the testimony of IT Sen, who testified that he directly

[2164] Co-Prosecutors' Response (F54/1), para. 498.
[2165] Co-Prosecutors' Response (F54/1), para. 499.
[2166] Co-Prosecutors' Response (F54/1), para. 500.
[2167] Co-Prosecutors' Response (F54/1), para. 501.
[2168] Lead Co-Lawyers' Response (F54/2), para. 762.
[2169] Lead Co-Lawyers' Response (F54/2), para. 763.
[2170] Lead Co-Lawyers' Response (F54/2), para. 763.
[2171] Lead Co-Lawyers' Response (F54/2), paras 763-764.
[2172] See *supra* Section II.C.

witnessed Cham men being drowned, the testimony of MATH Sor, who testified that she saw Cham being killed at a pit, and the testimony of NO Sates, who did not witness any killings but corroborates MATH Sor's testimony that women who stated they were Cham were taken away. Based on the totality of this evidence, it was reasonable for the Trial Chamber to find that the Cham were executed after being arrested and taken to Trea Village Security Centre.

760. It appears to this Chamber that the Trial Chamber was entitled to find that "a large number of Cham" were arrested and taken to Trea Village Security Centre. NO Sates's evidence, as noted above, was that there were around 300 women detained there and that afterwards only 30 remained,[2173] which this Chamber considers meant the 30 women who claimed they were Khmer, including NO Sates. Whether the killings that occurred at Trea Village could amount to extermination will be discussed below. The argument that there was insufficient, unreliable, and uncorroborated evidence to find that murders and extermination were committed at Trea Village is thus dismissed.

b. Killing of Cham at Wat Au Trakuon

761. Evidence was received by the Trial Chamber from Cham villagers and members of the security forces operating at Wat Au Trakuon Security Centre concerning their own knowledge of arrests and killing of Cham on a massive scale in 1977.[2174] Based on this, the Trial Chamber found that "a large number of people perceived as enemies, including Cham people from various villages of Kang Meas district, Sector 41, were systematically arrested and brought to Wat Au Trakuon in 1977 where they were executed *en masse*."[2175]

762. KHIEU Samphân submits that the Trial Chamber erred in fact in finding that a large number of people including a majority of Cham were arrested and brought to Wat Au Trakuon where they were executed[2176] as this was an inference drawn from indirect evidence of low probative value.[2177] He argues that the Trial Chamber heard from only four direct witnesses, which was insufficient to allow it to find beyond reasonable doubt that people were arrested because they were Cham.[2178] He submits that the Trial Chamber erred in law, basing itself on

[2173] Trial Judgment (E465), para. 3278.
[2174] Trial Judgment (E465), para. 3291.
[2175] Trial Judgment (E465), para. 3304.
[2176] KHIEU Samphân's Appeal Brief (F54), para. 899.
[2177] KHIEU Samphân's Appeal Brief (F54), para. 899.
[2178] KHIEU Samphân's Appeal Brief (F54), para. 900.

hearsay, in finding hundreds of Cham were arrested.[2179] He argues that the Trial Chamber should not have relied on Written Records of Interview.[2180]

763. KHIEU Samphân further submits that the Trial Chamber erred in finding that a large number of people including a majority of Cham were executed at Wat Au Trakuon in 1977;[2181] that the identification of the Cham by two witnesses "was not sound";[2182] that the Trial Chamber's finding that killings at Wat Au Trakuon were corroborated by members of security forces is incorrect;[2183] that it was incorrect and hearsay that the majority of the people brought to Wat Au Trakuon were Cham as witnesses said both Khmer and Cham were arrested and killed there;[2184] and that Written Records of Interview on the massacre of Cham at Wat Au Trakuon are of low probative value.[2185]

764. The Co-Prosecutors respond that KHIEU Samphân objects to the findings but fails to demonstrate that the finding that Cham were rounded up in various villages in Kang Meas district and taken to Wat Au Trakuon, and that a large number of people, including a majority of Cham, were executed at Wat Au Trakuon in 1977 was unreasonable.[2186] They respond that whether people were arrested solely because they were Cham does not mean that the Trial Chamber "erred in law" by finding that hundreds of Cham in Peam Chi Kang commune were arrested by members of the Long Sword Group. Rather, KHIEU Samphân is merely asserting that the evidence is of low probative value and proposing an alternative reading of the evidence, which fails the standard of appellate review.[2187] They further aver that there is no error in the Trial Chamber's finding that Cham were in the majority of those executed at Wat Au Trakuon, and the Trial Chamber did not, but could, rely on hearsay evidence to make this finding.[2188]

765. The Lead Co-Lawyers respond that KHIEU Samphân's arguments are unclear as he appears to accept that killings took place, but disputes the ethnicity of victims.[2189] They respond

[2179] KHIEU Samphân's Appeal Brief (F54), para. 901.
[2180] KHIEU Samphân's Appeal Brief (F54), para. 901.
[2181] KHIEU Samphân's Appeal Brief (F54), para. 906.
[2182] KHIEU Samphân's Appeal Brief (F54), para. 906.
[2183] KHIEU Samphân's Appeal Brief (F54), para. 907.
[2184] KHIEU Samphân's Appeal Brief (F54), para. 908.
[2185] KHIEU Samphân's Appeal Brief (F54), para. 909.
[2186] Co-Prosecutors' Response (F54/1), para. 504.
[2187] Co-Prosecutors' Response (F54/1), para. 506.
[2188] Co-Prosecutors' Response (F54/1), para. 507.
[2189] Lead Co-Lawyers' Response (F54/2), para. 295.

that KHIEU Samphân distorted the testimony of Civil Party HIM Man, on which the Trial Chamber relied on in part to make its finding.[2190]

766. This Chamber notes that the Trial Chamber acknowledged that the witnesses and civil parties who testified before it did not directly witness killings at Wat Au Trakuon Security Centre, but made its finding that killings occurred based on multiple hearsay accounts of the killings in addition to direct evidence of:

> (i) Cham people, being systematically rounded up in various villages of Kang Meas district and taken to Wat Au Trakuon by militiamen, including members of the Long Sword Group; (ii) Cham people being tied up and held at the pagoda before being taken away *en masse*; and (iii) people hearing screams coming from the pits and calls for help, and music from loudspeakers being played at night over the screams. All witnesses and Civil Parties consistently stated that the Cham taken to the pagoda never returned, and pits containing human remains were uncovered around the pagoda after January 1979.[2191]

767. The Trial Chamber's findings concerning killings at Wat Au Trakuon are not unreasonable. A Trial Chamber may, with caution, rely on hearsay evidence to establish an element of a crime.[2192] There was general consistency in all the evidence considered to support the Trial Chamber's findings. Former members of the Long Sword Group, a group created to conduct large arrests and bring those arrested to Wat Au Trakuon,[2193] testified that they were ordered to arrest all Cham people, and, while denying their roles in the killing of Cham at Wat Au Trakuon, did not deny that killings occurred.[2194] While the content of seven Written Records of Interview that "corroborate the mass killing of Cham at Wat Au Trakuon"[2195] was not tested in court, their common features provide some probative value when they corroborate in-court testimony. KHIEU Samphân has not demonstrated that the Trial Chamber erred in relying on them to support its findings.

768. SEN Srun, a palm tree climber who lived close to Wat Au Trakuon,[2196] testified that he assisted in the arrest of Cham on a certain day and that he estimated 400-500 Cham were arrested; 200-300 from the village and the remainder from worksites.[2197] KHIEU Samphân argues that SEN Srun did not explain how he had arrived at this figure,[2198] but SEN Srun

[2190] Lead Co-Lawyers' Response (F54/2), paras 741-747.
[2191] Trial Judgment (E465), para. 3302.
[2192] Case 002/01 Appeal Judgment (F36), para. 302.
[2193] Trial Judgment (E465), para. 3284.
[2194] Trial Judgment (E465), paras 3291, 3297-3299.
[2195] Trial Judgment (E465), para. 3300, and fn. 11215.
[2196] Trial Judgment (E465), para. 3286.
[2197] T. 14 September 2015 (SEN Srun), E1/346.1, pp. 33-37.
[2198] KHIEU Samphân's Appeal Brief (F54), para. 902.

explained that the figure was his personal estimate.[2199] Although he did not witness this group being killed, he explained that after the group was taken to Wat Au Trakuon, music was played over loudspeakers for an unusually long time that night,[2200] he never saw those people again,[2201] and his good friend Moeun, who had participated in the killings, told him that the Cham were killed that night.[2202] He also stated that after 1979, he saw skulls and Cham clothing in pits next to Wat Au Trakuon that were being excavated.[2203] He was not questioned about how he knew the arrested people were Cham, but he was asked whether he knew any of the Cham who were arrested, and he named some that he knew.[2204] Witness MUY Vanny similarly stated that he did not witness killings, but noticed that the main temple was full of people who were later gone and he was told that they had been killed.[2205]

769. HIM Man testifies to hiding in the dark behind bushes 100 metres from pits outside Wat Au Trakuon where Cham were killed. He stated that, while he could not actually see the killings, he could hear the Cham screaming to Allah for help as they were killed.[2206] Witness SAMRIT Muy similarly stated that he heard screams for help while music was played over loudspeakers at Wat Au Trakuon.[2207] HIM Man clearly refers to the arrest of Cham. The fact that he was a Cham himself and was spared because he was not "associated with anyone" and had "not done anything" does not indicate that arrests were indiscriminate. KHIEU Samphân's claim that HIM Man's testimony indicates that arrests were indiscriminate[2208] is simply not tenable.

770. SAY Doeun, a member of the Long Sword Group, stated that he arrested Cham in "late 1978". Apart from this date, the Trial Chamber found his testimony in relation to treatment of the Cham to be consistent with that of other witnesses. SAY Doeun often claimed during his testimony that his memory was poor,[2209] yet, consistent with other witnesses, he mentioned the

[2199] T. 14 September 2015 (SEN Srun), E1/346.1, p. 35.
[2200] T. 14 September 2015 (SEN Srun), E1/346.1, pp. 42-43.
[2201] T. 14 September 2015 (SEN Srun), E1/346.1, pp. 42-43.
[2202] T. 14 September 2015 (SEN Srun), E1/346.1, pp. 42-43.
[2203] T. 14 September 2015 (SEN Srun), E1/346.1, pp. 45-46.
[2204] T. 14 September 2015 (MUY Vanny), E1/346.1, pp. 84-85.
[2205] T. 11 January 2016 (MUY Vanny), E1/373.1, pp. 52, 58, 65.
[2206] T. 17 September 2015 (HIM Man), E1/349.1, pp. 47-48.
[2207] T. 15 September 2015 (HIM Man), E1/347.1, pp. 33-35.
[2208] KHIEU Samphân's Appeal Brief (F54), para. 903.
[2209] T. 12 January 2016 (SAY Doeun), E1/374.1, pp. 33, 39, 48

arrest of Cham from multiple villages taking place on a single day, and testified that the Cham were taken to Wat Au Trakuon and that he heard from security guards that they were killed.[2210]

771. SENG Kuy, a rice farmer, witnessed all the Cham in his village being arrested on one night.[2211] He stated that he was ordered to take them by oxcart to Wat Au Trakuon and he did so.[2212] He stated that he never saw those Cham again.[2213] He did not know why they were arrested but he knew that they were Cham from his own village. He stated that "the Cham people who were arrested were innocent Cham people. They did not do anything wrong, and they strived to work very hard."[2214] KHIEU Samphân's assertion that this testimony cannot be relied upon to show people were arrested because they were Cham[2215] is absolutely without merit and is rejected. It is of no relevance to the issue that Cham were targeted and killed at Wat Au Trakuon whether SENG Kuy knew the reason for their arrest.

772. These witnesses and the others relied on by the Trial Chamber support the Trial Chamber's finding that Cham were killed at Wat Au Trakuon. KHIEU Samphân has not demonstrated that the Trial Chamber was unreasonable to rely on their testimonies.

773. The argument raised by KHIEU Samphân that Khmer people as well as Cham were killed at Wat Au Trakuon[2216] is irrelevant to the issue of whether Cham were killed at Wat Au Trakuon. There is ample evidence that a large number of Cham were executed at Wat Au Trakuon and KHIEU Samphân's submission that this was wrong in fact is simply not supported by any evidence. This argument is therefore dismissed.

c. The Numeric Threshold for Extermination

774. The Trial Chamber stated that although it was unable to establish a definite number of victims, it was satisfied that "a great number of Cham civilians" were taken to Trea Village and Wat Au Trakuon security centres and that the killings occurred on a massive scale and formed part of the same operation.[2217]

[2210] T. 12 January 2016 (SAY Doeun), E1/374.1, pp. 83-88.
[2211] T. 9 September 2015 (SENG Kuy), E1/344.1, p. 81.
[2212] T. 9 September 2015 (SENG Kuy), E1/344.1, pp. 86-87.
[2213] T. 9 September 2015 (SENG Kuy), E1/344.1, p. 89.
[2214] T. 9 September 2015 (SENG Kuy), E1/344.1, pp. 92-93.
[2215] KHIEU Samphân's Appeal Brief (F54), para. 905.
[2216] KHIEU Samphân's Appeal Brief (F54), paras 906-908.
[2217] Trial Judgment (E465), paras 3311-3312.

775. KHIEU Samphân argues that the Trial Chamber finding on the number of victims was based on speculation and was imprecise.[2218]

776. The Co-Prosecutors respond that KHIEU Samphân failed to establish that the Trial Chamber erred, his argument being premised on the incorrect assertion that the Trial Chamber erred in finding executions had occurred at Trea Village and Wat Au Trakuon.[2219] They respond that the Trial Chamber did not speculate on the number of executions but instead explicitly found it was unable to establish a definite number and that the *actus reus* of extermination does not require a specific number of deaths.[2220]

777. While extermination has generally been defined as "killing on a large scale",[2221] there is no numeric threshold required for the crime against humanity of extermination.[2222] Extermination has been found on the basis of fewer than 60 killings.[2223] The Trial Chamber considered that the killings at Trea Village and at Wat Au Trakuon "formed part of the same murder operation."[2224] The *actus reus* of extermination may be established through an aggregation of separate incidents where they form part of the same operation.[2225]

778. Considering that the Trial Chamber found that the CPK targeted the Cham to be purged, this Chamber concludes that it is not unreasonable to find that the killings at Trea Village and Wat Au Trakuon formed part of the same operation where the numbers of victims could be aggregated when determining whether killing occurred on a massive scale for the *actus reus* of extermination. Although the Trial Chamber did not have the exact number of victims at Trea Village or Wat Au Trakuon, one witness referred to 400-500 Cham who were arrested and held at Wat Au Trakuon and testified that he was told by his friend, their executioner, that they were killed.[2226] The Supreme Court Chamber concludes that this number on its own would amount

[2218] KHIEU Samphân's Appeal Brief (F54), para. 911.
[2219] Co-Prosecutors' Response (F54/1), paras 510-511.
[2220] Co-Prosecutors' Response (F54/1), para. 511.
[2221] Case 002/01 Appeal Judgment (F36), paras 521, 525.
[2222] Case 002/01 Appeal Judgment (F36), para. 551.
[2223] Case 002/01 Appeal Judgment (F36), para. 551, referring to *Prosecutor v. Lukić and Lukić*, Appeals Chamber (ICTY), IT-98-32/1-A, Judgement, 4 December 2012 ("*Lukić & Lukić* Appeal Judgment (ICTY)"), para. 537.
[2224] Trial Judgment (E465), para. 3312.
[2225] *See Prosecutor v. Stanišić & Župljanin*, Appeals Chamber (ICTY), IT-08-91-A, Judgement, 30 June 2016 ("*Stanišić & Župljanin* Appeal Judgment (ICTY)"), para. 1022; *Prosecutor v. Tolimir*, Appeals Chamber (ICTY), IT-05-882-A, Judgement, 8 April 2015, para. 147; *Prosecutor v. Mladić*, Trial Chamber I (ICTY), IT-09-92-T, Judgment (Volume III of V), 22 November 2017, para. 3067.
[2226] T. 14 September 2015, E1/346.1, pp. 33-38, 42-43.

to killing on a large scale, even without aggregating the killing that occurred at Trea Village. This argument is dismissed.

d. Intention to Kill on a Large Scale

779. The Trial Chamber found that evidence demonstrates that the killings of Cham at Trea Village Security Centre and Wat Au Trakuon were organised and deliberate, pursuant to a general CPK policy targeting the Cham.[2227] In making this finding, the Trial Chamber made reference[2228] to its findings that: (1) the CPK, in an effort to establish an atheistic and homogenous society without class divisions, targeted the Cham as an ethnic and religious group throughout the DK period;[2229] (2) orders to purge the Cham in the East Zone came from the upper echelon, including KE Pauk (Central (old North) Zone Secretary),[2230] and following a meeting held in Kampong Thma with East Zone leaders where smashing enemies was discussed, Cham were forcibly transferred and disappeared;[2231] and (3) orders to purge the Cham in the Central (old North) Zone came from the upper echelon and were implemented through district secretaries who reported indirectly to KE Pauk. Further, following meetings held in 1977 discussing enemies, Cham were systematically arrested based on lists prepared beforehand.[2232]

780. KHIEU Samphân submits that the Trial Chamber erred in finding that there was intent to kill Cham on a large scale.[2233] He argues that there is lack of evidence that KE Pauk gave an order to destroy all Cham[2234] and of any order given at the zone level in the Central Zone.[2235] He submits that the Trial Chamber relied on the testimony of PRAK Yut, but other testimonies did not corroborate her testimony,[2236] and the testimony of SEN Srun that Cham were not mentioned at a meeting he attended at Wat Au Trakuon was "discarded" by the Trial Chamber.[2237] KHIEU Samphân also points out that VAN Mat stated that there was no mention

[2227] Trial Judgment (E465), para. 3313.
[2228] Trial Judgment (E465), fns 11229-11230, referring to paras 3227, 3275, 3290.
[2229] Trial Judgment (E465), fns 11229-11230, referring to paras 3227, 3275, 3290. The Trial Chamber referred to paragraph 3227 of its Judgment, but the Supreme Court Chamber considers that it meant to refer to paragraph 3228 because paragraph 3227 is not relevant.
[2230] Trial Judgment (E465), para. 3275.
[2231] Trial Judgment (E465), para. 3275.
[2232] Trial Judgment (E465), para. 3290.
[2233] KHIEU Samphân's Appeal Brief (F54), para. 912.
[2234] KHIEU Samphân's Appeal Brief (F54), paras 912-914.
[2235] KHIEU Samphân's Appeal Brief (F54), paras 915-924.
[2236] KHIEU Samphân's Appeal Brief (F54), para. 916.
[2237] KHIEU Samphân's Appeal Brief (F54), para. 917.

of a plan aimed specifically at the Cham.[2238] Further, he argues that YOU Vann stated that the lists she made were not specific to the Cham but also included soldiers of the Sihanouk regime and Vietnamese.[2239] Lastly, he submits that YEAN Lon's and SAY Doeun's testimonies concerning an order to arrest Cham were hearsay and should not have been relied upon.[2240]

781. The Co-Prosecutors respond that KHIEU Samphân misconstrues the Trial Chamber's findings and wrongly implies that the finding on intent to kill on a large scale was based solely on evidence of specific orders and meetings.[2241] They further submit that KHIEU Samphân misrepresents the nature of some witnesses' testimony.[2242] In this regard, they note that the Trial Chamber did not find that KE Pauk ordered all Cham destroyed at the meeting referred to by the Trial Chamber, but found that a meeting was held discussing the smashing of enemies, soon after that, Cham were transferred and disappeared.[2243] They consider VAN Mat's testimony to be consistent with this.[2244] Similarly, they respond that KHIEU Samphân misrepresents the Trial Chamber's assessment of PRAK Yut and SEN Srun's credibility and that the Trial Chamber is entitled to accept part of a witness's testimony but reject other parts.[2245] As to YOU Van's testimony, the Co-Prosecutors submit that her testimony partly corroborated PRAK Yut's and shows that lists of non-Khmer were compiled, and that subsequently non-Khmer gradually disappeared.[2246]

782. This Chamber concludes that KHIEU Samphân misrepresents the Trial Chamber's finding and indeed the witnesses' evidence when he states that it held that KE Pauk ordered all Cham destroyed. KE Pauk may well have given such orders but that is not what the witness said nor what the Trial Chamber found. Rather, relying on the evidence of VAN Mat, the Trial Chamber found that orders to purge the Cham in the East Zone came from the upper echelon, including KE Pauk, and that a meeting with East Zone leaders was held in Kampong Thma where the smashing of enemies was discussed.[2247] VAN Mat testified that soon after that meeting, he with 400 to 500 Cham from his village and places nearby were removed, forced on to boats, and taken to Stueng Trang where they were tied up by Khmer Rouge cadres and

[2238] KHIEU Samphân's Appeal Brief (F54), para. 914.
[2239] KHIEU Samphân's Appeal Brief (F54), para. 917.
[2240] KHIEU Samphân's Appeal Brief (F54), paras 919, 921.
[2241] Co-Prosecutors' Response (F54/1), para. 514.
[2242] Co-Prosecutors' Response (F54/1), paras 518-519.
[2243] Co-Prosecutors' Response (F54/1), para. 515.
[2244] Co-Prosecutors' Response (F54/1), para. 515.
[2245] Co-Prosecutors' Response (F54/1), para. 516.
[2246] Co-Prosecutors' Response (F54/1), para. 517.
[2247] Trial Judgment (E465), para. 3275.

guarded by armed soldiers.[2248] Those of that group who were forcibly transferred disappeared, as, according to VAN Mat, had happened to thousands and thousands of Cham who had been evacuated previously.[2249] The Trial Chamber noted that while these events were happening in Kroch Chhmar district, they were contemporaneous with other arrests and killings of Cham in the same district, in particular at Trea Village Security Centre.[2250]

783. Considering all that evidence, the Trial Chamber was satisfied that orders to purge the Cham in the Kroch Chhmar district came from the upper echelon, including KE Pauk, and that this was consistent with the policy which was implemented by KE Pauk on the other side of the Mekong and contemporaneous with the most serious purges conducted against the Cham at Wat Au Trakuon and Trea village.[2251] This Chamber can find nothing unreasonable regarding those conclusions.

784. This Chamber notes that KHIEU Samphân's challenge to the Trial Chamber's reliance on PRAK Yut's testimony seems to cherry pick her evidence in order to minimise and neutralise it. PRAK Yut was an important witness who was heard over several days.[2252] Her evidence evolved from "only bad elements were arrested" and "good Cham" were spared to that her orders were to "purge specifically all the Cham people".[2253] She also gave evidence that she believed the only Cham person spared from smashing in the District was her adopted daughter and that she had specifically asked AO An to spare her.[2254] While it is true that she sought to distance herself from personal responsibility for the orders she implemented to arrest all Cham,[2255] this does not detract from the veracity of other parts of her testimony. This Chamber observes that it can generally be said that very few members of the CPK leadership or the cadre of the Party or the members of the militia or anyone else associated with the management of cooperatives or security centres were forthcoming in relation to their role in any crimes. This Chamber observes that YOU Vann, her messenger, testified that PRAK Yut ordered her to prepare a list with names of soldiers of the LON Nol regime, ethnic Cham, and

[2248] Trial Judgment (E465), para. 3274.
[2249] Trial Judgment (E465), para. 3274.
[2250] Trial Judgment (E465), para. 3274.
[2251] Trial Judgment (E465), para. 3275.
[2252] PRAK Yut testified on 18, 19, and 20 January 2016. T. 18 January 2016, E1/377.1; T. 19 January 2016, E1/378.1; T. 20 January 2016, E1/379.1. She was also heard by the Co-Investigating Judges six times, provided a statement to DC-Cam, and testified in Case 002/01. See Trial Judgment (E465), para. 3191.
[2253] T. 19 January 2016 (PRAK Yut), E1/378.1, pp. 11-14.
[2254] Trial Judgment (E465), para. 3221.
[2255] Trial Judgment (E465), para. 3221.

Vietnamese people.[2256] The fact that the Cham were not the only enemies listed does not detract from the Trial Chamber's finding that the Cham were also considered enemies. The point on appeal is that the Trial Chamber failed to consider this aspect of the testimony in its credibility assessment. This is unfounded. Neither did the Trial Chamber fail to consider the testimony of SEN Srun, who testified that although Cham were not specifically mentioned during the meeting he attended at Wat Au Trakuon, they would be considered enemies by the regime, as would any other non-Khmer.[2257]

785. In sum, the Supreme Court Chamber does not find that KHIEU Samphân has demonstrated that the Trial Chamber reached a conclusion no reasonable trial chamber could reach. These arguments are therefore dismissed.

2. Extermination of the Vietnamese

786. The Trial Chamber found that the elements of the crime against humanity of murder were established with respect to the killings of multiple Vietnamese in Svay Rieng, in DK waters, in Kampong Chhnang province, at Wat Khsach, as well as in Kratie.[2258] The Trial Chamber further found that the *actus reus* and *mens rea* of the crime against humanity of extermination were satisfied in relation to these killings.[2259] The Trial Chamber also found that the crime against humanity of murder was established with respect to the killings of six Vietnamese at Au Kanseng,[2260] murders that it found to form part of the basis for its subsequent finding that the elements of the crime against humanity of extermination were established at Au Kanseng.[2261] The Trial Chamber also found that its "extermination finding at S-21 encompass[ed] killings of the Vietnamese".[2262] The Trial Chamber considered that the crime against humanity of extermination subsumes the crime against humanity of murder and entered convictions only for extermination with respect to the treatment of the Vietnamese.[2263]

[2256] Trial Judgment (E465), para. 1661.
[2257] Trial Judgment (E465), para. 3286, referring to T. 14 September 2015 (SEN Srun), E1/346.1, pp. 97-98.
[2258] Trial Judgment (E465), paras 3490-3497, referring to, *inter alia*, paras 3453, 3455, 3461, 3471, 3482, 3488.
[2259] Trial Judgment (E465), paras 3498-3591, referring to, *inter alia*, paras 2571, 2621, 2926, 2959, 3466-3467, 3479, 3481-3482, 3488.
[2260] Trial Judgment (E465), para. 2959, referring to para. 2926.
[2261] Trial Judgment (E465), fn. 11788, referring to paras 2926, 2959. See also Trial Judgment (E465), para. 2968 (finding that the crime against humanity of extermination was established at Au Kanseng Security Centre "with respect to at least 111 prisoners.")
[2262] Trial Judgment (E465), fn. 11788, referring to paras 2571, 2621 (recalling its finding that "hundreds of Vietnamese soldiers and civilians were killed at S-21").
[2263] Trial Judgment (E465), para. 4337.

787. KHIEU Samphân alleges multiple factual and legal errors in the Trial Chamber's findings with respect to the killings of Vietnamese individuals in Svay Rieng, in DK waters, in Kampong Chhnang province, at Wat Khsach, and in Kratie, as well as at Au Kanseng Security Centre.[2264] He submits that the Trial Chamber erred in finding that the crime against humanity of extermination was established in respect of these killings.[2265]

788. The Co-Prosecutors respond that KHIEU Samphân fails to show that the Trial Chamber erred in finding that Vietnamese were killed at the above-mentioned locations, and failed to show that the crimes against humanity of murder and extermination in relation thereto were not properly established.[2266] The Lead Co-Lawyers share the Co-Prosecutors' view of the errors alleged by KHIEU Samphân in relation to the Trial Chamber's findings regarding the killing of Vietnamese and its legal characterisation thereof.[2267]

789. In the case at hand, the Trial Chamber based its legal findings with respect to the crime against humanity of murder and the crime against humanity of extermination on specific instances of killings *and* the existence of a contemporaneous, "centrally-devised policy" targeting Vietnamese.[2268] All the credible oral and written evidence on which the Trial Chamber based its findings of specific killings ought accordingly to be viewed holistically alongside the established finding that a policy "targeting the Vietnamese for adverse treatment existed in DK throughout the indictment period."[2269]

a. Killing of Vietnamese in Svay Rieng

790. The Trial Chamber found that four Vietnamese families were killed in Svay Rieng in 1978.[2270] It based this finding on the testimony of witness SIN Chhem, who stated that the four Vietnamese families living a kilometre away from her house were taken away by the commune chief at night and disappeared.[2271] She testified that they were killed by someone named Savin and others.[2272] The Trial Chamber noted that the source of her knowledge was unclear and that

[2264] KHIEU Samphân's Appeal Brief (F54), paras 842-847 (Au Kanseng Security Centre), 987-992 (Svay Rieng), 993-1002 (DK territorial waters), 1003-1005 (Kampong Chhnang), 1006-1013 (Wat Khsach), 1014-1017 (Kratie).
[2265] KHIEU Samphân's Appeal Brief (F54), paras 1018-1027.
[2266] Co-Prosecutors' Response (F54/1), paras 596-599 (Svay Rieng), 600-603 (Au Kanseng Security Centre), 604-607 (Wat Khsach), 608-612 (Kratie), 613-615 (Kampong Chhnang), 616-620 (DK waters), 621-625 (extermination).
[2267] Lead Co-Lawyers' Response (F54/2), paras 278, 280, 299-307.
[2268] Trial Judgment (E465), para. 3417.
[2269] Trial Judgment (E465), para. 3417. See also Section VIII.B.5.a.
[2270] Trial Judgment (E465), paras 3490-3491, referring to paras 3453, 3455.
[2271] Trial Judgment (E465), para. 3453, referring to T. 14 December 2015 (SIN Chhem), E1/367.1, pp. 26-27, 71.
[2272] Trial Judgment (E465), para. 3453, referring to T. 14 December 2015 (SIN Chhem), E1/367.1, pp. 27-30.

she did not witness the killings, but also noted that she testified to having seen scattered remains of bodies of the persons she heard had been killed the night before.[2273] The Trial Chamber recalled its finding that the CPK targeted the Vietnamese as a group and from April 1977 widely called for their destruction, and, in light of this, was satisfied that the only reasonable conclusion which could be drawn from the arrest and disappearance of the four families and the presence of dead bodies afterwards is that these arrests and disappearances were the result of the systematic implementation in this area of the policy and that those who disappeared were killed.[2274]

791. KHIEU Samphân contends that the Trial Chamber erred in finding that Vietnamese were killed in Svay Rieng, as this finding was based solely on the testimony of SIN Chhem, whose statements were based on hearsay, and which he alleges is imprecise, inconsistent, and unreliable.[2275]

792. The Co-Prosecutors submit that KHIEU Samphân mischaracterises the witness's testimony, which they argue is clear and consistent.[2276]

793. The Lead Co-Lawyers agree with the Co-Prosecutors' Response.[2277]

794. Though KHIEU Samphân correctly submits that the Trial Chamber found that "the witness never saw any killing",[2278] the Trial Chamber found the level of detail in her testimony to be sufficient to establish that killings occurred in Svay Rieng province.[2279] SIN Chhem was married to the Svay Yay commune chief.[2280] The witness testified that she saw the remains of the family of four and witnessed "with [her] own eyes" Vietnamese individuals whose hands were tied behind their backs.[2281] Indeed, the Trial Chamber relied upon the former account in reaching the disputed finding.[2282] Significantly, SIN Chhem also testified that there had been

[2273] Trial Judgment (E465), para. 3453, referring to T. 14 December 2015 (SIN Chhem), E1/367.1, p. 79.
[2274] Trial Judgment (E465), para. 3453.
[2275] KHIEU Samphân's Appeal Brief (F54), paras 987-992.
[2276] Co-Prosecutors' Response (F54/1), paras 596-599.
[2277] Lead Co-Lawyers' Response (F54/2), para. 278.
[2278] Trial Judgment (E465), para. 3453.
[2279] Trial Judgment (E465), para. 3453 (finding that the date of the disappearance of the Vietnamese families was 1978, noting SIN Chhem's testimony that the killers were "someone named Savin along with others from the new commune committee and security guards", and finding that the sources of the hearsay evidence concerning other Vietnamese being disappeared and killed were those victims' close neighbours in Tuol Vihear, Sikar, and Kien Ta Siv villages), referring to T. 14 December 2015 (SIN Chhem), E1/367.1, pp. 26-31, 71, 79; Written Record of Interview of SIN Chhem, 5 December 2008, E3/7794, ERN (EN) 00251406-00251407, pp. 3-4.
[2280] T. 14 December 2015 (SIN Chhem), E1/367.1, p. 17.
[2281] T. 14 December 2015 (SIN Chhem), E1/367.1, pp. 79-80.
[2282] Trial Judgment (E465), para. 3453, referring to T. 14 December 2015 (SIN Chhem), E1/367.1, p. 79.

only four "mixed" families, among whom she had relatives,[2283] out of approximately one hundred in the village and that the Vietnamese families were "taken away".[2284] Considering the overall level of detail provided by the witness in her testimony, and the finding that there existed a policy targeting Vietnamese in Cambodia, this Chamber sees no reason to depart from the Trial Chamber's findings with respect to the killing of four Vietnamese families in Svay Rieng province.

b. Killing of Vietnamese in DK Waters

795. The Trial Chamber found that the crime against humanity of murder was established in relation to the killings of Vietnamese fishermen and refugees in DK waters after April or May 1977 at Ou Chheu Teal port as evidenced by witness PAK Sok and on 19 March 1978 as reported by Division 164.[2285] The Trial Chamber found that the CPK armed forces were under orders to "systematically target" Vietnamese vessels that neared DK waters, without distinguishing between military and civilian targets, and that a number of Vietnamese fishermen and refugees were intentionally killed.[2286] The Trial Chamber found that PAK Sok was a member of Division 164 and testified that between 1975 and 1979 thousands of Thai and Vietnamese fishermen and refugees were arrested and killed. He testified that if "*Yuon*" were arrested, whether soldiers or refugees, they would be killed, and that some captured Vietnamese soldiers were sent to S-21 Security Centre.[2287] The Trial Chamber noted that PAK Sok also testified about a number of specific killing incidents, stating that on one occasion he was involved in transporting 12-13 captured Vietnamese to the port by truck and that he testified that one of these captured Vietnamese was a soldier while the others were ordinary people headed to Thailand. He testified that one member of the group was a baby and that soldiers threw it into the sea because it was crying loudly.[2288] Concerning the 19 March 1978 killings, the Trial Chamber found that in a Division 164 report to Brother 89 dated 20 March 1978, MEAS Muth informed SON Sen of two incidents involving Vietnamese boats. In the first incident, Division 164 fired at a Vietnamese motorboat causing it to sink, and in the second incident two Vietnamese motorboats were captured at Koh Tang Island and 76 Vietnamese people, both young and old, male and female, were tied up and brought to the mainland and

[2283] T. 14 December 2015 (SIN Chhem), E1/367.1, p. 77.
[2284] T. 14 December 2015 (SIN Chhem), E1/367.1, p. 26.
[2285] Trial Judgment (E465), paras 3493, 3497. See also Trial Judgment (E465), para. 3490.
[2286] Trial Judgment (E465), para. 3493, referring to paras 3456-3461.
[2287] Trial Judgment (E465), para. 3457.
[2288] Trial Judgment (E465), para. 3459, referring to T. 16 December 2015 (PAK Sok), E1/369.1, pp. 25-26.

two people were lost who fell into the water due to the fact that the smaller motorboat was shaky and plunged.[2289]

796. KHIEU Samphân submits that the Trial Chamber committed a series of legal and factual errors in finding that the crime against humanity of murder was established on 19 March 1978, disputing the probative value of the evidence on which the Trial Chamber relied[2290] and submitting that the killings might have taken place in connection with the hostilities between DK and Vietnam.[2291] He submits that the Trial Chamber erred by finding that killings occurred on 19 March 1978 on the basis of a single report from Division 164 that was not an original document but a copy obtained under unknown circumstances.[2292] He argues that the report said nothing about the fate of the Vietnamese whose boat sank and that since the report also indicates that there were several Vietnamese boats present, it is plausible that the Vietnamese whose boat sank were rescued by other Vietnamese boats.[2293] KHIEU Samphân also submits that the Trial Chamber erred by finding that the two Vietnamese who fell out of the small boat had been deliberately murdered since the report states that Division 164 was unable to find them, indicating that they had not been thrown into the water voluntarily.[2294]

797. The Co-Prosecutors respond that KHIEU Samphân's argument regarding the probative value of the evidence is speculative and insufficiently specific.[2295] They also submit that the evidence contains no indication of a relationship between the incidents and hostilities but that it does demonstrate the requisite intent to kill.[2296]

798. The Lead Co-Lawyers agree with the Co-Prosecutors' Response.[2297]

799. The Supreme Court Chamber notes that KHIEU Samphân challenges only the killings found to have occurred on 19 March 1978 and not the killing described by PAK Sok after April or May 1977. His argument that the Division 164 report is a copy rather than the original is insufficient to demonstrate that the Trial Chamber erred by considering it to be reliable. The Trial Chamber's reliance on this report alone to find that Vietnamese individuals had been

[2289] Trial Judgment (E465), para. 3460, referring to DK Report, 20 March 1978, E3/997, ERN (EN) 00233649.
[2290] KHIEU Samphân's Appeal Brief (F54), paras 997-1000, 1002-1003.
[2291] KHIEU Samphân's Appeal Brief (F54), para. 1001.
[2292] KHIEU Samphân's Appeal Brief (F54), para. 997.
[2293] KHIEU Samphân's Appeal Brief (F54), para. 998.
[2294] KHIEU Samphân's Appeal Brief (F54), para. 1002.
[2295] Co-Prosecutors' Response (F54/1), para. 618.
[2296] Co-Prosecutors' Response (F54/1), paras 619-620.
[2297] Lead Co-Lawyers' Response (F54/2), para. 278.

killed on 19 March 1978 is reasonable, particularly considering that PAK Sok corroborated that Vietnamese fishermen and refugees were arrested and killed and if any Vietnamese person, whether soldier or refugee, was arrested, they would be killed.

800. KHIEU Samphân's submissions that the killings may have been of non-civilians are similarly unpersuasive. Nothing in the report implies a connection to the then ongoing armed conflict. Rather, the report, authored by MEAS Muth, describes how one 22 horsepower Vietnamese boat was shot and sank and how, after boarding two further Vietnamese boats and binding the passengers, who were "young and old, male and female", two people fell into the water and could not be found.[2298] Even if the first boat were a military vessel holding Vietnamese soldiers, this would not prevent these killings from constituting part of the crime against humanity of extermination, as crimes against humanity may have non-civilian victims, as long as the attack was directed against a civilian population.[2299] The Trial Chamber found that the attack was directed at a civilian population and that Vietnamese were targeted and killed regardless of whether they were soldiers or civilians.

801. Nor did the Trial Chamber err in determining that the circumstances in which the killings occurred demonstrated that the direct perpetrators intended the killings. Whether the perpetrators actually intended the drowning deaths of the two individuals who fell off the boat during the second 19 March 1978 incident described in the report is irrelevant considering the Trial Chamber's findings that there was a policy to systematically seise or otherwise target Vietnamese boats and that Vietnamese fishermen or refugees would be killed on the spot or at shore once captured.[2300]

802. In light of its findings concerning a pattern of conduct with respect to seising *all* Vietnamese boats and the finding that there existed a nationwide policy targeting Vietnamese for hostile treatment, the Trial Chamber reasonably found the report to constitute a sufficient basis on which to establish that the two instances of killings took place in the circumstances described. KHIEU Samphân's submissions are therefore dismissed.

[2298] DK Report "*Communication téléphonique secrete en date du 20 mars 1978*", 20 March 1978, E3/997.
[2299] *Prosecutor v. Martić*, Appeals Chamber (ICTY), IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgment (ICTY)"), paras 313-314.
[2300] Trial Judgment (E465), para. 3461.

c. Killing of Vietnamese in Kampong Chhnang Province

803. The Trial Chamber found that Civil Party PRAK Doeun's wife, children, and mother-in-law as well as the Vietnamese members of six other families were deliberately executed on Ta Mov Island in 1977, which the Trial Chamber found to have taken place in the context of the organised and systematic gathering and screening of ethnically Vietnamese and their separation from Khmer individuals.[2301]

804. KHIEU Samphân submits that the Trial Chamber erred in relying solely on the oral testimony of PRAK Doeun and in finding that the killing of any of PRAK Doeun's children other than his youngest son was established.[2302]

805. The Co-Prosecutors submit that KHIEU Samphân fails to consider the totality of PRAK Doeun's evidence and that, while the Trial Chamber might have erred concerning how many of PRAK Doeun's children it found to have been killed, KHIEU Samphân does not establish that this erroneous finding invalidates the Judgment.[2303]

806. The Lead Co-Lawyers submit that PRAK Doeun's account is consistent and includes direct evidence of the events surrounding the killings.[2304]

807. The Trial Chamber relied on PRAK Doeun's testimony because it considered it to be sufficiently relevant and reliable. A review of the relevant transcripts shows that PRAK Doeun's testimony was both poignant and compelling and comprises significant relevant evidence of both a direct and hearsay character. PRAK Doeun gave evidence of something he was most unlikely to forget or invent. He provided his account in minute detail.[2305] It was not at all unusual that the actual killing was not witnessed. This Chamber also concurs with the Co-Prosecutors and the Lead Co-Lawyers that PRAK Doeun's account offers relevant insight into the circumstances surrounding the killings, particularly in relation to the treatment of

[2301] Trial Judgment (E465), paras 3490 (referring to para. 3471), 3494.
[2302] KHIEU Samphân's Appeal Brief (F54), paras 1003-1005.
[2303] Co-Prosecutors' Response (F54/1), paras 614-615.
[2304] Lead Co-Lawyers' Response (F54/2), para. 303.
[2305] See, *e.g.*, T. 2 December 2015 (PRAK Doeun), E1/361.1, pp. 72-76 (how a group of seven mixed marriage Khmer-Vietnamese families were walked for between four and ten kilometres before being separated into two groups, Khmer and Vietnamese; 75-76 (how his youngest child and his wife were sent away); 87-88 (how his unit chief informed him the following day that his wife and child had been killed, after which he was granted a week to recover together with another man who had also had a Vietnamese wife).

Vietnamese in the village before, during, and after the events.[2306] Contrary to KHIEU Samphân's argument,[2307] PRAK Doeun did not testify that Comrade Hoem, who told him of the killings and who therefore was the source of the hearsay, did not witness the killings, but, rather, that he did not inform him of the name of the executioner.[2308] The Trial Chamber, which was well-placed to evaluate the reliability and credibility of PRAK Doeun in the courtroom, therefore made no error in relying solely on his detailed, consistent, and persuasive testimony. Notwithstanding, this Chamber accepts KHIEU Samphân's argument that the Trial Chamber erred in finding that PRAK Doeun's "*children* […] were deliberately executed on Ta Mov island, Kampong Chhnang province, in late 1977".[2309] While PRAK Doeun testified concerning the deaths from illness or starvation of two of his children, they were not included in the group of mixed marriage families who were taken away and divided into two groups. It was only his youngest child who was taken away.[2310] The Trial Chamber therefore also erred in its legal finding that "PRAK Doeun's […] children […] were deliberately executed on Ta Mov island in 1977" and that "[t]he *actus reus* and *mens rea* of murder [were] therefore established with respect to these killings."[2311] Finding that only one child was executed is an error in detail, not in substance, which does not invalidate the judgment or occasion a miscarriage of justice.[2312] KHIEU Samphân's arguments are thus dismissed.

d. Killing of Vietnamese at Wat Khsach

808. The Trial Chamber found that Vietnamese civilians were brought to and killed *en masse* at Wat Khsach in late 1978 due to their perceived ethnicity and upon orders from the upper echelon.[2313] The Trial Chamber considered that the order, organised nature of the gathering of Vietnamese, their screening, and their systematic execution showed a clear intent to cause death.[2314] It found that all Vietnamese living in and around Yeang village, Chi Kraeng district (Sector 106), Siem Reap province were brought to and killed at Wat Khsach and that while the

[2306] See Co-Prosecutors' Response (F54/1), para. 614, referring to T. 2 December 2015 (PRAK Doeun), E1/361.1, pp. 52-54, 61, 64, 66; Lead Co-Lawyers' Response (F54/2), para. 303, referring to T. 2 December 2015 (PRAK Doeun), E1/361.1, pp. 72-73, 75-76, 88, 90.
[2307] KHIEU Samphân's Appeal Brief (F54), para. 1004.
[2308] T. 3 December 2015 (PRAK Doeun), E1/362.1, pp. 58-62.
[2309] Trial Judgment (E465), para. 3471 (emphasis added).
[2310] Trial Judgment (E465), para. 3466, referring to T. 2 December 2015 (PRAK Doeun), E1/361.1, pp. 73, 75-76. See KHIEU Samphân's Appeal Brief (F54), para. 1005.
[2311] Trial Judgment (E465), para. 3494.
[2312] *Cf.* Case 002/01 Appeal Judgment (F36), para. 99, referring to Internal Rules, Rule 104(1).
[2313] Trial Judgment (E465), paras 3490 (referring to para. 3482), 3495.
[2314] Trial Judgment (E465), para. 3495.

evidence presented did not allow it to establish an exact number of victims, it was satisfied that at least 10-20 Vietnamese civilians were killed there.[2315]

809. KHIEU Samphân alleges that the Trial Chamber erred in finding that particular Vietnamese individuals were murdered, that all Vietnamese in and around Yeang village were killed at Wat Khsach, and that the executions were carried out on the orders of the upper echelon.[2316] He submits that the Trial Chamber erred in finding that *Yeay* Hay and *Ta* Khut were killed, arguing that witness SEAN Song's testimony was hearsay from an unidentified source, that witness UM Suonn's testimony contained contradictions and that it appears he was not a direct witness to any killings, and that witness Y Vun learned from others that *Yeay* Hay and *Ta* Khut had been executed and stated that *Ta* Khut was executed after the arrival of Vietnamese troops.[2317] KHIEU Samphân argues that no one witnessed what happened to *Yeay* Hay and *Ta* Khut and that it is possible the events occurred outside the temporal scope of the proceedings.[2318] He argues that the Trial Chamber erred by finding that Vietnamese members of Chum's family were killed, as it relied on the testimonies of Y Vun and UM Suonn and the Written Record of Interview of LAUNH Khun, but the testimonies were unclear and the Written Record of Interview is of lesser probative value and LAUNH Khun did not witness any executions.[2319] He submits that as Chum spoke only Chinese and her father was Chinese, there could have been other reasons for the killing besides Vietnamese ethnicity.[2320] Concerning the finding that all Vietnamese in and around Yeang village were executed *en masse* at Wat Khsach, KHIEU Samphân argues that this finding was an unreasonable extrapolation and was based on the testimonies of SEAN Song and Y Vun, but SEAN Song's testimony was hearsay and Y Vun was not asked how he knew where the people came from and did not see them taken to the pagoda.[2321] Concerning the finding that the killings were carried out on orders from the upper echelon, KHIEU Samphân submits that this finding was made based on hearsay testimony from SEAN Song and Y Vun.[2322]

810. The Co-Prosecutors argue that KHIEU Samphân fails to establish an error on the part of the Trial Chamber in relying on the testimony of witnesses Y Vun, SEAN Song, and UM

[2315] Trial Judgment (E465), para. 3482.
[2316] KHIEU Samphân's Appeal Brief (F54), paras 1006-1017.
[2317] KHIEU Samphân's Appeal Brief (F54), para. 1007.
[2318] KHIEU Samphân's Appeal Brief (F54), para. 1008.
[2319] KHIEU Samphân's Appeal Brief (F54), para. 1009.
[2320] KHIEU Samphân's Appeal Brief (F54), para. 1010.
[2321] KHIEU Samphân's Appeal Brief (F54), paras 1011-1012.
[2322] KHIEU Samphân's Appeal Brief (F54), para. 1013.

Suonn in reaching its findings, that he misinterprets hearsay evidence, and that he disregards the hierarchical structure of the CPK in relation to enforcing orders and its contemporaneous policy targeting Vietnamese.[2323]

811. The Lead Co-Lawyers agree with the Co-Prosecutors' Response.[2324]

812. The Trial Chamber clearly conveyed that it found the testimony of Y Vun, SEAN Song, and UM Suonn "generally credible and reliable" in establishing that killings took at Wat Khsach,[2325] though it observed that it would not rely on the uncorroborated oral testimony of UM Suonn because of the "inconsistencies" it observed therein.[2326] The Trial Chamber followed the approach it set out, relying on the testimony of UM Suonn only where corroborated.[2327] As for the "significant commonality" found in their testimonies,[2328] the three witnesses, each of whose credibility and reliability the Trial Chamber assessed in view of "the passage of time and the traumatic nature of this event",[2329] knew and named some of the villagers who were taken to Wat Khsach. Their evidence does contain some inconsistencies concerning how and from where they witnessed the killings, but it nevertheless shows that only Vietnamese people were assembled, that cries were heard from the site, that Vietnamese individuals from within and outside the village were killed, and that no Vietnamese villagers remained afterwards.[2330] Further, that the Trial Chamber found that the killing of *Yeay* Hay and *Ta* Khut occurred later does not impair these findings.[2331] The Supreme Court Chamber will not entertain mere speculation that there may have been another reason for the killing of Chum's family. Such speculation is manifestly insufficient to demonstrate error on the part of the Trial Chamber. As for KHIEU Samphân's challenge to the Trial Chamber's finding that

[2323] Co-Prosecutors' Response (F54/1), paras 605-607.
[2324] Lead Co-Lawyers' Response (F54/2), para. 278.
[2325] Trial Judgment (E465), para. 3477.
[2326] Trial Judgment (E465), para. 3477.
[2327] Trial Judgment (E465), fns 11729, 11731, 11734, 11736, 11737, 11739 (corroborating fn. 11738 and accompanying text), 11740, 11748 (corroborating fns 11746-11747 and accompanying text), 11749.
[2328] Trial Judgment (E465), para. 3477.
[2329] Trial Judgment (E465), para. 3477.
[2330] With respect to the targeting of only Vietnamese villagers, see T. 27 October 2015 (SEAN Song), E1/357.1, pp. 88-89, 95-96; T. 15 December 2015 (Y Vun), E1/368.1, pp. 24, 26-27; T. 9 December 2015 (UM Suonn), E1/365.1, pp. 54-55, 69-70, 72. In relation to the screams that could be heard from Wat Khsach, see T. 27 October 2015 (SEAN Song), E1/357.1, p. 85; T. 15 December 2015 (Y Vun), E1/368.1, pp. 30-32; T. 9 December 2015 (UM Suonn), E1/365.1, pp. 55, 60-61, 63-65, 69-71. Concerning the killing of NEARY Chantha and other individuals at the pagoda, see T. 27 October 2015 (SEAN Song), E1/357.1, pp. 81-89; T. 28 October 2015 (SEAN Song), E1/358.1, p. 3; T. 15 December 2015 (Y Vun), E1/368.1, pp. 20, 32. As regards the absence of Vietnamese villagers after the killings, see T. 15 December 2015 (Y Vun), E1/368.1, pp. 34-35; T. 9 December 2015 (UM Suonn), E1/365.1, p. 72. *Cf.* Trial Judgment (E465), paras 3478-3479, 3481.
[2331] *Contra* KHIEU Samphân's Appeal Brief (F54), paras 1007-1008.

the killings occurred following the orders of "the upper echelon",[2332] the Trial Chamber explicitly observed that it found SEAN Song's testimony to be generally credible and reliable and corroborated by additional hearsay evidence.[2333] The Trial Chamber thereby adhered to the approach to assessing the probative value of hearsay evidence that it had set out in the Trial Judgment.[2334] This Chamber is therefore not persuaded by the arguments that the Trial Chamber erred in finding that the killing of Vietnamese at Wat Khsach in late 1978 was established.

e. Killing of Vietnamese in Kratie

813. The Trial Chamber found that 13 Vietnamese relatives of Civil Party UCH Sunlay , including his three children, his half-Vietnamese wife, and her parents and sister, as well as the wives and relatives of three or four other Khmer men in Kratie were deliberately killed in Kratie province in September 1978.[2335] The Trial Chamber found that Vietnamese were targeted on account of their perceived ethnicity and killed in Kratie province in 1978 and that the relatives of UCH Sunlay and three or four other Khmer men were executed in this context.[2336] KHIEU Samphân submits that the Trial Chamber erred in reaching its findings in relation to the murders in Kratie based merely on the testimony of Civil Party UCH Sunlay.[2337] KHIEU Samphân further submits that the Trial Chamber erred when it found that the murders of several of UCH Sunlay's relatives were established, without identifying certain of those individuals or establishing the circumstances of any of their deaths.[2338] The Co-Prosecutors respond that UCH Sunlay was well-placed to testify concerning the crime and that the Trial Chamber assessed his testimony with due caution.[2339] They further submit that the Trial Chamber did not err in identifying the relatives of UCH Sunlay who were killed and that, though it might have erred when including his wife's parents in the total without establishing their deaths, KHIEU Samphân fails to establish that this error invalidates the Trial Judgment, in whole or in part, or occasions a miscarriage of justice.[2340] The Lead Co-Lawyers agree with the Co-Prosecutors that the purported error with respect to the number of UCH Sunlay's relatives found to have

[2332] KHIEU Samphân's Appeal Brief (F54), para. 1013, referring to Trial Judgment (E465), paras 3480, 3482, 3495.
[2333] Trial Judgment (E465), para. 3480.
[2334] Trial Judgment (E465), para. 63, referring to Case 002/01 Appeal Judgment (F36), para. 302.
[2335] Trial Judgment (E465), para. 3496.
[2336] Trial Judgment (E465), para. 3488. See also Trial Judgment (E465), para. 3490.
[2337] KHIEU Samphân's Appeal Brief (F54), para. 1014.
[2338] KHIEU Samphân's Appeal Brief (F54), paras 1015-1016.
[2339] Co-Prosecutors' Response (F54/1), paras 610-611.
[2340] Co-Prosecutors' Response (F54/1), para. 612.

been killed is immaterial.[2341] They also reject KHIEU Samphân's submission that UCH Sunlay's account carries less weight because it stemmed from his statement of harm, arguing that his evidence, though partially hearsay, was nevertheless detailed, consistent, and corroborated, in part by his direct evidence.[2342]

814. This Chamber agrees with the Lead Co-Lawyers in that UCH Sunlay gave a detailed, consistent, and compelling account of the circumstances surrounding the death of his Vietnamese relatives and those of other Khmer villagers. Consistent with his Civil Party Application,[2343] he names "Thol", whom he recalls as having transported the victims to their place of death by oxcart and having witnessed their executions first-hand, as the source of the hearsay.[2344] He recounts the premise – collecting bamboo to build ladders pursuant to which husbands and wives were separated.[2345] He details how he was praised and offered psychological support by the cooperative chief for having had his wife and children taken away in service to *Angkar*.[2346] KHIEU Samphân's argument that the Trial Chamber erred in relying on what it found to be a relevant and reliable account, having observed the Civil Party's demeanour when he provided it, is accordingly unpersuasive. Further, while this Chamber accepts KHIEU Samphân's submission that the Trial Chamber erred in failing to establish the deaths of UCH Sunlay's parents-in-law and, therefore, in including them in the total number of those killed, this error in detail does not invalidate the Judgment or occasion a miscarriage of justice. For these reasons, KHIEU Samphân's arguments are dismissed.

f. Killing of Six Vietnamese at Au Kanseng

815. The Trial Chamber based its legal finding that the killing of six Vietnamese at Au Kanseng Security Centre satisfied the elements of the crime against humanity of murder[2347] on its factual finding that the six individuals were executed on the orders of Division 801 Chairman, SAO Saroeun.[2348] In reaching its factual finding, contrary to the argument raised by KHIEU Samphân,[2349] the Trial Chamber relied not only on the Written Record of Interview of Security Centre Chairman, CHHAOM Sé, but also on his lengthy in-court testimony in Case

[2341] Lead Co-Lawyers' Response (F54/2), para. 305.
[2342] Lead Co-Lawyers' Response (F54/2), paras 306-307. See also Lead Co-Lawyers' Response (F54/2), para. 200.
[2343] T. 1 March 2016 (UCH Sunlay), E1/394.1, p. 105, referring to UCH Sunlay Civil Party Application, E3/4844.
[2344] T. 1 March 2016 (UCH Sunlay), E1/394.1, pp. 105-106; T. 2 March 2016 (UCH Sunlay), E1/395.1, pp. 3-4.
[2345] T. 1 March 2016 (UCH Sunlay), E1/394.1, pp. 94, 103-104; T. 2 March 2016 (UCH Sunlay), E1/395.1, p. 15.
[2346] T. 1 March 2016 (UCH Sunlay), E1/394.1, p. 94.
[2347] Trial Judgment (E465), para. 2959.
[2348] Trial Judgment (E465), para. 2926.
[2349] KHIEU Samphân's Appeal Brief (F54), paras 842-843, 1052.

002/01.[2350] The Trial Chamber explained that, because CHHAOM Sé was unable to testify in Case 002/02 as a result of his death before he could appear in court,[2351] it relied on his responses to questions "that were directly or incidentally relevant to the scope of Case 002/02 […] [i]nsofar as the substance of these responses was open to examination by the Parties in court".[2352] As the Co-Prosecutors contend, the parties were authorised to examine CHHAOM Sé regarding executions at Au Kanseng Security Centre insofar as they pertained to orders he received from Division 801 Chairman, SAO Saroeun.[2353]

816. As for the probative value of CHHAOM Sé's evidence, the Trial Chamber evaluated the totality thereof before determining that he offered "consistent accounts" of the execution of the six captives.[2354] The Supreme Court Chamber is accordingly unpersuaded by KHIEU Samphân's arguments in relation to the Trial Chamber's finding that six Vietnamese individuals were executed at Au Kanseng Security Centre.

g. Whether the Killings Amount to Extermination

817. The Trial Chamber found that "the intentional killing of Vietnamese civilians in Svay Rieng in 1978, Vietnamese fishermen and refugees in DK waters after April or May 1977 at Ou Chheu Teal port as evidenced by PAK Sok and on 19 March 1978 as reported by Division 164, of PRAK Doeun's relatives and Vietnamese members of six other families in Kampong Chhnang province in 1977, UCH Sunlay's relatives and family members of three or four other Khmer men in Kratie in September 1978, and the mass killing of Vietnamese civilians at Wat Khsach in late 1978" total approximately 60 deaths, "a number which, in light of the overall evidence, is almost certainly an underestimation of the actual situation."[2355] It also recalled having found specific instances of killings of Vietnamese at S-21 and Au Kanseng Security Centres.[2356] The Trial Chamber recalled that there is no minimum number of victims required to establish extermination and found that these murders were part of the same murder operation

[2350] Trial Judgment (E465), para. 2926, referring to T. 11 January 2013 (CHHAOM Sé), E1/159.1, p. 104.
[2351] Trial Judgment (E465), para. 2860, referring to Decision on Proposed Witnesses (E459), para. 104 (fn. 264).
[2352] Trial Judgment (E465), para. 2860, referring to T. 11 January 2013 (CHHAOM Sé), E1/159.1, pp. 91-93 (request to *Angkar* for instruction regarding arrested Jarai); T. 8 April 2013 (CHHAOM Sé), E1/177.1, pp. 19-22 (women and children victims), 23-24 (execution of Jarai), 39-40 (classification of prisoners).
[2353] See Co-Prosecutors' Response (F54/1), para. 603, referring to T. 11 January 2013 (CHHAOM Sé), E1/159.1, pp. 92-93.
[2354] Trial Judgment (E465), para. 2926, referring to T. 11 January 2013 (CHHAOM Sé), E1/159.1, p. 104; T. 8 April 2013 (CHHAOM Sé), E1/177.1, p. 16; Written Record of Interview of CHHAOM Sé, 31 October 2009, E3/405, ERN (EN) 00406215, p. 7.
[2355] Trial Judgment (E465), para. 3499.
[2356] Trial Judgment (E465), para. 3499.

and satisfy the requirement of killing on a massive scale.[2357] In this regard, it took into account the general evidence of the CPK's targeting of Vietnamese including its calls to kill Vietnamese, the fact that in each case the Vietnamese killed were targeted as members of a group rather than as individuals, the fact that they were screened out from non-Vietnamese before being killed in Kampong Chhnang, Wat Khsach, and Kratie, the manner in which the killings were carried out, and the fact that there was consistent testimony that all Vietnamese were killed at the time and no Vietnamese remained in the area thereafter.[2358] The Trial Chamber found the that the evidence demonstrates that all of the killings were organised and deliberate, pursuant to CPK calls to identify, expel, and/or kill the Vietnamese, and it was thus satisfied that the *mens rea* of direct intent was established.[2359]

818. KHIEU Samphân contends that the killings of Vietnamese found by the Trial Chamber were isolated incidents and did not meet the requisite breadth of scale to amount to extermination.[2360] He argues that the specific instances of killing found by the Trial Chamber establish the deaths of no more than 19 individuals.[2361] He considers that the killings could not amount to the same murder operation as they occurred in five different zones of the country on different dates.[2362] He submits that the Trial Chamber unreasonably extrapolated to estimate that approximately 60 Vietnamese were murdered because there was no evidence or objective basis for it to estimate the average number of deaths at sea as two per family and five per boat.[2363]

819. The Co-Prosecutors respond that KHIEU Samphân's claim that the number of deaths do not reach the necessary magnitude is unsupported, that there is no minimum threshold for extermination, and that, in any event, the Trial Chamber considered that its finding of 60 deaths was almost certainly an underestimation.[2364] They argue that the assertion that the events took place in different locations and at different times does not show that the killings were unrelated, as this ignores that the Vietnamese were targeted because they were Vietnamese; the law requires consideration of victim selection and whether killings were aimed at collective group

[2357] Trial Judgment (E465), para. 3500.
[2358] Trial Judgment (E465), para. 3500.
[2359] Trial Judgment (E465), para. 3501.
[2360] KHIEU Samphân's Appeal Brief (F54), para. 1020.
[2361] KHIEU Samphân's Appeal Brief (F54), para. 1021.
[2362] KHIEU Samphân's Appeal Brief (F54), paras 1023-1025.
[2363] KHIEU Samphân's Appeal Brief (F54), paras 1026-1027.
[2364] Co-Prosecutors' Response (F54/1), para. 623.

or individual victims.[2365] Finally, they point out that the Trial Chamber explained the basis for its assessment of the Vietnamese killed at sea and that KHIEU Samphân merely disagrees but has not shown error.[2366]

820. The Supreme Court Chamber notes that the Trial Chamber explicitly considered that, across multiple sites, Vietnamese were "specifically screened out and separated from non-Vietnamese before being killed".[2367] Contrary to KHIEU Samphân's submission, the Trial Chamber did not need to compare events, "seeking similarities".[2368] These similarities exist objectively and they demonstrate that Vietnamese victims were targeted not as individuals but distinct from their Khmer neighbours or relatives, by virtue of their being perceived as Vietnamese. Moreover, the Trial Chamber found that these killings took place in the broader context of a nationwide policy targeting Vietnamese, both civilians and combatants, for hostile treatment, a finding already affirmed by this Chamber. It was these factors, among others, that led the Trial Chamber to find that killings in Kampong Chhnang province in 1977 and in Kratie province in 1978, whose relationship KHIEU Samphân disputes,[2369] were not distinct events, but instead formed "part of the same murder operation".[2370] As for the scale requirement, without including the killings of five of PRAK Doeun's children and the parents of UCH Sunlay's wife, which the Trial Chamber erroneously established,[2371] the total number of killings established stands at more than 50.[2372] Besides these killings, the majority of which the Trial Chamber established based on witnesses' live testimony, the Trial Chamber also established the killings of six Vietnamese at Au Kanseng Security Centre[2373] and the killings of hundreds of Vietnamese soldiers and civilians at S-21,[2374] killings encompassed in its finding of extermination. Nor can the Trial Chamber's estimate of two people per family and five people per boat where the evidence was not specific be read as anything other than cautious.[2375] Indeed, the Trial Chamber explicitly articulated that the number of specific killings it found to be established "in light of the overall evidence, is almost certainly an underestimation of the

[2365] Co-Prosecutors' Response (F54/1), para. 624.
[2366] Co-Prosecutors' Response (F54/1), para. 625.
[2367] Trial Judgment (E465), para. 3500.
[2368] KHIEU Samphân's Appeal Brief (F54), para. 1023.
[2369] KHIEU Samphân's Appeal Brief (F54), para. 1024.
[2370] Trial Judgment (E465), para. 3500.
[2371] See *supra* Sections VII.B.2.c and VII.B.2.e.
[2372] Trial Judgment (E465), fn. 11787 estimates 59 killings. Without those of UCH Sunlay's (two) parents-in-law and those of PRAK Doeun's five children, the figure is still 52 specific killings.
[2373] Trial Judgment (E465), para. 3499, referring to paras 2926, 2959.
[2374] Trial Judgment (E465), para. 3499, referring to paras 2571, 2621.
[2375] Trial Judgment (E465), fn. 11787.

actual situation".[2376] This Chamber therefore views this as a finding of the minimum death toll, which, given that "there is no numerical minimum; extermination has been found to have been committed in relation to thousands of killings as well as for fewer than sixty individuals",[2377] fails to undermine the Trial Chamber's finding that the massive scale requirement was satisfied.

821. For the foregoing reasons, KHIEU Samphân's submissions in relation to the killings of Vietnamese in Svay Rieng, DK waters, Kampong Chhnang province, Wat Khsach, Kratie province, and Au Kanseng Security Centre, and with respect to their characterisation as extermination are dismissed.

C. ENSLAVEMENT AS A CRIME AGAINST HUMANITY

1. Enslavement at Phnom Kraol

822. The Closing Order charges KHIEU Samphân with the crime against humanity of enslavement at Phnom Kraol Security Centre, specifically alleging that prisoners at Phnom Kraol were subjected to total physical and psychological control, such that virtually all decisions concerning their physical environment were taken by the authorities in order to achieve Party goals.[2378] Phnom Kraol Security Centre was a Sector 105 Security Office that consisted of Phnom Kraol Prison, two related sector offices, K-11 and K-17, and an execution site at nearby Trapeang Pring.[2379]

823. The Trial Chamber found that the crime against humanity of enslavement was committed at Phnom Kraol Security Centre, based on its findings that there was a mandatory and regimented work regime entailing economic exploitation of the detainees for the benefit of the Party, that there was no evidence the detainees were remunerated or had any choice as to whether to work, that the detainees feared being killed if they did not follow *Angkar's* instructions and they were subjected to psychological suffering, and that the Security Centre personnel exercised a substantial degree of control over the detainees by determining their movements inside the Security Centre, controlling their physical environment for the duration of their incarceration, and keeping them under guard at all times to prevent or deter their escape. This rendered the detainees incapable of articulating a choice as to whether they would

[2376] Trial Judgment (E465), para. 3499.
[2377] Case 002/01 Appeal Judgment (F36), para. 551, referring to *Lukić & Lukić* Appeal Judgment (ICTY), para. 537; *Ndahimana v. Prosecutor*, Appeals Chamber (ICTR), ICTR-01-68-A, Judgement, 16 December 2013, para. 231.
[2378] Trial Judgment (E465), para. 3119, referring to Case 002 Closing Order (D427), paras 1391-1394.
[2379] Trial Judgment (E465), paras 3019, 3027

work.[2380] The Trial Chamber concluded that this demonstrated that the Security Centre personnel exercised the powers attaching to the right of ownership over the detainees, thus fulfilling the *actus reus* of enslavement, and that the means of implementation of the forced labour regime and the continuing subjugation of prisoners' rights are consistent with the intentional exercise of these powers, thereby fulfilling the *mens rea* of the crime.[2381]

824. KHIEU Samphân refers to his earlier argument, rejected by both the Trial Chamber and this Chamber,[2382] that the Trial Chamber was only seised of enslavement in relation to K-11, and argues that the evidence of enslavement at K-11 was insufficient. He argues that the Trial Chamber relied solely on the testimony of Civil Party KUL Nem and on one Written Record of Interview, but the Civil Party was unable to be questioned on enslavement at K-11 as he only referred to it in his statement of suffering at the end of his examination, and the Written Record of Interview came from a deceased witness who could not be examined in court.[2383]

825. The Co-Prosecutors respond that the Trial Chamber properly considered evidence of enslavement at K-11, K-17, and Phnom Kraol Prison and KHIEU Samphân's submission that the conviction was based solely on insufficient and untested evidence from K-11 is baseless.[2384]

826. The Lead Co-Lawyers agree with the Co-Prosecutors' Response, but point out that KHIEU Samphân's claim that he was unable to examine KUL Nem is false. They note that KUL Nem's entire testimony was a statement of suffering, heard in an impact hearing, and that he mentioned K-11 in his very first answer and several other times before being questioned by KHIEU Samphân's counsel.[2385]

827. The Supreme Court Chamber has already determined that the Trial Chamber was not limited to K-11 when assessing whether enslavement occurred at Phnom Kraol Security Centre.[2386] In determining that the elements of enslavement had been satisfied, the Trial Chamber properly assessed evidence from K-11, K-17, and the Phnom Kraol Prison. KHIEU Samphân made no argument concerning the sufficiency of the evidence the Trial Chamber relied on from K-17 and Phnom Kraol Prison other than that it could not be considered by the

[2380] Trial Judgment (E465), paras 3121-3122.
[2381] Trial Judgment (E465), paras 3122-3123.
[2382] Trial Judgment (E465), para. 3119;
[2383] KHIEU Samphân's Appeal Brief (F54), paras 880-883.
[2384] Co-Prosecutors' Response (F54/1), paras 859-860.
[2385] Lead Co-Lawyers' Response (F54/2), paras 323, 325.
[2386] See *supra* Section VI.A.2.

Trial Chamber. KHIEU Samphân's claim that he was unable to question KUL Nem about facts relevant to enslavement at K-11 is false. As pointed out by the Lead Co-Lawyers, KUL Nem mentioned K-11 and the conditions there throughout his testimony and prior to being questioned by KHIEU Samphân's defence counsel.[2387] This challenge is accordingly dismissed.

D. DEPORTATION AS A CRIME AGAINST HUMANITY

828. The Closing Order charges KHIEU Samphân with the crime against humanity of deportation with respect to the removal of a large number of Vietnamese from Tram Kak district and from Prey Veng and Svay Rieng provinces in 1975 and 1976.[2388] The Trial Chamber found that deportation as a crime against humanity occurred from Tram Kak Cooperatives and Prey Veng.[2389] Although the Trial Chamber found that it was "very likely that some Vietnamese were deported" from Svay Rieng as well, it considered that the available evidence did not meet the requisite standard of proof.[2390] KHIEU Samphân alleges that deportation did not occur from either Tram Kak Cooperatives or Prey Veng. His arguments will be addressed in turn.

1. Tram Kak Cooperatives

829. In assessing whether deportation from Tram Kak occurred, the Trial Chamber found that large numbers of Vietnamese were gathered up in Tram Kak district in the period from late 1975 until early 1976, in particular a "huge number" who were gathered up from various communes over a four-day period in early 1976.[2391] It accepted the generalised evidence that Vietnamese vanished from Tram Kak district and concluded that in the overall coercive environment the Vietnamese lacked any genuine choice concerning their expulsion.[2392] The Trial Chamber also found that clear instructions were issued by the district level to kill and purge Vietnamese during the period when they were expelled.[2393] It considered that the coordinated and coercive nature of gathering up the Vietnamese showed that they had been lawfully present in Tram Kak at the time.[2394] The Trial Chamber found that the available

[2387] T. 24 October 2016 (KUL Nem), E1/488.1, pp. 88, 95, 103.
[2388] Trial Judgment (E465), para. 3502.
[2389] Trial Judgment (E465), paras 1159, 3507.
[2390] Trial Judgment (E465), para. 3505.
[2391] Trial Judgment (E465), paras 1157-1158.
[2392] Trial Judgment (E465), para. 1157.
[2393] Trial Judgment (E465), paras 1157-1158.
[2394] Trial Judgment (E465), para. 1157.

evidence did not allow it to find particular instances of executions of Vietnamese during this period, nor allow it to track with specificity their particular fate, but it was satisfied that despite the evidentiary gaps, "the only reasonable inference to be drawn from the overall evidence is that – at a bare minimum – significant numbers of them were expelled to Vietnam".[2395] This inference is based on the Trial Chamber's assessment of the April 1976 issue of *Revolutionary Flag* and its findings concerning an exchange of Khmer Krom, who arrived in Tram Kak in return for Vietnamese who had left. The Trial Chamber was satisfied that some Vietnamese gathered in Tram Kak crossed the border to Vietnam and that there existed an overarching intention to displace them across a national border.[2396] The Trial Chamber took note of the fact that the deportation process appeared to have occurred as part of an organised and intentional exchange, and thus as part of an agreement between the DK and Vietnamese authorities, but did not consider that this established that the displacement occurred on a ground permitted by international law, either for civilian security or imperative military reasons.[2397] Whilst the Trial Chamber found that there was an armed conflict between Cambodia and Vietnam from at least May 1975, it did not find that this provided a lawful basis upon which to coercively transfer civilians across the border.[2398] Accordingly, it found that the crime against humanity of deportation was established at Tram Kak.[2399]

830. KHIEU Samphân submits that the Trial Chamber erred in concluding that some Vietnamese gathered up in Tram Kak district crossed the border into Vietnam because the evidence does not support this finding and some evidence relied on was obtained through torture or was outside the scope of the trial.[2400] He argues that the Trial Chamber acknowledged that the evidence did not allow it to ascertain what had happened to the Vietnamese who had been gathered up and that it did not explain how it inferred that some of them had crossed the border; it also concluded that some had disappeared using the language that many "were deported and/or disappeared", which constituted the other inhumane act of enforced disappearance.[2401] He submits that because there was ambiguity concerning the fate of the Vietnamese, any doubt should have been decided in his favour in accordance with the principle of *in dubio pro reo*.[2402] KHIEU Samphân also claims that the Trial Chamber erred in

[2395] Trial Judgment (E465), para. 1158.
[2396] Trial Judgment (E465), para. 1158.
[2397] Trial Judgment (E465), para. 1159.
[2398] Trial Judgment (E465), para. 1159.
[2399] Trial Judgment (E465), para. 1159.
[2400] KHIEU Samphân's Appeal Brief (F54), para. 688.
[2401] KHIEU Samphân's Appeal Brief (F54), paras 690-694.
[2402] KHIEU Samphân's Appeal Brief (F54), paras 693-694.

establishing that there was intent to displace Vietnamese beyond the border, as the Trial Chamber relied on the same evidence for the *mens rea* that it used to find that the *actus reus* had been established.[2403] He argues that the evidence relied on by the Trial Chamber demonstrates "more of an intent to execute than an attempt to displace".[2404]

831. The Co-Prosecutors respond that the Trial Chamber's legal findings on deportation were clear and that there is no requirement to determine what happened to particular Vietnamese persons, just as there is no requirement to name individual mass killing victims.[2405] They submit that KHIEU Samphân viewed the witness testimony in isolation in considering whether it supported the conclusion that a national border had been crossed, when the Trial Chamber was relying on that testimony for its findings that Vietnamese who were lawfully present in Cambodia were rounded up in late 1975 and early 1976.[2406] Concerning the alleged torture-tainted evidence, they note that the Trial Chamber found that the sentence on which it relied was not torture-tainted.[2407] Concerning the *mens rea*, they respond that KHIEU Samphân did not demonstrate any error in the Trial Chamber's reliance on the same evidence to find the *mens rea* as it had used for the *actus reus*.[2408]

832. The Lead Co-Lawyers respond that KHIEU Samphân raises doubt as to whether the Vietnamese crossed the border or were killed, erroneously believing that if there is doubt, he must be acquitted, but the intentional gathering of large numbers of people through coercive means and causing them to disappear is still criminal.[2409] If KHIEU Samphân's arguments on deportation succeed, the Lead Co-Lawyers urge that the Supreme Court Chamber use the unchallenged findings to determine that the other inhumane act of enforced disappearances is established.[2410]

833. The Supreme Court Chamber notes that KHIEU Samphân does not dispute that large numbers of Vietnamese were gathered up and expelled from Tram Kak. Rather, he argues that the evidence is insufficient to show beyond reasonable doubt that (1) the Vietnamese crossed an international border, which the Trial Chamber found was an essential element of deportation

[2403] KHIEU Samphân's Appeal Brief (F54), paras 715-716.
[2404] KHIEU Samphân's Appeal Brief (F54), para. 717.
[2405] Co-Prosecutors' Response (F54/1), paras 573-574.
[2406] Co-Prosecutors' Response (F54/1), para. 575.
[2407] Co-Prosecutors' Response (F54/1), para. 584.
[2408] Co-Prosecutors' Response (F54/1), para. 587.
[2409] Lead Co-Lawyers' Response (F54/2), para. 316.
[2410] Lead Co-Lawyers' Response (F54/2), para. 318.

as a crime against humanity,[2411] and (2) that there was intent for the Vietnamese to cross the border. He argues that the Trial Chamber was unable to determine whether the Vietnamese were deported or killed, thus any doubt should be resolved in his favour in accordance with the principle of *in dubio pro reo*.[2412]

834. The Supreme Court Chamber does not consider that KHIEU Samphân's *in dubio pro reo* argument assists him. There is no question that the conduct at issue if committed with the requisite intent is criminal. Deportation and the other inhumane act of forcible transfer "both entail the forcible displacement of persons from the area in which they are lawfully present, without grounds permitted under international law. The crime of deportation requires that the victims be displaced across a *de jure* state border, or, in certain circumstances, a *de facto* border", while forcible transfer involves displacement of persons within national boundaries.[2413] The question of whether a border was crossed determines whether the conduct is characterised as the crime against humanity of deportation or as the other inhumane act of forcible transfer, not whether the conduct was criminal.

835. As pointed out by the Lead Co-Lawyers, the gathering up and removal of the Vietnamese from Tram Kak could also constitute the other inhumane act of enforced disappearance. The Supreme Court Chamber does not need to consider whether this conduct amounts to enforced disappearance, however, as the Trial Chamber already found, and this Chamber upheld, that other inhumane acts through conduct characterised as enforced disappearances had been established in Tram Kak, including in relation to the disappearance of Vietnamese.[2414]

836. To determine whether the evidence before the Trial Chamber was sufficient to be correctly characterised as deportation, this Chamber will review the evidence relied on by the Trial Chamber. The Trial Chamber inferred that "some Vietnamese persons gathered up in Tram Kak district indeed crossed the international border and were sent to Vietnam".[2415] This inference was drawn on the basis of witness and civil party testimony referring to Vietnamese being exchanged for Khmer Krom and sent back to their country, which in turn was consistent

[2411] Trial Judgment (E465), para. 681.
[2412] KHIEU Samphân's Appeal Brief (F54), paras 689-694.
[2413] *Prosecutor v. Gotovina et al.*, Trial Chamber I (ICTY), IT-06-90-T, Judgement, Volume II of II, 15 April 2011, para. 1738.
[2414] Trial Judgment (E465), paras 1201, 1204.
[2415] Trial Judgment (E465), para. 1158.

with a statement made in a notebook from the Kraing Ta Chan security centre located in Tram Kak district[2416] and statements made in the April 1976 *Revolutionary Flag*, as well as the Trial Chamber's findings concerning an exchange whereby Khmer Krom arrived in Tram Kak district in return for Vietnamese who had left.[2417]

837. The witness and civil party testimony relied on by the Trial Chamber consisted of testimony from: (1) PECH Chim, part of the District Committee and Tram Kak District Secretary,[2418] who gave detailed evidence of the political structures of the district and of Kraing Ta Chan Security Centre and testified that there were Vietnamese soldiers and civilians "everywhere" in Tram Kak and that there was a repatriation process which did not involve executions, but was rather an exchange of persons over two nights to "empty the area" of Vietnamese. He testified that as far as he knew, those married to Cambodians were permitted to stay. He also testified on Khmer Krom refugees being received in Tram Kak district. While he gave details of these events, he was careful to distance himself from any killings;[2419] (2) EK Hoeun, who had worked in the District Office and who suggested the occurrence of both planned exchanges and also killings of Vietnamese;[2420] (3) SANN Lorn, a messenger for the District Office in Angk Roka, who was involved in an operation to transport a "huge number" of Vietnamese in Tram Kak district who had been told they were being sent back to Vietnam, but he did not know what happened to them after he handed them over to the district militia;[2421] (4) CHANG Srey Mom, who testified that some Vietnamese were taken from Nhaeng Nhang commune when *Angkar* was searching for Vietnamese to be "sent back to their country", but recalled them being taken in the direction of the mountains rather than toward Vietnam;[2422] (5) CHOU Koemlan, who described an announcement made in her village that Vietnamese had to be gathered and sent back to their country, but who also referred to this as a "vicious trick";[2423] (6) RIEL Son, who testified that Vietnamese disappeared at night time or during the time he was working in the field or at canal worksites;[2424] and (7) PHANN Chen, a former chief of

[2416] Trial Judgment (E465), para. 2683.
[2417] Trial Judgment (E465), paras 1115, 1158.
[2418] Trial Judgment (E465), paras 922, 956, 1071, 2694, 2702-2705 and section 10.1.5.
[2419] Trial Judgment (E465), paras 1110, 1121.
[2420] Trial Judgment (E465), paras 1111-1112.
[2421] Trial Judgment (E465), paras 1113-1114.
[2422] Trial Judgment (E465), para. 1116.
[2423] Trial Judgment (E465), para. 1116.
[2424] Trial Judgment (E465), para. 1117.

Kraing Ta Chan Security Centre, who testified that he knew about instructions from the District Committee to "smash" Vietnamese.[2425]

838. Although KHIEU Samphân submits that the Trial Chamber erred in relying on PECH Chim's testimony, claiming that he was referring to events that took place prior to 17 April 1975,[2426] the Supreme Court Chamber notes that the Trial Chamber considered the issue of the time period to which PECH Chim referred. The Trial Chamber explained that "at one point in his evidence, PECH Chim appeared to say that a withdrawal of Vietnamese took place in 1972 rather than after 17 April 1975. However, the overall thrust of PECH Chim's evidence described events after 17 April 1975 and this Chamber is satisfied that his description of events involving Yeay Khom and Chorn relates to this later period".[2427] Although the Supreme Court Chamber acknowledges that PECH Chim stated that the repatriation of Vietnamese he had referred to occurred in 1972,[2428] it recalls that the Trial Chamber is the chamber entrusted with determining factual findings[2429] and it will not lightly upset such conclusions. The Trial Chamber explained why it understood PECH Chim's statements to refer to the post-17 April 1975 period despite his later clarification to the contrary, and the Supreme Court Chamber does not consider the Trial Chamber's finding to be one that no reasonable trial chamber could reach.

839. KHIEU Samphân submits that the testimony of EK Hoeun, SANN Lorn, CHANG Srey Mom, and CHOU Koemlan shed no light on the fate of the Vietnamese who were gathered up, except that some of their evidence indicated that the Vietnamese were sent away from the border.[2430] However, EK Hoeun testified to a policy to repatriate Vietnamese from Tram Kak district in exchange for Khmer Krom. This policy then changed to one of killing Vietnamese.[2431] There was some coherence between the witnesses to acts of treachery when Vietnamese headed for the border in trucks were diverted and presumed killed.[2432] There was some coherence in the evidence that large numbers of Vietnamese were rounded up and taken

[2425] Trial Judgment (E465), para. 1117.
[2426] KHIEU Samphân's Appeal Brief (F54), paras 696-698.
[2427] Trial Judgment (E465), fn. 3707.
[2428] PECH Chim was asked specifically about whether his earlier statements concerning the repatriation of Vietnamese referred to the post-17 April 1975 time period and he stated: "Allow me to clarify the matter. Maybe I was confused in my statement. The Vietnamese withdrawal actually took place in 1972, that is before the liberation in 1975. At that time, Angkar made an arrangement for the repatriation of the Vietnamese and that took place in 1972, though I cannot recall the month." T. 24 April 2015, E1/292.1, p. 59.
[2429] Case 002/01 Appeal Judgment (F36), para. 94.
[2430] KHIEU Samphân's Appeal Brief (F54), paras 700-703.
[2431] Trial Judgment (E465), para. 1111.
[2432] See Trial Judgment (E465), paras 1111, 1112, 1116.

away in trucks.[2433] EK Hoeun was acutely aware of what was happening to the Vietnamese as he himself was of Vietnamese origin.[2434]

840. SANN Lorn testified that he transported Vietnamese but had no idea what happened to them after he handed them over to the district militia.[2435] "CHANG Srey Mom testified that some Vietnamese or persons who pretended to be Vietnamese in an attempt to leave Cambodia, were taken from Nhaeng Nhang commune when Angkar was searching for Vietnamese to be 'sent back to their country'."[2436] However, she also recalled people boarding a truck or trucks that were headed away from Vietnam.[2437] CHOU Koemlan "described an announcement made in 1976 in her village in Leay Bour commune, when they were told that Vietnamese 'had to be gathered up and sent back to their country'", but she referred to this as a "vicious trick".[2438] These testimonies support the idea that Vietnamese were gathered up and moved, and may also lend some credence to the inference that some Vietnamese crossed the border.

841. The Trial Chamber found a statement made in a notebook from Kraing Ta Chan Security Centre to be consistent with this testimony. The relevant portion of the Kraing Ta Chan notebook states that "[i]n January 1976 *Angkar* rounded up the *Yuon* [Vietnamese] people and sent them back to Vietnam".[2439] The Trial Chamber found that this statement was "a narrative description";[2440] thus it was not considered to be torture-tainted and could be properly relied upon by the Trial Chamber. This Chamber concurs and refers to Section V.E.2.e of this Judgment, addressing KHIEU Samphân's arguments concerning reliance on torture-tainted evidence, including the Trial Chamber's reliance on this document.

842. The Trial Chamber also relied on an issue of *Revolutionary Flag*. The issue in question states:

> Our people are called the "Kampuchean people." However, there were many foreigners, hundreds of thousands, and one type of foreigner that was very strongly poisonous and dangerous to our people. These people have what is called poisonous composition since they came to wolf us down, came to nibble at us, came to swallow us, came to confiscate and take away everything, and came to endanger our nation and our people, and they have caused us to lose much territory in the past. Even recently, before we waged the war of national liberation and during that five-year period, some territory and some locations were 99 percent foreigner, meaning 99% of those

[2433] See Trial Judgment (E465), paras 1112-1114.
[2434] Trial Judgment (E465), para. 1112.
[2435] Trial Judgment (E465), para. 1114.
[2436] Trial Judgment (E465), para. 1116.
[2437] Trial Judgment (E465), para. 1116.
[2438] Trial Judgment (E465), para. 1116.
[2439] Kraing Ta Chan Notebook, E3/5827, ERN (EN) 00866430.
[2440] Trial Judgment (E465), para. 1115.

> districts were foreigners. We could not get inside there. These foreigners came to confiscate and to swallow. Traitors and exploiting classes inside the country sold land to foreigners, whole villages, subdistricts, districts, lakes, and swamps, and let them be the complete masters. Kampucheans, Khmer, could not go inside. So then, this example makes it clear that each year our nation was in tremendous danger. If left to continue for ten more years, what would have happened? If left to continue another 20 or 30 years, what would have happened? Within 20 years these foreigners would certainly have increased to 10,000,000 persons. It is this state that was called swallowing and wolfing-down our Kampuchean nation and people. This was the actual state of our country.
>
> However, our revolution, in particular on 17 April 1975, sorted this issue out cleanly and sorted it out entirely. We assume that we sorted it out permanently. For thousands of years we were unable to resolve this issue and did not resolve it. The exploiting classes did not only not sort this out, they sold whole sections of land to these foreigners. Now we have […] swept hundreds of thousands of these foreigners clean and expelled them from our country, got them permanently out of our territory.[2441]

843. According to KHIEU Samphân, the Trial Chamber distorted the meaning of this passage, which actually indicated that the Khmer Rouge had expelled Americans, Europeans, and others when it arrived in the capital on 17 April 1975.[2442] He argues that the Trial Chamber's reliance on Expert Alexander HINTON to support its conclusion that the *Revolutionary Flag* referred to expelling Vietnamese, is flawed as this was not HINTON's area of expertise.[2443] KHIEU Samphân's submission is unpersuasive. The passage clearly refers to "one type of foreigner" and refers to particular districts being composed almost entirely of this type of foreigner. It was certainly reasonable for the Trial Chamber to conclude that it referred to the Vietnamese and to their removal.

844. The Trial Chamber also referred to its findings concerning the arrival of Khmer Krom in Tram Kak in exchange for Vietnamese who had left.[2444] KHIEU Samphân argues that these findings should not be used to prove that Vietnamese were deported because none of the Khmer Krom who testified knew what happened to the Vietnamese.[2445] However, documentary evidence from the Tram Kak District Records supports that Vietnamese were removed from Tram Kak, as one document refers to the Khmer Krom being those "exchanged against Yuon".[2446] Although the Trial Chamber correctly recognised that crimes against the Khmer Krom were beyond the scope of Case 002/02,[2447] there is no reason why the Trial Chamber should not have considered facts relevant to the Khmer Krom when they relate to charges

[2441] Revolutionary Flag, April 1976, E3/759, pp. 5-6.
[2442] KHIEU Samphân's Appeal Brief (F54), para. 706.
[2443] KHIEU Samphân's Appeal Brief (F54), para. 708.
[2444] Trial Judgment (E465), para. 1158, referring to paras 1118-1119, 1125.
[2445] KHIEU Samphân's Appeal Brief (F54), para. 710.
[2446] Confirmation Report, 8 May 1977, E3/2048, ERN (EN) 01454946.
[2447] Trial Judgment (E465), para. 185.

within the scope of Case 002/02, despite KHIEU Samphân's argument to the contrary.[2448] The Trial Chamber explicitly considered the authenticity of the Tram Kak District Records, noting that some of them, including the above-quoted document, demonstrate consistency and corroboration with evidence given by persons who appeared before it.[2449] The Supreme Court Chamber sees no error in the Trial Chamber's reliance on them.

845. In sum, the Supreme Court Chamber concludes that KHIEU Samphân has failed to demonstrate the unreasonableness of the Trial Chamber's inference that at least some of the "huge number" of Vietnamese it found were removed from Tram Kak,[2450] who had previously been found "everywhere" in Tram Kak district,[2451] actually crossed the border to Vietnam.

846. This Chamber finds no merit in the further submission that the Trial Chamber erred in concluding that there was intent to force Vietnamese across a national border. The evidence was of people of Vietnamese origin being rounded up and brought to Tram Kak and then transported out. The strong suspicion that most were executed does not displace the evidence that Vietnamese did not have a choice in what happened. KHIEU Samphân's allegations regarding the deportation of Vietnamese from Tram Kak are dismissed.

2. Prey Veng

847. In assessing whether deportation from Prey Veng occurred, the Trial Chamber recalled its finding that from 1975 to the end of 1976, there was a nationwide policy to expel people of Vietnamese ethnicity living in Cambodia.[2452] The Trial Chamber was satisfied that the preparation of lists of Vietnamese and the implementation of a policy that considered Vietnamese ethnicity to be matrilineal created a coercive environment where the Vietnamese were forced to leave and lacked any genuine choice.[2453] The Trial Chamber was satisfied that the Vietnamese in question had lived in their respective communities, some for generations, prior to their forced displacement.[2454] The Trial Chamber found that a number of Vietnamese were gathered and removed from Prey Veng province.[2455] The Trial Chamber also considered that the armed conflict between Cambodia and Vietnam did not provide a lawful basis for

[2448] KHIEU Samphân's Appeal Brief (F54), para. 714.
[2449] Trial Judgment (E465), Section 10.1.4, and in particular para. 869.
[2450] Trial Judgment (E465), para. 1114.
[2451] Trial Judgment (E465), para. 1110.
[2452] Trial Judgment (E465), para. 3503.
[2453] Trial Judgment (E465), para. 3503.
[2454] Trial Judgment (E465), para. 3504.
[2455] Trial Judgment (E465), para. 3505.

deportation.[2456] Recalling its findings concerning the policy to expel people of Vietnamese ethnicity from Cambodia, it found that the displacement of Vietnamese was intentional.[2457] Accordingly, the Trial Chamber found that "the crime against humanity of deportation is established in relation to the large number of Vietnamese expelled from Prey Veng province in 1975 and 1976."[2458]

848. KHIEU Samphân submits that the Trial Chamber engaged in unwarranted extrapolation to conclude, based on evidence specific to families from three villages, that a large number of Vietnamese were gathered, evacuated, and expelled from throughout Prey Veng province.[2459] He argues that the evidence was, in any event, insufficient to conclude that families were evacuated from the three villages of Anlong Trea, Pou Chentam, and Angkor Yuos.[2460] He claims that the Trial Chamber relied on the testimony of one witness, one civil party, two Written Records of Interview, and an annex to a Civil Party Application, and that the witness's testimony was misrepresented, the civil party's testimony was hearsay, and the Written Records of Interview lacked detail and reliability and were of low probative value.[2461] Concerning the Annex to a Civil Party Application, KHIEU Samphân argues that due to its low probative value, the Trial Chamber claimed to rely on it only as corroborative evidence, but instead made the finding that Vietnamese were removed from Angkor Yuos village based solely on that Civil Party Application.[2462]

849. KHIEU Samphân further submits that the Trial Chamber erred in finding that Vietnamese were forced to leave as the evidence relied on by the Trial Chamber was general and not specific to Prey Veng; there is no evidence of a coercive environment or of lists of Vietnamese being drawn up in Prey Veng.[2463] He contends that the Trial Chamber erred by relying on evidence of a general policy to establish intent to deport, rather than finding intent specifically with regard to the deportations from Prey Veng.[2464]

850. The Co-Prosecutors respond that the Trial Chamber did not unreasonably extrapolate; it referred to events that occurred throughout the province before focusing on specific instances

[2456] Trial Judgment (E465), para. 3506.
[2457] Trial Judgment (E465), para. 3507.
[2458] Trial Judgment (E465), para. 3507.
[2459] KHIEU Samphân's Appeal Brief (F54), paras 966-969.
[2460] KHIEU Samphân's Appeal Brief (F54), para. 968.
[2461] KHIEU Samphân's Appeal Brief (F54), paras 969-977.
[2462] KHIEU Samphân's Appeal Brief (F54), para. 978.
[2463] KHIEU Samphân's Appeal Brief (F54), paras 981, 984.
[2464] KHIEU Samphân's Appeal Brief (F54), paras 985-986.

of families being gathered, removed, and seen leaving from boats in particular villages, and, in any event, there is no minimum number of persons required to prove the charge of deportation.[2465] They respond that the Trial Chamber did not distort the witness's testimony, that the Written Records of Interview corroborate this testimony, and that the civil party's testimony included her personal knowledge of Vietnamese in the area being forced to return to Vietnam and her statement that she urged her Vietnamese husband to leave.[2466] They submit that the Annex to the Civil Party Application corroborates the existence of a pattern of displacements of Vietnamese from Prey Veng and "[e]ven if the [Trial Chamber] erred by legally characterising this evidence as an instance of deportation, the [Trial Chamber] properly found that other instances of deportation of Vietnamese from Prey Veng province to Vietnam were established" beyond reasonable doubt.[2467] They respond that KHIEU Samphân failed to demonstrate any error in the Trial Chamber's finding that there was a coercive environment in which the Vietnamese lacked any genuine choice in leaving and that this was part of a nationwide policy, demonstrating intent.[2468]

851. The Lead Co-Lawyers agree with the Co-Prosecutors' Response, and add that Civil Party DOUNG Oeurn testified that she heard Vietnamese were being sent to Vietnam, that she urged her husband to go, but he refused, and that one Vietnamese family in her village did return to Vietnam.[2469] They respond that it was reasonable for the Trial Chamber to rely on this evidence, and that it explicitly acknowledged that some of the evidence was hearsay.[2470] They further respond that KHIEU Samphân disregards that the specific events in Prey Veng were corroborated by evidence relating to a nationwide policy, and that the Trial Chamber had assessed a considerable body of evidence in establishing that policy.[2471]

852. There is no numeric threshold required for a finding of deportation. The Supreme Court Chamber therefore dismisses KHIEU Samphân's argument that the Trial Chamber erroneously extrapolated from the evidence to find that a "large number" of Vietnamese were deported from Prey Veng. This Chamber will consider whether the evidence relied on by the Trial Chamber to find the *actus reus* of deportation was sufficient, before considering KHIEU Samphân's

[2465] Co-Prosecutors' Response (F54/1), para. 562.
[2466] Co-Prosecutors' Response (F54/1), paras 563-565.
[2467] Co-Prosecutors' Response (F54/1), para. 566.
[2468] Co-Prosecutors' Response (F54/1), para. 567.
[2469] Lead Co-Lawyers' Response (F54/2), paras 308-310.
[2470] Lead Co-Lawyers' Response (F54/2), paras 311-312.
[2471] Lead Co-Lawyers' Response (F54/2), para. 313.

arguments concerning whether the expulsions to Vietnam were forced and were committed with intent.

853. In finding that the *actus reus* of deportation had been met, the Trial Chamber stated that "[s]pecific instances of families being gathered, removed and seen leaving by boats were found" in Anlong Trea village, Pou Chentam village, and Angkor Yuos village.[2472] The Trial Chamber based its findings regarding Anlong Trea village on the testimony of Witness SAO Sak and the Written Records of Interview of EM Bunnim and BUN Reun.[2473] It relied on the testimony of Civil Party DOUNG Oeun to reach its findings regarding Pou Chentam village.[2474] The Trial Chamber relied on an annex to a Civil Party Application to reach its findings regarding Angkor Yuos village.[2475]

854. SAO Sak spent her entire life in Anlong Trea village.[2476] The Trial Chamber found that "[s]he directly witnessed the Vietnamese living in Anlung Trea village […] being gathered and 'evacuated to the lower part', with mixed families being gathered 'continuously and they were sent by boats'".[2477] She clarified that "the lower part" refers to Vietnam.[2478] She also clarified that she did not witness the events she described, but was told about them by others.[2479] Her

[2472] Trial Judgment (E465), para. 3505.
[2473] Trial Judgment (E465), para. 3430.
[2474] Trial Judgment (E465), para. 3431.
[2475] Trial Judgment (E465), para. 3432.
[2476] Trial Judgment (E465), para. 3430.
[2477] Trial Judgment (E465), para. 3430.
[2478] T. 3 December 2015, E1/362.1, p. 90.
[2479] T. 7 December 2015, E1/363.1, pp. 15-17:

> Q: […] I would like to read out to you what you stated on Thursday and put some questions to you regarding that. You stated at 15.20.15 as follows: "I saw that they were assembled and they were evacuated to the lower region. Those who were from mixed families were continually assembled and sent away by boat. As for mixed families, they sent those families one at a time and they kept disappearing." Do you remember making that statement on Thursday?
> A. Yes I did.
> Q. Can you explain to the Chamber to the best of your recollection, how those persons were assembled and evacuated? What do you remember as regards those events?
> A. I did not witness that. They assembled people and sent to somewhere. So each family was collected and sent away and they disappeared and <they did not allowed us to see that. Sometimes they were sent at night time, sometimes at day time, I did not know much about this because I worked during the day. I only knew that every two or three days, so and so family disappeared. So, I secretly asked other people and they told me that they were sent away to the lower area. But, no one knew where they were taken to.
> Q. Did you know during that period who assembled these people? Were they cadres or militiamen in your village in Anlong Trea or did persons from outside of the village come to organise such evacuations? Do you remember anything about that?
> A. I did not know about that. I did not know who came to assemble people I just only knew that people disappeared. […]
> Q. On Thursday you stated that the persons who were assembled and evacuated, were evacuated to Vietnam. How did you come by such information and on what basis here today can you say that they were evacuated to Vietnam?
> A. It's only what I heard from other people say that those people were sent to the lower area, to Vietnam.

hearsay evidence was corroborated by the Written Records of Interview of EM Bunnim and BUN Reun.

855. EM Bunnim was born in Anlong Trea village.[2480] According to his Written Record of Interview, he was 51 years of age in 2009,[2481] so he would have been 17 years old in 1975, not "a young child" as claimed by KHIEU Samphân.[2482] He does not explain how he learned that the civil authorities told the Vietnamese to go back to Vietnam, but clearly states that they did so. This Chamber does not consider that he would have been too young to understand such an instruction. When asked if he knew what happened to the Vietnamese and their families in his birth village, he responded:

> During the LON Nol period there were already some Vietnamese making repatriation. After the Khmer Rouge won [the war] in 1975, the Vietnamese people, who had been living in Anlung Trea village (for a long time ago), were told by the civil authorities of the village and the commune to go back to Vietnam. I saw with my own eyes those Vietnamese people rode in the boats from Anlung village down to Neak Loeung. I did not see or recall whether any persons died if they resisted. At that time I was young working as cow herder. I did not participate in the meeting so I did not know about the policy to send the Vietnamese people back to their country.[2483]

856. He also states that his grandmother told him that his mother was arrested and taken away on a boat because she was Vietnamese, but he was spared because the villagers explained to the village militias that he had Khmer blood as his father was pure Khmer.[2484]

857. BUN Reun was born in Anlong Trea village and lived there from 1975 to 1979.[2485] In 1975, he would have been 14 years old.[2486] He worked as a messenger for the village chief and stated that he was instructed to call in a boy whose father was Vietnamese, but the boy cried, so he informed the chief he was unable to locate the boy. He stated that he did not know why the boy had been summoned.[2487] He listed Vietnamese families still living in Anlong Trea and stated that the Khmer Rouge allowed the majority of the Vietnamese to return to their home

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> Q. And those persons who told you that, were people who were living in Anlong Trea village at the time; did people talk about that in the village at the time, that people were evacuated to Vietnam or is that something you learnt about subsequently after the end of the Democratic Kampuchea regime?
> A. It's what I heard from the villagers, that those people were evacuated to Vietnam and they were sent back to their home country in Vietnam. So it's what people said.

[2480] Written Record of Interview of EM Bunnim, 4 April 2009, E3/7760, p. 2.
[2481] Written Record of Interview of EM Bunnim, 4 April 2009, E3/7760, p. 2.
[2482] KHIEU Samphân's Appeal Brief (F54), para. 975.
[2483] Written Record of Interview of EM Bunnim, 4 April 2009, E3/7760, p. 3.
[2484] Written Record of Interview of EM Bunnim, 4 April 2009, E3/7760, p. 4.
[2485] Written Record of Interview of BUN Reun (Beun), 15 January 2009, E3/7811, p. 2.
[2486] Written Record of Interview of BUN Reun (Beun), 15 January 2009, E3/7811, p. 2, stating that the witness was 48 years old on the date of the interview in 2009.
[2487] Written Record of Interview of BUN Reun (Beun), 15 January 2009, E3/7811, p. 2.

country and that he learned of the transporting of Vietnamese back to their country through villagers and personal observations.[2488] The Supreme Court Chamber does not consider that the Trial Chamber erred in finding that Vietnamese families from Anlong Trea were deported based on the testimony of SAO Sak and the Written Records of Interview of EM Bunnim and BUN Reun. KHIEU Samphân has not demonstrated that this was a finding that no reasonable trial chamber could reach.

858. Concerning Pou Chentam village, the Trial Chamber stated: "[f]rom 1975, DOUNG Oeurn who was living in Pou Chentam village, Svay Antor commune, Prey Veng district, Prey Veng province, heard that the Vietnamese living in her area had to return to Vietnam and that *Ta* Ki, *Yeay* Min and their children did. The manner in which this return occurred, however, was not further explored in court."[2489] As noted by the Lead Co-Lawyers,[2490] DOUNG Oeurn was personally aware that Vietnamese were being told to return to Vietnam, and she urged her Vietnamese husband to go, but he refused, and he was later taken away.[2491] She testified that the Khmer Rouge arrived in Pou Chentam village in 1977,[2492] contradicting the Trial Chamber's finding that the deportations occurred in 1975 and 1976.[2493]

859. In relation to Angkor Yuos village, the Trial Chamber relied on an annex to the Civil Party Application of PEOU Hong, who was born in 1965 and thus would have been 10 years old in 1975.[2494] The Trial Chamber recognised that it "bears very limited probative value".[2495] However, the Trial Chamber found that it corroborated the existence of a pattern of displacements of Vietnamese in Prey Veng province in 1975.[2496] The annex states:

[2488] Written Record of Interview of BUN Reun (Beun), 15 January 2009, E3/7811, p. 3.
[2489] Trial Judgment (E465), para. 3431.
[2490] Lead Co-Lawyers' Response (F54/2), para. 222.
[2491] T. 25 January 2016, E1/381.1, p. 11-12.
[2492] T. 25 January 2016, E1/381.1, p. 21-22:

> Q. Thank you very much. Are you able to recall when it was that the Khmer Rouge arrived in Pou Chentam village?
> A. It was in 1977 when Khmer Rouge arrived in Pou Chentam.
> Q. I'd like to -- I heard you say that the Khmer Rouge arrived in your village in 1977. I would like to read a quote to you from a transcript of an individual who you may know, a fellow villager. His name was Theng Hui or Thang Phal. He came to testify before this Court, and this is the transcript at E1/370.1 just before the three -- 15.30.24 mark. Madam Civil Party, he stated that the Khmer Rouge took control of Pou Chentam village in 1972 or 1973. Having heard that, does that refresh your recollection that the Khmer Rouge actually arrived in Pou Chentam village in 1972 or 1973?
> A. I do not know about that statement. What I know is that it was in 1977 when the Khmer Rouge arrived at Pou Chentam village. That was all I knew.

[2493] Trial Judgment (E465), para. 3503.
[2494] Victim Information Form of PEOU Hong, E3/7165a, ERN (EN) 00824517.
[2495] Trial Judgment (E465), para. 3432.
[2496] Trial Judgment (E465), para. 3432.

> In late 1975, the chiefs of Angkor Yos village, namely Ta Muon and Sin, announced to ethnic Vietnamese residents and those with Vietnamese origins residing in the village that, "The *Angkar* needs to send you back to Vietnam." Then those families of Hong's great grand parents, grandparents, great aunts, great uncles, and aunts, including his own family along with many other Vietnamese families, under the supervision of the Khmer Rouge cadres, left the village by boats headed for K'am Samnar, a village on the Cambodian-Vietnamese border in Leuk Daek district of Sector 25. K'am Samnar was known as location where the Vietnamese side came to receive over these ethnic Vietnamese. Aftyer [sic] Hong's family group had spent about five nights at K'am Samnar, the Vietnamese side announced that, "These people are all Khmer nationals; thus, Vietnam does not accept them." The Khmer Rouge cadres told all these people to return to their original villages. Hong's family traveled back to Angkor Yos. Upon their arrival in Angkor Yos village, Hong's family had to live and farm like other people in the village.[2497]

860. The Supreme Court Chamber considers that the evidence relied on by the Trial Chamber is insufficient to support a finding beyond reasonable doubt that deportation occurred from Pou Chentam and Angkor Yuos villages. However, when considered together with the evidence from Anlong Trea village and the evidence of a nationwide policy to expel Vietnamese, the Trial Chamber could have reasonably concluded that some deportations occurred from Prey Veng in general.

861. KHIEU Samphân's argument that there was no policy toward the Vietnamese is addressed elsewhere in this Appeal Judgment.[2498] Concerning whether the Trial Chamber could have relied on general evidence of a policy toward Vietnamese in finding that the returns were forced and carried out with intent, the Supreme Court Chamber finds that KHIEU Samphân has not demonstrated any error in the Trial Chamber's approach. Evidence that Vietnamese were expelled nationally can certainly support a conclusion that Vietnamese were expelled from a particular area. Evidence of an intent to deport Vietnamese nationally can demonstrate intent to deport Vietnamese from Prey Veng. It was not necessary for the Trial Chamber to rely on evidence specific to Prey Veng as long as the evidence relied on allowed the Trial Chamber to find beyond reasonable doubt that the elements of deportation were met. Accordingly, the Supreme Court Chamber rejects KHIEU Samphân's argument.

E. TORTURE AS A CRIME AGAINST HUMANITY

1. Torture of the Cham

862. The Trial Chamber held that the crime against humanity of torture was established in relation to torture of the Cham.[2499] It found that IT Sen and other Cham men were separated

[2497] Victim Information Form of PEOU Hong, E3/7165a, ERN (EN) 00824527.
[2498] See Section VIII.B.5.a. See also Section VII.H.1.a.ii.
[2499] Trial Judgment (E465), para. 3319.

from women and children at Trea Village and ordered to go to the riverfront, where they were tied up, beaten, and repeatedly asked if they were Muslims.[2500] It recalled that "beatings amount *per se* to acts of torture causing serious pain or suffering" and that they "were deliberately inflicted by military men operating at the Security Centre, in order to determine whether the detainees were members of the Cham group".[2501] The Trial Chamber found that the deliberate physical and mental mistreatment inflicted during interrogations came from public officials acting on behalf of the CPK, whom the trial chamber found to be public officials, and was for the purpose of obtaining information.[2502]

863. KHIEU Samphân argues that the Trial Chamber erred in fact in considering that the beatings of IT Sen and other Cham men were inflicted to establish whether the detainees were Cham, as it relied only on the unsubstantiated testimony of IT Sen and this testimony was contradictory in stating that the beatings were to establish whether the detainees were Cham when the interrogators already knew they were Cham.[2503]

864. The Co-Prosecutors respond that KHIEU Samphân failed to demonstrate that the Trial Chamber's finding that Cham were tortured was one no reasonable trier of fact could make and misrepresented IT Sen's testimony.[2504] They respond that it is well-established that the Trial Chamber may rely on a single witness to make a finding and that IT Sen's testimony that the interrogators already knew the detainees were Cham does not make his evidence contradictory, nor would such a contradiction negate the Trial Chamber's finding that the beatings were to establish whether the detainees were Cham, satisfying the *mens rea* of torture.[2505]

865. The Lead Co-Lawyers agree with the Co-Prosecutors and additionally respond that "the Trial Chamber's finding that steps were taken to verify that the men were Cham once they arrived in Trea Village was also supported by the evidence of Civil Party NO Sates and Witness MATH Sor."[2506]

866. The Supreme Court Chamber agrees that the Trial Chamber may convict an accused on the basis of a single witness.[2507] Further, although IT Sen gave the only evidence concerning

[2500] Trial Judgment (E465), para. 3317, referring to para. 3276.
[2501] Trial Judgment (E465), para. 3318.
[2502] Trial Judgment (E465), para. 3318.
[2503] KHIEU Samphân's Appeal Brief (F54), para. 925.
[2504] Co-Prosecutors' Response (F54/1), para. 521.
[2505] Co-Prosecutors' Response (F54/1), paras 522-523.
[2506] Lead Co-Lawyers' Response (F54/2), para. 320.
[2507] Case 002/01 Appeal Judgment (F36), para. 496.

the beatings as acts of torture, his testimony concerning the sorting of men from women and Cham from Khmer at Trea Village was corroborated by NO Sates and MATH Sor, all three of whom the Trial Chamber found to be "credible and their evidence to be generally reliable."[2508] Although KHIEU Samphân challenged their credibility at trial, the Trial Chamber was not persuaded by his submissions.[2509]

867. Further, this Chamber considers that IT Sen's statement that their tormentors "knew we were Chams" and beat them worse if any of them denied being Cham does not detract from the finding that "the mistreatment was inflicted for the purposes of obtaining information."[2510] While another equally reasonable trier of fact may have found the evidence to be more consistent with torture by soldiers on people they knew to be Cham, because they were Cham, for the purpose of intimidation, the intent to torture still stands if the beatings were carried out to obtain information.[2511] The Supreme Court Chamber thus finds that KHIEU Samphân has not shown that no reasonable trier of fact could have made the same finding and dismisses his arguments concerning torture as a crime against humanity.

F. PERSECUTION AS A CRIME AGAINST HUMANITY

1. Applicable Law

868. The Trial Chamber defined the crime against humanity of persecution as:

> (i) an act or omission which […] discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*); and
>
> (ii) deliberate perpetration of an act or omission with the intent to discriminate on political, racial or religious grounds (*mens rea*).[2512]

869. This definition of persecution was affirmed by the Supreme Court Chamber in Case 002/01 and was not contested by the parties during the trial stage.[2513]

870. KHIEU Samphân alleges two errors of law relating to this definition of persecution and the interpretation of its elements. First, he submits that the Trial Chamber erred by omitting a requirement in customary international law that a deprivation of rights or discrimination must have as its objective the removal of persons from the society in which they live alongside the

[2508] Trial Judgment (E465), paras 3277-3280.
[2509] Trial Judgment (E465), para. 3280.
[2510] Trial Judgment (E465), para. 3318.
[2511] See Trial Judgment (E465), para. 701 (setting out the elements of torture).
[2512] Trial Judgment (E465), para. 713.
[2513] Trial Judgment (E465), para. 713.

perpetrators, or eventually even from humanity itself.[2514] Second, he argues that the Trial Chamber erred in characterising undifferentiated treatment that has a particular impact on a class of individuals as discrimination in fact.[2515] The Supreme Court Chamber will address these arguments in turn. Arguments relating to factual issues are addressed separately in the relevant sections of this Judgment.

a. Whether an Objective to Remove a Group from Society is an Element of Persecution

871. The Trial Chamber, relying on this Chamber's jurisprudence, defined the crime against humanity of persecution as:

> (i) an act or omission which […] discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*); and
>
> ii) deliberate perpetration of an act or omission with the intent to discriminate on political, racial or religious grounds (*mens rea*).[2516]

872. In this appeal, KHIEU Samphân nevertheless submits that the Trial Chamber erred by omitting a requirement in customary international law that a deprivation of rights or discrimination must have as its objective the removal of persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.[2517] While KHIEU Samphân notes that in the Case 001 Appeal Judgment, the Supreme Court Chamber rejected jurisprudence that the definition includes a requirement of the objective of permanent removal from society, he submits that the Supreme Court Chamber erred in doing so.[2518] He submits that ICTY and ICTR jurisprudence initially included the requirement based on post-World War II jurisprudence but later abandoned it without reasoning.[2519] He claims that this position indicates no more than that the requirement was no longer in existence in 1991.[2520] He argues that the International Military Tribunal ("IMT") Judgment and the *Eichmann* Judgment of the Jerusalem District Court show that persecution requires intent to remove targeted individuals from society.[2521]

[2514] KHIEU Samphân's Appeal Brief (F54), para. 642.
[2515] KHIEU Samphân's Appeal Brief (F54), paras 744, 813, 954.
[2516] Trial Judgment (E465), para. 713, referring to Case 001 Appeal Judgment (F28), paras 236-240. The limitation to the discriminatory grounds of political, racial, or religious grounds reflects the scope of the discriminatory grounds included in the ECCC Law. Case 001 Appeal Judgment (F28), para. 237.
[2517] KHIEU Samphân's Appeal Brief (F54), para. 642.
[2518] KHIEU Samphân's Appeal Brief (F54), paras 643-644.
[2519] KHIEU Samphân's Appeal Brief (F54), para. 643.
[2520] KHIEU Samphân's Appeal Brief (F54), paras 645-652.
[2521] KHIEU Samphân's Appeal Brief (F54), paras 653-655.

873. The Co-Prosecutors respond that the Trial Chamber correctly followed the Supreme Court Chamber's jurisprudence, which relied on a wealth of post-World War II jurisprudence to determine that there is no legal requirement that the perpetrator possess a persecutory intent over and above a discriminatory intent.[2522] They respond that only one ICTY Judgment, the *Kordić & Čerkez* Trial Judgment, which was overturned on appeal, actually required an objective to remove a targeted group from society as an element of the crime.[2523] They further respond that post-World War II jurisprudence does not support KHIEU Samphân's position, but instead demonstrates that the requisite intent for persecution is the discriminatory intent directed against a specific group or groups.[2524]

874. The Supreme Court Chamber recalls its thorough inquiry into the elements of the crime of persecution in Case 001. That inquiry included an analysis of how the *mens rea* element of persecution was applied in the IMT and national military tribunals' jurisprudence. The Supreme Court Chamber reasoned in Case 001 that the *mens rea* of persecution includes a specific intent to discriminate over and above the general intent to commit the underlying crime it encompasses.[2525] This conclusion was supported by a plain and purposive reading of the drafting history and text of the IMT Charter, Control Council Law No. 10, and the 1950 Nuremberg Principles, and further strengthened by this Chamber's review of the *ad hoc* tribunal jurisprudence, which it found to be "relatively uncontroversial" on the requirement of a specific intent for persecution.[2526]

875. The Supreme Court Chamber explained in Case 001 that:

> two Trial Chambers in the ICTY and one Trial Chamber in the ICTR […] found that the *mens rea* for persecution requires evidence that the deprivation of rights must "have as its aim the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself." However, other ICTY and ICTR Trial Chambers and Appeals Chambers did not adopt this requirement. Furthermore, the Supreme Court Chamber finds that while this became the ultimate goal of the Nazi plan of persecution of the Jews in particular, post-World War II tribunals did not seem to require evidence of this for each and every defendant vis-à-vis the specific persecutory acts for which they were convicted.[2527]

[2522] Co-Prosecutors' Response (F54/1), para. 378.
[2523] Co-Prosecutors' Response (F54/1), para. 379.
[2524] Co-Prosecutors' Response (F54/1), paras 380-382, referring to the *Justice* and *RuSHA* Judgments of the US Military Tribunal and the *Greiser* Judgment of the Supreme National Tribunal of Poland, as well as their alternative understanding of the IMT and *Eichmann* Judgments.
[2525] Case 001 Appeal Judgment (F28), para. 236 & fns 504-505.
[2526] Case 001 Appeal Judgment (F28), paras 236-239 & fns 504-507, 511-514.
[2527] Case 001 Appeal Judgment (F28), fn. 514 (internal citations omitted).

876. This Chamber is unpersuaded by the jurisprudence relied upon by KHIEU Samphân to alter its finding. The IMT may have found that some defendants intended to remove Jews from German society, but this was not set out by the IMT as an element of persecution. Rather, it was a finding made based on the facts of the case. The same is true of the *Eichmann* case.

877. The IMT was presented with a significant amount of evidence concerning the pre-1939 treatment of Jews and appears to have considered that persecution occurred prior to the existence of a policy directed toward removing Jews from German society (though it may have lacked jurisdiction over these acts of persecution due to their not having been committed in execution of or connection with war crimes or crimes against peace). The IMT Judgment states:

> The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale. […] *With the seizure of power, the persecution of the Jews was intensified*. A series of discriminatory laws was passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. *By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life*.[2528]

878. The facts found were of increasing and worsening discrimination against the Jews culminating in their arrests and removal to slave labour and death camps. There is no suggestion in that judgment that those Jews who fled Germany because of the discriminatory laws which restricted their professional, economic and family life were *not* persecuted as they were *not removed from German life* nor is there any suggestion that the crime of persecution mandated the extermination of the Jews or any targeted group.

879. In the same vein, the *Eichmann* case, which KHIEU Samphân also focuses on, read in context, also indicates that the intent to discriminate for persecution was construed more broadly than the intent to eliminate persons belonging to a group from society, as KHIEU Samphân argues.[2529] The relevant part of the *Eichmann* Judgment, which he also quotes, in fact reads that "[a]ll his acts carried out with the intent of exterminating the Jewish People also amount, in fact, to the persecution of Jews on national, racial, religious and political grounds."[2530] The Court did not hold that the intent of persecution *is* the intent to exterminate

[2528] *United States of America et al. v. Goering et al.*, Judgment (IMT), 1 October 1946, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (1947), Vol. I ("IMT Judgment"), pp. 247-249 (emphasis added).
[2529] KHIEU Samphân's Appeal Brief (F54), paras 653-655.
[2530] KHIEU Samphân's Appeal Brief (F54), para. 654, fn. 1139, referring to District Court of Jerusalem Criminal Case No. 40/61, 36 ILR, 1968, para. 201.

or eliminate the persons. Rather, it cautiously stated that it additionally "amounts to" persecution.

880. Furthermore, the reason persecution is considered a crime against humanity is due to the inhumanity of discriminatory gross or blatant denials of fundamental human rights.[2531] It would be nonsensical to consider that this crime could not serve to protect a group of people living in a society where their fundamental human rights are violated, but would only protect those intended to be removed from that society. A group could be considered "second-class citizens" and treated poorly without a desire that they be removed from society.

881. While the concern is with the law as it existed in 1975, it is notable that the additional *mens rea* element suggested by KHIEU Samphân was not considered for inclusion in the Rome Statute. Were it at one time considered an element of persecution, one should expect to find at least some discussion of whether to remove it, yet this does not appear to have been discussed.

882. As this Chamber has found that an intent to remove "persons from the society in which they live, or eventually even from humanity itself" is not an element of the *mens rea* of persecution, KHIEU Samphân has failed to show an error of law by the Trial Chamber. His arguments that the Trial Chamber erred by failing to establish that this element had been met with regard to Buddhists and Monks and the Cham are therefore moot.[2532] This argument is dismissed in whole.

b. Whether Undifferentiated Treatment that Has a Particular Impact on a Class of Individuals Can Amount to Discrimination in Fact

883. KHIEU Samphân submits that the Trial Chamber erred in law in characterising undifferentiated treatment that has a particular impact on a class of individuals as discrimination in fact.[2533] He argues that indirect discrimination is a recent human rights concept that emerged in 1995 and was recognised in ECtHR case law only in the 2000s and was not considered discrimination in fact in customary international law in 1975.[2534]

[2531] Draft Code of Crimes against Peace and Security of Mankind, 1996, p. 49: "The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognized in the Charter of the United Nations (Arts. 1 and 55) and the International Covenant on Civil and Political Rights (art. 2)".
[2532] KHIEU Samphân's Appeal Brief (F54), paras 656-657.
[2533] KHIEU Samphân's Appeal Brief (F54), paras 744, 813, 954-956.
[2534] KHIEU Samphân's Appeal Brief (F54), paras 955-956.

884. The Co-Prosecutors respond that there is no legal requirement to differentiate between direct or indirect discrimination when establishing the existence of *de facto* discrimination,[2535] and that an act or omission discriminates in fact when there are discriminatory consequences for members of a specific group.[2536]

885. The Lead Co-Lawyers respond that discrimination does not relate only to the acts or omissions taken in relation to a group, but to the consequences experienced by the group.[2537] They respond that the notion of discrimination resulting from equal treatment that has unequal consequences is referred to in human rights law as indirect discrimination, and the term "discrimination" has long been understood as incorporating both direct and indirect discrimination.[2538] The Lead Co-Lawyers submit that this concept can apply to international criminal law as well as human rights law as, unlike in human rights law, intent is clearly required for responsibility in international criminal law.[2539] They consider that the Supreme Court Chamber's reference in Case 001 to discriminatory or persecutory consequences indicates that persecution could be established through indirect discrimination.[2540] They cite three advisory opinions of the Permanent Court of International Justice (in 1923, 1932, and 1935), the 1929 Déclaration des Droits Internationaux de l'Homme, the 1960 UNESCO Convention against Discrimination in Education, the 1969 International Convention on the Elimination of All Forms of Racial Discrimination, a 1974 Judgment of the Court of Justice of the European Communities, and the 1979 International Convention on the Elimination of All Forms of Discrimination Against Women as evidence that discrimination was understood as including indirect discrimination in international law prior to 1975.[2541]

886. The Supreme Court Chamber considers that the primary issue before it is whether a finding of discrimination in fact can be established from the consequences or impact felt by a particular group. The Supreme Court Chamber recalls that the *actus reus* of persecution requires an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law.[2542] Discrimination in fact

[2535] Co-Prosecutors' Response (F54/1), paras 470, 479, 489, 491.
[2536] Co-Prosecutors' Response (F54/1), para. 405.
[2537] Lead Co-Lawyers' Response (F54/2), paras 345-348.
[2538] Lead Co-Lawyers' Response (F54/2), para. 349.
[2539] Lead Co-Lawyers' Response (F54/2), para. 350.
[2540] Lead Co-Lawyers' Response (F54/2), paras 352-353.
[2541] Lead Co-Lawyers' Response (F54/2), paras 354-362.
[2542] See *supra* Section VII.F.1.

refers to whether the target group actually suffers discriminatory consequences as a result of the act or omission, that is, discriminatory intent alone is insufficient.[2543]

887. The Supreme Court Chamber agrees with the Co-Prosecutors that there is no legal requirement to differentiate between direct or indirect discrimination when establishing the existence of discrimination in fact. This Chamber considers that whether the acts amount to direct or indirect discrimination is irrelevant for a determination of whether the group suffered consequences of the relevant act or omission. An act or omission is considered discriminatory when a victim is targeted because of the victim's membership in a group defined by the perpetrator on a political, racial, or religious basis.[2544] Whether a victim is targeted by indirect discrimination relates to the intent behind the act or omission. Sometimes, to establish whether laws are directed specifically towards one group when applied to all requires some examination. For instance, if a regime decreed that all citizens had to eat meat once a week this would have little deleterious effect on meat eaters but would affect those who belonged to religions that followed vegetarianism. Because the decree has negative consequences particularly for those whose religions require vegetarianism, members of those groups can be considered to have suffered discrimination in fact as a result of the decree. Whether this decree simply had unintended consequences for those religious groups or was a ruse to target those groups is a matter for enquiry into the objective of the decree. A holistic and contextual evaluation might determine that the intent behind the decree was specifically to target the adherents of religions that practiced vegetarianism. In such a situation, the conduct would amount to persecution.

888. In conclusion, the Trial Chamber did not err in law by considering the impact on the victims when determining whether discrimination in fact occurred. KHIEU Samphân's argument to the contrary is dismissed.

2. Political Persecution

a. Political Persecution of the Cham

889. The Trial Chamber found that the movement of the Cham from the East Zone to the Central (old North) Zone was discriminatory in fact and was deliberately perpetrated with the intent to discriminate against the Cham because they were perceived as enemies following

[2543] Case 001 Appeal Judgment (F28), paras 228, 271.
[2544] Case 002/01 Appeal Judgment (F36), para. 690.

rebellions in the East Zone.[2545] It found that acts committed against the group violated multiple human rights,[2546] and that the acts charged as persecution comprise acts that separately amount to independent crimes against humanity, and acts which on their own did not necessarily amount to crimes but, considered cumulatively, rose to the requisite level of severity to constitute persecution.[2547]

890. The Trial Chamber noted that in Case 002/01, the Supreme Court Chamber found that the Trial Chamber had erred in finding that the crime against humanity of persecution on political grounds had been established in relation to the forcible transfer of "New People" as "it cannot be said that it has been established that the transfer of people itself was carried out in a discriminatory manner or with discriminatory intent" and that "given that the transfer of people – primarily for economic goals – appears to have been a widespread practice that affected all parts of the population, the movement of the population during Movement of the Population Phase Two was not, as such, discriminatory or an emanation of persecutory intent".[2548] The Trial Chamber differentiated its findings in Case 002/02 concerning the movement of the Cham, explaining that it found that the Cham in the East Zone were specifically targeted as a result of rebellions and that this was indicative of Cham being dispersed to break up their communities, rather than just to displace the labour force.[2549]

i. Alleged Errors Concerning the *Actus Reus*

891. KHIEU Samphân submits that the Trial Chamber erred in law by failing to establish that the population transfers affected exclusively or at least primarily Cham and were therefore discriminatory, or that in the course of the transfer, the Cham were treated differently from others; this being the test the Supreme Court Chamber set out in Case 002/01 with regard to "New People."[2550] He argues that the Trial Chamber erred in fact by finding that the transfer of Cham as part of a broader transfer of the population could be considered discriminatory.[2551]

892. The Co-Prosecutors respond that KHIEU Samphân confuses the Supreme Court Chamber's analysis of the facts in Case 002/01 concerning "New People" with a general test

[2545] Trial Judgment (E465), para. 3323.
[2546] Trial Judgment (E465), para. 3324.
[2547] Trial Judgment (E465), para. 3325.
[2548] Trial Judgment (E465), para. 3321, quoting Case 002/01 Appeal Judgment (F36), para. 705.
[2549] Trial Judgment (E465), para. 3322.
[2550] KHIEU Samphân's Appeal Brief (F54), paras 926-927, referring to Case 002/01 Appeal Judgment (F36), para. 701.
[2551] KHIEU Samphân's Appeal Brief (F54), para. 926.

for discrimination.[2552] They respond that KHIEU Samphân failed to demonstrate an error of fact; the movement of the Cham was found to be distinct from the movement of New People in Case 002/01 as the Trial Chamber found that the Cham were targeted for movement because they were perceived to be enemies following rebellions.[2553]

893. The Lead Co-Lawyers agree with the Co-Prosecutors' Response.[2554] They add that treatment does not become indiscriminate simply because multiple different groups within a population are subjected to the same maltreatment; rather, "the appropriate comparison to establish whether discrimination exists is between the alleged target group and the general population as a whole."[2555]

894. In the Appeal Judgment in Case 002/01, the Supreme Court Chamber did not set out a test for determining whether discrimination in fact occurs. Rather, it explained that because of the scope of Case 002/01, the only conduct that could be taken into account to make a finding as to the *actus reus* of persecution was the actual transfer of people and not what happened to them at their destinations.[2556] It then explained that "[t]hus, in order to establish persecution of 'New People' *as covered by the case at hand*, it would have had to be established that the population transfers affected exclusively or at least primarily 'New People' and was therefore discriminatory, or that, in the course of the transfer, 'New People' were treated differently from 'Old People'."[2557] The Supreme Court Chamber does not find that the Trial Chamber erred in law and applied an incorrect test to determine whether discrimination in fact had occurred.

895. Turning to the assertion that the Trial Chamber erred in fact by finding that the transfer of Cham as part of a broader transfer of the population could be considered discriminatory, the Supreme Court Chamber recalls that an act or omission is considered discriminatory when a victim is targeted because of the victim's membership in a group defined by the perpetrator on a political, racial, or religious basis.[2558] There must be actual discriminatory consequences as a result of the act or omission.[2559]

[2552] Co-Prosecutors' Response (F54/1), para. 472.
[2553] Co-Prosecutors' Response (F54/1), paras 472-474.
[2554] Lead Co-Lawyers' Response (F54/2), paras 449, 369.
[2555] Lead Co-Lawyers' Response (F54/2), para. 367.
[2556] Case 002/01 Appeal Judgment (F36), para. 701.
[2557] Case 002/01 Appeal Judgment (F36), para. 701 (emphasis added).
[2558] Case 002/01 Appeal Judgment (F36), para. 690.
[2559] Case 001 Appeal Judgment (F28), para. 267.

896. The Supreme Court Chamber notes that it has upheld the Trial Chamber's finding that the CPK targeted the Cham because of the Koh Phal and Svay Kleang rebellions in order to disperse them and to ease tensions.[2560] Thus, the Cham were targeted for dispersal based on being considered political enemies. The dispersal had the discriminatory consequence for the Cham of breaking up their communities.[2561] Therefore, the act of dispersing the Cham was properly considered by the Trial Chamber to be discriminatory and the *actus reus* of the crime against humanity of persecution on political grounds is established. KHIEU Samphân's argument is dismissed.

ii. Alleged Error Concerning the *Mens Rea*

897. KHIEU Samphân submits that the Trial Chamber erred in fact by finding that the purpose of the dispersal of the Cham was to break up their communities and ease tensions by relying on a single telegram, Telegram 15,[2562] and ignoring the contradictory evidence which showed[2563] that the transfer of 50,000 Cham was part of a project to distribute the population throughout Cambodia and that the Trial Chamber did not explain why it chose the discriminate goal of easing tensions rather than this indiscriminate goal.[2564] He argues that the Trial Chamber should have found that the "relocation" of Cham living on the Vietnamese border was justified by armed hostility, and that the Chamber failed to explain why it concluded that the "relocation" of the Cham was punishment for rebellions when "evacuations" had already been planned prior to them occurring.[2565]

898. The Co-Prosecutors respond that KHIEU Samphân has not shown that the finding that the primary purpose of dispersing the Cham was to break up their communities and ease tensions was unreasonable.[2566] They submit that the Trial Chamber did acknowledge the argument that Cham living on the Vietnamese border were moved due to the conflict, but found that the Cham living along the Mekong were targeted over those living close to the border.[2567] Contrary to what KHIEU Samphân claims, the Co-Prosecutors submit that the Trial Chamber did not make a finding that the displacement of the Cham was intended to punish the Cham and respond that whether there was a plan to move the Cham prior to the rebellions does not

[2560] See *infra* Section VIII.B.5.b.
[2561] Trial Judgment (E465), para. 3322.
[2562] Trial Judgment (E465), para. 3322.
[2563] KHIEU Samphân's Appeal Brief (F54), para. 928.
[2564] KHIEU Samphân's Appeal Brief (F54), para. 929.
[2565] KHIEU Samphân's Appeal Brief (F54), para. 930.
[2566] Co-Prosecutors' Response (F54/1), para. 526.
[2567] Co-Prosecutors' Response (F54/1), para. 527.

demonstrate that there could not have been a discriminatory intent behind their displacement after the rebellions.[2568]

899. The Supreme Court Chamber has upheld[2569] the Trial Chamber's finding, which relied largely, but by no means solely, on Telegram 15, that "[w]hen the Cham resisted abandoning their ethnic and religious identity, 'rebellions' were brutally suppressed, leaders of the rebellions were executed and Cham communities dispersed."[2570] The Trial Chamber specifically considered arguments that the transfer of 50,000 Cham was part of a project to distribute the population throughout Cambodia and that relocation of Cham living on the Vietnamese border was justified by armed hostility,[2571] but considered that Telegram 15 establishes that the CPK specifically targeted the East Zone Cham population after the September 1975 Koh Phal and October 1975 Svay Kleang rebellions, and demonstrated that the transfer of Cham was principally designed to disperse the Cham to ease tensions.[2572] The Supreme Court Chamber does not consider this finding to be unreasonable and does not consider it relevant that there may have been a plan in place to move the Cham prior to the rebellions taking place. This would not demonstrate that after the rebellions occurred, there could not have been a discriminatory intent to move the Cham. Furthermore, to satisfy the *mens rea* of persecution, intent to discriminate need not be the primary intent behind an act, as long as it is a significant one.[2573] KHIEU Samphân has not demonstrated a lack of intent to discriminate on political grounds. This argument is therefore dismissed.

iii. Whether Arrests May Be Referred to in Establishing the Requisite Level of Severity

900. KHIEU Samphân argues that the Trial Chamber erred in law in including unsubstantiated, unreferenced, and unrelated "arrests" in assessing the severity of the discriminatory acts to determine whether they amount to persecution.[2574]

901. The Co-Prosecutors deny this and submit that, to the contrary, the Trial Chamber referred to the acts charged as persecution in the Closing Order, which included arrests, so it was proper to consider these acts in its gravity assessment.[2575] The Co-Prosecutors add that, in

[2568] Co-Prosecutors' Response (F54/1), para. 528.
[2569] See *supra* Section VIII.B.5.b.
[2570] Trial Judgment (E465), para. 3228.
[2571] Trial Judgment (E465), paras 3211-3212.
[2572] Trial Judgment (E465), paras 3212, 3262, fn. 10811, 3268, 3322-3323.
[2573] *Prosecutor v. Krnojelac*, Trial Chamber II (ICTY), IT-97-25-T, Judgment, 15 March 2002 ("*Krnojelac* Trial Judgment (ICTY)"), para. 435.
[2574] KHIEU Samphân's Appeal Brief (F54), para. 932.
[2575] Co-Prosecutors' Response (F54/1), para. 530, fn. 1859.

any event, KHIEU Samphân did not demonstrate that the requisite level of severity would not have been established without considering the arrests.[2576]

902. The Trial Chamber found that "[t]he acts charged as persecution"[2577] include "acts which, on their own, do not necessarily amount to crimes (in particular, arrests)."[2578] However, the paragraphs of the Closing Order relevant to political persecution of the Cham do not refer to arrests. The Co-Prosecutors claim that paragraph 268 of the Closing Order refers to arrests.[2579] This paragraph states:

> The people who were moved, including Chams, were organised into groups. Some people were separated either when departing, during the journey, or upon arrival. A former local cadre states "we did not have a policy that prohibited the new people from living with their relatives who were the base people". A number of witnesses declare that the Cham people were dispersed through Khmer villages with only a minority of Cham people allowed in each village. There is evidence that Cham men, women and children were split up and moved to different places. Some Cham witnesses, however, state that they remained with their families throughout the movements of population or that they were subsequently allowed to join their families. Others indicate that whilst the majority of Cham people were moved, a small number were required to remain in their home villages. Three witnesses explain that they were made to live in the open spaces under the houses of Khmer people. Two others state that the elders and religious leaders in their village were arrested and killed before the movement of the population occurred.

903. The only mention of arrests in this paragraph is in its final sentence, which refers to arrests that occurred prior to the movement of the population, which falls outside the scope of Case 002/02.[2580] The Co-Prosecutors also refer to a footnote of the Case 002/02 Trial Judgment which quotes a document in which a witness made a brief reference to arrests.[2581] This footnote does not contain any finding made by the Trial Chamber concerning arrests and cannot serve to bring arrests within the scope of the acts that could amount to political persecution.

904. Because arrests were not within the scope of the charges relating to persecution on political grounds, the Supreme Court Chamber finds that the Trial Chamber erred by referring to arrests as acts constituting persecution on political grounds. Nonetheless, the Supreme Court

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[2576] Co-Prosecutors' Response (F54/1), para. 531.
[2577] Trial Judgment (E465), para. 3325.
[2578] Trial Judgment (E465), para. 3325.
[2579] Co-Prosecutors' Response (F54/1), fn. 1859.
[2580] See Trial Judgment (E465), para. 3184, which states that the scope of the charges relating to the treatment of the Cham encompasses facts relating to political persecution of the Cham during the Movement of Population Phase Two.
[2581] Co-Prosecutors' Response (F54/1), fn. 1859, citing Trial Judgment (E465), fn. 11017, referring, *inter alia*, to "MAT Ysa Interview Record, E3/5207, 14 August 2008, p. 3, ERN (En) 00242077" and includes the following quote: "After the rebellion, aside from making arrests, they sent a number of villagers away by boat to Koh Ta Sauy and to Kampong Thom Province. Almost all of the original villagers were evacuated away, and they told us that we had to relocate to different villages and subdistricts. A small number of the original villagers, including my family, continued living in this village, but I did not know why they kept me living there."

Chamber does not consider the Trial Chamber's ultimate finding that the crime against humanity of persecution on political grounds was established to be affected by this error. The independent crime against humanity of other inhumane acts perpetrated through forcible transfer was considered by the Trial Chamber to amount to a persecutory act,[2582] so this necessarily rises to the requisite level of gravity or severity. Because the Trial Chamber's error does not invalidate the judgment, this argument is dismissed.

b. Political Persecution of Other "Real or Perceived Enemies"

905. The Trial Chamber found that persecution on political grounds as a crime against humanity occurred against the targeted group of "real or perceived enemies of the CPK" at Tram Kak Cooperatives,[2583] Trapeang Thma Dam Worksite,[2584] 1st January Dam Worksite,[2585] Kampong Chhnang Airfield Construction Site,[2586] S-21 Security Centre,[2587] Kraing Ta Chan Security Centre,[2588] Au Kanseng Security Centre,[2589] and Phnom Kraol Security Centre.[2590] While the targeted group of "real or perceived enemies of the CPK" could also include the Cham,[2591] the Trial Chamber's findings of political persecution related to the Cham were separately dealt with by the Trial Chamber and are separately dealt with in the section of this Judgment related to the treatment of the Cham.

906. KHIEU Samphân challenges the findings of political persecution at Kampong Chhnang Airfield Construction Site, Kraing Ta Chan Security Centre, and Phnom Kraol Security Centre only in relation to the Trial Chamber's *saisine*.[2592] The Supreme Court Chamber has addressed with these arguments in the section of this Judgment relating to *saisine*.

907. Before turning to the challenges related to political persecution at Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam Worksite, S-21 Security Centre, and Au Kanseng Security Centre, the Supreme Court Chamber will address KHIEU Samphân's overarching argument that "real or perceived enemies of the CPK" is not a

[2582] Trial Judgment (E465), para. 3325.
[2583] Trial Judgment (E465), para. 1179.
[2584] Trial Judgment (E465), para. 1413.
[2585] Trial Judgment (E465), para. 1692.
[2586] Trial Judgment (E465), para. 1828.
[2587] Trial Judgment (E465), para. 2604.
[2588] Trial Judgment (E465), para. 2843.
[2589] Trial Judgment (E465), para. 2993.
[2590] Trial Judgment (E465), para. 3151.
[2591] See Trial Judgment (E465), para. 3772.
[2592] KHIEU Samphân's Appeal Brief (F54), paras 493, 495-510, 884-886.

sufficiently discernible group such that it could be the target of persecution on political grounds.

i. Whether "Real or Perceived Enemies of the CPK" is a Sufficiently Discernible Group

908. A section of the Case 002/02 Trial Judgment addressing the common purpose of the joint criminal enterprise is dedicated to the Trial Chamber's findings on "real or perceived enemies".[2593] In this section, the Trial Chamber first provided a chronological overview of contemporaneous documentary evidence relating to the CPK's notion of enemies, followed by a factual analysis of that evidence.[2594] It found that evidence demonstrates that throughout the DK period so-called enemies were discussed continuously and at length at various levels and the concept of the "enemy" encompassed those who were perceived as opposing in fact or ideologically the communist revolution.[2595]

909. The Trial Chamber found that the CPK continuously stratified the DK population into classes and categorised different kinds of potential threats, but despite the CPK's "constant re-categorisation of different types of enemies and changing shifts in focus, any person or entity not adhering to or threatening the CPK's Party line, *i.e.* the Marxist-Leninist notion of communist revolution through armed struggle, could be branded an enemy".[2596] It noted that the degree of emphasis on different types of enemies fluctuated depending on who posed the biggest threat at the time, but "[w]hile the categories were broad and plentiful, they did not change significantly after the 1976 internal purges and rise in conflict with Vietnam that same year."[2597] It listed specific categories of enemies as: (1) former ranking civilian and military personnel of the Khmer Republic;[2598] (2) "New People";[2599] (3) returnees from abroad;[2600] (4) monks;[2601] and (5) CIA, KGB, and "*Yuon*" or Vietnamese agents.[2602] However, at other points in the Judgment, the Trial Chamber also referred to other categories of enemies, including counter-revolutionaries, detractors and traitors of the revolution, feudalists, and ethnic Vietnamese.[2603] The Trial Chamber found that many different types of conduct could fall under

[2593] Trial Judgment (E465), Section 16.3.
[2594] Trial Judgment (E465), para. 3744.
[2595] Trial Judgment (E465), para. 3744.
[2596] Trial Judgment (E465), para. 3839.
[2597] Trial Judgment (E465), para. 3840.
[2598] Trial Judgment (E465), Section 16.3.2.1.3.1.
[2599] Trial Judgment (E465), Section 16.3.2.1.3.2.
[2600] Trial Judgment (E465), Section 16.3.2.1.3.3.
[2601] Trial Judgment (E465), Section 16.3.2.1.3.4.
[2602] Trial Judgment (E465), Section 16.3.2.1.3.5.
[2603] Trial Judgment (E465), paras 3924, 3982.

"counter-revolutionary 'enemy activity'", including theft, rape or other immoral conduct, fleeing home and desertion, mistreatment of combatants or cadres, misuse of the Party line, expressing opinions, having "political tendencies", or practising "reactionary religions".[2604]

910. The Trial Chamber considered that the meaning of "real or perceived enemies of the CPK" depends on the context in which these enemies were discussed and explained that therefore evidence from the relevant crime sites would complement these findings.[2605] The Trial Chamber examined evidence from each of the cooperatives, worksites, and security centres within the scope of the Case 002/02 Trial Judgment when considering the composition and discernibility of the targeted group at each location:[2606]

a. Concerning the Tram Kak Cooperatives, the Trial Chamber recognised that the Closing Order charged political persecution of "real or perceived enemies of the CPK",[2607] and found this group to be sufficiently discernible,[2608] but limited its findings to the targeting of the sub-groups of New People and former Khmer Republic soldiers and officials.[2609]

b. Concerning the Trapeang Thma Dam Worksite, the Trial Chamber was satisfied that the targeted group of "real or perceived enemies of the CPK" was a clearly discernible group, as company and battalion chiefs were instructed to identify people with "'bad background', LON Nol soldiers, '*Yuon*', CIA agents, students, intellectuals and those who were considered to have engaged in activities against *Angkar* in their units"[2610], and "some official [DK] documents made reference to New People as a category of individuals who could not be trusted".[2611]

c. Concerning the 1st January Dam Worksite, the Trial Chamber considered that the targeted group of "real or perceived enemies of the CPK" constituted New People and former Khmer Republic soldiers and officials and was a clearly discernible group since New People were clearly identified as enemies and former Khmer

[2604] Trial Judgment (E465), para. 3846.
[2605] Trial Judgment (E465), para. 3835.
[2606] The Trial Chamber's findings concerning "real or perceived enemies of the CPK" at the Kampong Chhnang Airfield Construction Site, Kraing Ta Chan Security Centre, and Phnom Kraol Security Centre are not discussed herein because, as mentioned above, KHIEU Samphân did not challenge the findings of political persecution at these sites, except with regard to the Trial Chamber's *saisine*.
[2607] Trial Judgment (E465), para. 1170.
[2608] Trial Judgment (E465), para. 1174.
[2609] Trial Judgment (E465), paras 1175-1179.
[2610] Trial Judgment (E465), para. 1407.
[2611] Trial Judgment (E465), para. 1407.

Republic soldiers and officials were identified through biographies, arrested, and taken to the security office.[2612]

d. Concerning the S-21 Security Centre, the Trial Chamber noted that the Closing Order specifically identified numerous real or perceived enemies of the CPK, including those considered to be traitors, CIA or KGB, or Vietnamese, and that it stated that people arrested as "real or perceived enemies of the CPK" included Revolutionary Army of Kampuchea soldiers, CPK cadres, ministry personnel, former Khmer Republic soldiers and officials, intellectuals, diplomats returning from abroad, and foreigners.[2613] The Trial Chamber recalled its finding that the specific categories of real or perceived enemies of the CPK mentioned in the Closing Order are not exhaustive and included detractors of the socialist revolution and critics of the Party and these categories continued to expand over time.[2614] It referred to its findings concerning "real or perceived enemies of the CPK" at Au Kanseng Security Centre and stated that it was satisfied that the group was sufficiently discernible to determine whether consequences occurred for the group.[2615]

e. Concerning the Au Kanseng Security Centre, the Trial Chamber considered "real or perceived enemies of the CPK" to be sufficiently discernible since the Closing Order clearly identified the group characterised as "real or perceived enemies of the CPK" and stated that it included:

> detractors of the socialist revolution and critics or opponents of the Party (including those connected with feudalistic practices or accused of immorality, and individuals suspected of or implicated in complicity with Party enemies), as well as the Vietnamese and suspected Vietnamese collaborators (including former Thieu-Ky soldiers, FULRO members and ethnic Jarai from Vietnam).[2616]

911. KHIEU Samphân's arguments concerning the discernibility of the targeted group of "real or perceived enemies of the CPK" were made only in relation to the S-21 and Au Kanseng Security Centres. Concerning S-21, he argues that the Trial Chamber erred by considering that the group of "real or perceived enemies of the CPK" was sufficiently discernible since it found that the specific categories of enemies were not exhaustive and expanded over time, which is

[2612] Trial Judgment (E465), para. 1687.
[2613] Trial Judgment (E465), paras 2598-2599.
[2614] Trial Judgment (E465), para. 2600.
[2615] Trial Judgment (E465), para. 2600.
[2616] Trial Judgment (E465), paras 2982-2983.

at odds with the determination of what a sufficiently discernible group is.[2617] Concerning Au Kanseng Security Centre, he submits that the several sub-categories of "real or perceived enemies of the CPK" found by the Trial Chamber encompass a variety of people who were regarded differently by the CPK and that the Trial Chamber should therefore have found that no discernible criteria applied in targeting the victims, as the Supreme Court Chamber found in Case 001.[2618]

912. The Co-Prosecutors respond that "real or perceived enemies of the CPK" may constitute a sufficiently discernible group according to ECCC jurisprudence, and the Trial Chamber did not err in finding that it expanded over time since this finding was based on the evidence.[2619] They respond that the Trial Chamber found, concerning Au Kanseng, numerous instances in which people were subjected to harsher treatment and living conditions than the remainder of the population, a finding that could logically only be made based on a comparison of discernible groups.[2620]

913. The Lead Co-Lawyers respond that KHIEU Samphân gives no authority for the view that a sufficiently discernible group must be immutable and homogenous.[2621] They respond that this is contrary to established jurisprudence: at the ICTY in a number of cases the persecuted group was defined negatively as "non-Serbs", and in Case 002/01, the Supreme Court Chamber "confirmed the possibility that persecution as a crime against humanity might target aggregated groups without any common identity or agenda" and recognised that New People encompassed various sub-categories.[2622] They respond that the Nuremberg indictment addressed persecution directed at "opponents and supposed or suspected opponents of the regime", which included members of various groups deemed over time to constitute potential opposition, and that the IMT Judgment detailed policies of targeting a range of persons suspected to be opponents of the regime.[2623]

914. The Supreme Court Chamber considers that its past jurisprudence sufficiently addresses the arguments raised in these challenges. In Case 001, it explained:

[2617] KHIEU Samphân's Appeal Brief (F54), para. 825.
[2618] KHIEU Samphân's Appeal Brief (F54), paras 850-853.
[2619] Co-Prosecutors' Response (F54/1), paras 846, 883.
[2620] Co-Prosecutors' Response (F54/1), para. 883.
[2621] Lead Co-Lawyers' Response (F54/2), para. 339.
[2622] Lead Co-Lawyers' Response (F54/2), paras 339-340.
[2623] Lead Co-Lawyers' Response (F54/2), para. 341.

> 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). Furthermore, the targeted political group or groups may be defined broadly by a perpetrator such that they are characterised in negative terms and include close affiliates or sympathisers as well as suspects.[2624]

915. The Supreme Court Chamber also determined in Case 001 that the Trial Chamber did not err in finding that the targeted group at issue in that case "encapsulated 'all real or perceived political opponents [to the CPK], including their close relatives or affiliates' as defined by the Party Centre".[2625]

916. In Case 002/01, the Supreme Court Chamber explained that "[i]n particular in respect of [persons of certain ethnicity or nationality or persons representing certain social strata], they may be made the object of political persecution not because all, or even the majority, of their members hold political views opposed to those of the perpetrator, but because they are perceived by the perpetrator as potential opponents or otherwise as obstacles to the implementation of the perpetrator's political agenda."[2626] The Supreme Court Chamber extensively analysed post-World War II jurisprudence and concluded in Case 002/01 that political persecution was understood as encompassing situations where the perpetrators designated targeted groups in broad strokes without inquiry into the political views held by the individuals concerned.[2627] It "thus confirm[ed] the possibility that persecution as a crime against humanity might target aggregated groups without any common identity or agenda."[2628]

917. The Supreme Court Chamber thus rejects KHIEU Samphân's argument that "real or perceived enemies of the CPK" is not sufficiently discernible since the specific categories of enemies were not exhaustive and expanded over time. As demonstrated from the Supreme Court Chamber's past jurisprudence on this issue, political persecution may occur where a group is broadly targeted because its members are perceived by the perpetrator to be political enemies. They need not consist of a single homogenous polity.[2629] As long as all members of the group are perceived to be political enemies, it does not matter whether they otherwise fall

[2624] Case 001 Appeal Judgment (F28), para. 272.
[2625] Case 001 Appeal Judgment (F28), para. 273.
[2626] Case 002/01 Appeal Judgment (F36), para. 669.
[2627] Case 002/01 Appeal Judgment (F36), paras 670-677.
[2628] Case 002/01 Appeal Judgment (F36), para. 678.
[2629] Case 002/01 Appeal Judgment (F36), para. 678.

under different categories or whether these categories are exhaustive, as it is the designation of political enemy that has led to their targeting.

918. The Supreme Court Chamber also rejects KHIEU Samphân's argument that the several sub-categories of "real or perceived enemies of the CPK" encompass people who were regarded differently by the CPK. As long as these people were regarded as enemies of the CPK and were therefore subject to discriminatory treatment, whether they were otherwise regarded differently is immaterial. It is not necessary that all members of a persecuted group suffer the same level of discrimination.[2630]

919. That said, the Supreme Court Chamber considers that care must be taken to ensure that those classified as "real or perceived enemies of the CPK" actually were considered by the perpetrators to pose a political threat or danger. Certain behaviour may have been termed "counter-revolutionary 'enemy activity'"[2631] without those who engaged in that conduct actually having been considered to pose a political threat.

920. It does not appear that the Trial Chamber considered the targeted group at any of the crime sites at issue to include those who engaged in any type of non-political "enemy activity". The Trial Chamber noted that the Closing Order referred to "real or perceived enemies of the CPK" at Au Kanseng Security Centre as including those accused of immorality,[2632] but its findings related to the targeted group make no mention of individuals accused of immorality. KHIEU Samphân's challenges concerning the discernibility of "real or perceived enemies of the CPK" are dismissed.

ii. Tram Kak Cooperatives

921. After considering the charges and the nature and discernibility of the targeted group, including related arguments by the parties,[2633] the Trial Chamber found that in the period immediately after 17 April 1975, former Khmer Republic military and police were screened at Champa Pagoda and other locations in Tram Kak district and many were taken away and disappeared.[2634] The Trial Chamber found that while there was a "clear plan to purge and kill former Khmer Republic soldiers in Tram Kak district in the aftermath of 17 April 1975",

[2630] Case 002/01 Appeal Judgment (F36), para. 684.
[2631] Trial Judgment (E465), para. 3846.
[2632] Trial Judgment (E465), para. 2982.
[2633] Trial Judgment (E465), paras 1168-1174.
[2634] Trial Judgment (E465), para. 1175.

different instructions were disseminated at different points in time, and from April and May 1977, former Khmer Republic soldiers and officials were again targeted for arrest and were killed as part of an "organised killing operation".[2635]

922. With regard to New People more broadly, the Trial Chamber found they were classified as "Depositees" or "parasitic" people and were treated as subordinate and there existed a systematic and widely known discrimination against New People before mid-1978.[2636] The Trial Chamber found that New People received less food than Base People and, therefore, in particular suffered and died from malnutrition and that the working conditions varied depending on a person's categorisation, with New People suffering from worse treatment.[2637] The Trial Chamber was satisfied that their discrimination went much further than matters of political rights, with New People, former Khmer Republic soldiers and officials, and other perceived threats targeted for arrest.[2638]

923. The Trial Chamber found that the acts were deliberately committed with the intent to discriminate on political grounds against anyone considered to oppose the CPK, and that the acts discriminated in fact and infringed upon and violated fundamental human rights.[2639] It found some of the underlying discriminatory acts to amount to the independent crimes against humanity of enslavement and other inhumane acts and was therefore satisfied that they rise to the level of severity to constitute persecution as a crime against humanity.[2640]

924. The Trial Chamber did not make findings concerning the treatment of the general group of "real or perceived enemies of the CPK" at Tram Kak Cooperatives apart from its findings specific to former Khmer Republic soldiers and officials and New People.

Former Khmer Republic Soldiers and Officials

925. KHIEU Samphân submits that the Trial Chamber erred in fact in finding that persecution of former Khmer Republic soldiers and officials occurred at Tram Kak Cooperatives, as: (1) there was no probative evidence of orders to search for and arrest former Khmer Republic soldiers or officials in Tram Kak; (2) there was no probative evidence of a killing operation beginning in April 1977; and (3) the Trial Chamber referred to charges made

[2635] Trial Judgment (E465), para. 1175.
[2636] Trial Judgment (E465), para. 1176.
[2637] Trial Judgment (E465), para. 1177.
[2638] Trial Judgment (E465), para. 1177.
[2639] Trial Judgment (E465), para. 1178.
[2640] Trial Judgment (E465), para. 1179.

in the Closing Order rather than to findings made in its Judgment as support for its finding that former Khmer Republic soldiers and officials were targeted for arrest and killing.[2641]

926. The Co-Prosecutors respond that KHIEU Samphân has not demonstrated that the Trial Chamber erred and has failed to acknowledge the totality of the evidence relied on by the Trial Chamber.[2642] It responds that even though the Trial Chamber referred in a footnote to allegations in the Closing Order rather than its findings, it also in the same footnote referred to other paragraphs of its Judgment that did contain factual findings with evidentiary support.[2643]

927. The Lead Co-Lawyers respond that the Trial Chamber made factual findings that former Khmer Republic soldiers and officials were persecuted during different periods, first in the aftermath of 17 April 1975, and again following April/May 1977, and KHIEU Samphân only challenged the factual findings made during the latter period, so even if he were successful in demonstrating error, the overall finding of political persecution of former Khmer Republic soldiers and officials would not be affected.[2644]

928. The Supreme Court Chamber notes that, as argued by the Lead Co-Lawyers, the Trial Chamber made findings regarding discriminatory treatment of former Khmer Republic soldiers at Tram Kak Cooperatives that involved two distinct time periods: the period of approximately one week after 17 April 1975[2645] and the period beginning in April and May 1977.[2646] KHIEU Samphân, despite making a general allegation that the Trial Chamber erred in fact "by finding that the crime had been established",[2647] only made specific arguments concerning the Trial Chamber's findings relevant to the second period.[2648] Therefore, even if his arguments were successful, they would be insufficient to overturn his conviction for the persecution of former Khmer Republic soldiers at Tram Kak Cooperatives. This challenge is therefore dismissed.

New People

[2641] KHIEU Samphân's Appeal Brief (F54), para. 720.
[2642] Co-Prosecutors' Response (F54/1), paras 429-431, 434.
[2643] Co-Prosecutors' Response (F54/1), para. 436.
[2644] Lead Co-Lawyers' Response (F54/2), para. 383.
[2645] Trial Judgment (E465), para. 1175, referring to the findings it made at paragraphs 958-961. The following paragraph 962 states that "[t]he Chamber finds that the events at Champa Pagoda were restricted to a relatively short period: one week or slightly longer after the fall of Phnom Penh and Takeo town."
[2646] Trial Judgment (E465), para. 1175, referring to the findings it made at paras 1062-1063, 1080-1081.
[2647] KHIEU Samphân's Appeal Brief (F54), para. 720.
[2648] KHIEU Samphân challenges the Trial Chamber's findings in paragraph 1175 of the Judgment referring back to paragraphs 1062-1063, 1081-1082, and 2813 of the Judgment, but does not challenge the Trial Chamber's other findings in paragraph 1175 of the Judgment referring back to the findings made in paragraphs 958-961, 963-965, and 1077.

929. KHIEU Samphân submits that the Trial Chamber erred in finding that at Tram Kak, (1) New People received different rations; (2) working conditions were worse for New People; (3) working conditions were worse particularly in youth units; (4) New People were subjected to "miserable treatment"; and (5) New People were subject to surveillance and arrest.[2649] The Supreme Court Chamber notes that the Trial Chamber also found that New People were categorised separately from Base People; segregated from Base People in separate cooperatives or separate working groups; and treated as subordinate to Base People.[2650] These findings were not specifically challenged by KHIEU Samphân.

930. The Supreme Court Chamber will consider each of the categories of discrimination challenged by KHIEU Samphân, but considers that the Trial Chamber's findings concerning discrimination against New People at Tram Kak Cooperatives must ultimately be viewed holistically rather than piecemeal, due to their interconnectivity. The Supreme Court Chamber recalls that the Trial Chamber is best placed to evaluate the evidence and that its factual findings will not be lightly overturned.

a) Rations

931. The Trial Chamber made the finding that New People received less food than Base People and that New People in particular suffered and died from malnutrition.[2651] The Supreme Court Chamber considers the act of persecution at issue to be providing less food to New People, with the result of that action being the suffering and death from malnutrition. In making the finding that New People received less food than Base People,[2652] the Trial Chamber relied on high-level policy documents indicating that the CPK set different rations for different categories of people based on their class background.[2653] It then turned to the implementation of the policy in Tram Kak,[2654] and, to make the finding that New People received less food in

[2649] KHIEU Samphân's Appeal Brief (F54), para. 727.
[2650] Trial Judgment (E465), para. 1176.
[2651] Trial Judgment (E465), para. 1177.
[2652] Trial Judgment (E465), para. 1177.
[2653] Trial Judgment (E465), Section 10.1.7.3.1 ("High-level policy documents") and in particular para. 1009, referring to Revolutionary Flag, November 1976, E3/139, and IENG Sary's Diary, undated, E3/522, ERN (EN) 00003288, p. 52 (entry dated 30 November 1976). Paragraph 1009 also refers to paragraph 994, where the Trial Chamber relied on Revolutionary Flag, March 1978, E3/745.
[2654] Trial Judgment (E465), Section 10.1.7.3.2 ("Implementation in Tram Kak") and in particular para. 1016.

practice, relied on the testimonies of PECH Chim, KEO Chandara, TAK Sann, and CHOU Koemlan.[2655]

932. Contrary to KHIEU Samphân's assertion,[2656] the Trial Chamber did not mention exculpatory evidence without taking it into account. The Trial Chamber noted that some evidence suggested that the district level sought to impose broadly equal rations across different categories of person, but explained that it found the evidence that in practice New People received less food than Base People to be more convincing.[2657] It explained that PECH Chim attributed the practice of Base People receiving more rice than New People to "loopholes in the management" of different cooperatives, and that NEANG Ouch stated that chiefs did not coordinate well and some kitchen halls did not have enough food for people to eat, but, recalling its finding that the CPK's policy set different rations for different categories of persons, the Trial Chamber rejected the notion that the discriminatory distribution of food resulted from mere loopholes in the management of cooperatives.[2658]

933. As for KHIEU Samphân's assertion that the Trial Chamber omitted the exculpatory evidence of SAO Han that the food rations were the same,[2659] the fact that a Trial Chamber does not explicitly mention a piece of evidence does not mean that the evidence was not considered and does not demonstrate error.[2660] In any event, the Supreme Court Chamber does not consider this evidence to outweigh the evidence explicitly considered and relied on by the Trial Chamber.

934. KHIEU Samphân specifically challenges the testimonies of PECH Chim and TAK Sann, asserting that PECH Chim indicated that food distribution and rations were the same for everyone and did not specify where, when, how often, or by whom distinctions were made when he indicated that in reality New People received less rice.[2661] He argues that Civil Party

[2655] Trial Judgment (E465), para. 1016. It also referred in this paragraph to the testimony of EK Hoeun, but only to note that he attributed problems to cooks stealing rice.
[2656] KHIEU Samphân's Appeal Brief (F54), para. 730 ("The Chamber lacked impartiality by disregarding the exculpatory evidence. In fact, all it did was mention the exculpatory evidence of PECH Chim, NEANG Ouch and CHANG Srey Mom, without taking it into account.").
[2657] Trial Judgment (E465), Section 10.1.7.3.2 ("Implementation in Tram Kak") and in particular para. 1016.
[2658] Trial Judgment (E465), para. 1016.
[2659] KHIEU Samphân's Appeal Brief (F54), para. 730.
[2660] The Trial Chamber is not required to articulate every step of its reasoning and is presumed to have properly evaluated all the evidence before it. Case 002/01 Appeal Judgment (F36), para. 304.
[2661] KHIEU Samphân's Appeal Brief (F54), para. 729.

TAK Sann was confused, lacked credibility, and did not explain how she concluded that New People received less food than Base People.[2662]

935. The Supreme Court Chamber does not consider PECH Chim's testimony to be of low probative value simply because he did not give detailed explanations concerning the distinction in the distribution of rice. He explained that he "observed that there was a distinction in the distribution of rice."[2663] Despite the fact that he testified that this was contrary to policy,[2664] the Trial Chamber found that this was in fact due to a policy set by the CPK.[2665] KHIEU Samphân has failed to substantiate his assertion that TAK Sann was confused and therefore lacked credibility.[2666] She explained that she witnessed that the food rations were unequal.[2667]

936. KHIEU Samphân also challenges the Trial Chamber's reliance on a DC-Cam interview of RIEL Son, asserting that RIEL Son actually explained that Base People had better access to food because they were more knowledgeable and able to find outside food, not that Base People received more rations.[2668] The Co-Prosecutors respond that the Trial Chamber relied on RIEL Son's DC-Cam interview to further corroborate strong testimonial and documentary evidence and KHIEU Samphân's argument does not show that the Trial Chamber erred in using this evidence for its broader finding on differences in access to food.[2669] While the Trial Chamber relied on RIEL Son's DC-Cam interview for its finding that there were "[d]ifferences in access to food",[2670] rather than to support its finding that New People were provided with less food, the Supreme Court Chamber agrees with KHIEU Samphân that this evidence does not support a finding that New People were discriminated against with regard to food. Nonetheless, the Supreme Court Chamber considers that the Trial Chamber relied on sufficient other evidence without considering this DC-Cam interview.

[2662] KHIEU Samphân's Appeal Brief (F54), para. 729.
[2663] T. 23 April 2015 (PECH Chim), E1/291.1, p. 60.
[2664] T. 23 April 2015 (PECH Chim), E1/291.1, p. 61.
[2665] Trial Judgment (E465), para. 1016.
[2666] KHIEU Samphân's Appeal Brief (F54), para. 729.
[2667] T. 1 April 2015 (TAK Sann), E1/286.1, p. 45:
A. The food ration was not equal. For Base People, they had more food. And as for us, we were New People, our food were less.
Q. And how were you able to determine this? How were you able to see with your own eyes that that was the situation?
A. I had foods and I had meals, so I could witness it.
[2668] KHIEU Samphân's Appeal Brief (F54), para. 731.
[2669] Co-Prosecutors' Response (F54/1), para. 791.
[2670] Trial Judgment (E465), para. 1016.

937. The Supreme Court Chamber does not find that KHIEU Samphân has demonstrated that the Trial Chamber erred with regard to its finding that New People received less food than Base People.

b) Working Conditions, Including in Mobile Youth Units

938. The Supreme Court Chamber notes that, as argued by KHIEU Samphân,[2671] most of the evidence relied on by the Trial Chamber for its finding of differential working conditions between New People and Base People only demonstrates that working conditions were harsh, rather than showing that the treatment was disparate. In the paragraphs of the Trial Judgment cited by the Trial Chamber as support for its finding of differential treatment, the only mention of differential treatment was made by SAO Han, who stated Full-Rights People enjoyed better conditions than the Candidates or 17 April People and that the better conditions consisted of being chiefs of units and supervising New People.[2672] NUT Nov also mentioned that many New People became sick more often than Base People,[2673] but the Supreme Court Chamber does not consider that this supports a finding of differential *treatment*, since he explained that New People became sick more often because they were unused to working in the rice fields.[2674]

939. According to the Co-Prosecutors, the Trial Chamber's general findings on harsh working conditions need to be read in the broader context of the categorisation of people and its implementation in Tram Kak.[2675] In the section of the Trial Judgment dealing with implementation of the system of categorisation of people, the Trial Chamber made the finding that positions of authority were reserved for Base People.[2676] In a footnote, the Trial Chamber cited evidence showing that Base People, as chiefs, did not work as hard as New People: RY Pov testified that Base People did not work but only monitored work and TAK Sann testified that the four or five Base People who led her cooperative unit did not need to work as hard.[2677] The Supreme Court Chamber considers that this evidence demonstrates that the working conditions of New People were different and worse than those of Base People but only in that New People could not hold positions of authority and benefit from the better working conditions that came along with these positions. This is a relatively narrow distinction, as there

[2671] KHIEU Samphân's Appeal Brief (F54), para. 732.
[2672] T. 17 February 2015 (SAO Han), E1/264.1, pp. 93-95.
[2673] Trial Judgment (E465), para. 1020, referring to T. 12 March 2015 (NUT Nov), E1/276.1, p. 47.
[2674] T. 12 March 2015 (NUT Nov), E1/276.1, p. 47.
[2675] Co-Prosecutors' Response (F54/1), para. 793.
[2676] Trial Judgment (E465), paras 1002, 1004.
[2677] Trial Judgment (E465), fn. 3168, referring to T. 12 February 2015 (RY Pov), E1/262.1, pp. 15-16, 64-65; T. 1 April 2015 (TAK Sann), E1/286.1, pp. 39-40.

is no evidence that most Base People were chiefs, and there is no evidence in these sections of the Trial Judgment indicating that the working conditions for New People were otherwise worse than they were for Base People.

940. The Supreme Court Chamber recognises that it is artificial to consider working conditions in isolation because if New People were provided with less food, it is logical that they would find working conditions to be more difficult, even if these conditions were otherwise the same as the Base People's working conditions. However, this relates to the result of discriminatory practices with regard to food rations, rather than demonstrating that New People were treated differently in the working conditions imposed on them, apart from the denial of the opportunity to hold positions of authority and benefit by those positions. The Supreme Court Chamber does not consider that the Trial Chamber relied on sufficient evidence to establish that working conditions were worse for New People than they were for Base People, with the exception of being prohibited from holding leadership roles and benefiting from the better working conditions that came with such roles.

c) Miserable Treatment

941. The Trial Chamber relied on the testimonies of BUN Saroeun, IM Vannak, TAK Sann, YEM Khonny, and RY Pov for its finding that New People were exposed to miserable treatment and were treated as worthless slaves.[2678] The Supreme Court Chamber agrees with KHIEU Samphân that BUN Saroeun's testimony does not support a finding of discriminatory treatment, as he testified that food could be withheld for transgressions or failing to meet quotas, but did not indicate that such treatment was directed at New People. Similarly, TAK Sann's and YEM Khonny's testimonies describe miserable treatment, but do not demonstrate that this treatment was discriminatory.[2679] However, RY Pov and IM Vannak do refer specifically to the treatment of New People; they stated that Base People could curse, hit, or beat New People and their testimonies corroborate each other.[2680] The Supreme Court Chamber does not consider that the Trial Chamber erred in relying on these witnesses without explicitly considering their credibility.

[2678] Trial Judgment (E465), para. 1177, referring to para. 1023.
[2679] Trial Judgment (E465), para. 1023, referring to T. 1 April 2015 (TAK Sann), E1/286.1 p. 40; T. 3 April 2015 (YEM Khonny), E1/288.1, pp. 9-10.
[2680] Trial Judgment (E465), para. 1023.

942. Although KHIEU Samphân submits that RY Pov's testimony cannot support a generalised finding and the conduct described cannot be ascribed to leadership,[2681] the Supreme Court Chamber considers it reasonable that the Trial Chamber found, based on these testimonies, that New People in particular were subjected to miserable treatment. The Supreme Court Chamber considers that this finding is closely linked to, and must be considered in the context of, the Trial Chamber's other uncontested findings that New People were categorised and were treated as subordinate to Base People. In this context of CPK-imposed categorisation where New People were viewed as subordinate to Base People, evidence from two witnesses that Base People could curse, hit, or beat New People, could support a generalised finding and the conduct could be reasonably considered to be the result of CPK policies.

d) Monitoring and Arrests

943. The Trial Chamber's legal findings on political persecution do not refer to the monitoring of New People; rather, the Trial Chamber "found that New People, Khmer Republic soldiers and officials, and other perceived threats to the CPK were targeted for arrest for innocuous thoughts, speech or conduct considered to be contrary to the revolution."[2682] In support of this finding, the Trial Chamber referred to paragraphs 1055 and 1080 of the Trial Judgment. Paragraph 1055 relates to monitoring, and it contains evidence that New People were monitored. However, as argued by KHIEU Samphân,[2683] most of the evidence relied upon by the Trial Chamber in this paragraph does not indicate whether monitoring was directed at New People or whether everyone was monitored, and therefore cannot show discriminatory treatment.

944. The Trial Chamber found that militia monitored "people" including under their houses at night.[2684] The Trial Chamber stated that one witness testified that both New and Old People were monitored[2685] and that another testified that suspected enemies were monitored.[2686] It also referred to testimonies indicating that certain people were monitored, including one that

[2681] KHIEU Samphân's Appeal Brief (F54), para. 737.
[2682] Trial Judgment (E465), para. 1177.
[2683] KHIEU Samphân's Appeal Brief (F54), paras 739-740.
[2684] Trial Judgment (E465), para. 1055.
[2685] Trial Judgment (E465), para. 1055, referring to T. 4 May 2015 (KHOEM Boeun), E1/296.1, pp. 88-89.
[2686] Trial Judgment (E465), para. 1055, referring to T. 8 May 2015 (EK Hoeun), E1/299.1, pp. 83-84.

indicated that New People were monitored,[2687] but from these testimonies it is unclear whether such monitoring targeted New People.[2688]

945. The Trial Chamber also referred to four reports found in Tram Kak District Records. The first "describ[ed] a family who do not go to bed early and keep talking without sleep 'but [we] can not hear [what they said]'".[2689] The second "referr[ed] to a report from Kus commune on MEI Moch, a New Person, who 'said in his sleep that in order to poison the children, the poison is mixed with cassava […] He said in his sleep at night at 11: he repeated the same words for three times at that time […]. The New People like him also got up and heard clearly about this.'"[2690] The third described Base People reporting "on a new inhabitant in the commune that he was 'extremely debauched in the previous society' such that the commune asked whether to "send him out or not"".[2691] The fourth "describ[ed] how a former LON Nol soldier was 'very brutal according to the information from New People who know him'".[2692] These reports support that New People were monitored, but do not indicate whether monitoring was targeted at New People.

946. Paragraph 1080 states that "[t]he documentary evidence confirms that New People, former Khmer Republic soldiers and officials, and Khmer Krom persons were particularly

[2687] THANN Thim, a New Person, testified that New People were not trusted and his group of New People were kept under surveillance. T. 21 April 2015 (THANN Thim), E1/289.1, p. 27.
[2688] In addition to THANN Thim, the Trial Chamber stated that VONG Sarun testified that she learned that she and her husband were monitored because they were "considered to be a class below ordinary peasants" (Trial Judgment (E465), para. 1055, referring to T. 18 May 2015 (VONG Sarun), E1/300.1, pp. 62-63). It is not clear whether VONG Sarun and her husband were considered to be "New People"; she does not refer to herself or her husband as such. The Trial Chamber stated that BUN Saroeun felt watched on a permanent basis, but it did not explain whether BUN Saroeun was a New Person (Trial Judgment (E465), para. 1055, referring to T. 3 April 2015 (BUN Saroeun), E1/288.1, p. 37). The Trial Chamber stated that CHAN Srey Mom told Oiffce of the Co-Investigating Judges investigators that militia would spy on New People and that she testified that biographies and employment backgrounds would be pried into (Trial Judgment (E465), para. 1055, referring Written Record of Interview of CHANG Srey Mom, 11 November 2009, E3/5832, ERN (EN) 00410266; T. 29 January 2015 (CHANG Srey Mom), E1/254.1, p. 48). CHAN Srey Mom did tell investigators that militiamen would spy on New People, but she also stated that she and her husband (both "candidate people") were eavesdropped on by militiamen, and she does not appear to have been questioned about whether Base People were also monitored (Written Record of Interview of CHANG Srey Mom, 11 November 2009, E3/5832, ERN (EN) 00410264).
[2689] Trial Judgment (E465), fn. 3471, referring to Tram Kak District Record, 13 May [year not specified], E3/8428, ERN (EN) 00322165.
[2690] Trial Judgment (E465), fn. 3471, referring to Tram Kak District Record, 22 September 1977, E3/2441, ERN (EN) 00369488, p. 26.
[2691] Trial Judgment (E465), para. 1055, referring to Tram Kak District Record, 3 May 1977, E3/2048, ERN (EN) 01454944, p. 1.
[2692] Trial Judgment (E465), para. 1055, referring to Tram Kak District Record, 12 March [year not specified], E3/2441, ERN (EN) 00369476, p. 14.

susceptible to arrest for thoughts, speech or conduct considered contrary to the revolution." It refers to:

a. "A report dated 3 May 1977 [that] requests an opinion from 'respected Angkar' on solving a problem with a New Person, then asks for Angkar to decide whether the person should be sent away";[2693]

b. "A report from Popel commune to the District Party dated 11 April [that] notes that 'For those people who hold a ranking position, we will send them out [to you] consecutively and for soldiers and some teachers who attempted to destroy [and] our revolution, could you please give us advice what to do or let us decide at some bases – so please gives us your advice. With high commitment to destroy/smash the spy of the enemy to its total extinction in order to serve the Socialist Revolution and Building Socialism for our Party and the people as required'";[2694]

c. "A note dated 24 April 1977 from Ta Phem commune [that] includes an instruction annotated to 'watch in advance on whether they are new or base people'";[2695]

d. "A report dated 6 May 1977 from Khporp Trabaek commune to Angkar, Tram Kak district, [that] provided information on four persons 'with former ranks and positions' who had been transferred up to the commune's base the previous day";[2696] and

e. "A report dated 8 May 1977 from Popel commune to District Angkar [that] confirmed that 'the number of military families smashed by the Angkar and died is 393 or 106 families […] 892 persons or 231 military families remain'".[2697]

947. Whether former Khmer Republic soldiers and officials were targeted for arrest has been addressed in the section above. The Supreme Court Chamber considers that this evidence does not support a finding beyond reasonable doubt that New People (who were not former Khmer Republic soldiers or officials) were particularly targeted for arrest for thoughts, speech or

[2693] Trial Judgment (E465), para. 1080, referring to Tram Kak District Record, 3 May 1977, E3/2048, ERN (EN) 01454944, p. 1.
[2694] Trial Judgment (E465), para. 1080, referring to Tram Kak District Record, 11 April [1977], E3/4629, ERN (EN) 00322133.
[2695] Trial Judgment (E465), para. 1080, referring to Tram Kak District Record, 24 April 1977, E3/4107, ERN (EN) 00361772.
[2696] Trial Judgment (E465), para. 1080, referring to Tram Kak District Record, 6 May 1977, E3/2050, ERN (EN) 00276576.
[2697] Trial Judgment (E465), para. 1080, referring to Tram Kak District Record, 8 May 1977, E3/2048, ERN (EN) 01454946.

conduct considered contrary to the revolution. It demonstrates that a person's category was relevant to authorities, but is not sufficient to demonstrate that New People were particularly targeted; nor does it indicate why New People were arrested.

948. In sum, the Supreme Court Chamber considers that the Trial Chamber erred in finding that it had been established beyond reasonable doubt that the working conditions for New People were worse than those of Base People, except for the fact that New People could not hold leadership positions or benefit from the better working conditions that came along with such positions, and that New People were targeted for arrest for innocuous thoughts, speech or conduct considered to be contrary to the revolution. It considers that the Trial Chamber did not err in finding that New People received less food than Base People, that the working conditions of New People were worse than those of Base People in that New People could not hold positions of authority and benefit from the better working conditions that came along with these positions, and that New People in particular suffered from miserable treatment.

949. The Supreme Court Chamber concludes that the underlying discriminatory acts of providing less food to New People, preventing New People from holding leadership positions, and subjecting New People to "miserable treatment", together with the Trial Chamber's uncontested findings that New People were categorised separately from Base People, segregated from Base People in separate cooperatives or separate working groups, and treated as subordinate to Base People is sufficient to meet the gravity threshold to amount to persecution as a crime against humanity. These underlying acts must be considered cumulatively and in context,[2698] and in this regard the results of providing the New People with less food are relevant: New People in particular suffered and died from malnutrition.[2699] KHIEU Samphân's argument is dismissed.

iii. Trapeang Thma Dam Worksite

950. After considering the charges and the nature and discernibility of the targeted group, including related arguments by the parties,[2700] the Trial Chamber considered the underlying acts in question to be the subjection to harsher treatment and living conditions than the rest of the population, and, with regard to New People, the exclusion from leadership positions.[2701] It

[2698] Case 001 Appeal Judgment (F28), para. 257.
[2699] Trial Judgment (E465), para. 1177.
[2700] Trial Judgment (E465), paras 1403-1408.
[2701] Trial Judgment (E465), para. 1409.

also noted that some perceived enemies were killed pursuant to orders.[2702] It considered that these underlying acts were discriminatory in fact and were carried out with the specific intent to discriminate against the targeted group.[2703] The Trial Chamber found that the acts included independent crimes against humanity, as well as acts which on their own do not necessarily amount to crimes, and it was satisfied that, considered together, they cumulatively rise to the level of severity to constitute persecution on political grounds.[2704]

951. KHIEU Samphân submits that the only underlying acts in question were the exclusion of New People from leadership positions and their being monitored by Base People, which was insufficient to find that any fundamental rights were violated or that the gravity requirement to constitute persecution as a crime against humanity was satisfied.[2705] He argues that the Trial Chamber relied only on the testimony of one Civil Party, SAM Sak, and distorted his evidence.[2706]

952. The Co-Prosecutors respond that the Trial Chamber found the persecuted group was "real or perceived enemies of the CPK" and made reasonable findings that enemies of the CPK were subjected to discrimination, this treatment violated fundamental rights, and the violation reached the requisite level of gravity to satisfy the *actus reus* of persecution.[2707]

953. The Lead Co-Lawyers support the arguments made by the Co-Prosecutors and respond that KHIEU Samphân, rather than the Trial Chamber, distorted Civil Party SAM Sak's testimony.[2708] They respond that SAM Sak did not suggest that Base People and New People had similar feelings at the worksite, but emphasised the pain and fear New People felt and that his mistreatment was due to his status as a New Person.[2709] They respond that the Trial Chamber could have properly made a finding on the basis of one civil party testimony, but did not do so in this case; rather, it corroborated SAM Sak's evidence with witnesses and Civil Party SEN Sophon, as well as documentary evidence.[2710] They respond that KHIEU Samphân is incorrect that the underlying acts at issue involved only the exclusion of New People from

[2702] Trial Judgment (E465), para. 1409.
[2703] Trial Judgment (E465), paras 1410-1411.
[2704] Trial Judgment (E465), paras 1411-1412.
[2705] KHIEU Samphân's Appeal Brief (F54), paras 763-767.
[2706] KHIEU Samphân's Appeal Brief (F54), paras 765-766.
[2707] Co-Prosecutors' Response (F54/1), para. 835.
[2708] Lead Co-Lawyers' Response (F54/2), para. 434.
[2709] Lead Co-Lawyers' Response (F54/2), paras 435-436.
[2710] Lead Co-Lawyers' Response (F54/2), para. 437.

leadership positions and state that the Trial Chamber also found that New People were singled out to be arrested and killed.[2711]

954. The Supreme Court Chamber first notes that KHIEU Samphân is incorrect that the only findings characterising discrimination were that New People were excluded from leadership positions and were monitored by "Old People".[2712] The Trial Chamber found that the targeted group of "real or perceived enemies of the CPK" was broader than just New People.[2713] It found that company and battalion chiefs were instructed to identify and kill these real or perceived enemies, and that some workers identified as enemies were actually killed pursuant to orders.[2714]

955. In listing the underlying discriminatory acts constituting political persecution, the Trial Chamber also stated that "[t]hose who were considered not hard-working were put in a 'case unit' where they were made to work harder compared to workers in normal units."[2715] However, the Supreme Court Chamber does not agree that this finding can be considered a discriminatory act, since there was no finding that "real or perceived enemies of the CPK" or, more specifically, New People were targeted to be put in this "case unit". The testimonies relied upon by the Trial Chamber do not appear to make a distinction between the category of persons who would be placed in there.[2716]

956. To make the finding that New People were excluded from leadership positions and were monitored by "Old People", the Trial Chamber noted that all of the witnesses who had a leadership role were Old People, and relied on the testimonies of CHHUM Seng, MUN Mot, SAM Sak, and SEN Sophon.[2717] To make the finding that company and battalion chiefs were

[2711] Lead Co-Lawyers' Response (F54/2), para. 438.
[2712] KHIEU Samphân's Appeal Brief (F54), paras 763-764.
[2713] Trial Judgment (E465), para. 1407.
[2714] Trial Judgment (E465), para. 1409.
[2715] Trial Judgment (E465), para. 1409, referring to para. 1268.
[2716] Trial Judgment (E465), para. 1268, fn. 4331. The footnote supporting this finding states:
T. 28 July 2015 (MAM Soeurm), E1/324.1, pp. 85-86 (explaining that those who were considered stubborn, inactive or made mistakes would be put in the case unit "for being tempered" and work harder than in the normal units); T. 11 August 2015 (KAN Thorl), E1/328.1, p. 9 (answering in the positive to Judge LAVERGNE's question whether people appointed to the case unit were people "who had disciplinary issues because they didn't work hard enough or they did not follow the rules."). See also, T. 18 August 2015 (CHHUM Seng), E1/332.1, pp. 11-12 (confirming that he heard of the existence of a unit of people who were less hardworking than others and that those who complained that they were forced to work intensively and that they were not given enough food were put in a special unit whose chief was Sres); T. 20 August 2015 (LING Lrysov), E1/334.1, p. 43 (testifying that the case unit was made up of people who were said to exploit other peoples' work); CHIEP Chhean Interview Record, E3/7805, 20 December 2008, p. 3, ERN (EN) 00277816.
[2717] Trial Judgment (E465), para. 1345.

instructed to identify and kill real or perceived enemies of the CPK, the Trial Chamber relied mainly on the testimony of CHHUM Seng,[2718] but also noted that the killing of workers identified as enemies accorded with a weekly report made by Sector 5 that stated: "the socialist revolution movement has been advancing rapidly one level forward as it has proceeded very well, progressively, destroying the enemy that opposed the socialism, strengthening and expanding the regime, the collective regime and socialist locations, and sweeping clean and uprooting further the remains of the capitalist class and other oppressive class".[2719] To make the finding that some workers identified as enemies were actually killed pursuant to orders, the Trial Chamber relied on the testimonies of CHHUM Seng, KAN Thorl, and TAK Boy.[2720]

957. KHIEU Samphân only challenges the testimony of SAM Sak.[2721] Although the Supreme Court Chamber does not consider that the Trial Chamber distorted this civil party's testimony, as argued by KHIEU Samphân, even if this testimony were disregarded, it is apparent that the Trial Chamber relied on sufficient other evidence to support its findings. The Supreme Court Chamber therefore rejects the argument that the evidence relied upon by the Trial Chamber was insufficient.

958. The Supreme Court Chamber also rejects KHIEU Samphân's assertions that no fundamental rights were violated and that the gravity threshold to amount to persecution was not met.[2722] KHIEU Samphân's arguments are based on the incorrect premise that the only underlying acts of persecution at issue are the exclusion of New People from leadership positions and their being monitored. As explained above, this is not the case. The Trial Chamber found that the acts of persecution included acts that amount to independent crimes against humanity.[2723] Acts that amount to independent crimes against humanity, such as murder, necessarily violate fundamental human rights and meet the gravity threshold. This argument is therefore dismissed.

[2718] Trial Judgment (E465), paras 1362-1363.
[2719] Trial Judgment (E465), fn. 4673, quoting Weekly Report of Sector 5 Committee, 21 May 1977, E3/178, p. 3, referring to THUN Thy DC-Cam Interview, 17 June 2011, E3/9157, p. 22.
[2720] Trial Judgment (E465), para. 1367.
[2721] KHIEU Samphân's Appeal Brief (F54), paras 764-766.
[2722] KHIEU Samphân's Appeal Brief (F54), para. 767.
[2723] Trial Judgment (E465), para. 1412.

iv. 1st January Dam Worksite

959. After considering the charges and the nature and discernibility of the targeted group, including related arguments by the parties,[2724] the Trial Chamber considered the discriminatory acts with regard to New People. It considered the underlying acts in question to be that "New People were more readily reprimanded for offences or mistakes, and [were] prevented from taking leadership positions, which further exacerbated their precarious situation."[2725] It found these acts to be discriminatory in fact.[2726] It found that the *mens rea* was met since New People were under heightened scrutiny, were reprimanded for minor offenses and risked adverse consequences, and the message was clear that the reason for this discriminatory treatment was because of their membership in the group.[2727] The Trial Chamber found that although the underlying acts do not amount to independent crimes, persecution was nevertheless established with regard to New People.[2728]

960. With regard to former Khmer Republic soldiers and officials, the Trial Chamber considered the underlying acts in question to be their arrest and disappearance, and stated that it was satisfied that they suffered discrimination in fact and that there was a specific intent to discriminate against them.[2729] The Trial Chamber found that the acts, considered together and within the harsh context in which they were committed, cumulatively rise to the level of gravity to constitute persecution on political grounds.[2730]

New People

961. KHIEU Samphân submits: (1) that the Trial Chamber erred in fact because there was no discrimination against New People at the 1st January Dam Worksite;[2731] (2) erred in law by asserting that there was a fundamental right to equal treatment;[2732] (3) erred in law and in fact by finding that the treatment violated the fundamental right of New People to equal

[2724] Trial Judgment (E465), paras 1685-1687.
[2725] Trial Judgment (E465), para. 1688.
[2726] Trial Judgment (E465), para. 1688.
[2727] Trial Judgment (E465), para. 1688.
[2728] Trial Judgment (E465), para. 1689.
[2729] Trial Judgment (E465), para. 1690.
[2730] Trial Judgment (E465), para. 1691.
[2731] KHIEU Samphân's Appeal Brief (F54), paras 788-796.
[2732] KHIEU Samphân's Appeal Brief (F54), para. 797.

treatment;[2733] and (4) erred in law by failing to set out the requisite level of gravity that needed to be met for the underlying acts to be characterised as persecution.[2734]

962. The Co-Prosecutors respond that the Trial Chamber correctly determined there was discrimination at the 1st January Dam Worksite.[2735] They respond that KHIEU Samphân failed to explain how the Trial Chamber's reference to a fundamental right to equal treatment invalidates the decision; failed to demonstrate that the Trial Chamber erred in law or fact in finding that the treatment suffered by New People was a violation of a fundamental right; and failed to demonstrate that the Trial Chamber erred in its application of the gravity threshold for persecution.[2736] They argue that the Trial Chamber's finding of persecution was not grounded on a right to equal treatment but on the violation of multiple rights.[2737]

963. Finding it to be dispositive, the Supreme Court Chamber will now address the argument concerning whether the Trial Chamber erred in finding that there was a fundamental right to equal treatment that had been violated. The Trial Chamber found that "[t]he CPK treatment of New People at the 1st January Dam infringed upon and violated their fundamental right to equal treatment."[2738] The Trial Chamber did not explain what this right entails and did not examine whether such a right existed in Cambodia in 1975-1979. According to the ICCPR, which did not enter into force until 23 March 1976, and was not signed by Cambodia until 1980, the right to equal treatment refers to the right of all persons to be equal before the law and entitled to the equal protection of the law.[2739] The Trial Chamber did not analyse whether New People and Base People were considered equal before the law and made no findings in this regard.

964. The Supreme Court Chamber rejects the argument put forward by the Co-Prosecutors[2740] that the Trial Chamber determined that the fundamental rights violated include the rights to life, personal dignity, liberty and security, and freedom from arbitrary or unlawful

[2733] KHIEU Samphân's Appeal Brief (F54), para. 797.
[2734] KHIEU Samphân's Appeal Brief (F54), para. 797.
[2735] Co-Prosecutors' Response (F54/1), para. 819.
[2736] Co-Prosecutors' Response (F54/1), para. 820.
[2737] Co-Prosecutors' Response (F54/1), para. 821.
[2738] Trial Judgment (E465), para. 1689.
[2739] ICCPR, Arts 14, 26.
[2740] Co-Prosecutors' Response (F54/1), para. 821. This argument was also supported by the Lead Co-Lawyers. See Lead Co-Lawyers' Response (F54/2), para. 447.

arrest. The Trial Chamber's legal findings on political persecution distinguish between New People and former Khmer Republic soldiers and officials:

a. Paragraph 1688 of the Trial Judgment sets out the acts the Trial Chamber found to discriminate in fact against New People (part of the *actus reus* of persecution; the acts or omissions must also deny or infringe upon a fundamental right laid down in international customary or treaty law) and that they were deliberately perpetrated with the intent to discriminate (the *mens rea*).

b. Paragraph 1689 states that the CPK's treatment of New People at the 1st January Dam Worksite infringed upon and violated their fundamental right to equal treatment (the rest of the *actus reus* requirement for persecution). It also contains the Trial Chamber's analysis of the gravity requirement for the acts to rise to the level of persecution. It makes the finding that "[a]lthough the acts found above to have been discriminatory against New People do not on their own amount to independent crimes, the *actus reus* of persecution is nevertheless established with regard to New People."

c. Paragraph 1690 then sets out the acts the Trial Chamber found to discriminate in fact against former Khmer Republic soldiers and officials (part of the *actus reus* of persecution) and finds that there was a specific intent to discriminate against them (the *mens rea*).

d. Paragraph 1691 lists the fundamental rights that the Trial Chamber considered to be violated (the rest of the *actus reus* requirement for persecution) and contains the Trial Chamber's analysis of the gravity requirement for the acts to rise to the level of persecution.

965. Paragraph 1691 is somewhat ambiguous in its finding that "[a]cts committed against *these groups of workers* infringed upon or violated their fundamental rights pertaining to life, personal dignity, liberty and security and freedom from arbitrary or unlawful arrest […]".[2741] Considering the separation between the Trial Chamber's analysis of the elements of persecution relating to New People and its analysis of the elements relating to former Khmer Republic soldiers and officials, as well as its finding in paragraph 1689 that the *actus reus* of persecution had been met, prior to its finding in paragraph 1691 concerning violation of the

[2741] Trial Judgment (E465), para. 1691 (emphasis added).

rights to life, personal dignity, liberty and security, and freedom from arbitrary or unlawful arrest, the Supreme Court Chamber interprets "these groups of workers" to refer only to Khmer Republic soldiers and officials.

966. As the Trial Chamber erred in finding that there was a fundamental right to equal treatment laid down in international customary or treaty law that had been infringed or violated, the Supreme Court Chamber upholds KHIEU Samphân's argument and reverses his conviction for political persecution against New People at the 1st January Dam Worksite. The remaining arguments relevant to this challenge need not be considered.

Former Khmer Republic Soldiers and Officials

967. KHIEU Samphân submits that the evidence relied on by the Trial Chamber was insufficient to find that (1) there was a practice of identifying former Khmer Republic soldiers and officials for purposes of arresting them; (2) HUN Sethany's father was arrested and disappeared; and (3) a group of former soldiers was arrested and disappeared.[2742] He argues that the Trial Chamber relied on a finding that there was a practice of compiling lists at the district and sector levels to identify soldiers to be arrested to establish that this actually occurred at the 1st January Dam Worksite.[2743] He submits that HUN Sethany's testimony is the sole evidence of the arrest of her father on political grounds and that she heard this from her siblings; he argues that this is insufficient to find a policy targeting all former Khmer Republic soldiers and officials at the 1st January Dam Worksite.[2744] KHIEU Samphân contends that the Trial Chamber erred in relying on UTH Sen's testimony concerning the arrest and disappearance of a group of former LON Nol soldiers because he only directly witnessed two or three of them taken away and did not know who took them.[2745] KHIEU Samphân argues that the rest of UTH Sen's testimony on this subject was hearsay and speculation.[2746]

968. The Co-Prosecutors respond that KHIEU Samphân did not mention that the Trial Chamber relied on two crucial testimonies: PRAK Yut's testimony that she and other district secretaries made lists of former LON Nol soldiers, and OR Ho's testimony that there was a practice of identifying and arresting former Khmer Republic civil servants.[2747] They respond

[2742] KHIEU Samphân's Appeal Brief (F54), para. 798.
[2743] KHIEU Samphân's Appeal Brief (F54), para. 799.
[2744] KHIEU Samphân's Appeal Brief (F54), paras 800-801.
[2745] KHIEU Samphân's Appeal Brief (F54), para. 802.
[2746] KHIEU Samphân's Appeal Brief (F54), para. 802.
[2747] Co-Prosecutors' Response (F54/1), para. 439.

that it is well-established that the Trial Chamber can rely even on uncorroborated hearsay evidence as long as it does so with caution, and that the Trial Chamber did approach this evidence with caution and relied on it after considering it together with other testimonies.[2748] They respond that the Trial Chamber did not rely on a general policy of discrimination against former Khmer Republic soldiers to establish such discrimination at the 1st January Dam Worksite, but rather established, based on witness testimony, that discrimination occurred at the 1st January Dam Worksite and determined that this discrimination was part of a general policy against former Khmer Republic soldiers.[2749]

969. The Lead Co-Lawyers agree with the Co-Prosecutors' Response, but make submissions specifically with regard to HUN Sethany's testimony.[2750] They respond that important aspects of HUN Sethany's testimony were not hearsay; she gave direct evidence that her father, who had been associated with the former regime and opposed the Khmer Rouge, disappeared and never returned, and that, before he disappeared, he had been terrified of what they would do to him and his family.[2751] They respond that the Trial Chamber was entitled to rely on her other evidence, in spite of it being hearsay, and that she recounted multiple consistent, original sources of the information.[2752] They respond that the Trial Chamber did not rely on HUN Sethany's testimony alone for its finding that former Khmer Republic soldiers and officials were targeted at the 1st January Dam Worksite; her evidence was supported by other witnesses.[2753]

970. The Supreme Court Chamber recalls that the Trial Chamber may properly rely on evidence outside the temporal or geographic scope of the case to establish by inference the elements of criminal conduct.[2754] Here, the Trial Chamber recalled its earlier finding that former Khmer Republic soldiers and officials were considered enemies and were targeted for arrest and often disappeared.[2755] It then considered the areas surrounding the 1st January Dam worksite and found there was a practice of identifying LON Nol soldiers of high rank through

[2748] Co-Prosecutors' Response (F54/1), paras 440-442.
[2749] Co-Prosecutors' Response (F54/1), para. 443.
[2750] Lead Co-Lawyers' Response (F54/2), para. 394.
[2751] Lead Co-Lawyers' Response (F54/2), para. 397.
[2752] Lead Co-Lawyers' Response (F54/2), paras 398-400.
[2753] Lead Co-Lawyers' Response (F54/2), para. 401.
[2754] *Nahimana et al.* Appeal Judgment (ICTR), para. 315 (referring to evidence outside the temporal scope); *Taylor* Trial Judgment (SCSL), para. 101 (referring to evidence outside the temporal scope), para. 110 (referring to evidence outside the geographic scope); *Prlić et al.* Trial Decision (ICTY), p. 9 (referring to evidence outside the temporal scope); *Prosecutor v. Lubanga*, Trial Chamber (ICC), ICC-01/04-01/06, Judgment pursuant to Article 74 of the Stature, 14 March 2012, paras 1022-1023 (referring to evidence outside the temporal scope).
[2755] Trial Judgment (E465), para. 1660.

the compilation of lists at the district and sector levels for the purposes of arresting them.[2756] Turning to the 1st January Dam Worksite specifically, the Trial Chamber relied on two testimonies: one by HUN Sethany, who testified that her father, a former teacher, was arrested and disappeared and another by UTH Seng, who testified that a group of former Khmer Republic soldiers was arrested and disappeared.[2757] While the Trial Chamber relied only on these two testimonies specifically concerning the 1st January Dam Worksite, they may properly be considered together with the other findings to infer that former Khmer Republic soldiers and officials were not just arrested and disappeared in these two instances, but that this formed a general practice.

971. The Supreme Court Chamber does not find error in the Trial Chamber's reliance on HUN Sethany's or UTH Seng's testimonies. The Trial Chamber may, with caution, rely on hearsay to establish an element of a crime.[2758] Furthermore, HUN Sethany's testimony concerning the arrest of her father is hearsay, but her testimony that he was a former teacher who opposed the Khmer Rouge regime, that he disappeared, and she never saw him again is not.[2759] In addition to his hearsay testimony, UTH Seng testified that he directly witnessed two to three workers being taken away who he believed were connected to the former regime.[2760] These testimonies, together with the other evidence relied upon by the Trial Chamber that in the areas surrounding the 1st January Dam Worksite there was a practice of identifying LON Nol soldiers of high rank through the compilation of lists at the district and sector levels for the purposes of arresting them, could lead the Trial Chamber to reasonably conclude that former Khmer Republic soldiers and officials were arrested and disappeared at the 1st January Dam Worksite. This argument is dismissed.

v. S-21 Security Centre

972. After considering the charges and the nature and discernibility of the targeted group,[2761] the Trial Chamber considered the underlying acts in question to be the arrest, detainment in poor conditions, interrogation, torture, and execution of individuals who were implicated as members of an enemy network.[2762] It considered that these acts were discriminatory in fact and

[2756] Trial Judgment (E465), paras 1660-1661.
[2757] Trial Judgment (E465), paras 1662-1663.
[2758] Case 002/01 Appeal Judgment (F36), para. 302.
[2759] T. 27 May 2015 (HUN Sethany), E1/306.1, pp. 18, 33-34.
[2760] T. 2 June 2015 (UTH Seng), E1/308.1, pp. 110-111; T. 3 June 2015 (UTH Seng), E1/309.1, pp. 8-9.
[2761] Trial Judgment (E465), paras 2598-2600.
[2762] Trial Judgment (E465), para. 2601.

were deliberately perpetrated with the intent to discriminate against the targeted group, as those arrested and detained were viewed as internal or external enemies and they suffered arrest, detainment, harsher living conditions, torture, and execution as a direct result of their perceived status as enemies of the CPK.[2763] The Trial Chamber found that the *mens rea* of political persecution was established because of its finding that there was a policy targeting perceived political adversaries that was systematically disseminated.[2764] It noted that the conduct in question amounted to independent crimes against humanity, thus the acts rise to the requisite level of severity to constitute persecution.[2765]

973. KHIEU Samphân argues that the Trial Chamber erred in finding that the acts directed at "real or perceived enemies of the CPK" were discriminatory in fact, as the massive scale of the arrests show that they were indiscriminate.[2766] He notes that in Case 001, the Supreme Court Chamber reversed the Trial Chamber's finding on persecution on political grounds since it found that no discernible criteria applied in targeting the victims; he contends that the evidence in Case 002/02 evinced nothing new that would support a different finding in this case.[2767]

974. The Co-Prosecutors respond that arrests *en masse* do not mean that a group was not targeted; the number of people targeted does not determine whether those people were subject to discrimination.[2768] They argue that KHIEU Samphân misrepresented the Supreme Court Chamber's Case 001 jurisprudence and that it held that "as long as political enemies were defined pursuant to a policy employing some kind of general criteria, while other members of the population enjoyed a degree of freedom, there are grounds to find persecution on political grounds."[2769]

975. The Supreme Court Chamber agrees with the Co-Prosecutors that the fact that people were arrested *en masse* does not preclude a finding of persecution on political grounds, as long as members of the targeted group were arrested because they belonged to the targeted group. In Case 001, the Supreme Court Chamber did not state that a massive scale of arrests would demonstrate that victims were "indiscriminately targeted" and thus there would be no persecution. It stated:

[2763] Trial Judgment (E465), para. 2602.
[2764] Trial Judgment (E465), para. 2602.
[2765] Trial Judgment (E465), para. 2603.
[2766] KHIEU Samphân's Appeal Brief (F54), para. 826.
[2767] KHIEU Samphân's Appeal Brief (F54), paras 826-827.
[2768] Co-Prosecutors' Response (F54/1), para. 847.
[2769] Co-Prosecutors' Response (F54/1), para. 848.

> In sum, for the occurrence of persecution, it is necessary that the act or omission discriminates in fact and discriminates against a discernible group defined pursuant to given criteria. Conversely, there is no discrimination in fact where: 1) there is a mistake of fact by the perpetrator as to whether a victim actually belongs to the defined target group; or 2) the perpetrator targets victims irrespective of whether they fall under the discriminatory criterion, in other words, where the targeting is indiscriminate.[2770]

976. The Supreme Court Chamber, in that same Judgment, further explained:

> By the end of the regime, "[t]he process of elimination of Party enemies turned into paranoia" as "the Party Centre began to perceive enemies everywhere and became more concerned about internal rather than external enemies." Individuals were identified and found guilty "simply by virtue of having been accused." Based on these facts, the Supreme Court Chamber considers that as long as political enemies were defined pursuant to a policy employing some kind of general criteria, while other members of the population enjoyed a degree of freedom, there are grounds to find persecution on political grounds.[2771]

977. The Supreme Court Chamber's reversal of the conviction of persecution on political grounds in Case 001 was specific to KAING Guek Eav *alias* Duch. The Supreme Court Chamber explained that KAING Guek Eav *alias* Duch did not employ any general criteria to define political enemies since "individuals were indiscriminately apprehended, mistreated and eliminated without any attempt at rational or coherent justification on political grounds", "the Accused knew that not all those held at S-21 were in fact enemies of the Party, but that they were in any event detained, interrogated and executed", and "the Accused, in his criminal activity, consciously mistreated persons who did not fall under any persecutory category and did so, not in order to discriminate against political enemies, but to demonstrate his loyalty and efficiency to the Party."[2772]

978. In Case 002/02, the Trial Chamber made no findings that KHIEU Samphân was aware that KAING Guek Eav *alias* Duch did not employ any general criteria to define political enemies but instead consciously mistreated persons who were not considered enemies of the CPK. The Trial Chamber found that "the focus of the S-21 operation was directed against real or perceived political enemies of the CPK" and that "[t]hose arrested, detained, interrogated, tortured and ultimately executed at S-21 were identified and arrested based on the fact that they were labelled as enemies, traitors or spies and viewed as political enemies of the CPK and the revolution."[2773] KHIEU Samphân has not demonstrated that the Trial Chamber erred in finding that the acts were discriminatory. This argument is dismissed.

[2770] Case 001 Appeal Judgment (F28), para. 277.
[2771] Case 001 Appeal Judgment (F28), para. 282.
[2772] Case 001 Appeal Judgment (F28), para. 283.
[2773] Trial Judgment (E465), para. 2601.

vi. Au Kanseng Security Centre

979. After considering the charges and the nature and discernibility of the targeted group, including related arguments by the parties,[2774] the Trial Chamber considered the underlying acts in question to be arresting, detaining, and subjecting the targeted group to harsher treatment and living conditions than the remainder of the population, resulting in mental and physical suffering and attacks against their dignity.[2775]

980. The Trial Chamber considered the arrest, detention, and imposition of harsher treatment and living conditions of at least 100 Jarai was discriminatory as it was perpetrated as a result of their perceived enemy status.[2776] The Trial Chamber also considered that the arrest, detention, and treatment of Witnesses PHON Thol and MOEURNG Chandy was a result of their perceived enemy status.[2777] The Trial Chamber considered the arrest, detention, subjection to re-education, and attacks against human dignity of military prisoners was discriminatory as it was perpetrated due to their perceived enemy status.[2778] The Trial Chamber was thus satisfied that the *actus reus* of persecution on political grounds was met.[2779] It was satisfied that the *mens rea* was met, having regard to the systemic dissemination of a policy targeting perceived political adversaries, the resultant "uniform attack" upon civilian and military personnel at the Security Centre, and the intentional deprivation of their rights.[2780] The Trial Chamber found that the acts included independent crimes against humanity, as well as acts which on their own do not necessarily amount to crimes, and it was satisfied that considered together they cumulatively rise to the level of severity to constitute persecution on political grounds.[2781]

981. KHIEU Samphân submits that the Trial Chamber erred in finding that 100 Jarai, PHON Thol, MOEURNG Chandy, and military prisoners were subjected to harsher treatment and living conditions, since it also found that the detention regime varied between serious offenders, light offenders, and women and children; the differences in treatment were based more on the nature of the offence than on political grounds.[2782] With regard to the 100 Jarai, KHIEU Samphân argues that the cramped conditions to which they were subjected was due to the fact that the buildings at Au Kanseng were not designed to hold so many prisoners at once;

[2774] Trial Judgment (E465), paras 2980-2983.
[2775] Trial Judgment (E465), paras 2984, 2990.
[2776] Trial Judgment (E465), para. 2986.
[2777] Trial Judgment (E465), paras 2987-2988.
[2778] Trial Judgment (E465), paras 2989-2990.
[2779] Trial Judgment (E465), para. 2990.
[2780] Trial Judgment (E465), para. 2990.
[2781] Trial Judgment (E465), para. 2992.
[2782] KHIEU Samphân's Appeal Brief (F54), para. 854.

that there is no evidence they were subjected to any particular ill-treatment; and that they were not the only prisoners executed, so there is no evidence they were subjected to harsher treatment than others.[2783] He argues that PHON Thol did not receive harsher treatment; the Trial Chamber found that he was subjected to re-education and attacks on human dignity, but it also found that re-education was meant for all persons accused of the least serious offences throughout the country, and his testimony actually shows he received more lenient treatment than other prisoners.[2784] He contends that MOEURNG Chandy also received the same treatment as others.[2785] He submits that the Trial Chamber failed to explain how military prisoners received harsher treatment than other prisoners.[2786]

982. The Co-Prosecutors respond that the argument about detention conditions varying according to whether prisoners were serious offenders, light offenders, or women and children ignores that the Trial Chamber found that the targeted group was susceptible to arrest because of their membership in the group.[2787] It responds that members of the targeted group received harsher treatment and living conditions than the rest of the population by virtue of their detention at the security centre.[2788]

983. The Supreme Court Chamber notes that the Trial Chamber found the acts amounting to persecution to be arresting, detaining, and subjecting the targeted group to harsher treatment and living conditions than the remainder of the population.[2789] KHIEU Samphân has limited his argument to whether members of the targeted group were subjected to harsher treatment or living conditions, but does not challenge the Trial Chamber's finding that the targeted group was arrested and detained on discriminatory grounds, *i.e.*, because of their membership in the targeted group.

984. KHIEU Samphân submits that the living and working conditions of the targeted group must be assessed in comparison with other prisoners at Au Kanseng who were not members of the targeted group, while the Co-Prosecutors respond that the Trial Chamber correctly considered the living and working conditions of the targeted group in comparison with non-prisoners. Neither party provides support for their position as to which group the comparison

[2783] KHIEU Samphân's Appeal Brief (F54), para. 855.
[2784] KHIEU Samphân's Appeal Brief (F54), para. 856.
[2785] KHIEU Samphân's Appeal Brief (F54), para. 857.
[2786] KHIEU Samphân's Appeal Brief (F54), para. 858.
[2787] Co-Prosecutors' Response (F54/1), para. 884.
[2788] Co-Prosecutors' Response (F54/1), para. 884.
[2789] Trial Judgment (E465), para. 2990.

should be made against, nor did the Trial Chamber explain why it compared the treatment of the targeted group with the rest of the population, rather than other detainees.[2790]

985. The Supreme Court Chamber concludes that if all detainees at Au Kanseng Security Centre were detained there because they were considered to be members of the targeted group, then their treatment should be considered against the treatment of non-prisoners, since the detention only of the targeted group would indicate that the entire system of detention was directed at them. On the other hand, if the population of Au Kanseng Security Centre included people who were not considered to be members of the targeted group, the treatment of the targeted group should be considered against the treatment of other detainees at the Security Centre. This is because the treatment of the targeted group must be directed against the targeted group to amount to persecution. If the treatment is merely a result of detention, and in detention members of the targeted group are treated equally to non-members of the group, then the treatment could not be considered directed at the group.

986. The Trial Chamber did not make any explicit finding as to whether all detainees at Au Kanseng were members of the targeted group of "real or perceived enemies of the CPK", but it appears that, at least initially, the population included members of the targeted group as well as non-members, since the Trial Chamber found that "Au Kanseng initially served as a detention and corrections centre for Division 801 soldiers who had been sent for re-education as a result of minor wrongdoings. Ill-disciplined soldiers and suspected internal enemies were reformed through indoctrination or reinforcement of the Party line."[2791] Therefore, the Supreme Court Chamber concludes that the harsh treatment and living conditions of the targeted group at Au Kanseng Security Centre must be compared to the treatment of other detainees at Au Kanseng rather than the general population.

987. The Trial Chamber did not find that members of the targeted group were subjected to harsher treatment or living conditions than others at Au Kanseng except for the 100 Jarai, whom

[2790] Trial Judgment (E465), para. 2984:
> The Chamber has found numerous instances in which people were subjected to harsher treatment and living conditions than the remainder of the population and were arrested for re-education. […] The Chamber has found that civilian and military detainees were subjected to mental and physical suffering and attacks against their human dignity constituting the crime against humanity of other inhumane acts as a result of the prevailing living, working and detention conditions at the Security Centre. […] The Chamber is satisfied that the Jarai and other Au Kanseng detainees were subjected to harsher treatment and living conditions than the rest of the population by virtue of their detention at the Security Centre.

[2791] Trial Judgment (E465), para. 2885.

it found were held in particularly cramped conditions.[2792] These conditions were explained as resulting from the inability of Au Kanseng to accommodate such a large influx of prisoners,[2793] that is, they were not conditions targeted at the Jarai because they were considered to be enemies. The Trial Chamber did not consider the killing of the Jarai to be one of the underlying discriminatory acts, and did not refer to their killing when considering the Jarai's harsh treatment. Since members of the targeted group were not targeted for harsher treatment than other detainees at Au Kanseng, the Supreme Court Chamber considers that the Trial Chamber erred in finding that subjecting the targeted group to harsher treatment or living conditions was a discriminatory act. Nonetheless, the Supreme Court Chamber considers that the remaining discriminatory acts of arresting and detaining members of the targeted group are sufficient to rise to the level of persecution as a crime against humanity. KHIEU Samphân's argument is dismissed.

3. Religious Persecution

a. Religious Persecution of the Cham

988. According to the Trial Chamber, the scope of the charges relating to religious persecution encompasses facts relating to the Movement of Population Phase Two and nationwide throughout the DK period.[2794]

989. The Trial Chamber made legal findings on persecution on religious grounds in two sections of the Trial Judgment, the first specifically in relation to the treatment of the Cham at the 1st January Dam Worksite,[2795] and the second in relation to the treatment of the Cham generally.[2796]

990. The Trial Chamber found that Cham workers at the 1st January Dam Worksite suffered discrimination because they were forced to eat pork, were prevented from worshipping, and were prevented from speaking their native language.[2797] The Trial Chamber was satisfied that these restrictions were discriminatory in fact and were deliberately perpetrated with the intent to discriminate against the Cham because of their religious and cultural practices.[2798] The Trial

[2792] Trial Judgment (E465), paras 2939, 2986.
[2793] Trial Judgment (E465), para. 2939.
[2794] Trial Judgment (E465), para. 3184(vi).
[2795] Trial Judgment (E465), section 11.2.24.4.
[2796] Trial Judgment (E465), section 13.2.10.6.
[2797] Trial Judgment (E465), para. 1695.
[2798] Trial Judgment (E465), para. 1695.

Chamber found that the acts committed against the Cham at the 1st January Dam Worksite infringed upon and violated their fundamental rights pertaining to freedom of religion and that the restrictions were not necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others.[2799] The Trial Chamber found that although the persecutory acts did not rise to the level of independent crimes, considered together and in the context within which they were committed, they rose to the requisite level of severity to constitute persecution as a crime against humanity.[2800]

991. In its determination that persecution on religious grounds had been committed against the Cham generally, the Trial Chamber noted its previous findings that:

a. Cham people at the 1st January Dam Worksite suffered discrimination as they were forced to eat pork, prevented from worshipping, and prevented from speaking their native language;

b. the CPK implemented a policy specifically targeting the Cham as an ethnic and religious group and imposed restrictions on their religious and cultural practices in various locations in Cambodia throughout the DK period; and

c. these restrictions included prohibition on daily prayers, forcing the Cham to eat pork, forcing the Cham to wear the same dress and haircuts as the Khmer people, forcing the Cham to speak only the Khmer language, and burning Korans and dismantling mosques or using them for non-religious purposes.[2801]

992. The Trial Chamber was satisfied that these restrictions on the Cham were discriminatory in fact and were deliberately perpetrated with the intent to discriminate against the Cham because of their religious and cultural practices.[2802] The Trial Chamber found the acts committed against the Cham "variously infringed upon and violated fundamental rights and freedoms pertaining to movement, personal dignity, liberty and security, freedom from arbitrary or unlawful arrest, a fair and public trial and equality before the law as enshrined in customary international law."[2803]

[2799] Trial Judgment (E465), para. 1696.
[2800] Trial Judgment (E465), para. 1696.
[2801] Trial Judgment (E465), para. 3328.
[2802] Trial Judgment (E465), para. 3329.
[2803] Trial Judgment (E465), para. 3330.

993. The Trial Chamber stated that the acts charged as persecution included acts separately found to amount to independent crimes against humanity, as well as acts which on their own did not necessarily amount to crimes against humanity.[2804] The Trial Chamber further found that they cumulatively rose to the requisite level of seriousness to constitute persecution on religious grounds.[2805]

i. The Persecutory Acts

994. Before embarking on an examination of KHIEU Samphân's challenges related to religious persecution, the Supreme Court Chamber first considers it necessary to clarify the nature of the persecutory acts at issue, as it notes that the parties dispute the nature of the acts constituting the persecution on religious grounds found by the Trial Chamber.

995. KHIEU Samphân submits that the persecutory acts in question are the restrictions on religious and cultural practices set out by the Trial Chamber in paragraph 3328 of the Trial Judgment; *i.e.*, being forced to eat pork, the prevention of worship and daily prayers, the prevention of speaking the Cham native language, being required to wear the same dress and haircuts as Khmer people, the burning of Korans, and the dismantling of mosques or using them for nonreligious purposes.[2806]

996. The Co-Prosecutors[2807] and the Lead Co-Lawyers,[2808] on the other hand, respond that the acts charged as persecution include "*all* acts committed nationwide throughout the DK period",[2809] and would include murder, extermination, imprisonment, torture, and forcible transfer as an other inhumane act.[2810]

997. As acknowledged by the Trial Chamber, "[t]he particular acts amounting to persecution must be expressly charged."[2811] Paragraph 1420 of the Case 002 Closing Order, on the legal findings of religious persecution of the Cham, does not explicitly state what the persecutory acts in question actually were. It states:

> The elements of the crime of religious persecution of the Cham have been established (see the sections regarding "**Treatment of the Cham", phase 2 of the movement of population** and the

[2804] Trial Judgment (E465), para. 3331.
[2805] Trial Judgment (E465), para. 3331.
[2806] KHIEU Samphân's Appeal Brief (F54), para. 963.
[2807] Co-Prosecutors' Response (F54/1), para. 538. See also Co-Prosecutors' Response (F54/1), para. 470, fn. 1712.
[2808] Lead Co-Lawyers' Response (F54/2), paras 461, 466.
[2809] Co-Prosecutors' Response (F54/1), para. 538.
[2810] Co-Prosecutors' Response (F54/1), para. 470, fn. 1712, para. 534.
[2811] Trial Judgment (E465), para. 716.

> **"1st January Dam"**). There was a country-wide suppression of Cham culture, traditions and language. The CPK banned the practice of Islam and forbade the Cham from praying, seized and burned Qurans, closed or destroyed mosques, and forced Cham people to eat pork. Religious leaders and learned Islamic scholars were arrested and killed. Cham women were forced to cut their hair and were prohibited from covering their heads. Cham communities were broken up and Cham people were forcibly moved throughout Cambodia and dispersed among other communities.[2812]

998. While this paragraph refers to the arrest and killing of religious leaders and Islamic scholars, the Trial Chamber was not satisfied beyond reasonable doubt that this occurred during the period relevant to the indictment.[2813] This paragraph does not refer to other killing, torture, or imprisonment of Cham, but perhaps could have intended reference to these crimes by referring to the sections on "'Treatment of the Cham', phase 2 of the movement of population and the '1st January Dam'".

999. With regard to the 1st January Dam Worksite, it appears clear that the Trial Chamber considered the persecutory acts at issue to be the forced consumption of pork, being prevented from worshipping and being prevented from speaking the Cham native language.[2814] These were the acts the Trial Chamber stated that the Closing Order charged and the acts it stated it had found caused the Cham to suffer discrimination.[2815] It found that these persecutory acts infringed upon and violated the Cham workers' fundamental rights pertaining to freedom of religion.[2816] The Trial Chamber stated that the acts "do not amount to independent crimes."[2817]

1000. With regard to the treatment of the Cham generally, however, the Trial Chamber was not as clear in stating what the persecutory acts at issue actually were. The Trial Chamber first set out the charges in the Closing Order, stating that:

> [T]he charged conduct with respect to the persecution on religious grounds of the Cham includes the suppression of Cham culture, traditions and language. It is alleged that the CPK banned the practice of Islam, forbade the Cham from praying, seized and burned Korans, closed or destroyed mosques, and forced Cham people to eat pork. It is further alleged that religious leaders and Islamic scholars were arrested and killed, and that Cham women were forced to cut their hair and were prohibited from covering their heads. Furthermore it is alleged that Cham communities were broken up and Cham people were forcibly moved throughout Cambodia and dispersed among other communities.[2818]

[2812] Case 002 Closing Order (D427), para. 1420 (emphasis in original).
[2813] Trial Judgment (E465), para. 3237.
[2814] Trial Judgment (E465), para. 1695.
[2815] Trial Judgment (E465), paras 1693, 1695. The Trial Chamber did not specifically mention that the Closing Order charged the suppression of Cham language, although the Closing Order did do so.
[2816] Trial Judgment (E465), para. 1696.
[2817] Trial Judgment (E465), para. 1696.
[2818] Trial Judgment (E465), para. 3327, referring to Case 002 Closing Order (D427), para. 1420.

The Trial Chamber then recalled its findings that the Cham suffered discrimination at the 1st January Dam Worksite as they were forced to eat pork and were prevented from worshipping or speaking their native language and its findings that:

> [T]he CPK implemented a policy specifically targeting the Cham as an ethnic and religious distinct group and imposed restrictions on Cham religious and cultural practices in Kroch Chhmar district, in various locations within the Central (old North) Zone, and in other various locations in Cambodia throughout the DK period. Such restrictions included prohibition on daily prayers, forcing Cham to eat pork and wear the same dress and haircuts as the Khmer people, forcing them to only speak the Khmer language, as well as burning Korans and dismantling mosques or using them for purposes other than prayer. Those who resisted were arrested and/or killed. The Chamber does not consider such restrictions permissible.[2819]

Its focus on the religious and cultural restrictions in the Closing Order and its findings indicates that these were what the Trial Chamber considered to be the persecutory acts, but its statement that "those who resisted were arrested and/or killed" could indicate that it also considered arrests and killings to amount to persecutory acts.[2820]

1001. The Trial Chamber then listed the fundamental rights violated by the alleged persecutory acts as: "fundamental rights and freedoms pertaining to movement, personal dignity, liberty and security, freedom from arbitrary or unlawful arrest, a fair and public trial and equality before the law".[2821] The Trial Chamber did not list the rights to life or freedom from torture, which could indicate that it considered the persecutory acts to be the religious and cultural restrictions and perhaps the forced dispersal it mentioned when discussing the Closing Order, but not other crimes such as murder, extermination, torture, etc. It is curious that the Trial Chamber did not list freedom of religion as a fundamental right breached, as it did in relation to the religious persecution at the 1st January Dam Worksite.

1002. However, in assessing whether the acts rise to the requisite level of seriousness to amount to persecution as a crime against humanity, the Trial Chamber stated that:

> The acts charged as persecution include acts separately found to amount to independent crimes against humanity (including murder, extermination, imprisonment, persecution on political grounds during [Movement of Population] Phase Two (including torture, genocide and conduct characterised as forcible transfer) as well as acts which, on their own, do not necessarily amount to crimes (in particular, arrests).[2822]

[2819] Trial Judgment (E465), para. 3328.
[2820] Trial Judgment (E465), para. 3328.
[2821] Trial Judgment (E465), para. 3330.
[2822] Trial Judgment (E465), para. 3331.

1003. The missing parenthetical mark from the Trial Chamber's statement above makes unclear the exact crimes to which the Trial Chamber was referring. An additional point of confusion is the fact that the Trial Chamber, in making its findings in relation to persecution on political grounds, never referred to torture or genocide as acts of political persecution.[2823]

1004. Another part of the Trial Judgment indicates that the Trial Chamber considered the persecutory acts to be limited to the restrictions on religious and cultural practices. The Trial Chamber stated in relation to the Trea Village Security Centre that the "[f]acts related to the Trea Village Security Centre are relevant to the charges of genocide and crimes against humanity of murder, extermination, imprisonment and torture [of the Cham]."[2824] The Trial Chamber did not state that it considered these facts relevant to religious persecution, although if genocide, murder, extermination, imprisonment, and torture were considered to be persecutory acts, this site would necessarily be relevant to religious persecution.

1005. Because of the Trial Chamber's inconsistent treatment of the persecutory acts, and in light of the principle of *in dubio pro reo*, the Supreme Court Chamber finds that the alleged persecutory acts considered by the Trial Chamber to amount to the *actus reus* of persecution on religious grounds as a crime against humanity are the restrictions on religious and cultural practices of prohibition on daily prayers, forcing the Cham to eat pork, forcing the Cham to wear the same dress and haircuts as the Khmer people, forcing the Cham to speak only the Khmer language, and burning Korans and dismantling mosques or using them for non-religious purposes. The Supreme Court Chamber will assess the challenges relating to religious persecution in this light.

ii. Whether the Persecutory Acts Occurred

1006. This section of the Judgment addresses arguments relating to the sufficiency of the evidence used to find that the persecutory acts occurred. Arguments relating to whether the persecutory acts amount to discrimination in fact are addressed in the following section.

1007. The Trial Chamber analysed whether persecutory acts occurred (1) at the 1st January Dam Worksite;[2825] (2) in the East Zone;[2826] (3) in the Central (old North) Zone;[2827] and (4) in

[2823] Trial Judgment (E465), para. 3325.
[2824] Trial Judgment (E465), para. 3270.
[2825] Trial Judgment (E465), section 11.2.22.
[2826] Trial Judgment (E465), section 13.2.6.1.
[2827] Trial Judgment (E465), section 13.2.6.2.

other locations.[2828] The Supreme Court Chamber will first consider whether the Trial Chamber erred in fact concerning the persecutory acts at the 1st January Dam Worksite, as the Trial Chamber made a separate legal finding on religious persecution at this worksite. The Supreme Court Chamber will then consider the other locations together when determining whether the Trial Chamber erred in fact concerning the persecutory acts in the East Zone, the Central (old North) Zone, and other locations.

1st January Dam Worksite

1008. The Trial Chamber considered that the Cham suffered discrimination at the 1st January Dam Worksite as they were forced to eat pork and were prevented from worshipping and speaking their native language.[2829] The Trial Chamber considered that the treatment of the Cham at the 1st January Dam Worksite had to "also be viewed in the context of how they were treated in the villages from which they were selected in Sectors 41, 42 and 43."[2830]

1009. KHIEU Samphân challenges the Trial Chamber's finding that there was discrimination in fact against the Cham at the 1st January Dam Worksite.[2831] Addressing two preliminary matters, he submits that the Trial Chamber erred in relying on a witness testifying about a disappearance for its finding that Cham were forced to eat pork and prevented from practising their religion or speaking their native language.[2832] He claims that the Trial Chamber erred in law by referring to events and the treatment of the group in various parts of the Central Zone and elsewhere in Cambodia which were outside the geographic scope of this case and should not be used to establish crimes committed within this scope.[2833]

1010. With regard to the finding that "[m]ultiple witnesses testified that the Cham were forced to eat pork […] or to forego eating",[2834] KHIEU Samphân submits that there were actually only three witnesses who made this claim and not "multiple" witnesses as the Trial Chamber said.[2835] Further, he notes that this must be considered in the context of a food shortage where the availability of meat for consumption was actually a "welcome exception" for the workers, who were offered pork.[2836] He concludes that the evidence does not show that the Cham were

[2828] Trial Judgment (E465), section 13.2.6.3.
[2829] Trial Judgment (E465), para. 1659.
[2830] Trial Judgment (E465), para. 1654.
[2831] KHIEU Samphân's Appeal Brief (F54), paras 804, 807.
[2832] KHIEU Samphân's Appeal Brief (F54), para. 805.
[2833] KHIEU Samphân's Appeal Brief (F54), para. 806.
[2834] Trial Judgment (E465), para. 1656.
[2835] KHIEU Samphân's Appeal Brief (F54), para. 808.
[2836] KHIEU Samphân's Appeal Brief (F54), paras 808-809.

treated differently and that failure to take affirmative action to provide alternative meat is not sufficient to support a finding of discrimination.[2837] As for the prohibition of worship, he argues that the evidence shows that neither Cham nor Khmer were allowed to practise religion so there was no discrimination in fact, "regardless of the impact of the indiscriminate measures."[2838] With respect to the prohibition on speaking the Cham native language, KHIEU Samphân submits that the Trial Chamber made this finding based on two witnesses, only one of whom actually testified to this.[2839] In his view, the Trial Chamber made "unsuitable and unreasonable" factual findings to find discrimination in fact which amounted to errors of fact.[2840]

1011. The Co-Prosecutors respond that KHIEU Samphân's argument about the Trial Chamber relying on a witness testimony about a disappearance was actually just a typographical error on the Trial Chamber's part; it should have referred to paragraph 1659, rather than 1658.[2841] They state that the Trial Chamber only referred to events outside the 1st January Dam Worksite to provide context for the acts that occurred there and did not make findings based on these outside events.[2842] As for the forced consumption of pork, the Co-Prosecutors respond that KHIEU Samphân mischaracterises evidence in claiming that pork was a welcome exception, noting that a witness described Cham as eating salt or consuming only soup to avoid pork.[2843] They further aver that a choice between eating pork and not eating is not a real choice.[2844] As for whether Cham were prohibited from speaking their native language, the Co-Prosecutors submit that the Trial Chamber may rely on the testimony of a single witness to support a finding and KHIEU Samphân did not even challenge the credibility of the witness, thus failing to demonstrate that the Trial Chamber's finding was unreasonable.[2845] Lastly, the Co-Prosecutors submit that, in any case, the Trial Chamber found that a wide range of discriminatory acts were committed against the Cham not only at the 1st January Dam Worksite but also at various locations across Cambodia, so the elements of

[2837] KHIEU Samphân's Appeal Brief (F54), para. 810.
[2838] KHIEU Samphân's Appeal Brief (F54), para. 811.
[2839] KHIEU Samphân's Appeal Brief (F54), para. 812.
[2840] KHIEU Samphân's Appeal Brief (F54), paras 804, 807.
[2841] Co-Prosecutors' Response (F54/1), para. 467.
[2842] Co-Prosecutors' Response (F54/1), para. 463.
[2843] Co-Prosecutors' Response (F54/1), para. 464.
[2844] Co-Prosecutors' Response (F54/1), para. 464.
[2845] Co-Prosecutors' Response (F54/1), para. 466.

persecution would have been satisfied even without the discriminatory acts found to have been committed at the 1st January Dam Worksite.[2846]

1012. At the outset, the Supreme Court Chamber notes that the discrimination of the Cham at worksites was specifically considered as part of a continuum of acts of discrimination against them in their villages. The Trial Chamber also considered the discrimination against so called "New People" at the same worksites and in the context of discrimination against them in the communities from which they were selected, as well as the overall CPK policy towards them.[2847] The findings were interlinked with the larger picture. As the Trial Chamber stated: "[t]he 1st January worksite was *not an* '*isolated bubble*'".[2848]

1013. One of KHIEU Samphân's submissions relating to a minor typographical error in the judgment is unworthy of consideration.[2849] As to whether the Trial Chamber erred in law by referring to events in other parts of Cambodia, this Chamber has already held in this Judgment that the Trial Chamber was permitted to refer to these events outside the geographical scope of the case for context.[2850] The Trial Chamber itself explained this at paragraph 1641 and was explicit that it referred to these events for context only.[2851] Accordingly, the Trial Chamber did not commit any legal error.

1014. Turning to the specific challenges against the assessment of the evidence for the finding that the Cham were forced to eat pork, the Trial Chamber cited testimony, *inter alia*, from two

[2846] Co-Prosecutors' Response (F54/1), para. 468.
[2847] Trial Judgment (E465), para. 1641.
[2848] Trial Judgment (E465), para. 1641 (emphasis added).
[2849] He submits that the Trial Chamber erred in relying on a witness testifying about a disappearance for its finding that Cham were forced to eat pork and prevented from practising their religion or speaking their native language. KHIEU Samphân's Appeal Brief (F54), para. 805. In paragraph 1695 of the Trial Judgment, a section of the Judgment dealing with legal findings concerning religious persecution at the 1st January Dam Worksite, the Trial Chamber stated that it had "found that Cham workers at the 1st January Dam Worksite suffered discrimination as they were forced to eat pork, they were prevented from worshiping and speaking their native tongue." It cited paragraph 1658 of the Trial Judgment for this finding. Paragraph 1658 does not mention a finding concerning discrimination at the 1st January Dam Worksite, but the following paragraph, paragraph 1659, states: "The Chamber finds that Cham suffered discrimination as they were forced to eat pork and they were prevented from worshipping and speaking their native tongue." It appears that the Trial Chamber made a simple typographical error that in no way affects the validity of its finding.
[2850] See *supra* paras 666-668.
[2851] See Trial Judgment (E465), para. 1654:

> The Chamber notes its findings in Section 13.2: Treatment of the Cham that the CPK imposed restrictions on Cham religious and cultural practices in various locations […] in Cambodia throughout the DK period. […] The Chamber considers that the treatment of the Cham at the 1st January Dam must also be viewed in the context of how they were treated in the villages from which they were selected in Sectors 41, 42 and 43.

See also Trial Judgment (E465), para. 1656: "With this backdrop, the Chamber now considers the treatment of the Cham people at the 1st January Dam."

witnesses and one civil party.[2852] The Supreme Court Chamber recalls that an appeal is not a re-hearing or re-evaluation of the evidence and an appellate court does not interfere with a factual finding of a trial chamber unless the finding is one that no reasonable trier of fact would determine.[2853] Further, the number of witnesses testifying to a fact is not determinative of its reasonableness: a trier of fact may rely on the testimony of only one witness, if it finds it to be reliable and credible.[2854] This Chamber notes that other non-Cham workers testified on the prohibitions imposed on the Cham at the 1st January Dam Worksite. They testified that "[e]veryone was instructed to eat pork. No one could refuse. And if we did not eat pork we had nothing to eat, so we had to eat pork anyway."[2855] Other evidence that the Trial Chamber considered indicated that if the Cham refused to eat the pork, they could eat soup if it did not contain pork products; otherwise there was only salt.[2856] While another trier of fact might have reached a different though equally reasonable conclusion than the one of the Trial Chamber, this Chamber finds that KHIEU Samphân has failed to show that no reasonable trier of fact could have made the same finding as the Trial Chamber.

1015. KHIEU Samphân does not dispute that the Cham were prevented from worshipping, arguing only that there was no discrimination as Cham and Khmer were treated equally in this regard, a matter that will be addressed below.

1016. Turning to the finding of the prohibition to speak the Cham native language, this Chamber notes that the Trial Chamber based its finding on two witness testimonies and considered them persuasive enough to rely on.[2857] This Chamber considers that KHIEU Samphân has failed to show that no reasonable trier of fact could have made the same finding as the Trial Chamber. His challenge is therefore dismissed.

Elsewhere in Cambodia

1017. The Trial Chamber found that the Khmer Rouge forcibly imposed restrictions on the Cham religious and cultural practices. In the East Zone, in Kroch Chhmar district, this included forbidding traditional clothing and grooming practices, forcing the Cham to have the same dietary regime as the Khmer, which included eating pork, confiscating and burning Korans,

[2852] Trial Judgment (E465), para. 1656, fns 5637-5638.
[2853] See *supra* Section. II.C.
[2854] See Case 002/01 Appeal Judgment (F36), para. 496. See also *Nahimana et al.* Appeal Judgment (ICTR), para. 949.
[2855] T. 25 May 2015 (MEAS Laihour), E1/304.1, p. 110.
[2856] Trial Judgment (E465), para. 1656 & fns 5634, 5637, 5638 (and evidence cited therein).
[2857] Trial Judgment (E465), para. 1656, fn. 5636 (and evidence cited therein).

and dismantling mosques or using them for nonreligious purposes.[2858] In the Central (old North) Zone, this included prohibition of daily prayers, forcing the Cham to eat pork and wear the same dress and haircuts as Khmer people, requiring the Cham to speak only the Khmer language, destroying Korans, and dismantling mosques or using them for purposes other than prayer.[2859] Elsewhere in Cambodia, this included prohibitions on daily prayers, forcing the Cham to eat pork and wear the same dress and haircuts as Khmer people, forcing the Cham to speak only the Khmer language, burning Korans, and dismantling mosques or using them for purposes other than prayer.[2860]

1018. KHIEU Samphân makes similar challenges to the treatment of the Cham as at the 1st January Dam Worksite. He submits that the Trial Chamber erred in finding that the Cham were forced to eat pork because everyone was served the same food and the Cham simply were not provided an alternative to pork.[2861] He argues that only one civil party, LEOP Neang, testified to being forced to eat pork while someone with a gun stood behind her and it was erroneous for the Trial Chamber to make a generalised finding about the treatment of the Cham throughout the country on the basis of this testimony.[2862] KHIEU Samphân further submits that the evidence that Korans were destroyed is not credible.[2863] He argues that the Trial Chamber erred in law and in fact by relying on interviews conducted by Nate THAYER outside the judicial framework that were not subject to adversarial debate.[2864]

1019. The Co-Prosecutors respond that KHIEU Samphân misrepresents the evidence before the Trial Chamber; contrary to KHIEU Samphân's allegation, LEOP Neang's testimony is not the only evidence that the Cham were forced to eat pork.[2865] Concerning the alleged burning of Korans, the Co-Prosecutors respond that the Trial Chamber did not exceed its discretion in evaluating the evidence and KHIEU Samphân ignores that the confiscation and burning of Korans was a factor leading to the Koh Phal rebellion.[2866] They argue that KHIEU Samphân

[2858] Trial Judgment (E465), para. 3238.
[2859] Trial Judgment (E465), para. 3245.
[2860] Trial Judgment (E465), para. 3250.
[2861] KHIEU Samphân's Appeal Brief (F54), paras 944-946.
[2862] KHIEU Samphân's Appeal Brief (F54), para. 946.
[2863] KHIEU Samphân's Appeal Brief (F54), paras 948-949.
[2864] KHIEU Samphân's Appeal Brief (F54), para. 950.
[2865] Co-Prosecutors' Response (F54/1), para. 481.
[2866] Co-Prosecutors' Response (F54/1), para. 482.

fails to demonstrate that the Trial Chamber went beyond the deference afforded to it in assessing the evidence by relying on the Nate THAYER interviews.[2867]

1020. The Lead Co-Lawyers respond that it was not only LEOP Neang who gave evidence that demonstrated that there would be negative consequences if the Cham did not eat pork.[2868] Additionally, they cite the testimony of Civil Parties MAN Sles and MEU Peou that even without the threat of violence, the real prospect of starvation compelled the Cham to eat pork when it was the only food provided and the prospect of starvation was intended to coerce the Cham to do so.[2869] Concerning the alleged burning of Korans, the Lead Co-Lawyers respond that the two testimonies of civil parties relied upon by the Trial Chamber were clear that the Cham were not allowed to use Korans and that Korans were taken from them; the eventual fate of the Korans is irrelevant.[2870]

1021. The Supreme Court Chamber notes that KHIEU Samphân argues only that there is insufficient and unreliable evidence to find that the Cham were forced to eat pork and that Korans were destroyed.[2871] This Chamber notes that the Trial Chamber relied on several sources of evidence, including but not limited to live witnesses, to make this finding that the Cham were forced to eat pork.[2872] The Trial Chamber found, and this Chamber will not disturb the finding, that there was evidence that the Cham at the 1st January Dam Worksite were forced to eat pork.[2873] However, there are also other testimonies that were relied upon by the Trial Chamber that indicate that the Cham were forced to eat pork elsewhere. For example, in addition to LEOP Neang, who stated that she was watched by someone who was armed to ensure that she would eat pork when it was served to her,[2874] Civil Party SOS Min explained that the Cham:

> were forced to eat the food that we could not eat. And if we did not eat, we would be accused of not giving up to our religious practice. And that would be subject to be monitored. If we opposed any of the principles they imposed, then we would be accused of being an enemy of Angkar.[2875]

[2867] Co-Prosecutors' Response (F54/1), para. 483.
[2868] Lead Co-Lawyers' Response (F54/2), para. 456.
[2869] Lead Co-Lawyers' Response (F54/2), para. 457.
[2870] Lead Co-Lawyers' Response (F54/2), paras 458-459.
[2871] KHIEU Samphân's Appeal Brief (F54), paras 944-950.
[2872] Trial Judgment (E465), paras 3235-3236, 3239, 3242.
[2873] See *supra* para. 1014.
[2874] T. 3 April 2015, E1/288.1, p. 98.
[2875] T. 8 September 2015, E1/343.1, p. 72.

HIM Man corroborates this evidence.[2876] Based on the foregoing, the Supreme Court Chamber does not find the Trial Chamber's conclusion that Cham were forced to eat pork to be unreasonable.

1022. As for the destruction of Korans, this Chamber notes that the Trial Chamber relied on more than one witness to find that Korans were confiscated and burned, including several interviews conducted by Nate THAYER.[2877] In this regard, this Chamber agrees with the Trial Chamber that there was evidence that Korans were burnt overall in Cambodia. NO Sates, stated that in 1975, Korans were collected and burnt, but she does not know where they were taken.[2878] SOS Min stated that Korans were collected and placed in an office.[2879] Meanwhile, IT Sen, like NO Sates, also stated that the Korans were burnt.[2880] The Nate THAYER interviews relied on to find that Korans were burned elsewhere is of some corroborative value but it was certainly not the only piece of evidence that the Trial Chamber relied upon to make its finding. Further, whether the Korans were burned or otherwise destroyed is a fact of little import considering that it is uncontested that the Cham were prohibited from worshipping. KHIEU Samphân's allegations that the Trial Chamber erred in making these findings are hereby dismissed in their totality.

iii. Whether the Restrictions on Freedom of Religion Were Permissible

1023. KHIEU Samphân submits that the Trial Chamber erred by failing to explain why the religious restrictions were not permitted by law, as in its statement of the applicable law, it stated that "the right to manifest one's religion may be subject to some restrictions" and "[t]he Chamber will assess any restrictions on freedom of religion or the manifestation of religion on the facts of the case".[2881] He also considers that the Trial Chamber confused the question of whether there was differential treatment of the Cham with the question of whether there was a violation of a fundamental right, although these are distinct elements of persecution.[2882]

1024. The Co-Prosecutors respond that the Trial Chamber's findings did not lack analysis; the Trial Chamber "referred to, and thus clearly analysed, the grounds on which freedom to

[2876] See Trial Judgment (E465), paras 3239, 3242 & fns 10935, 10941, referring to, *inter alia*, T. 17 September 2015 (HIM Man), E1/349.1, pp. 40-41; T. 18 September 2015 (HIM Man), E1/350.1, p. 15.
[2877] Trial Judgment (E465), paras 3234-3236, 3249.
[2878] T. 28 September 2015 (NO Sates), E1/350.1, pp. 79-80.
[2879] T. 8 September 2015 (SOS Min), E1/343.1, p. 104.
[2880] T. 7 September 2015 (IT Sen), E1/342.1, p. 66.
[2881] KHIEU Samphân's Appeal Brief (F54), paras 952-953, referring to Trial Judgment (E465), paras 720-721.
[2882] KHIEU Samphân's Appeal Brief (F54), para. 953.

manifest one's religion may permissibly be restricted, rejecting the applicability of those grounds to 'the facts of the case'".[2883] They consider that KHIEU Samphân has misconstrued the Trial Chamber's findings by suggesting the finding that the restrictions were impermissible was related to the later finding on the violation of fundamental rights.[2884]

1025. The Lead Co-Lawyers agree with the Co-Prosecutors that the Trial Chamber's "conclusion was reasonable and sufficiently reasoned by virtue of its reference to the Trial Chamber's earlier reference to the restrictions permissible on religious freedom."[2885]

1026. The Supreme Court Chamber finds no indication that the Trial Chamber confused the elements of persecution by finding that the restrictions were impermissible. This Chamber considers that the Trial Chamber's explicit reference to its earlier discussion that the right to manifest one's religion may be subject to some restrictions and its statement that it would assess any such restrictions on the facts of the case,[2886] indicates that the Trial Chamber did indeed assess whether the restrictions were permissible or constituted breaches of the fundamental right to freedom of religion. That the Trial Chamber did not elaborate on its analysis does not indicate that it failed to perform such analysis. KHIEU Samphân's allegation to the contrary is dismissed.

iv. Whether the Persecutory Acts Discriminated in Fact

1027. KHIEU Samphân considers that the persecutory acts were applied equally to everyone and submits that they did not discriminate in fact as equal treatment cannot be characterised as indirect discrimination.[2887] He considers that the Trial Chamber erred by not focusing on whether measures applied indiscriminately to everyone but instead on only considering their impact on the Cham.[2888]

1028. The Co-Prosecutors respond that the argument about undifferentiated treatment ignores the Trial Chamber's findings that the discriminatory acts were committed in pursuit of a policy specifically targeting the Cham and many of the persecutory acts were not undifferentiated but could only have targeted the Cham, for example the prohibition on daily prayers, the

[2883] Co-Prosecutors' Response (F54/1), para. 487.
[2884] Co-Prosecutors' Response (F54/1), para. 485.
[2885] Lead Co-Lawyers' Response (F54/2), para. 467.
[2886] Trial Judgment (E465), para. 3328, fn. 11264, referring to paras 719-721.
[2887] KHIEU Samphân's Appeal Brief (F54), paras 813, 954-956.
[2888] KHIEU Samphân's Appeal Brief (F54), paras 939-942, 954.

requirement to speak only Khmer, forbidding traditional clothing and haircuts, and the dismantling of mosques.[2889]

1029. Since it has been established that discrimination in fact can occur when there are unequal consequences for a particular group of an act or omission of general application,[2890] the Supreme Court Chamber must now consider whether the Cham faced particular consequences as a result of the religious and cultural restrictions. The Supreme Court Chamber does not find any error in the Trial Chamber's conclusion that the Cham were "predominantly and particularly affected" by the religious and cultural restrictions "because they had to radically change their lifestyle and religious practices to abide by them."[2891]

1030. It is this Chamber's considered view that the argument that there was no discrimination simply because the restrictions affected everyone fails to appreciate the intrinsic differences between the two groups, the Khmer Buddhists and Cham Muslims, who were both treated appallingly. Daily prayers, diet, dress, and language distinguished one group from the other.[2892] To offer pork to one may have been a welcome addition to a poor diet.[2893] To offer it to the other placed them in a difficult position as it was a prohibited food.[2894] The closure of a wat or pagoda does not involve a betrayal of the Buddhist religion in the individual while the prohibition of attendance at the mosque for Friday prayers and the prohibition of daily prayers has a different effect on Muslims as it involves a deviation from fundamental Islamic culture. Similarly, the prevention of speaking one's own language when one's distinctive dress and religion is prohibited may take on more resonance than when prohibited in isolation.

1031. The forcing of pork on Cham who were displaced and broken up from their communities had a particular resonance absent in non-Cham. The introduction of a prohibited food into their diet had to be humiliating and abhorrent. They were obliged to betray their religion by eating the prohibited food or to starve.[2895] This act was specific to the Cham and amounted to discrimination in fact. It was a discriminatory act of significance in its effect on the Cham population which did not affect other displaced people. The forcing them to eat pork or pork soup was an assault on their religion, while the prohibition on the use of their language,

[2889] Co-Prosecutors' Response (F54/1), paras 480, 490.
[2890] See *supra* Section VI.F.1.b.
[2891] Trial Judgment (E465), para. 3232.
[2892] Trial Judgment (E465), para. 3204.
[2893] See, *e.g.*, T. 27 May 2015 (HUN Sethany), E1/306.1, p. 53.
[2894] See, *e.g.*, Trial Judgment (E465), paras 1656, 3236, 3239, 3242, 3247 (and testimony cited therein).
[2895] See, *e.g.*, Trial Judgment (E465), paras 1656, 3246.

an assault on their distinct culture, which considered cumulatively with their being prohibited from attending their mosques or praying daily amounted to discrimination in fact.

v. Whether the Restrictions on Religious and Cultural Practices Breached Fundamental Rights

1032. KHIEU Samphân submits that the Trial Chamber erred in finding that there had been a breach of fundamental rights as none of the listed religious and cultural restrictions breach any of the fundamental rights the Trial Chamber referred to.[2896] He notes that the Trial Chamber did not state that it considered the freedom of religion to have been breached.[2897]

1033. The Co-Prosecutors respond that "persecutory acts are to be considered cumulatively and contextually" and, according to the Supreme Court Chamber, "'the crux of the analysis lies not in determining whether a specific persecutory act or omission *itself* breaches a human right that is fundamental in nature.'"[2898] They respond that the Trial Chamber applied the correct law and found that the cumulative effect from the restrictions "and being killed for resisting such acts together with all the other acts perpetrated against the Cham (including, but not limited to, murder, extermination, imprisonment, torture, and [other inhumane acts] (forced transfer) violated fundamental rights."[2899] They argue that no finding of the violation of the fundamental right to freedom of religion was required to satisfy the elements of religious persecution, but that it is clear that the Trial Chamber did consider the persecutory acts to have violated the right to freedom of religion.[2900]

1034. The Lead Co-Lawyers respond that:

> Although the Trial Chamber regrettably did not explicitly refer to the freedom of religion when listing the fundamental rights and freedoms violated, it is sufficiently clear that this was intended when the reasons are read as a whole (not least from the fact that the Trial Chamber had addressed the question of which restrictions on that right were permissible).[2901]

[2896] KHIEU Samphân's Appeal Brief (F54), para. 960.
[2897] KHIEU Samphân's Appeal Brief (F54), para. 961.
[2898] Co-Prosecutors' Response (F54/1), para. 534, quoting Case 001 Appeal Judgment (F28), para. 257.
[2899] Co-Prosecutors' Response (F54/1), para. 534.
[2900] Co-Prosecutors' Response (F54/1), para. 535.
[2901] Lead Co-Lawyers' Response (F54/2), para. 467.

They consider that the restrictions on religious practice were only one of several acts that constituted religious persecution and the Trial Chamber had in mind the other acts when listing the fundamental rights violated.[2902]

1035. The Trial Chamber found that the persecutory acts against the Cham "variously infringed upon and violated fundamental rights and freedoms pertaining to movement, personal dignity, liberty and security, freedom from arbitrary or unlawful arrest, a fair and public trial and equality before the law as enshrined in customary international law."[2903]

1036. The Trial Chamber's reference to certain rights listed above is unclear in the context of the religious and cultural restrictions. However, the Trial Chamber did state that it found the right to personal dignity to have been violated, and this finding appears reasonable. Forcing people to cut their hair and dress a certain way and to eat particular food that is abhorrent to them would certainly violate personal dignity. Additionally, although it did not so state, the Supreme Court Chamber considers that the Trial Chamber certainly found that the persecutory acts violated the freedom of religion. This is clear from its statement that the acts were impermissible and its reference to possible permissible restrictions on the freedom to manifest religion.[2904] Its failure to explicitly list this right as having been violated is regrettable, but does not affect the validity of KHIEU Samphân's conviction for the crime of religious persecution as the fundamental right to freedom of religion, as well as the right to personal dignity, were clearly breached by the religious and cultural restrictions.

vi. Whether There Was Intent to Discriminate on Religious Grounds

1037. KHIEU Samphân submits that the Trial Chamber erred in law and fact when it relied on its erroneous findings to infer discriminatory intent against the Cham "because of their religious and cultural practices".[2905] He argues that the Trial Chamber found that the Cham were discriminated against as a political group, but, in the section of the Trial Judgment dealing with religious persecution, found that there was an intent to discriminate against the Cham based on religious grounds, without explaining why it had changed the basis of persecution.[2906]

[2902] Lead Co-Lawyers' Response (F54/2), para. 468.
[2903] Trial Judgment (E465), para. 3330.
[2904] See *supra* para. 1026.
[2905] KHIEU Samphân's Appeal Brief (F54), para. 958, quoting Trial Judgment (E465), para. 3329.
[2906] KHIEU Samphân's Appeal Brief (F54), para. 959.

1038. The Co-Prosecutors respond that the Trial Chamber explicitly found that the acts were implemented pursuant to a policy specifically targeting the Cham as a religious group.[2907] They respond that victim groups can be targeted multiple times on different persecutory grounds and each charge arose from different facts addressing different criminal conduct.[2908]

1039. After discussing a number of restrictions against the Cham, the Trial Chamber held that "[i]n light of the above," it was "satisfied that these restrictions were discriminatory in fact and deliberately perpetrated with the intent to discriminate against the Cham because of their religious and cultural practices."[2909]

1040. This Chamber recalls that a judgment should be as a whole and each finding read in context. The impugned finding that the Trial Chamber found that there was discrimination against the Cham on religious and cultural grounds is a conclusion of the Trial Chamber based on evidence discussed in preceding paragraphs and earlier factual findings made.[2910] Moreover, the Trial Chamber inferred the intent to discriminate against the Cham on both "religious *and* cultural" grounds.[2911] As such, this Chamber concludes that KHIEU Samphân misrepresents the impugned finding when he states that the inference of intent was unsubstantiated and legally erroneous. The challenge that the Trial Chamber erred by inferring intent to discriminate on religious and cultural grounds is dismissed.

1041. As to whether the Trial Chamber erred in fact when inferring the intent to discriminate on both political and religious grounds, this Chamber considers that the Trial Chamber found that these measures were taken to implement a policy specifically targeting the Cham.[2912] The Trial Chamber found that in an effort "to establish an atheistic and homogenous society without class divisions", the CPK targeted the Cham.[2913] The Trial Chamber also found that the CPK's policy towards the Cham evolved over time: from assimilation as Khmer to their brutal suppression after the "rebellions," until the final shift in 1977-1978 when they were ordered to be purged.[2914]

[2907] Co-Prosecutors' Response (F54/1), para. 494.
[2908] Co-Prosecutors' Response (F54/1), para. 496.
[2909] Trial Judgment (E465), para. 3329.
[2910] Trial Judgment (E465), para. 3329. See also Trial Judgment (E465), paras 3328-3329, referring to paras 719-721, 3228, 3238, 3245, 3250, 3229-3250, Section 11.2.2.22.
[2911] Trial Judgment (E465), para. 3329 (emphasis added).
[2912] See *infra* Section VIII.B.5.b.
[2913] Trial Judgment (E465), para. 3228.
[2914] Trial Judgment (E465), para. 3228.

1042. The clear evidence relied upon by the Trial Chamber cannot be ignored: that the restrictions on religious and cultural practices, intended to assimilate the Cham, lay behind the rebellions.[2915] Their identity as Cham with different religious practices and their taking guidance from their religious leaders and teachers, their way of life on or near rivers, not being either farmers or town people was at odds with the CPK common plan to eliminate differences in social class and create one homogenous Khmer race of peasant workers. The targeting of Cham people was because they were Cham with a different ethnic origins, language, religion and customs making them different from the majority Khmer.[2916] To eliminate their differences, their religion and religious practices were prohibited, and no allowances were made for their strict taboo of pork or pork products[2917] or their requirement to pray five times daily.[2918] In the case of the Cham, it may be superficially difficult to distinguish between their targeting as enemies on political grounds because of the two rebellions in late 1975 or because they were Cham with different customs and especially a *reactionary* religion which had to be eradicated by integration into Khmer people as occurred during the pre-17 April 1975 period followed by the orders in 1977 for their extermination. The history of their increasingly strict targeting for discriminatory treatment and ultimately their total purging is evidence of the real purpose for their proposed targeting: because they were not Khmer. This infinitely more serious targeting does not detract from the facts of the lesser forms of discrimination against them for religious reasons which started in the Khmer Rouge takeover of Kroch Chhmar and its environs and continued thereafter.[2919] This Chamber concludes that the Trial Chamber's inference of an intent to discriminate on both political and religious grounds was reasonable.

1043. The Supreme Court Chamber considers that KHIEU Samphân has merely proposed a different interpretation of the evidence by failing to accept the difference between the levelling down of all society to worker peasants subject to the same deprivation and the specific actions to exclude Cham from Khmer society. KHIEU Samphân has failed to demonstrate that the Trial Chamber erred in fact in making its finding that the Cham were specifically targeted as a religious group. This challenge is therefore dismissed.

[2915] Trial Judgment (E465), para. 3228, referring to paras 3251-3268.
[2916] Trial Judgment (E465), para. 3228
[2917] The Trial Chamber received evidence that refusing to eat pork had consequences. See T. 17 September 2015 (HIM Man), E1/349.1, pp. 40-41; T. 8 September 2015 (HIM Man), E1/350.1, p. 15; T. 25 May 2015 (MEAS Laihour), E1/304.1, p. 110.
[2918] See Trial Judgment (E465), para. 3250.
[2919] Trial Judgment (E465), paras 3228, 3230.

vii. Whether the Threshold of Severity Was Established

1044. KHIEU Samphân submits that the Trial Chamber erred in law and in fact in conducting its assessment of the degree of severity of the discriminatory treatment to determine whether it reached the level of seriousness so as to constitute persecution, as it stated:

> The acts charged as persecution include acts separately found to amount to independent crimes against humanity (including murder, extermination, imprisonment, persecution on political grounds during MOP Phase Two (including torture, genocide and conduct characterised as forcible transfer) as well as acts which, on their own, do not necessarily amount to crimes (in particular, arrests).[2920]

However, not all of these acts were considered to be the persecutory acts in question and thus could not be used to assess the degree of severity. He notes that the Trial Chamber refers to genocide although he was acquitted of this crime.[2921]

1045. The Co-Prosecutors respond that the acts charged as persecution include "*all* acts committed nationwide throughout the DK period" and they were not limited to the religious and cultural restrictions set forth in paragraph 3328 of the Trial Judgment.[2922] They submit that there was no error made by the Trial Chamber when it inferred a CPK policy, and that KHIEU Samphân's complaint that the Trial Chamber failed to identify which acts attained the level of gravity required for persecution indicates his misunderstanding of the law. [2923]

1046. The Lead Co-Lawyers endorse the Co-Prosecutors' submissions in full. They further respond that it is not necessary for the crime of persecution that the acts constitute international crimes; there is no doubt that the conduct met the alternative test of violating fundamental rights.[2924]

1047. The Supreme Court Chamber has already determined which acts are considered to be persecutory acts for the crime against humanity of religious persecution.[2925] These are the religious and cultural restrictions imposed on the Cham and do not include the other crimes committed against them.

[2920] Trial Judgment (E465), para. 3331.
[2921] KHIEU Samphân's Appeal Brief (F54), paras 962-963.
[2922] Co-Prosecutors' Response (F54/1), para. 538.
[2923] Co-Prosecutors' Response (F54/1), para. 539.
[2924] Lead Co-Lawyers' Response (F54/2), para. 466.
[2925] See *supra* Section VII.F.3.a.i.

1048. While it is regrettable that the Trial Chamber did not clearly articulate the appropriate analysis of whether the religious and cultural restrictions "rise to the same level of gravity or seriousness"[2926] as other underlying offences for crimes against humanity, but instead confused the issue by referring to the other crimes committed against the Cham, it is apparent to the Supreme Court Chamber that the religious and cultural restrictions do indeed rise to the requisite level of gravity to constitute a crime against humanity. The religious and cultural restrictions not only denied the fundamental right to freedom of religion but also destroyed the Cham's very identity. They caused the Cham to lose the characteristics that made them Cham, and even caused them lose the capacity to pass on their religious identity to future generations, forever destroying a piece of their religious heritage.[2927] The requisite level of severity has thus been established for the persecutory acts to amount to the crime against humanity of religious persecution. The Trial Chamber's error in analysing the severity of the acts does not invalidate KHIEU Samphân's conviction for the crime of religious persecution.

b. Religious Persecution of Buddhists and Buddhist Monks

1049. The Trial Chamber found that the crime against humanity of persecution on religious grounds against Buddhist monks was established at the Tram Kak Cooperatives.[2928] It based this determination on the finding that, *inter alia*, over 100 Buddhist monks were deliberately gathered at Angk Roka Pagoda in Tram Kak district and forced to defrock.[2929] EM Phoeung, a monk who arrived in Tram Kak from Phnom Penh, was among the monks gathered.[2930] The Trial Chamber was satisfied that the monks were identified on the basis of their religious identity and targeted because they were monks, as directed by Distrtict Secretary *Yeay* Khom. The Trial Chamber determined that the forcible disrobing of monks at other pagodas was consistent across Tram Kak district.[2931] Despite being unable to discern the total number of monks defrocked in Tram Kak district, the Trial Chamber concluded that "hundreds of monks

[2926] Trial Judgment (E465), para. 716 ("Persecutory acts may include the other underlying offences for crimes against humanity (such as murder, extermination, enslavement, imprisonment and torture), as well as other acts which rise to the same level of gravity or seriousness, including acts which are not necessarily crimes in and of themselves. In determining whether this threshold is met, acts should not be considered in isolation but rather should be examined in their context and with consideration of their cumulative effect. Although persecution often consists of a series of acts, a single act or omission may be grave or serious enough to amount to persecution where it results in the gross or blatant denial of a fundamental human right under treaty or customary international law.") (internal citations omitted).
[2927] Trial Judgment (E465), para. 3242.
[2928] Trial Judgment (E465), paras 1183-1187.
[2929] Trial Judgment (E465), paras 1094-1096, 1183, 1185.
[2930] Trial Judgment (E465), para. 1094.
[2931] Trial Judgmentt (E465), para. 1183.

were disrobed across various communes".[2932] The Trial Chamber considered that the allusion to monks as "worms" or "leeches" as well as declarations denigrating Buddhism as mere superstition and the Buddha as "only concrete" demonstrated the discriminatory intention behind the process. It concluded that these findings show that the "conduct established in this case intentionally discriminated against Buddhist monks, because they were monks" and that the conduct was discriminatory in fact because the victims were members of the targeted religious group, the Buddhist monks.[2933] As a result, the Trial Chamber was satisfied that the "forcible defrocking of hundreds of monks in Tram Kak district amounted to persecution on religious grounds as a crime against humanity."[2934]

1050. In addition, the Trial Chamber determined that Buddhist symbols were destroyed and pagodas used for a variety of non-religious purposes throughout Tram Kak district. It considered that the evidence revealed a complete abolition of Buddhist practices, constituting an "organised [and] sustained attack against religion" considered to be incompatible with the implementation of the revolution.[2935] It found that the "elements of religious persecution are established in relation to the destruction of Buddhist symbols, the disappearance of former monks, the requisition of places of worship, and the banning of outward expression of religious practice or belief" which discriminated against all those who believed in Buddhism and infringed on the basic fundamental right to freedom of religion.[2936] It found that the abolition of religious practices, symbolism, and the inability of residents to make offerings to monks deprived people of their "psychological base".[2937] Based on these considerations, the Trial Chamber concluded that the physical and mental impact of these events "infringed fundamental rights to a degree of gravity similar to that of other crimes against humanity", and that the acts "discriminated in fact because it targeted those with Buddhist beliefs and backgrounds, based entirely on what these places, symbols and practices meant to those persons"[2938] and thus amount to the crime against humanity of persecution on religious grounds.[2939]

[2932] Trial Judgment (E465), paras 1105, 1183.
[2933] Trial Judgment (E465), paras 1185.
[2934] Trial Judgment (E465), paras 1185.
[2935] Trial Judgment (E465), paras 1105, 1107-1108, 1184.
[2936] Trial Judgment (E465), para. 1186.
[2937] Trial Judgment (E465), para. 1186.
[2938] Trial Judgment (E465), para. 1186.
[2939] Trial Judgment (E465), para. 1186.

1051. Accordingly, the Trial Chamber was satisfied that both the *actus reus* and the *mens rea* of the crime against humanity of persecution against Buddhist monks and believers on religious grounds were established at the Tram Kak Cooperatives.

1052. KHIEU Samphân submits that the Trial Chamber committed several errors including: (1) failing to consider the intention to exclude Buddhist monks and Buddhists in general from society as part of the *mens rea* requirement; (2) making findings despite a lack of evidence regarding the physical or mental effects of alleged acts of persecution against Buddhists; and (3) finding that persecution occurred despite the absence of discriminatory treatment against Buddhist monks and Buddhists in general.[2940]

1053. Given that the first issue has already been discussed,[2941] the Supreme Court Chamber will only consider the two remaining arguments.

i. Alleged Lack of Evidence Regarding the Physical or Mental Effects of the Persecutory Acts against Buddhists

1054. KHIEU Samphân submits that the Trial Chamber erred in fact by finding that "the physical and mental impact of these events infringed fundamental rights to a degree of gravity similar to that of other crimes against humanity" based on its findings that the abolition of religious practices deprived individuals of their "psychological base"[2942] and that in general, "marriage ceremonies were no longer conducted according to Cambodian traditions".[2943] He contends that the Trial Chamber assessed the evidence in an unreasonable manner, relying essentially on the subjective and personal testimony of Civil Party BUN Saroeun.[2944] He believes that the Trial Chamber's conclusion is based on an excessive generalisation and extrapolation of this evidence, which cannot support that the *actus reus* of religious persecution has been established.[2945]

1055. The Co-Prosecutors respond that KHIEU Samphân's contention not only misconstrues the Trial Chamber's finding, but is also limited to one piece of evidence and ignores the cumulative impact of the persecutory acts, while overlooking the fact that those acts occurred

[2940] KHIEU Samphân's Appeal Brief (F54), paras 743-747.
[2941] See *supra* Section VII.F.1.a.
[2942] KHIEU Samphân's Appeal Brief (F54), para. 746.
[2943] KHIEU Samphân's Appeal Brief (F54), para. 746, quoting Trial Judgment (E465), para. 1186.
[2944] KHIEU Samphân's Appeal Brief (F54), para. 746, referring to T. 3 April 2015 (BUN Saroeun) E1/288.1, pp. 30-31.
[2945] KHIEU Samphân's Appeal Brief (F54), para. 747.

as part of the CPK's larger persecutory campaign against Buddhists.[2946] He, moreover, does not dispute the additional legal findings on the gravity of discriminatory acts against monks.[2947] They argue that a holistic reading of the legal finding in conjunction with previous legal and factual findings and their cross references, demonstrates that the Trial Chamber relied on a variety of evidence attesting to "the destruction of Buddhist symbols, the disappearance of former monks, the requisition of places of worship, and the banning of outward expression of religious practice or belief".[2948] They aver that the Trial Chamber's findings were also based on the centrality of Buddhism in Cambodian society at the time,[2949] the scale and duration of the persecutory acts in the district[2950] and the extent to which those acts impacted Buddhists.[2951]

1056. According to the Lead Co-Lawyers, KHIEU Samphân mischaracterises Civil Party BUN Saroeun's testimony as subjective, personal, and "simplistically concerned with the 'absence of pagodas'".[2952] On the contrary, they submit that this evidence relates to the absence of monks, and religious ceremonies and practices in general,[2953] and that the Trial Chamber relied on evidence from various sources to assess the severity and gravity of the acts against Buddhists.[2954] For instance, two individuals, including Civil Party MIECH Ponn, gave evidence to the Office of the Co-Investigating Judges' investigators that Buddhist monks committed suicide as a result the DK policies.[2955] They also argue that the Trial Chamber may draw conclusions on the basis of the testimony of a single civil party or witness,[2956] and note that the gravity requirement is readily established, citing ICTY jurisprudence.[2957]

[2946] Co-Prosecutors' Response (F54/1), para. 408.
[2947] Co-Prosecutors' Response (F54/1), paras 408, 411-413.
[2948] Co-Prosecutors' Response (F54/1), para. 411, quoting Trial Judgment (E465), para. 1186.
[2949] Co-Prosecutors' Response (F54/1), paras 411-412, fns 1545, 1548-1550, referring to, *inter alia*, Trial Judgment (E465), para. 1185, fn. 3613.
[2950] Co-Prosecutors' Response (F54/1), paras 411-412, fn. 1546.
[2951] Co-Prosecutors' Response (F54/1), paras 411-412, fn. 1547, referring to Trial Judgment (E465), paras 1184-1187.
[2952] Lead Co-Lawyers' Response (F54/2), paras 472, 474.
[2953] Lead Co-Lawyers' Response (F54/2), paras 472, referring to T. 3 April 2015 (BUN Saroeun), E1/288.1, p. 31 ("I was absolutely torn because this was a sacred place and there were no longer any monks there and in the past there used to be celebrations, ceremonies but there were no longer any religious practice so I felt that I was completely deprived of any psychological base.").
[2954] Lead Co-Lawyers' Response (F54/2), para. 471.
[2955] Lead Co-Lawyers' Response (F54/2), para. 474, referring to Written Record of Interview of MIECH Ponn, 9 December 2009, E3/5523, ERN (EN) 00434652; Written Record of Interview of TEP Dom, 13 November 2007, E3/7983, ERN (EN) 00165219.
[2956] Lead Co-Lawyers' Response (F54/2), para. 471, referring to Case 002/01 Appeal Judgment (F36), para. 424.
[2957] Lead Co-Lawyers' Response (F54/2), para. 475, quoting *Prosecutor v. Đorđević*, Appeals Chamber (ICTY), IT-05-87/1-A, Judgement, 27 January 2014 ("*Đorđević* Appeal Judgment (ICTY)"), para. 567:

> The destruction of religious property meets the equal gravity requirement as it amounts to "an attack on the very religious identity of a people" and as such manifests "a nearly pure expression" of the notion of crimes against humanity as also found by several trial chambers. Proof that a building is dedicated to religion satisfies the equal

1057. The Supreme Court Chamber notes that the paragraph to which KHIEU Samphân refers relates to acts of persecution against Buddhists in general, such as the destruction of Buddhist symbols, the disappearance of former monks, the requisition of places of worship, and the banning of outward expression of religious practice or belief.[2958] KHIEU Samphân does not challenge the gravity of the persecutory acts against Buddhist monks specifically, which is addressed in another paragraph of the Trial Judgment.[2959] The Supreme Court Chamber accordingly examines whether the Trial Chamber erred in fact in its findings in relation to the persecutory acts against Buddhists in general.

1058. This Chamber observes that in order to establish the *actus reus* of persecution, the Trial Chamber was required to find that the acts against the Buddhists discriminated in fact and infringed on a fundamental right enshrined in international customary or treaty law. For acts of persecution not enumerated in Article 5 of the ECCC Law to constitute a crime against humanity, the Trial Chamber is further required to find that they are of comparably gravity to those enumerated in Article 5, that is, murder, extermination, enslavement, deportation, imprisonment, torture, and rape. Such acts must be considered in context and in light of their cumulative effect.[2960] The Trial Chamber conflates these separate requirements by concluding that "the physical and mental impact of the acts against Buddhists in general infringed fundamental rights to a degree of gravity comparable to that of other crimes against humanity."[2961] Indeed, it is not necessary to consider the effect of the acts on a specific group when determining whether acts of destruction of religious property rise to the requisite gravity. This is because, as explained by the *Kordić & Čerkez* Trial Chamber, and this Chamber concurs, "all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects."[2962]

1059. This Chamber also recalls that the Trial Chamber referred to its finding that the abolition of religious practices, symbolism, and the inability of residents to make offerings to

gravity requirement without requiring an assessment of the value of the specific religious property to a particular community.

[2958] Trial Judgment (E465), para. 1186.
[2959] Trial Judgment (E465), para. 1187.
[2960] Trial Judgment (E465), para. 716.
[2961] Trial Judgment (E465), para. 1186.
[2962] *Prosecutor v. Kordić and Čerkez*, Trial Chamber (ICTY), IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić & Čerkez* Trial Judgment (ICTY)"), para. 207. See also *Kordić & Čerkez* Trial Judgment (ICTY), paras 202, 206. The ICTY Appeals Chamber has also agreed with this position. See *Đorđević* Appeal Judgment (ICTY), para. 567.

monks, deprived people of their "psychological base",[2963] it was not the sole reason for its finding of discrimination in fact or that the acts infringed the fundamental right to freedom of religion. The Trial Chamber determined that the acts were discriminatory because they "targeted those with Buddhist beliefs and backgrounds, based entirely on what these places, symbols and practices meant to those persons."[2964]

1060. The Supreme Court Chamber notes that the Trial Chamber did not rely solely on the testimony of Civil Party BUN Saroeun, who felt "absolutely torn" and "completely deprived of any psychological base"[2965] due to the absence of monks, celebrations, ceremonies, and religious practice, as well as evidence that weddings were not conducted according to Cambodian tradition.[2966] The Trial Chamber relied on extensive evidence of the physical and mental impact caused by these acts, as paragraph 1186 refers to different sections of the Judgment.[2967] Besides, the fact that the Trial Chamber used the expression employed by Civil Party BUN Saroeun does not imply that it relied solely on this testimony.

1061. More broadly, the Supreme Court Chamber recalls that, as the Trial Chamber found, Buddhism has been the dominant religion in Cambodia since at least the 13th century[2968] and was "inextricably intertwined with [the] Cambodian identity and affected most aspects of life".[2969] Buddhist monks were influential and had an important place in Cambodian society at the time.[2970] Thus, this Chamber considers that, given the adverse consequences of the harsh DK policies in the treatment of Buddhists, its scale and duration, its systematic character, and

[2963] Trial Judgment (E465), para. 1186. (The Trial Chamber this reference when rejecting NUON Chea's submission that there was a mere restriction on certain manifestations of Buddhism insufficient to be considered an infringement of the fundamental right to practise or manifest religion).
[2964] Trial Judgment (E465), para. 1186.
[2965] T. 3 April 2015 (BUN Saroeun), E1/288.1, pp. 30-31 (BUN Saroeun felt "absolutely torn because this was a sacred place and there were no longer any monks there and in the past there used to be celebrations, ceremonies but there were no longer any religious practice so I felt that I was completely deprived of any psychological base").
[2966] Trial Judgment (E465), paras 1186, 3636-3638.
[2967] Trial Judgment (E465), para. 1186, referring to, *inter alia*, paras 1105, 1107-1108, 3638, which refer to many testimonies and Written Records of Interview. Without being exhaustive, Written Record of Interview of UK Him, 14 July 2014, E3/9584, p. 9 (in relation to marriages conducted without following Cambodian tradition: "I was afraid that ancestors would harm us"); T. 16 February 2015 (EM Phoeung), E1/263.1, pp. 40, 48, 78 ("[T]he three statutes of the Buddhist disciplines – that is, the monks, the buddha and the disciplines. We leave them all behind to become a layman […] or an ordinary person", "we were all afraid. We were all terrified [when the Khmer rouge came in]", "all monks did not dare to refuse [to defrock]"); T. 21 June 2012 (KHIEV Neou), E1/90.1, p. 9 ("When [we] were ordered to disrobe, [we] just did that so [we] could survive; [we] did not think much of the rest"); T. 15 March 2016 (Alexander HINTON), E1/402.1, pp. 58-61; T. 29 January 2015 (CHANG Srey Mom), E1/254.1, p. 36 ("Actually, I secretly walked into that temple at night time, without anybody seeing it. I prayed to the Buddha. So, let me say that I actually went there secretly at night, without letting anyone know about it.").
[2968] Trial Judgment (E465), para. 257.
[2969] Trial Judgment (E465), para. 258.
[2970] Trial Judgment (E465), paras 260, 261.

the climate of fear and coercion in which it was conducted, the "complete abolition of Buddhist practices"[2971] was particularly severe, violent, and had a significant impact on daily life.

1062. Accordingly, this Chamber concluded that when the acts were considered cumulatively and in their context, the Trial Chamber was correct in concluding that they were discriminatory in fact and clearly of significant gravity and a flagrant violation of the basic fundamental right of freedom of thought, conscience, and religion.

1063. Consequently, the Supreme Court Chamber finds that KHIEU Samphân has not demonstrated that no reasonable trier of fact could have reached the Trial Chamber's conclusion or that the Trial Chamber's assessment of the evidence was wholly erroneous. This argument is therefore dismissed.

ii. Alleged Absence of Discriminatory Treatment against Buddhist Monks and Buddhists in General

1064. As previously discussed, and similar to his arguments regarding the religious persecution against the Cham at the 1st January Dam Worksite and throughout Cambodia,[2972] KHIEU Samphân submits that the Trial Chamber erred in law in characterising undifferentiated treatment that has a particular impact on a class of individuals as discrimination in fact and by considering the impact on Buddhists of measures meant to apply to everyone.[2973] He argues that the acts perpetrated against Buddhist monks do not amount to discrimination in fact[2974] and that there is no *de facto* discrimination or discriminatory intent with regard to Buddhists in general since they were subjected to the same regulations as the general population. [2975]

1065. In response, the Co-Prosecutors reiterate[2976] that there is no legal requirement to differentiate between "direct" or "indirect" discrimination.[2977] They submit that Buddhists and Buddhist monks particularly suffered the consequences of the CPK's policy to eradicate

[2971] Trial Judgment (E465), para. 1184.
[2972] See *supra* Section VII.F.1.b.
[2973] KHIEU Samphân's Appeal Brief (F54), para. 745.
[2974] KHIEU Samphân's Appeal Brief (F54), para. 744.
[2975] KHIEU Samphân's Appeal Brief (F54), para. 745.
[2976] Co-Prosecutors' Response (F54/1), paras 470, 479, 489, 491.
[2977] Co-Prosecutors' Response (F54/1), para. 405.

religion, and were targeted in Tram Kak district due to their membership in a religious group.[2978] The Lead Co-Lawyers concur with the Co-Prosecutors' Response.[2979]

1066. Given that the cross-cutting arguments regarding whether undifferentiated treatment can result in discrimination in fact have already been discussed, the Supreme Court Chamber addresses whether there is discriminatory treatment against Buddhist believers and monks. Because of the binary structure of the appeal arguments and the Trial Chamber's reasoning, the Supreme Court Chamber will first address the persecutory acts against Buddhist monks before turning to the persecutory acts against Buddhists in general.

Whether the Persecutory Acts against Buddhist Monks Discriminated in Fact

1067. The Trial Chamber determined that the forcible defrocking of hundreds of monks across Tram Kak district amounted to persecution on religious grounds as a crime against humanity.[2980] The Trial Chamber specifically rejected the claim that monks were "treated like everyone else" because the established conduct intentionally discriminated against Buddhist monks on the basis that they were monks.[2981] The Trial Chamber also found that forcing the monks to leave the monkhood and renounce their faith was in fact unequal because of the overall severity of the treatment, in light of what the monks were forced to give up.[2982]

1068. The Supreme Court Chamber recalls that the *actus reus* of persecution requires an act or omission which discriminates in fact, and that denies or infringes upon a fundamental right laid down in international customary or treaty law. A discriminatory act or omission occurs when a victim is targeted because the victim is a member of a group defined by the perpetrator on specific grounds, such as political, racial or religious.[2983] As a result of the act or omission, there must be actual discriminatory consequences.[2984] The primary issue to determine here is whether a finding of discrimination in fact can be established based on the consequences or impact felt by a specific group. Discrimination in fact refers to whether the target group actually

[2978] Co-Prosecutors' Response (F54/1), para. 406.
[2979] Lead Co-Lawyers' Response (F54/2), paras 345-362.
[2980] Trial Judgment (E465), para. 1185.
[2981] Trial Judgment (E465), para. 1185. See also NUON Chea's Amended Closing Brief in Case 002/02, 28 September 2017, E457/6/3/1, para. 905 (arguing that "even if disrobing took place […] it was an illustration of the DK's intent to ensure equality amongst all its citizens by requiring everyone to work and contribute to the country's development").
[2982] Trial Judgment (E465), para. 1185.
[2983] Case 002/01 Appeal Judgment (F36), para. 690.
[2984] Case 001 Appeal Judgment (F28), para. 267.

suffers consequences as a result of the act or omission; that is, discriminatory intent alone is insufficient.[2985]

1069. The Supreme Court Chamber concurs with the Co-Prosecutors that it is not required to differentiate between direct and indirect discrimination when establishing the existence of discrimination in fact. This Chamber considers that whether the acts constitute direct or indirect discrimination is irrelevant in determining whether the group suffered as a consequence of the relevant act or omission. An act or omission is considered discriminatory when a victim is targeted because of the victim's membership in a group defined by the perpetrator on a political, racial, or religious basis. The intent behind the act or omission determines whether a victim is targeted by indirect discrimination. It is sometimes necessary to establish whether laws are directed specifically towards one group when applied to all.

1070. In light of the religious persecution of Buddhist monks, the Supreme Court Chamber notes that the general prohibition of religion and religious practice was effected through a multitude of measures aimed at assimilating the population into a single atheistic and homogenous group, regardless of the religious group.[2986] As a result, the forced disrobing of Buddhist monks was related to this objective, implying that nobody could teach, become a monk, wear robes or practice religion. Nevertheless, the Supreme Court Chamber finds that Buddhist monks were not solely targeted in order to assimilate them with the rest of the population. The CPK policies conspicuously were orchestrated to abolish religion and religious practices, as the CPK was aware of the centrality of Buddhism and the influence of monks on Cambodian traditions and daily life.

1071. The Supreme Court Chamber notes that Buddhist monks were also specifically identified and targeted because of their "special" status in society. This approach is evidenced by numerous references to them as "worms" or "leeches",[2987] "[t]he petty bourgeoisie […] who give up monkhood" as an easy source to be "convinced by enemies",[2988] but also as a "special class" in the sense that, although monks were similar to peasants in some respects, "they do not labour in crop production by themselves, they live with support from all […] other classes", "[t]hey depend economically on the peasants to support their livelihood" and high-ranking

[2985] Case 001 Appeal Judgment (F28), para. 263.
[2986] Trial Judgment (E465), para. 3390 (the CPK intended "to establish an atheistic and homogenous society without class divisions").
[2987] T. 16 February 2015 (EM Phoeung), E1/263.1, p. 24.
[2988] Revolutionary Flag, Issue 6, June 1977, E3/135, ERN (EN) 00142907, 00446860.

monks are connected to the "upper stratum", which set them apart in a different category.[2989] Other CPK documents describe the monks with good and bad points, noting nonetheless that most monks "do not work hard"[2990], that their situation could also be similar to the police and soldier class, intellectual class and various ethnic classes.[2991] Similarly, a policy document dated 22 September 1975 stated that "from 90 to 95 percent of [monks] abandoned their monkhood", and that "this special layer [of the society] will no longer cause any worry".[2992] Buddhism was incompatible with the revolution because it had been an instrument of exploitation.[2993] Finally, according to KAING Guek Eav *alias* Duch, POL Pot further explained during the CPK's anniversary meeting in September 1978 that the Party was trying to "eliminate" Buddhism and the way to do this was to make monks build dams and blend together with the popular masses.[2994] In light of the foregoing, the Supreme Court Chamber finds that the CPK specifically targeted Buddhist monks because they were monks.

1072. In addition, the Supreme Court Chamber is satisfied that, while acts of persecution against Buddhist monks overlap with the general prohibition of religious practices, these were conducted in a discriminatory manner. This Chamber also finds that these persecutory acts resulted in discriminatory consequences as the role of monks was abolished and their status in society was lowered.[2995] The Supreme Court Chamber concludes that Buddhist monks were subjected to discrimination and thus such discriminatory conduct amounts to persecution on religious grounds. This challenge is accordingly dismissed.

Whether the Acts against Buddhists in General Discriminate in Fact and Whether there Was Intent to Discriminate

1073. The Trial Chamber found that the elements of the crime against humanity of religious persecution against Buddhists in general were established.[2996] The underlying acts of

[2989] Notebook, 24 March 1973, E3/8380, ERN (EN) 00940617-00940619; DK Notebook, undated, E3/8381, ERN (EN) 01369266.
[2990] Notebook, undated, E3/1233, ERN (EN) 00711617; Notebook, 24 March 1973, E3/8380, ERN (EN) 00940618.
[2991] DK Notebook, undated, E3/8381, ERN (EN) 01369261, 01369266 (echoing the undated Notebook, E3/1233, ERN (EN) 00711616-00711617, listing monks as a "special class").
[2992] Policy Document, No. 6, 22 September 1975, E3/99, ERN (EN) 00244275.
[2993] Trial Judgment (E465), para. 1108.
[2994] Trial Judgment (E465), para. 1092, referring to T. 29 March 2012 (KAING Guek Eav), E1/56.1, pp. 8-9 (stating that KAING Guek Eav *alias* Duch attended this meeting and described POL Pot and NUON Chea alongside each other on the stage).
[2995] Buddhist monks had an important place in Cambodian society at the time. Trial Judgment (E465), paras 260-261.
[2996] Trial Judgment (E465), paras 1184, 1186.

persecution against the Buddhists for which KHIEU Samphân was found responsible include the destruction of Buddhist symbols, the disappearance of former monks, the requisition of places of worship, and the banning of outward expression of religious practice or belief.[2997] The Trial Chamber further emphasised that there was a "complete abolition of Buddhist practices, not a mere restriction",[2998] that it was "an organised sustained attack against religion because it was considered to be incompatible with […] the revolution",[2999] and that it "targeted those with Buddhist beliefs and backgrounds, based entirely on what these places, symbols and practices meant to those persons"[3000] and therefore, *de facto* discriminated against them, "[i]rrespective of whether equality of outcome was the ultimate goal".[3001]

1074. The primary issue to resolve is whether discrimination in fact can be established based on the persecutory acts suffered or from the consequences or impact felt by the Buddhists in general. Discrimination in fact is synonymous with "active persecution", as discussed by the IMT.[3002] Persecution necessitates that the targeted group, in this case Buddhists in general, be subjected to actual persecution, that there be discrimination. The measures employed against the group must be considered in practice, taking into account their implementation and their cumulative impact. The Supreme Court Chamber recalls that the prohibition of prayers, the dismantling and conversion of places of worship, the destruction of symbols and the banning of traditional customs applied to all and were the result of the general policy of prohibiting religious practice.[3003] As mentioned above, the Trial Chamber found that the Cham were also subjected to bans on the wearing of traditional clothing and grooming practices, bans on worship, requirements that the Cham speak only the Khmer language, the destruction of mosques and burning of Korans.[3004]

1075. Similarly, the Supreme Court Chamber agrees with the Trial Chamber's assessment that there existed a "complete abolition of Buddhist practices, not a mere restriction", and that

[2997] Trial Judgment (E465), para. 1186.
[2998] Trial Judgment (E465), para. 1184.
[2999] Trial Judgment (E465), para. 1184.
[3000] Trial Judgment (E465), para. 1186.
[3001] Trial Judgment (E465), para. 1186.
[3002] IMT Judgment, p. 30.
[3003] Trial Judgment (E465), paras 1024 (referring to the abolition of private belongings and witnesses being given black clothing), 1052 ("Militia members […] wore black uniforms like ordinary people"), 1093 ("The Chamber finds that the CPK was intent on eliminating Buddhism from Cambodian society"), 1108 ("The Chamber is satisfied that the practice of Buddhism was banned in Tram Kak district"), 1184 ("the evidence reveals the complete abolition of Buddhist practices"), 3228 (the CPK intended "to establish an atheistic and homogenous society without class divisions"), 3232 ("instructions banning religion and religious practices – such as long hair and head scarves – applied to both Khmer and Cham").
[3004] Trial Judgment (E465), paras 1695, 3328.

it was "an organised sustained attack against religion because it was considered to be incompatible with the implementation of the revolution".[3005] The Trial Chamber highlighted that the DK Constitution referred to reactionary religions that were detrimental to DK and the Kampuchean people and recalled witness testimony stating that all religions were considered reactionary, there was no freedom of religion, and that Buddhism and Islam were considered as a "reactionary faith".[3006]

1076. Furthermore, there is clear evidence that Buddhists in general suffered adverse consequences from this policy of general application. The Trial Chamber determined that Buddhism was dominant in Cambodia, "inextricably intertwined" with the Khmer identity and affected most aspects of life.[3007] In the same vein, the Trial Chamber found that the Cham were "predominantly and particularly affected" by the religious and cultural restrictions "because they had to radically change their lifestyle and religious practices to abide by them".[3008] The Supreme Court Chamber recalls that the Trial Chamber enumerated the consequences of the abolition of Buddhism in general, including the destruction of Buddhist symbols, disappearance of former monks, requisition of worship sites, and the ban on religious expression. The Trial Chamber emphasised that there was a "complete abolition of Buddhist practises and not a mere restriction", that it was "an organised sustained attack against religion because it was considered to be incompatible with [...] the revolution", and that it "targeted those with Buddhist beliefs and backgrounds, based entirely on what these places, symbols, and practises meant to those persons" and therefore *de facto* discriminated against them as a result of their religion.[3009] It is this Chamber's view that Buddhists in general suffered adverse consequences, which impacted their daily life and that this was intended by the CPK. Therefore, it is found that the acts of persecution had an adverse impact onto Buddhists in general, and this conduct therefore constituted persecution on religious grounds against Buddhists in general.

1077. As previously noted, the Trial Chamber emphasised that, based on KAING Guek Eav *alias* Duch's testimony, the CPK intended to "eliminate" Buddhism in Cambodia and that several witnesses described the complete destruction of Buddhism during the DK period.[3010]

[3005] Trial Judgment (E465), para. 1184.
[3006] Trial Judgment (E465), paras 1090, 1092-1093 1108, 3215.
[3007] Trial Judgment (E465), para. 258.
[3008] Trial Judgment (E465), para. 3232.
[3009] Trial Judgment (E465), paras 1184, 1186.
[3010] Trial Judgment (E465), paras 1092-1093, 4015, 4164, 4298.

The Supreme Court Chamber concludes that there is no error in the Trial Chamber's finding that acts of general application imposed in an attempt to create an atheistic and homogenous society[3011] could amount to intent to target the Buddhists in general.

1078. In this Chamber's view, KHIEU Samphân has failed to show that the Trial Chamber erred and it thus rejects his challenges.

4. Racial Persecution

1079. The Closing Order charged KHIEU Samphân with the crime against humanity of persecution on racial grounds of Vietnamese in Tram Kak Cooperatives, S-21 Security Centre, Kraing Ta Chan Security Centre, Au Kanseng Security Centre, and in Prey Veng and Svay Rieng provinces, throughout the DK period and on the basis that Vietnamese people were "deliberately and systematically identified and targeted due to their perceived race" as they were perceived by the CPK to be "racially distinct from Cambodian people, based on biological and particularly matrilineal descent". On the basis of the Closing Order and the Severance Decision, the acts charged with regard to the treatment of the Vietnamese were limited to expulsions from Cambodian territory to Vietnam, arrest, detention and killings of Vietnamese and, from April 1977, mass gathering and killings in Prey Veng and Svay Rieng.[3012]

1080. The Trial Chamber found that the crime against humanity of racial persecution of Vietnamese was established at Tram Kak Cooperatives, S-21 Security Centre, Au Kanseng Security Centre, and in Prey Veng and Svay Rieng.[3013] It found that this crime was committed as part of a policy of targeting Vietnamese "for adverse treatment throughout the DK period (in particular, for deportation before April 1977 and for destruction as a racial group thereafter)", because the Vietnamese were considered to be "the DK's most dangerous enemy".[3014] KHIEU Samphân alleges that racial persecution did not occur at any of the above-mentioned sites. His arguments will be addressed in turn.

[3011] Trial Judgment (E465), para. 3228.
[3012] Trial Judgment (E465), para. 3508, referring to Case 002 Closing Order (D427), para. 1422; Case 002 Additional Severance Decision Annex (E301/9/1.1), para. 5(ii)(b).
[3013] Trial Judgment (E465), para. 4005. It did not find racial persecution to have been established at Kraing Ta Chan Security Centre. Trial Judgment (E465), para. 3509.
[3014] Trial Judgment (E465), para. 4005.

a. Tram Kak Cooperatives

1081. In considering the charge of racial persecution at Tram Kak Cooperatives, the Trial Chamber noted that the Closing Order referred to the persecutory acts as:

> the expulsion of Vietnamese people and, in some cases, that they were arrested, detained or killed. It describes examples of disappearances of Vietnamese from a village (Prey Ta Lei village, Trapeang Thom North commune) and an announcement in Nhaeng Nhang commune that persons of Vietnamese ethnicity would be sent back to Vietnam, with two phases whereby some were 'sent home' at first, but others were executed later on.[3015]

1082. According to the Trial Chamber, "significant numbers of Vietnamese were deported to Vietnam in the period around 1975 to 1976."[3016] It was satisfied the deportees were targeted on the discriminatory basis of being Vietnamese and that they were sufficiently discernible as a racial group to determine whether consequences occurred for the group. It was further satisfied that those deported were Vietnamese, and that the acts were therefore discriminatory in fact.[3017] It considered that the deportations denied and infringed upon fundamental rights and freedoms pertaining to freedom of movement, personal dignity, liberty, and security, freedom from arbitrary or unlawful arrest, a fair and public trial, and equality before the law.[3018] It considered this conduct to meet the requisite level of severity to constitute persecution.[3019] Concerning the *mens rea*, the Trial Chamber found that the Vietnamese were intentionally targeted based on their race, citing instructions and orders regarding the transportation of Vietnamese, and contemporaneous reports and publications in the *Revolutionary Flag* that targeted them.[3020] Finally, the Trial Chamber explained that its findings in relation to racial persecution of Vietnamese in Tram Kak district were limited to the circumstances surrounding their deportation to Vietnam in the period before mid-1976, as the evidence for the later period did not allow it to find beyond reasonable doubt that the relevant conduct was discriminatory in fact.[3021]

1083. KHIEU Samphân argues that the Trial Chamber erred in fact by finding that the *actus reus* of racial persecution was established since this conclusion was based on the finding that Vietnamese in Tram Kak were deported, which he argued was incorrect elsewhere in his

[3015] Trial Judgment (E465), para. 1188, referring to Case 002 Closing Order (D427), para. 320.
[3016] Trial Judgment (E465), para. 1189.
[3017] Trial Judgment (E465), para. 1189.
[3018] Trial Judgment (E465), para. 1190.
[3019] Trial Judgment (E465), para. 1190.
[3020] Trial Judgment (E465), para. 1191.
[3021] Trial Judgment (E465), para. 1192.

Appeal Brief.[3022] He further contends that the Trial Chamber erred in determining the *mens rea* of racial persecution was established because it relied solely on "the instructions and orders given regarding the transportation of Vietnamese, contemporaneous reports, as well as contemporaneous publications in the *Revolutionary Flag* targeting the Vietnamese".[3023] He claims that the Trial Chamber did not provide any references for these sources, but its analysis refers to instructions to kill and purge Vietnamese, which does not support the finding that instructions were issued to transport Vietnamese.[3024] He argues that the only report the Trial Chamber mentioned refers to exchanging Khmer Krom families for Vietnamese families, but it says nothing about the number and provenance of Vietnamese who were exchanged and does not evince discriminatory intent against Vietnamese in Tram Kak.[3025] Finally, he submits that the April 1976 *Revolutionary Flag* referred to by the Trial Chamber does not show discriminatory intent toward Vietnamese in Tram Kak in relation to acts of deportation in 1975 and 1976.[3026]

1084. The Co-Prosecutors respond that KHIEU Samphân failed to show error in the finding that the *actus* reus had been met, but instead simply repeats his erroneous argument that deportation had not been established.[3027] Concerning the *mens rea*, they respond that KHIEU Samphân's claim that he had to guess as to the evidence relied upon is misleading, as he referred only to a conclusory paragraph that followed an extensive analysis of the treatment of Vietnamese in Tram Kak.[3028]

1085. Concerning the underlying acts, the Lead Co-Lawyers respond that KHIEU Samphân simply referred to his arguments about deportation, which focused on whether the Vietnamese crossed an international border.[3029] It is not necessary for a victim to cross an international border to establish an act of persecution.[3030] The Trial Chamber found that the Vietnamese were targeted for being Vietnamese and were gathered up, arrested, moved, and in many cases killed or disappeared, clearly violating fundamental rights, and so an argument about whether

[3022] KHIEU Samphân's Appeal Brief (F54), paras 749-750, referring to paras 686-718.
[3023] KHIEU Samphân's Appeal Brief (F54), para. 751, quoting Trial Judgment (E465), para. 1191.
[3024] KHIEU Samphân's Appeal Brief (F54), paras 751-752.
[3025] KHIEU Samphân's Appeal Brief (F54), para. 753.
[3026] KHIEU Samphân's Appeal Brief (F54), paras 754-755.
[3027] Co-Prosecutors' Response (F54/1), para. 637.
[3028] Co-Prosecutors' Response (F54/1), para. 638.
[3029] Lead Co-Lawyers' Response (F54/2), para. 502.
[3030] Lead Co-Lawyers' Response (F54/2), paras 502-503.

they crossed a border could not demonstrate any error in the Trial Chamber's conclusion that racial persecution occurred.[3031]

1086. In determining whether the *actus reus* of racial persecution at Tram Kak Cooperatives was satisfied, the Supreme Court Chamber recalls that the persecutory act in question is the deportation of Vietnamese from Tram Kak and refers to Section VII.D.1 of this Judgment, which upholds the Trial Chamber's finding that the crime against humanity of deportation from Tram Kak was established. Furthermore, it recalls that the only challenge made by KHIEU Samphân to the *actus reus* of deportation at Tram Kak was whether the Vietnamese actually crossed a national border. He did not contest that the Vietnamese had been gathered up and removed.[3032] This Chamber agrees with ICTY Appeals Chamber jurisprudence that it is irrelevant whether a border was crossed for the purpose of determining persecution, because forcible displacement is equally punishable as an underlying act of persecution; it is unnecessary for the purposes of a persecution conviction to distinguish between the underlying acts of deportation and forcible transfer as the criminal responsibility of the accused is sufficiently captured by the general concept of forcible displacement.[3033] The Supreme Court Chamber further notes that the Closing Order referred to the persecutory acts as the "expulsion of Vietnamese" as well as their disappearance.[3034] Although the Trial Chamber established that deportation occurred, and this Chamber upheld that finding, it was unnecessary to determine whether the Vietnamese were forced across a border to determine whether the *actus reus* of persecution was established, and KHIEU Samphân has not contested that they were gathered up and removed from Tram Kak. Thus, KHIEU Samphân's argument concerning whether the *actus reus* of persecution was established fails.

1087. Turning to KHIEU Samphân's arguments concerning the *mens rea*, the Trial Chamber found that Vietnamese were systematically targeted due to their perceived race.[3035] It stated that this targeting was evidenced by instructions and orders regarding the transportation of Vietnamese, contemporaneous reports, and publications in the *Revolutionary Flag*.[3036] The Supreme Court Chamber disagrees with KHIEU Samphân that the only instructions and orders mentioned by the Trial Chamber relate to killing Vietnamese. The Trial Chamber referred to

[3031] Lead Co-Lawyers' Response (F54/2), para. 505.
[3032] KHIEU Samphân's Appeal Brief (F54), paras 686-718.
[3033] *Naletilić & Martinović* Appeal Judgment (ICTY), para. 154.
[3034] Trial Judgment (E465), para. 1188, referring to Case 002 Closing Order (D427), paras 320, 1422.
[3035] Trial Judgment (E465), para. 1191.
[3036] Trial Judgment (E465), para. 1191.

testimony by EK Hoeun and SANN Lorn discussing instructions regarding the transportation of Vietnamese.[3037] These instructions demonstrate intent to target Vietnamese. The report about an exchange of Vietnamese demonstrates that the exchange was intentional, and accordingly, the Supreme Court Chamber sees no error in the Trial Chamber's reliance on it.

1088. As discussed in the section of this Judgment dealing with deportation of Vietnamese at Tram Kak, the Trial Chamber found,[3038] and the Supreme Court Chamber agrees, that the "foreigners" mentioned in the April 1976 *Revolutionary Flag* are the Vietnamese. The language used demonstrates that Vietnamese were targeted and that this targeting was due to their perceived race. The *Revolutionary Flag* states:

> Our people are called the "Kampuchean people." However, there were many foreigners, hundreds of thousands, and one type of foreigner that was very strongly poisonous and dangerous to our people. These people have what is called poisonous composition since they came to wolf us down, came to nibble at us, came to swallow us, came to confiscate and take away everything, and came to endanger our nation and our people, and they have caused us to lose much territory in the past. Even recently, before we waged the war of national liberation and during that five-year period, some territory and some locations were 99 percent foreigner, meaning 99% of those districts were foreigners. […]
>
> However, our revolution, in particular on 17 April 1975, sorted this issue out cleanly and sorted it out entirely. We assume that we sorted it out permanently. For thousands of years we were unable to resolve this issue and did not resolve it. The exploiting classes did not only not sort this out, they sold whole sections of land to these foreigners. Now we have […] swept hundreds of thousands of these foreigners clean and expelled them from our country, got them permanently out of our territory.[3039]

1089. It is immaterial that the *Revolutionary Flag* does not refer specifically to Tram Kak, as it indicates a nationwide intent to target Vietnamese for expulsion, including from Tram Kak. This argument is dismissed.

b. S-21 Security Centre

1090. When examining the charge of racial persecution at S-21 Security Centre, the Trial Chamber noted that the persecutory acts in question were the arrest, detainment, and killing of Vietnamese.[3040] The Trial Chamber considered KHIEU Samphân's argument that everyone at S-21 was considered to be a traitor and Vietnamese were not treated differently from others.[3041] It stated that it had established that the Vietnamese constituted a significant proportion of the

[3037] Trial Judgment (E465), paras 1111-1115.
[3038] Trial Judgment (E465), para. 1118.
[3039] Revolutionary Flag, April 1976, E3/759, pp. 5-6.
[3040] Trial Judgment (E465), para. 2605.
[3041] Trial Judgment (E465), para. 2606.

foreign detainees at S-21.[3042] The Trial Chamber found that Vietnamese were arrested, detained, interrogated, and executed at S-21 because the CPK considered them to be racially distinct from Cambodians.[3043] The Trial Chamber noted that the training and study sessions attended by S-21 cadres inculcated national hatred and fear of the Vietnamese.[3044] The Trial Chamber found that, while the Vietnamese were seen as political enemies, they were primarily identified as enemies on the basis of their race.[3045] The Trial Chamber found the persecutory acts were discriminatory in fact and that they were committed with the intent to discriminate, as Vietnamese were arrested, detained, interrogated, and executed because of their race.[3046]

1091. KHIEU Samphân submits that the Trial Chamber erred by finding that the Vietnamese were targeted because they were racially distinct from Cambodians.[3047] He argues that the Trial Chamber relied on S-21 notebooks, but these were from 1978, after a major territorial invasion by the Vietnamese, when Vietnam was perceived as a military and political enemy.[3048] He argues that the Trial Chamber also relied on evidence concerning identification of Vietnamese through matrilineal ethnicity, but this applied to Vietnamese living in Cambodia rather than Vietnamese detained at S-21, who were arrested from various locations near the Vietnamese border and in Cambodian waters. He considers that the Trial Chamber has conflated the various groups of Vietnamese.[3049] He notes that the Vietnamese detained at S-21 were labelled as spies or soldiers, and that KAING Guek Eav *alias* Duch explained they were interrogated to obtain confessions, in order to show Vietnam's goal of invading Cambodia and creating an Indochinese federation.[3050] This, he avers, shows that the arrest of Vietnamese was not motivated by race, but by their connection to an enemy country.[3051] KHIEU Samphân argues that the Trial Chamber ignored his argument that there was no differential treatment between the Vietnamese and other detainees.[3052] He asserts that KAING Guek Eav *alias* Duch was convicted of political persecution in Case 001 because the detainees at S-21, including the Vietnamese, were targeted as opponents of the regime.[3053] He contends that the Supreme Court

[3042] Trial Judgment (E465), para. 2607.
[3043] Trial Judgment (E465), para. 2607.
[3044] Trial Judgment (E465), para. 2607.
[3045] Trial Judgment (E465), para. 2608.
[3046] Trial Judgment (E465), para. 2608.
[3047] KHIEU Samphân's Appeal Brief (F54), para. 828.
[3048] KHIEU Samphân's Appeal Brief (F54), para. 829.
[3049] KHIEU Samphân's Appeal Brief (F54), para. 830.
[3050] KHIEU Samphân's Appeal Brief (F54), para. 831.
[3051] KHIEU Samphân's Appeal Brief (F54), para. 831.
[3052] KHIEU Samphân's Appeal Brief (F54), para. 832.
[3053] KHIEU Samphân's Appeal Brief (F54), para. 833.

Chamber did not contradict the Trial Chamber on this point, but reversed the finding of political persecution in the case of detainees who were indiscriminately apprehended and killed.[3054]

1092. The Co-Prosecutors respond that, when referring to the Vietnamese, the Trial Chamber did not assimilate different groups or find that only Vietnamese nationals were detained at S-21. Rather, it found that "Vietnamese from within Cambodia including families trying to flee the country and children from Svay Rieng, the Southwest Zone, and Kampong Som were detained at S-21."[3055] They respond further that the Trial Chamber did not rely largely upon the matrilineal theory of ethnicity when identifying Vietnamese at S-21, but relied on, *inter alia*, testimony of S-21 guards that they were taught at study sessions that the Vietnamese were the "hereditary enemy".[3056] According to the Co-Prosecutors, KHIEU Samphân's argument that the Vietnamese were treated the same as other detainees ignores the fact that they were brought to S-21, detained, tortured, and executed *because* they were Vietnamese, and that they were treated differently than other detainees, as evidenced by the fact that KAING Guek Eav *alias* Duch was usually informed about their arrival, their confessions were recorded and broadcast, and they were singled out for harsher interrogation methods.[3057] In addition, the argument that the Vietnamese were treated as soldiers or spies ignores evidence that Vietnamese civilians were forced to confess to being spies and does not explain the execution of Vietnamese children at S-21.[3058] Finally, the Co-Prosecutors submit that KHIEU Samphân misrepresented Case 001 jurisprudence; the Case 001 indictment charged KAING Guek Eav *alias* Duch with persecution of Vietnamese on political grounds, so he could not have been convicted of persecution on racial grounds; and, in any event, factual findings are unique to each case.[3059]

1093. The Lead Co-Lawyers respond that members of a particular group can be targeted for more than one reason, and that the ICC and ICTY have found persecution on two or more discriminatory grounds in relation to the same conduct.[3060] Concerning the discernibility of the targeted group, they argue that the Trial Chamber's reference to "Vietnamese living in Cambodia" may have caused confusion. They argue that the group subjected to persecution must be a *racial* group, and, in this case, the group in question is the Vietnamese, whether they

[3054] KHIEU Samphân's Appeal Brief (F54), para. 834.
[3055] Co-Prosecutors' Response (F54/1), para. 641.
[3056] Co-Prosecutors' Response (F54/1), para. 642.
[3057] Co-Prosecutors' Response (F54/1), para. 643.
[3058] Co-Prosecutors' Response (F54/1), para. 644.
[3059] Co-Prosecutors' Response (F54/1), para. 645.
[3060] Lead Co-Lawyers' Response (F54/2), para. 374.

lived in Cambodia or Vietnam and whether they were civilians or military personnel.[3061] They respond further that the Trial Chamber did consider the armed conflict with Vietnam, but international law does not authorise parties to an armed conflict to intern or execute people based on their race.[3062]

1094. The Supreme Court Chamber concurs with the Lead Co-Lawyers that racial persecution must target a racial group, and that the Vietnamese, whether living within or outside Cambodia, were the targeted group in question. A group can be targeted on multiple grounds and the fact that the Vietnamese were considered to be political enemies, as acknowledged by the Trial Chamber, does not show that they were not also persecuted on the basis of race. Similarly, the fact that KAING Guek Eav *alias* Duch was convicted of political rather than racial persecution, and that this Chamber upheld in part his conviction for political persecution, does not preclude a finding that Vietnamese were also persecuted on racial grounds.

1095. The Trial Chamber explicitly took into account KHIEU Samphân's argument that the Vietnamese were targeted because they were perceived as political enemies, but found that they were "primarily identified as being hereditary enemies by virtue of their race."[3063] While KHIEU Samphân may disagree with this conclusion, he has failed to demonstrate that no reasonable Trial Chamber could reach it. The Trial Chamber also noted KHIEU Samphân's argument that Vietnamese detainees were not treated differently than other detainees.[3064] Its finding that the Vietnamese were arrested, detained, interrogated, and executed at S-21 *because* they were Vietnamese and racially distinct from the Cambodian people[3065] rendered it immaterial whether they were treated the same as other detainees while in detention. In any event, as KHIEU Samphân points out,[3066] the Vietnamese were interrogated in order to obtain confessions, with the aim of showing that Vietnam's goal was to invade Cambodia and create an Indochinese federation; thus, even in detention, they were singled out and not treated the same as other detainees. This argument is dismissed.

[3061] Lead Co-Lawyers' Response (F54/2), paras 482-484.
[3062] Lead Co-Lawyers' Response (F54/2), para. 511.
[3063] Trial Judgment (E465), para. 2608.
[3064] Trial Judgment (E465), para. 2606.
[3065] Trial Judgment (E465), para. 2607.
[3066] KHIEU Samphân's Appeal Brief (F54), para. 831.

c. Au Kanseng Security Centre

1096. When considering the charge of racial persecution at Au Kanseng Security Centre, the Trial Chamber noted that the persecutory acts charged in the Closing Order were specifically "the arrest and execution of six Vietnamese and the group of Jarai."[3067] It recalled its finding that SAO Saroeun directed CHHAOM Sé to execute a group of six Vietnamese civilians, and that this order was carried out by Au Kanseng security personnel.[3068] It noted that it had previously found that Vietnamese people were perceived as enemies by the CPK and was accordingly satisfied that the targeted group was sufficiently discernible to determine whether the requisite consequences occurred for the group.[3069] It was satisfied that the killing of the six Vietnamese was committed with intent to discriminate on racial grounds, taking into account "the intensified nature of the armed conflict between DK and the Socialist Republic of Vietnam at the time of the group's arrest in late 1978, the impending collapse of the DK regime and evidence of the arrest and execution at S-21 of Vietnamese 'spies' and perceived Thieu-Ky soldiers in late 1978."[3070] The Trial Chamber found that the acts committed against the Vietnamese infringed and violated various fundamental rights and freedoms, and meet the requisite level of severity to amount to persecution.[3071] It concluded that racial persecution had been established in the case of the murder of the six Vietnamese.[3072]

1097. Turning to the group of Jarai, the Trial Chamber stated that the group was arrested and detained on suspicion of being external enemies, not as a result of their perceived membership in any racial group.[3073] It noted that because there was limited evidence presented as to reasons for their execution, their deaths could not be linked to their actual or perceived race.[3074] It therefore found that the crime against humanity of racial persecution was not established in the case of the Jarai.[3075]

1098. KHIEU Samphân argues that the Trial Chamber's findings regarding the killing of the six Vietnamese were based on insufficient evidence; they were "based solely on the vague written statement of CHHAOM Se."[3076] He argues that the Trial Chamber also erred by

[3067] Trial Judgment (E465), para. 2994, referring to Case 002 Closing Order (D427), paras 618-622.
[3068] Trial Judgment (E465), para. 2995.
[3069] Trial Judgment (E465), para. 2995.
[3070] Trial Judgment (E465), para. 2996.
[3071] Trial Judgment (E465), paras 2997-2998.
[3072] Trial Judgment (E465), para. 2998.
[3073] Trial Judgment (E465), para. 3000.
[3074] Trial Judgment (E465), para. 3001.
[3075] Trial Judgment (E465), para. 3002.
[3076] KHIEU Samphân's Appeal Brief (F54), para. 859.

concluding that the six Vietnamese were persecuted on racial grounds, despite the fact that their arrest was based on the same reason as the Jarai, namely political reasons.[3077] He submits that the Trial Chamber included the Vietnamese in its consideration of political persecution of "real or perceived enemies".[3078] He submits that CHHAOM Sé stated that the six Vietnamese were arrested shortly before 1979 at the Au Ya Dav village battlefield, with no evidence that the arrest was racially motivated.[3079]

1099. The Co-Prosecutors respond that the Trial Chamber's findings on the CPK's reasons for arresting and executing Vietnamese civilians differs from those on the CPK's reasons for targeting perceived political enemies.[3080] They claim further that KHIEU Samphân selectively quoted from CHHAOM Sé's Written Record of Interview; CHHAOM Sé mentioned that the Vietnamese were arrested at the battlefield but referred to them as "civilians".[3081] The Lead Co-Lawyers agree, and respond further that the six Vietnamese executed at Au Kanseng were known to be civilians, and that labelling them as enemy spies does not prevent racial discrimination when the reason they were labelled as such was because of their race.[3082]

1100. The Supreme Court Chamber does not consider that KHIEU Samphân has demonstrated that the Trial Chamber's findings were unreasonable. The finding that six Vietnamese were murdered was not based solely on CHHAOM Sé's Written Record of Interview, as claimed by KHIEU Samphân.[3083] The Trial Chamber also referred to CHHAOM Sé's consistent testimony in court,[3084] where CHHAOM Sé, without mentioning explicitly that he was referring to the six Vietnamese, stated: "[s]eparately, regarding the group of six people, I receive instructions from Sao Saroeun for them to be executed."[3085]

1101. With regard to the contention that the six Vietnamese were killed for political reasons and that the Trial Chamber included the Vietnamese in its consideration of political persecution of "real or perceived enemies",[3086] a group can be, and in this case was, targeted on multiple grounds. The Trial Chamber's finding of intent to discriminate based on "the intensified nature

[3077] KHIEU Samphân's Appeal Brief (F54), para. 860.
[3078] KHIEU Samphân's Appeal Brief (F54), para. 860.
[3079] KHIEU Samphân's Appeal Brief (F54), para. 861.
[3080] Co-Prosecutors' Response (F54/1), para. 648.
[3081] Co-Prosecutors' Response (F54/1), para. 649.
[3082] Lead Co-Lawyers' Response (F54/2), para. 510.
[3083] KHIEU Samphân's Appeal Brief (F54), para. 859.
[3084] Trial Judgment (E465), para. 2926.
[3085] T. 11 January 2013 (CHHAOM Sé), E1/159.1, p. 104. See *supra* Section VII.B.2.f.
[3086] KHIEU Samphân's Appeal Brief (F54), para. 860.

of the armed conflict between DK and the Socialist Republic of Vietnam at the time of the group's arrest in late 1978, the impending collapse of the DK regime and evidence of the arrest and execution at S-21 of Vietnamese 'spies' and perceived Thieu-Ky soldiers in late 1978"[3087] appears to relate more to a political motive for persecution than to a racial one, but the Trial Chamber's finding of intent to discriminate against these six Vietnamese on the basis of race must be considered in light of its finding of a nationwide policy of targeting Vietnamese for adverse treatment.[3088] In this light, and given that CHHAOM Sé indicated that the six Vietnamese were civilians,[3089] the Trial Chamber's finding is reasonable. Accordingly, this argument is dismissed.

d. Prey Veng and Svay Rieng

1102. In considering the charge of racial persecution at Prey Veng and Svay Rieng, the Trial Chamber noted that the persecutory acts charged in the Closing Order were the expulsions from Cambodian territory to Vietnam, the arrest, detention, and killings of Vietnamese and, from April 1977, the mass gathering and killings of Vietnamese.[3090] The Trial Chamber recalled its finding that from April 1975, the CPK identified Vietnamese through the creation of lists and that mixed families were targeted based on matrilineal ethnicity.[3091] It stated that a large number of Vietnamese were deported from Prey Veng to Vietnam in 1975 and 1976, that Vietnamese were displaced (with some displacements preceded by arrests) in Prey Veng between 1977 and 1979, and that those who were taken away never returned.[3092] It also noted that it found Vietnamese civilians were killed in Svay Rieng in 1978.[3093] It was satisfied that the Vietnamese living in Cambodia were sufficiently discernible as a racial group to determine whether there were consequences for the group and that the victims were in fact Vietnamese.[3094] It therefore concluded that the acts were discriminatory in fact.[3095] It found that the persecutory acts infringed upon and violated fundamental rights and freedoms, and determined that the acts reached the level of seriousness required for the crime of persecution, thereby satisfying the *actus reus*.[3096] It found that the *mens rea* of the specific intent to

[3087] Trial Judgment (E465), para. 2996.
[3088] Trial Judgment (E465), para. 4005.
[3089] Written Record of Interview of CHHAOM Sé, 31 October 2009, E3/405, p. 7.
[3090] Trial Judgment (E465), para. 3508, referring to Case 002 Closing Order (D427), para. 1422.
[3091] Trial Judgment (E465), para. 3510.
[3092] Trial Judgment (E465), para. 3510.
[3093] Trial Judgment (E465), para. 3510.
[3094] Trial Judgment (E465), para. 3511.
[3095] Trial Judgment (E465), para. 3511.
[3096] Trial Judgment (E465), paras 3511-3512.

discriminate on racial grounds was satisfied, citing the systematic targeting of Vietnamese individuals based on their perceived race, as evidenced by the preparation of lists, the matrilineal policy applied to mixed families, and contemporaneous publications and speeches by leading CPK figures targeting the Vietnamese.[3097]

1103. KHIEU Samphân contends that the Trial Chamber erred in finding that (1) "Vietnamese living in Cambodia" were a sufficiently discernible racial group; (2) the persecutory acts occurred; (3) the acts constituted discrimination in fact; and (4) the Vietnamese were deliberately targeted in the Prey Veng and Svay Rieng provinces.[3098] Each of these arguments will be considered in turn.

i. Discernibility of the Group

1104. KHIEU Samphân submits that the Trial Chamber referred in a footnote to its discussion of CIA, KGB, and *Yuon* agents in assessing the discernibility of the group, but these groups do not correspond to "Vietnamese living in Cambodia".[3099] According to him, the Trial Chamber's findings suggest that *Yuon* could refer to almost anyone suspected of treason, even Cambodians.[3100] He claims that the Trial Chamber's failure to provide a clear and precise definition of the group and its failure to clarify the distinction between agents of the *Yuon*, Vietnamese troops, Vietnamese civilians in Vietnam, and Vietnamese civilians in Cambodia prevents a finding that the group was sufficiently discernible.[3101]

1105. The Co-Prosecutors respond that KHIEU Samphân referred to a footnote detailing the terms "CIA, KGB, and Yuon agents" but ignored the Trial Chamber's extensive discussion of the Vietnamese group when assessing evidence of a targeting policy.[3102]

1106. The Lead Co-Lawyers respond that the Trial Chamber appears to have referred to the wrong section of the Trial Judgment when citing its finding concerning the discernibility of the targeted group; it should have referred to Sections 13.3.5.2 and 13.3.6 rather than Section

[3097] Trial Judgment (E465), para. 3513.
[3098] KHIEU Samphân's Appeal Brief (F54), para. 1028.
[3099] KHIEU Samphân's Appeal Brief (F54), para. 1028.
[3100] KHIEU Samphân's Appeal Brief (F54), para. 1029.
[3101] KHIEU Samphân's Appeal Brief (F54), paras 1031-1032.
[3102] Co-Prosecutors' Response (F54/1), para. 628.

16.3.2.1.3.5, but this apparent clerical error is not a sufficient basis to overturn its substantive conclusions.[3103]

1107. The Supreme Court Chamber considers that the Trial Chamber's conclusion that the Vietnamese were a sufficiently discernible racial group was not unreasonable. Although the Trial Chamber's reference to Section 16.3.2.1.3.5 in support for its finding[3104] appears to be in error, other portions of the Trial Judgment demonstrate that the Trial Chamber analysed this issue and concluded that the group was discernible.[3105] KHIEU Samphân correctly points out that the Trial Chamber has caused some confusion[3106] by referring to "[t]he Vietnamese living in Cambodia as a distinct group".[3107] This Chamber considers that the racial group in question is the Vietnamese people as a whole. The Trial Chamber's findings concerning the discernibility of the group do not indicate that Vietnamese in Cambodia were racially distinct from the Vietnamese outside Cambodia, and the Closing Order charges racial persecution of the Vietnamese people without limiting the group to Vietnamese living within Cambodia.[3108] The Supreme Court Chamber does not consider the Trial Chamber's erroneous citation or its somewhat unclear wording to invalidate its finding that the Vietnamese were a sufficiently discernible group.

ii. Whether the Persecutory Acts Occurred

1108. KHIEU Samphân refers to his arguments, which are addressed elsewhere in this Judgment,[3109] that the crime against humanity of deportation of Vietnamese in Prey Veng and that the killings of Vietnamese in Svay Rieng in 1978 were not established.[3110] He argues that the Trial Chamber erred by finding that arrests in Prey Veng between 1977 and 1979 amounted to persecutory acts as the Trial Chamber found that the dates of the arrests described by the witnesses were uncertain.[3111] He argues further that the Trial Chamber made no reference to

[3103] Lead Co-Lawyers' Response (F54/2), para. 481.
[3104] Trial Judgment (E465), fn. 11815.
[3105] Trial Judgment (E465), Sections 13.3.5 "Targeting of the Vietnamese" and 13.3.6 "Identification of the Vietnamese and Matrilineal Ethnicity".
[3106] KHIEU Samphân's Appeal Brief (F54), paras 1031-1032.
[3107] Trial Judgment (E465), Section 13.3.6.1.
[3108] Case 002 Closing Order (D427), para. 1422 ("Vietnamese people were persecuted on the basis that the CPK considered the Vietnamese to be racially distinct from Cambodian people, based on biological and particularly matrilineal descent.").
[3109] See *supra* Sections VII.D.2 and VII.B.2.a.
[3110] KHIEU Samphân's Appeal Brief (F54), para. 1033, referring to paras 966-986 and 987-992.
[3111] KHIEU Samphân's Appeal Brief (F54), para. 1034.

specific arrests of Vietnamese families in Svay Rieng in order to determine whether the arrests could be characterised as persecution.[3112]

1109. The Co-Prosecutors respond that KHIEU Samphân did not demonstrate any error in the findings that Vietnamese were deported from Prey Veng in 1975 and 1976 and murdered in Svay Rieng in 1978 and that he misstated the Trial Chamber's finding concerning arrests in Prey Veng between 1977 and 1979.[3113] They argue that while the Trial Chamber was unable to establish that killings had occurred based on the evidence before it, it was able to rely on the same evidence to conclude that Vietnamese individuals were transferred or arrested and never returned.[3114] The Co-Prosecutors also point out that KHIEU Samphân omitted findings concerning arrests in Svay Rieng between 1977 and 1979.[3115]

1110. The Lead Co-Lawyers respond that KHIEU Samphân appears to challenge whether the arrests in Prey Veng fell within the temporal scope of the charge, but the Trial Chamber was not seised of arrests only after April 1977. The temporal limitation only referred to mass gathering and killings.[3116]

1111. The Supreme Court Chamber notes that it has already upheld the Trial Chamber's findings concerning deportation from Prey Veng and the killing of four Vietnamese families in Svay Rieng as an act of extermination elsewhere in this Appeal Judgment.[3117] Thus, it will now limit its analysis to determining whether the persecutory act of arrests occurred.

1112. The Supreme Court Chamber notes that the Trial Chamber did not mention specific arrests in Svay Rieng in its legal findings regarding racial persecution, but only mentioned that some of the displacements of Vietnamese from Prey Veng between 1977 and 1979 were preceded by arrests.[3118] According to the paragraph of the Trial Judgment cited as support, the Trial Chamber would not consider the killings of certain Vietnamese individuals because of uncertainty surrounding the dates when the killings occurred.[3119] The preceding paragraph

[3112] KHIEU Samphân's Appeal Brief (F54), para. 1035.
[3113] Co-Prosecutors' Response (F54/1), paras 630-631.
[3114] Co-Prosecutors' Response (F54/1), para. 631.
[3115] Co-Prosecutors' Response (F54/1), para. 631.
[3116] Lead Co-Lawyers' Response (F54/2), paras 489-491.
[3117] See *supra* Sections VII.D.2 and VII.B.2.a.
[3118] Trial Judgment (E465), para. 3510.
[3119] Trial Judgment (E465), para. 3451:
> The overall evidence presented with regard to killings of Vietnamese in Prey Veng province consists of direct and indirect evidence of transfers or arrests of Vietnamese individuals who were then taken away and never returned. The witnesses later found out through hearsay that these individuals were in fact killed. Taking into account the nationwide targeting of the Vietnamese, as evidenced before the Chamber,11625

indicates that the witnesses who testified about the arrests and killings of these individuals gave varying dates for the events, ranging from 1975 to early 1977.[3120] Thus, the Trial Chamber appears to have erred by referring to the occurrence of arrests in Prey Veng from 1977 to 1979, since it relied on arrests that it found may have occurred prior to that period. The Closing Order, however, did not limit the persecutory acts to arrests made between 1977 and 1979,[3121] and the Trial Chamber accepted the testimony that the arrests occurred.[3122] The Trial Chamber determined that the arrests occurred despite the uncertainty regarding the dates. As a result, the Supreme Court Chamber concludes that the Trial Chamber did not erred in finding that the persecutory acts included arrests. As previously stated, this Chamber has upheld the findings concerning deportation from Prey Veng and killing in Svay Rieng, and thus concludes that the Trial Chamber correctly determined that deportations, arrests, and killings occurred.

iii. Whether the Acts Were Discriminatory in Fact

1113. According to KHIEU Samphân, the Trial Chamber erred by failing to establish that the Vietnamese were targeted on the basis of their race. He argues that there were numerous grounds for arrest during the DK era, and that some witnesses explained that their Vietnamese family members may have been targeted for other reasons, as a result of their past activities.[3123]

1114. The Co-Prosecutors respond that KHIEU Samphân ignores the finding that the persecutory acts occurred in the context of systematic targeting of Vietnamese due to their race.[3124]

1115. The Lead Co-Lawyers respond that KHIEU Samphân misrepresented the evidence of Civil Parties SIENG Chanthy and DOUNG Oeurn. They point out that SIENG Chanthy provided significant evidence to support the targeting of Vietnamese people, and that DOUN

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it is probable that killings of Vietnamese occurred in Prey Veng province. However, considering the circumstantial and inconclusive evidence presented, the Chamber cannot conclude to the relevant standard that killings occurred. Additionally, recalling that the Chamber will not consider the killings of VAN Ngang, Chuy, and San, and because of the uncertainty surrounding the date where the killings described by LACH Kry, THANG Pal, and DOUNG Oeurn occurred, the Chamber is unable to reasonably establish that waves of killings of Vietnamese civilians occurred in Prey Veng province from April 1977.

[3120] Trial Judgment (E465), para. 3450.

[3121] Case 002 Closing Order (D427), para. 1422. The temporal limitation to acts from April 1977 applied only to the gathering up and killing *en masse* of Vietnamese throughout Prey Veng and Svay Rieng. The other acts listed in the Closing Order, including arrests of Vietnamese, were not limited to the period 1977-1979.

[3122] Trial Judgment (E465), para. 3450 ("Considering the passage of time and the fact that the three witnesses' accounts corroborate one another in large parts, the Chamber finds that discrepancies regarding the dates and the sequence of events do not affect the overall credibility of their live testimonies.")

[3123] KHIEU Samphân's Appeal Brief (F54), paras 1037-1039.

[3124] Co-Prosecutors' Response (F54/1), para. 632.

Oeurn's evidence was clear that her Vietnamese husband was taken away because he was Vietnamese.[3125]

1116. The Supreme Court Chamber observes that KHIEU Samphân has argued only that the Trial Chamber failed to explain why and how the persecutory acts targeted the Vietnamese.[3126] Although the Trial Chamber did not explicitly address why it considered the deportation of Vietnamese from Prey Veng, the killings of Vietnamese in Svay Rieng, and the above-mentioned arrests to have targeted the Vietnamese in the section of the judgment dealing with racial persecution in Prey Veng and Svay Rieng, this finding must be considered in context. The Trial Chamber found that there was a nationwide CPK policy targeting the Vietnamese and calling for their expulsion, and, from April 1977, for their destruction.[3127] In this context, it was entirely reasonable for the Trial Chamber to conclude that the deportation, killings, and arrests of Vietnamese were due to their race.

iv. Whether the Vietnamese Were Deliberately Targeted

1117. KHIEU Samphân referred to his previous argument that Vietnamese were not identified by the creation of lists.[3128] He submits that there is no evidence of the creation of lists with regard to Prey Veng and Svay Rieng; the two witnesses relied on by the Trial Chamber did not support that lists were drawn up.[3129] He contends that the Trial Chamber erred by finding that mixed families were targeted because of their matrilineal ethnicity, as the evidence relied on was only the personal conclusions of those who testified, and none of those who testified on this matter said that their information came from the upper echelons.[3130] He notes that no official CPK documents or speeches referenced a matrilineal policy; the Trial Chamber referred only to one document that mentioned surveillance of certain mixed families but did not indicate that any action was taken against them.[3131] Finally, KHIEU Samphân argues that the Trial Chamber erred by referring to publications in the *Revolutionary Flag* and speeches by leading CPK figures targeting the Vietnamese without explaining how these sources specifically

[3125] Lead Co-Lawyers' Response (F54/2), paras 493-495.
[3126] KHIEU Samphân's Appeal Brief (F54), paras 1037-1039.
[3127] Trial Judgment (E465), para. 3416.
[3128] KHIEU Samphân's Appeal Brief (F54), para. 1040, referring to paras 1551-1560.
[3129] KHIEU Samphân's Appeal Brief (F54), paras 1040-1042.
[3130] KHIEU Samphân's Appeal Brief (F54), paras 1043-1045.
[3131] KHIEU Samphân's Appeal Brief (F54), para. 1047.

targeted the Vietnamese living in Prey Veng and Svay Rieng.[3132] He refers to arguments that these sources did not refer to Vietnamese living in Cambodia.[3133]

1118. The Co-Prosecutors respond that KHIEU Samphân misrepresented the Trial Chamber's findings concerning identification of Vietnamese; the Trial Chamber relied on evidence of a witness and a civil party who testified to identification of Vietnamese in Prey Veng and Svay Rieng, and the evidence of lists created in other parts of Cambodia is relevant in assessing the CPK's intent to persecute Vietnamese in Prey Veng and Svay Rieng.[3134] They further respond that it is implausible that the various witnesses who all testified that the CPK considered that ethnicity was determined matrilineally came to the same personal deduction.[3135] Finally, the Co-Prosecutors respond that the Trial Chamber detailed specific *Revolutionary Flag* publications and speeches relating to the Vietnamese living in Cambodia, and explained that they established a nationwide policy to target the Vietnamese.[3136]

1119. The Lead Co-Lawyers respond that a finding relating to the creation of lists of Vietnamese in Prey Veng and Svay Rieng is not required for a finding of intent to discriminate. They cite evidence that lists would have been unnecessary in some communities in those provinces, as people already knew who the Vietnamese were.[3137]

1120. The Supreme Court Chamber finds no error in the Trial Chamber's reliance on the preparation of lists of Vietnamese, the matrilineal policy applied to mixed families, and contemporaneous publications and speeches by leading CPK figures targeting the Vietnamese.[3138] The creation of lists of Vietnamese demonstrates a nationwide policy of targeting Vietnamese regardless of whether lists were created specifically in Prey Veng and Svay Rieng. Furthermore, as noted by the Co-Prosecutors and Lead Co-Lawyers,[3139] the Trial Chamber also considered the evidence of Witness SAO Sak and Civil Party SIENG Chanthy, who testified to the identification of Vietnamese in Prey Veng and Svay Rieng,[3140] though the

[3132] KHIEU Samphân's Appeal Brief (F54), para. 1049.
[3133] KHIEU Samphân's Appeal Brief (F54), para. 1050, referring to paras 1059-1097.
[3134] Co-Prosecutors' Response (F54/1), para. 633.
[3135] Co-Prosecutors' Response (F54/1), para. 634.
[3136] Co-Prosecutors' Response (F54/1), para. 635.
[3137] Lead Co-Lawyers' Response (F54/2), para. 499.
[3138] Trial Judgment (E465), para. 3513.
[3139] Co-Prosecutors' Response (F54/1), para. 633; Lead Co-Lawyers' Response (F54/2), para. 499.
[3140] T. 7 December 2015 (SAO Sak), E1/363.1, p. 13 ("I knew those who had Vietnamese wives or Vietnamese husbands but in Angkar in the village chief, I think they may have done some statistics about the ethnicity of the villagers, that's why people in the higher ranking, in the Angkar, they knew something about the ethnicity of the people in the village."); T. 1 March 2016, E1/394.1, pp. 15, 22 ("They did not do anything to search for Vietnamese since Khmer Rouge had known in advance that which family was half-blooded. […] cooperative

Trial Chamber did not specifically refer to this evidence in finding that the targeting of Vietnamese for persecution was intentional.

1121. KHIEU Samphân has not demonstrated that the Trial Chamber's finding concerning the existence of a matrilineal policy was unreasonable simply because the various witnesses who referred to such a policy did not testify as to whether the policy originated from the CPK. Based on the testimonies of HENG Lai Heang, DOUNG Oeurn, SIN Chhem, UCH Sunlay, LACH Kry, and PRAK Doeun, as well as other witness interviews,[3141] it was reasonable to conclude that this was a CPK policy and that it demonstrates intentional targeting. Finally, this Chamber sees no error in the Trial Chamber's reliance on contemporaneous publications and speeches relating to a national policy of targeting Vietnamese as support for its finding that targeting occurred specifically in Prey Veng and Svay Rieng. This argument is thus dismissed.

G. OTHER INHUMANE ACTS AS CRIMES AGAINST HUMANITY

1122. The Trial Chamber found that KHIEU Samphân committed, through a JCE, the crimes against humanity of other inhumane acts through attacks against human dignity and conduct characterised as enforced disappearances, forced transfer, forced marriage, and rape within the context of forced marriage.[3142]

1123. In setting out the law applicable to the crime against humanity of other inhumane acts, the Trial Chamber found that "other inhumane acts" was accepted as a residual category of crimes against humanity under customary international law by 1975.[3143] The Trial Chamber concluded "that it was both foreseeable and accessible in general that other inhumane acts was punishable as a crime against humanity by 1975", taking into account "the customary status and gravity of the crime and the positions held by the Accused as members of Cambodia's governing authority."[3144]

1124. The Trial Chamber set out the elements of other inhumane acts:

chief was well aware that -- which families had link to Vietnamese origin. They knew clearly who was who in the village. As for my family, the chief of the cooperative knew it very well that my grandparents were ethnically Vietnamese. They did not need to ask us anymore as they already knew who we were.").
[3141] Trial Judgment (E465), fn. 11547.
[3142] Trial Judgment (E465), para. 4326.
[3143] Trial Judgment (E465), para. 723.
[3144] Trial Judgment (E465), para. 723.

a. "The *actus reus* of other inhumane acts as a crime against humanity requires an act or omission that caused serious mental or physical suffering or injury, or constituted a serious attack on human dignity."[3145]

b. "The *mens rea* of other inhumane acts as a crime against humanity requires that the act or omission was performed intentionally."[3146]

1125. The Trial Chamber then explained that the specific conduct underlying the crime against humanity of other inhumane acts need not itself be expressly criminalised under international law.[3147] The Trial Chamber noted that:

> the Supreme Court Chamber concluded that assessing whether the conduct infringes 'basic rights appertaining to human beings, as identified under international legal instruments' was one way of introducing a 'requirement of formal international unlawfulness'. In the view of the Supreme Court Chamber, this assists in assessing both the requirement of foreseeability and whether the conduct reaches the level of gravity of other crimes against humanity.[3148]

The Trial Chamber, noting that the categories of the conduct charged as other inhumane acts in Case 002/02 were not independent crimes against humanity in 1975 and were not charged as such, stated that it would assess all such conduct against the definition of other inhumane acts.[3149] The Trial Chamber considered that this task would be facilitated by setting out its understanding of the elements of such conduct, so it then analysed rape,[3150] attacks against human dignity,[3151] forced marriage,[3152] forced transfer,[3153] and enforced disappearances.[3154]

1126. KHIEU Samphân submits that the Trial Chamber erred in law in its assessment of the legality of other inhumane acts, in its finding concerning enforced disappearances as other inhumane acts, and in findings concerning forced marriage and rape in the context of forced marriage. These arguments will be addressed in turn.

[3145] Trial Judgment (E465), para. 724.
[3146] Trial Judgment (E465), para. 724.
[3147] Trial Judgment (E465), para. 725.
[3148] Trial Judgment (E465), para. 726.
[3149] Trial Judgment (E465), para. 727.
[3150] Trial Judgment (E465), section 9.1.8.1.
[3151] Trial Judgment (E465), section 9.1.8.2.
[3152] Trial Judgment (E465), section 9.1.8.3.
[3153] Trial Judgment (E465), section 9.1.8.4.
[3154] Trial Judgment (E465), section 9.1.8.5.

1. Assessing the Legality of Other Inhumane Acts

a. The Trial Chamber's Assessment of the Principle of Legality

1127. KHIEU Samphân submits that the Trial Chamber did not perform a rigorous examination of the principle of legality but merely concluded without reason that it was both foreseeable and accessible in general, that other inhumane acts were punishable as crimes against humanity by 1975.[3155] He argues that it is not enough to say that other inhumane acts were foreseeable since this category can cover numerous types of behaviour; instead, the Trial Chamber should have identified the conduct at issue and examined whether it could have been defined as criminal at the time.[3156]

1128. The Co-Prosecutors respond that KHIEU Samphân raises arguments that have been previously rejected by the Supreme Court Chamber, which has already confirmed that there is no requirement that the underlying conduct be criminalised under international law at the time of commission.[3157] They respond that the *ejusdem generis* rule is an essential safeguard of the principle of legality and the US Military Tribunal at Nuremberg used the doctrine to clarify the contours of other inhumane acts. These contours were further elucidated by other post-World War II jurisprudence and included acts which violated basic human rights and breached the applicable laws and customs of war.[3158] They respond that every ECCC Chamber and the *ad hoc* tribunals have consistently confirmed the legality of other inhumane acts after analysing post-World War II state practice to confirm foreseeability and accessibility.[3159]

1129. The Lead Co-Lawyers respond that KHIEU Samphân is incorrect to argue that the legality of the specific acts charged as other inhumane acts must be analysed, as this subverts the notion of a residual clause, the very objective of which is to catch conduct falling outside enumerated crimes against humanity.[3160]

1130. The Supreme Court Chamber considers that KHIEU Samphân misunderstands the application of the principle of legality with regard to other inhumane acts and its previous jurisprudence on this issue. What is required is that the category of other inhumane acts be

[3155] KHIEU Samphân's Appeal Brief (F54), paras 659-660.
[3156] KHIEU Samphân's Appeal Brief (F54), para. 665.
[3157] Co-Prosecutors' Response (F54/1), paras 385-386, referring to Case 002/01 Appeal Judgment (F36), paras 572-590, in particular, para. 584.
[3158] Co-Prosecutors' Response (F54/1), para. 388.
[3159] Co-Prosecutors' Response (F54/1), para. 388.
[3160] Lead Co-Lawyers' Response (F54/2), paras 532, 538.

foreseeable and accessible to the Accused. If the category of other inhumane acts is interpreted and applied properly, keeping in mind the safeguards discussed below, foreseeability and accessibility are ensured.[3161] There is no requirement that the underlying conduct be criminalised at the relevant time.[3162]

1131. In Case 002/01, the Supreme Court Chamber explained that the *ejusdem generis* principle provides an essential safeguard by requiring that the underlying conduct considered to amount to an other inhumane act be of a similar nature and gravity to the enumerated crimes against humanity.[3163] The Supreme Court Chamber in Case 002/01 explained that the requirement that the underlying conduct cause serious mental or physical suffering or injury or constitute a serious attack on human dignity was another limitation that adequately circumscribes this category of crime.[3164] Finally, the Supreme Court Chamber explained that it subscribed to the approach taken by the ICTY *Kupreškić* Trial Chamber of "relating 'other inhumane acts' to conduct infringing basic rights appertaining to human beings, as identified under international legal instruments" as another limitation on the interpretation of other inhumane acts.[3165] These limitations together circumscribe the conduct that can be properly considered to amount to an other inhumane act, such that the requirements of foreseeability and accessibility are satisfied.

1132. In the section of the Trial Judgment setting out the law concerning the crime against humanity of other inhumane acts, the Trial Chamber did not err by finding that it was foreseeable and accessible in general that other inhumane acts were punishable as a crime against humanity by 1975, since it was not required to make a separate assessment of the legality of the underlying conduct. The Trial Chamber recognised the safeguards that must be met for conduct to properly be considered to amount to an other inhumane act, stating that the act or omission must be of a similar nature and gravity to the enumerated crimes against humanity and must cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.[3166] The Trial Chamber also noted the Supreme Court Chamber's

[3161] Case 002/01 Appeal Judgment (F36), para. 578.
[3162] Case 002/01 Appeal Judgment (F36), para. 584.
[3163] Case 002/01 Appeal Judgment (F36), para. 578.
[3164] Case 002/01 Appeal Judgment (F36), paras 579-581.
[3165] Case 002/01 Appeal Judgment (F36), para. 584.
[3166] Trial Judgment (E465), paras 724-725.

jurisprudence concerning the requirement to assess whether the victims' basic rights were violated.[3167]

1133. A determination of whether these safeguards were met, such that the conduct was properly considered to amount to an other inhumane act and the principle of legality was respected could not be performed in the abstract in the section of the Trial Judgment setting out the applicable law. The Trial Chamber was to perform this analysis in the sections of the Trial Judgment where it made its legal findings.[3168] This argument is dismissed.

b. Alleged Requirement to Breach a Prohibition in Human Rights Instruments to Amount to an Other Inhumane Act

1134. KHIEU Samphân submits that the Supreme Court Chamber has agreed with ICTY jurisprudence which seeks to establish potential unlawfulness of the acts at the time of commission.[3169] He argues that the Trial Chamber erred by providing a "simple evocation of the fundamental rights included in instruments at the time" when it should have analysed these human rights instruments to identify prohibitions, to determine formal unlawfulness.[3170] He submits that the *Kupreškić* Trial Chamber considered international texts to establish basic human rights whose violation may constitute a crime against humanity, but the *Stakić* Trial Chamber rejected this approach as rights contained in international instruments do not necessarily amount to norms recognised in international criminal law.[3171] He argues that the Supreme Court Chamber in Case 002/01 seemed to establish a compromise between these two positions, by specifying that in addition to considering rights, it is also necessary to identify

[3167] Trial Judgment (E465), para. 726.
[3168] And, indeed, in the Trial Chamber's legal findings, it did state that it took into account whether the conduct was of a similar nature and gravity to the enumerated crimes against humanity and whether it caused serious mental or physical suffering or injury or constituted a serious attack on human dignity. However, the Trial Chamber did not thoroughly venture into an analysis to determine whether a basic right of the victims was violated, a matter that will be addressed in the following section. For attacks against human dignity, see Trial Judgment (E465), paras 1193-1199 (Tram Kak Cooperatives), 1414-1421 (Trapeang Thma Dam Worksite), 1698-1707 (First January Dam Worksite), 1829-1837 (Kampong Chhnang Airfield Worksite), 2611-2618 (S-21 Security Centre), 2848-2851 (Kraing Ta Chan Security Centre), 3003-3010 (Au Kanseng Security Centre), 3152-3159 (Phnom Kraol Security Centre). For enforced disappearances, see Trial Judgment (E465), paras 1200-1204 (Tram Kak Cooperatives), 1422-1429 (Trapeang Thma Dam Worksite), 1708-1712 (First January Dam Worksite), 1838-1846 (Kampong Chhnang Airfield Worksite), 2852-2858 (Kraing Ta Chan Security Centre), 3160-3166 (Phnom Kraol Security Centre). For forced transfer, see Trial Judgment (E465), paras 3335-3340. The Trial Chamber's assessments of forced marriage and rape in the context of forced will be addressed elsewhere in this Judgment, as KHIEU Samphân has raised separate grounds concerning the Trial Chamber's findings on forced marriage and rape in the context of forced marriage.
[3169] KHIEU Samphân's Appeal Brief (F54), para. 667.
[3170] KHIEU Samphân's Appeal Brief (F54), paras 669, 671.
[3171] KHIEU Samphân's Appeal Brief (F54), para. 668.

prohibitions contained in human rights instruments.[3172] He considers that the International Co-Investigating Judge investigating Cases 003 and 004 also subscribed to this approach.[3173]

1135. The Co-Prosecutors respond that the Trial Chamber was not required to identify "prohibitions" of relevant conduct in human rights instruments in addition to the "rights" the conduct violated.[3174] They respond that human rights instruments use the two drafting techniques interchangeably and that requiring conduct to be expressly forbidden defeats the purpose of having a residual category of crimes against humanity by reintroducing a requirement explicitly excluded by the Supreme Court Chamber.[3175] They respond that a "formal unlawfulness" component is not expressly required at the *ad hoc* tribunals to define other inhumane acts and these tribunals have not required prohibition of the specific conduct in question.[3176]

1136. The Lead Co-Lawyers respond that the distinction between rights and prohibitions in international human rights instruments has no basis in law; any right protected in international human rights instruments imposes a corresponding duty on a State, which amounts to a prohibition on that right.[3177] They respond that the *Kupreškić* Trial Chamber did not draw any distinction between rights and prohibitions in articulating its approach, nor did the *Blagojević* Trial Chamber, and the *Stakić* Trial Chamber rejected the *Kupreškić* approach, but was overturned on this issue.[3178] They respond that the Supreme Court Chamber did not, as claimed by KHIEU Samphân, adopt a compromise between the *Kupreškić* approach and the *Stakić* Trial Chamber's approach.[3179]

1137. The Supreme Court Chamber finds that KHIEU Samphân has again misinterpreted this Chamber's jurisprudence in Case 002/01. In that case, as explained above, this Chamber subscribed to the approach taken by the ICTY *Kupreškić* Trial Chamber of "relating 'other inhumane acts' to conduct infringing basic rights appertaining to human beings, as identified under international legal instruments".[3180] The Supreme Court Chamber explained that this "introduces a requirement of formal international unlawfulness and, in this way, a further

[3172] KHIEU Samphân's Appeal Brief (F54), para. 669.
[3173] KHIEU Samphân's Appeal Brief (F54), para. 670; T. 17 August 2021, F1/10.1, pp. 36-38.
[3174] Co-Prosecutors' Response (F54/1), para. 391.
[3175] Co-Prosecutors' Response (F54/1), para. 391.
[3176] Co-Prosecutors' Response (F54/1), para. 392.
[3177] Lead Co-Lawyers' Response (F54/2), para. 541.
[3178] Lead Co-Lawyers' Response (F54/2), para. 542.
[3179] Lead Co-Lawyers' Response (F54/2), para. 542.
[3180] Case 002/01 Appeal Judgment (F36), para. 584.

limitation on a blanket authorisation to interpret 'other inhumane acts'", which would assist in ensuring foreseeability.[3181] This Chamber in Case 002/01 reiterated that it is not required that the specific conduct must be expressly criminalised under international law, as this would render the concept of other inhumane acts as a residual category futile and ineffective. This Chamber stated that:

> Rather, the 'formal unlawfulness' requirement is to be achieved by identifying affirmative articulation of rights and prohibitions contained in human rights instruments, applicable at the time relevant for charges of 'other inhumane acts'.[3182]

The Supreme Court Chamber then referred to the prohibitions contained in Article 3 common to Geneva Conventions and the rights protected by the Universal Declaration of Human Rights ("UDHR") as examples relevant for the case at hand.[3183]

1138. The Supreme Court Chamber did not state that prohibitions contained in human rights instruments must be identified *in addition to* rights. This Chamber in Case 002/01 made clear that "the principle of *nullum crimen sine lege certa* is respected if the specific conduct which is found to constitute other inhumane acts violates a basic right of the victims and is of similar nature and gravity to other enumerated crimes against humanity."[3184] The *Kupreškić* Trial Chamber did not make such a distinction between rights and prohibitions.[3185] Nor did the *Katanga & Ngudjolo Chui* Pre-Trial Chamber, which also followed this approach.[3186] The International Co-Investigating Judge, who was deciding on a request for investigative action into conduct alleged to amount to forced pregnancy and forced impregnation, stated that "there must be a customarily accepted standard tied to the appropriate human right by which the inhumanity of the act is judged."[3187] He was unable to find that there was a clear human rights standard concerning forced pregnancy by 1975 and therefore did not consider that it amounted

[3181] Case 002/01 Appeal Judgment (F36), para. 584.
[3182] Case 002/01 Appeal Judgment (F36), para. 584.
[3183] Case 002/01 Appeal Judgment (F36), para. 584.
[3184] Case 002/01 Appeal Judgment (F36), para. 586.
[3185] *Kupreškić et al.* Trial Judgment (ICTY), para. 566.
[3186] *Prosecutor v. Katanga and Ngudjolo Chui*, Pre-Trial Chamber I (ICC), ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008 ("*Katanga & Ngudjolo Chui* Confirmation of Charges Decision (ICC)"), para. 448: "In the view of the Chamber, in accordance with article 7(l)(k) of the Statute and the principle of *nullum crimen sine lege* pursuant to article 22 of the Statute, inhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute."
[3187] Case 004, Consolidated Decision on the Requests for Investigative Action Concerning the Crime of Forced Pregnancy and Forced Impregnation, 13 June 2016, D301/5 ("Case 004 Consolidated Decision on the Requests (D301/5)"), para. 64.

to an other inhumane act at the time, and declined the request for investigative action.[3188] The International Co-Investigating Judge's approach merges the assessment required to identify a distinct criminal prohibition based on custom with the approach to be used when assessing the specificity of conduct charged within the crime of other inhumane acts. The assertion that there must be a "customarily accepted standard" against which to benchmark conduct within the crime of other inhumane acts, which rests upon one academic text in the International Co-Investigating Judge's decision,[3189] cannot be supported. As noted above, the purpose of the crime of other inhumane acts is to enable the prosecution of grave conduct which is not already criminalised as distinct crimes against humanity at the time in question. It would be illogical to require that an assessment of conduct for these purposes be so stringent.

1139. A prohibition set out in a human rights instrument will be relevant to the issue of whether the conduct at issue was foreseeable, but no new requirement was introduced to require the existence of such prohibition. Therefore, the Trial Chamber did not err by "provid[ing] a truncated analysis of the formal unlawfulness".

1140. However, despite accurately stating the law concerning other inhumane acts and recognising that the Supreme Court Chamber indicated that it should analyse whether the specific conduct at issue violated a basic right of victims, when making its legal findings, the Trial Chamber did not analyse whether the underlying conduct violated victims' basic rights. Nonetheless, the Supreme Court Chamber does not consider that this error affects the validity of the Trial Chamber's findings concerning attacks on human dignity, enforced disappearances, or forced transfer since the conduct at issue *did* violate the basic rights of victims, as explained below. The assessment of forced marriage and rape in the context of forced marriage is addressed elsewhere in this Judgment, as KHIEU Samphân has raised separate grounds concerning the Trial Chamber's findings on forced marriage and rape in the context of forced marriage.[3190]

1141. The Supreme Court Chamber found in Case 002/01 that the Movement of the Phase Two violated rights to liberty, security of person and to freedom of movement and residence, as well as, in its physical circumstances, the right to be free from cruel, inhuman or degrading

[3188] Case 004 Consolidated Decision on the Requests (D301/5), paras 70-74.
[3189] Case 004 Consolidated Decision on the Requests (D301/5), para. 64, referring to Terhi Jyrkkiö, "Other Inhumane acts as Crimes Against Humanity", *in* (2011) 1 *Helsinki Law Rev.* 204.
[3190] See Section VII.G.3.

treatment.[3191] The conduct at issue in Case 002/02 considered to amount to forced transfer as an other inhumane act took place as part of the Population Movement Phase Two; therefore, the same analysis concerning the rights violated applies here. The physical circumstances referred to in Case 002/01 as violating the right to be free from cruel, inhuman or degrading treatment are the same as those at issue in Case 002/02 considered to amount to attacks against human dignity;[3192] therefore, the same analysis applies here as well. Concerning conduct considered as enforced disappearances, the Supreme Court Chamber considers that such conduct could violate several rights contained in the Universal Declaration of Human Rights, such as: the right to life, liberty and security of person;[3193] the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment;[3194] the right to recognition as a person before the law;[3195] and the right to a fair trial.[3196]

1142. In sum, the Trial Chamber did not err by failing to identify prohibitions contained in human rights instruments to determine formal unlawfulness. Its statement of the law was accurate and its legal findings concerning attacks on human dignity, enforced disappearances, and forced transfer, while incomplete, do not invalidate the judgment. This argument is dismissed.

2. Enforced Disappearances

1143. As relevant to Case 002/02, the Closing Order charged KHIEU Samphân with the crime against humanity of other inhumane acts through conduct characterised as enforced disappearances during the Movement of the Population Phase Two with respect to the treatment of the Cham; at the Tram Kak Cooperatives; at Trapeang Thma Dam, 1st January Dam, and Kampong Chhnang Airfield Worksites; and at Kraing Ta Chan and Phnom Kraol Security Centres. The Closing Order alleged that enforced disappearances involved the arrest, detention, or abduction of victims in conditions which placed them outside the protection of the law and

[3191] Case 002/01 Appeal Judgment (F36), paras 656, 659 (paragraph 656 makes this finding in relation to Population Movement Phase One, and paragraph 659 states that its analysis of the Population Movement Phase Two is analogous).
[3192] These are the provision of insufficient food, water, shelter, or hygiene/sanitation. See Case 002/01 Appeal Judgment (F36), para. 619; Trial Judgment (E465), paras 1193, 1414, 1698, 1829, 2611, 2848, 3003, 3152.
[3193] Universal Declaration of Human Rights, 10 December 1948, GA Res. 217A (III), UN Doc. A/810, p. 71 (1948) ("UDHR"), Art. 3.
[3194] UDHR, Art. 5.
[3195] UDHR, Art. 6.
[3196] UDHR, Art. 10.

the refusal to provide access to, or convey information on the fate or whereabouts of such persons.[3197]

1144. The Trial Chamber found that the crime against humanity of other inhumane acts through conduct characterised as enforced disappearances was established at Tram Kak Cooperatives; at Trapeang Thma Dam, 1st January Dam, and Kampong Chhnang Airfield Worksites; and at Kraing Ta Chan and Phnom Kraol Security Centres.[3198] It determined that the crime against humanity of other inhumane acts through conduct characterised as enforced disappearances was not established with respect to the Cham.[3199] KHIEU Samphân challenges the Trial Chamber's findings concerning Tram Kak Cooperatives, Kraing Ta Chan Security Centre and Phnom Kraol Security Centre.[3200] These arguments will be addressed in turn.

a. Tram Kak Cooperatives

1145. In assessing whether enforced disappearances occurred at Tram Kak Cooperatives, the Trial Chamber found that a number of specific individuals were detained and disappeared within Tram Kak district, that political opponents and serious offenders could be arrested and disappeared, that Vietnamese persons were rounded up in 1975 and 1976, and were deported and disappeared, and that whole families of Khmer Krom disappeared.[3201] The Trial Chamber found that disappearances from Tram Kak Cooperatives were widespread and occurred in circumstances where persons were deprived of their liberty, and that widespread arrests were carried out by CPK agents.[3202] The Trial Chamber found that there was no legal process in place for persons to seek and obtain information about the fate of their relatives, and it was satisfied that the climate amounted to a general refusal to provide information about the fate of persons who disappeared.[3203] The Trial Chamber found that the enforced disappearances constituted attacks on human dignity against those who disappeared and caused serious mental or physical suffering to fellow prisoners who were left behind with no information of relative's or friend's fate.[3204] It considered that the disappearances were of a nature and gravity similar

[3197] Trial Judgment (E465), para. 753, referring to Case 002 Closing Order (D427), paras 1470-1478; Case 002 Severance Decision Annex (E301/9/1.1), p. 4. The Trial Chamber referred here also to S-21 and Au Kanseng Security Centres, but enforced disappearances at those two sites were not within the scope of Case 002/02. Case 002 Additional Severance Decision Annex, p. 4.
[3198] Trial Judgment (E465), paras 3927, 3986.
[3199] Trial Judgment (E465), para. 3342.
[3200] KHIEU Samphân's Appeal Brief (F54), paras 756-757, 837-840, 887-891.
[3201] Trial Judgment (E465), para. 1201.
[3202] Trial Judgment (E465), para. 1202.
[3203] Trial Judgment (E465), para. 1203.
[3204] Trial Judgment (E465), para. 1204.

to the enumerated crimes against humanity, thus establishing the *actus reus* of other inhumane acts. It found that the widespread and repeated nature of the conduct established that it was performed intentionally, thus satisfying the *mens rea*.[3205]

1146. KHIEU Samphân limits his arguments concerning enforced disappearances at Tram Kak Cooperatives to whether Vietnamese and Khmer Krom persons were disappeared. Concerning the Vietnamese, he argues that the Trial Chamber erred by finding that Vietnamese persons were deported "and/or" disappeared.[3206] He considers that the use of "and/or" shows that the Trial Chamber was unable to establish beyond reasonable doubt either deportation or enforced disappearances.[3207] He contends that any doubt should be resolved in his favour in accordance with the principle of *in dubio pro reo*, and that the Trial Chamber should not have found ethnic Vietnamese to be victims of enforced disappearance.[3208] Concerning the Khmer Krom, KHIEU Samphân argues that the Trial Chamber erred in law and in fact in finding that the Khmer Krom had disappeared as a group, as facts concerning Khmer Krom fell outside the scope of the trial and the Chamber could not establish the elements of the crime using out-of-scope evidence.[3209]

1147. The Co-Prosecutors respond that the finding that Vietnamese were deported and/or disappeared did not signify an inability to conclude beyond reasonable doubt that Vietnamese were either deported or disappeared, but rather that given the circumstances, the Trial Chamber inferred that Vietnamese were deported and the persons deported were also victims of enforced disappearance.[3210] They respond that the argument concerning *in dubio pro reo* fails as the Trial Chamber's findings contain no element of reasonable doubt.[3211] Concerning the Khmer Krom, the Co-Prosecutors contend that KHIEU Samphân was not charged with or convicted of enforced disappearance of the Khmer Krom as a specific group or as a subgroup of the Vietnamese at Tram Kak, and that the Trial Chamber properly considered evidence that whole Khmer Krom families were disappeared alongside evidence that Vietnamese and other residents of the cooperatives disappeared during the regime.[3212]

[3205] Trial Judgment (E465), para. 1204.
[3206] KHIEU Samphân's Appeal Brief (F54), para. 756.
[3207] KHIEU Samphân's Appeal Brief (F54), para. 756.
[3208] KHIEU Samphân's Appeal Brief (F54), para. 756.
[3209] KHIEU Samphân's Appeal Brief (F54), para. 757.
[3210] Co-Prosecutors' Response (F54/1), para. 591.
[3211] Co-Prosecutors' Response (F54/1), para. 591.
[3212] Co-Prosecutors' Response (F54/1), para. 595.

1148. The Lead Co-Lawyers respond that because Vietnamese and Khmer Krom victims were only two of several groups subjected to enforced disappearance, KHIEU Samphân's arguments are insufficient to overturn the overall finding that the crime against humanity of other inhumane acts through conduct characterised as enforced disappearance was established.[3213] They argue that KHIEU Samphân's focus on the wording "and/or" ignores that the Trial Chamber made clear, unequivocal findings about a number of individuals who disappeared and shows a misunderstanding of the elements of the crime; it is not necessary to determine the fate of the Vietnamese individuals beyond reasonable doubt, but only to determine whether the elements of the crime against humanity of other inhumane acts were established.[3214] Concerning the Khmer Krom, the Lead Co-Lawyers respond that KHIEU Samphân misunderstands the Trial Chamber's decisions and the Closing Order; the Trial Chamber stated that it would not consider evidence of the persecution of the Khmer Krom people, but that it would examine evidence of other crimes charged, certain victims of which happened to be Khmer Krom, and the Closing Order did not limit disappearances from Tram Kak to any particular group.[3215]

1149. The Supreme Court Chamber finds KHIEU Samphân's arguments, which are limited to Vietnamese and Khmer Krom persons, insufficient to overturn the Trial Chamber's finding that the crime against humanity of other inhumane acts through conduct characterised as enforced disappearances was established at Tram Kak Cooperatives. The Trial Chamber did not conclude that only Vietnamese and Khmer Krom individuals disappeared. It found that a number of specific individuals disappeared, including Civil Party OEM Saroeurn's uncle, IM Chak who was taken from Champa Pagoda at the same time as others who disclosed they had high ranks or were senior officials or were even former teachers, soldiers, or police or customs officers.[3216] Others who disappeared included, RIEL Son's brother YA San, his uncle LONG Neak and his brother RIEL Oem, SAO Han's elder brother LUON Han, IM Vannak's brother IM Mach, various relatives of LOEP Neang, [and] TAK Sann's husband.[3217] Although this challenge does not require further consideration for this reason alone, this Chamber clarifies that it does not consider that the Trial Chamber erred with respect to the disappearance of Vietnamese or Khmer Krom. The Trial Chamber used the wording "deported and/or

[3213] Lead Co-Lawyers' Response (F54/2), para. 587.
[3214] Lead Co-Lawyers' Response (F54/2), paras 590-594.
[3215] Lead Co-Lawyers' Response (F54/2), para. 589.
[3216] Trial Judgment (E465), para. 1201, referring to Trial Judgment (E465), paras 959-960, 964.
[3217] Trial Judgment (E465), para. 1201.

disappeared" because it was unable to determine the ultimate fate of every Vietnamese person who disappeared from Tram Kak district. However, determining the fate of those who disappeared was unnecessary in order to establish whether other inhumane act occurred through conduct characterised as enforced disappearance. Accordingly, the Trial Chamber properly assessed whether the elements of the crime against humanity of other inhumane acts had been established. The Supreme Court Chamber refers to Section VI.E of this Judgment, which addresses the Khmer Krom.

b. Kraing Ta Chan Security Centre

1150. In assessing whether enforced disappearances occurred at Kraing Ta Chan Security Centre, a security centre located in Tram Kak district, the Trial Chamber stated that it had previously found that other inhumane acts through conduct characterised as enforced disappearances were established in relation to the Tram Kak Cooperatives.[3218] It noted that a legal issue arose as to whether the crime against humanity of other inhumane acts through conduct characterised as enforced disappearances should be considered in relation to Kraing Ta Chan, given that the Trial Chamber was satisfied that many of those who disappeared from Tram Kak Cooperatives were brought to Kraing Ta Chan.[3219] "In other words, is the disappearance established as an inhumane act just the once, at the moment of first disappearance in Tram Kak district, or can it be established a second time, at Kraing Ta Chan."[3220] The Trial Chamber concluded that, as in principle, the underlying conduct of enforced disappearance could be committed more than once in relation to the same person, provided the necessary elements of the crime against humanity of other inhumane acts was established on each occasion.[3221] Concerning Kraing Ta Chan specifically, it noted that, although the original deprivation of liberty began with arrests in the Tram Kak Cooperatives, it continued throughout detention at Kraing Ta Chan and:

> [s]ubsequently, the unrecorded nature of the new phase of detention, the almost inevitable and fatal result, combined with the form of the executions and burials committed by persons who may not have been involved in the original arrests, all served to ensure the complete denial of recourse for family or friends – either to intervene, or to determine the whereabouts of their loved ones' remains. These were deliberate and material steps by additional actors following the initial disappearance of persons from the cooperatives. The Chamber is satisfied that the removal of

[3218] Trial Judgment (E465), para. 2853.
[3219] Trial Judgment (E465), para. 2853.
[3220] Trial Judgment (E465), para. 2853.
[3221] Trial Judgment (E465), para. 2854.

> prisoners from detention buildings constituted the continued deprivation of liberty, and culminated in their execution.[3222]

The Trial Chamber found that there was a refusal to disclose information regarding the fate of detainees removed from detention buildings to fellow detainees or to family members and loved ones outside, as well as a complete denial of recourse to any of the applicable legal remedies and procedural guarantees under international law.[3223] The Trial Chamber noted that when prisoners were removed from detention buildings, it was under the ruse that they would be sent home, remaining prisoners were left to speculate as to the fate of those who were removed, and came to associate the playing of music over loudspeakers with disappearances and probable killings.[3224] In light of its findings concerning the prominence of the CPK at Kraing Ta Chan, the Trial Chamber was satisfied that the disappearances were carried out by state agents with the authorisation and support of the CPK.[3225] The Trial Chamber considered that the ongoing abduction of prisoners constituted a serious attack on their human dignity, and that third parties, such as fellow prisoners, were also caused serious mental and physical suffering constituting a serious attack on their human dignity, thus the enforced disappearances were of a nature and gravity similar to the enumerated crimes against humanity, establishing the *actus reus* of other inhumane acts.[3226] Regarding the *mens rea*, the Trial Chamber found that the conduct amounting to enforced disappearances "was carried out repeatedly and over a prolonged period of time with egregious disregard for the effect on either those detained or those who might seek information about those individuals", thereby satisfying this Chamber that the conduct was intentional and that the *mens rea* was therefore established.[3227]

1151. KHIEU Samphân argues that the Trial Chamber erred in law in finding that the underlying conduct of enforced disappearance can be committed more than once in relation to the same person, because enforced disappearance constitutes continuous criminal conduct.[3228] He quotes from the General Comment of the Working Group on Enforced or Involuntary Disappearances ("Working Group") on enforced disappearance as a continuous crime:

> Enforced disappearances are prototypical continuous acts. **The act** begins at the time of abduction and extends for the whole period of time that **the crime** is not complete [...].

[3222] Trial Judgment (E465), para. 2854.
[3223] Trial Judgment (E465), para. 2855.
[3224] Trial Judgment (E465), para. 2855.
[3225] Trial Judgment (E465), para. 2856.
[3226] Trial Judgment (E465), para. 2857.
[3227] Trial Judgment (E465), para. 2858.
[3228] KHIEU Samphân's Appeal Brief (F54), para. 837.

> The crime cannot be separated and the conviction should cover the enforced disappearance as a whole.[3229]

1152. KHIEU Samphân submits that the deprivation of liberty that began with the arrests at Tram Kak Cooperatives continued throughout the detention phase at Kraing Ta Chan and, although the conduct involved several perpetrators, the Trial Chamber erred by considering that there were two separate crimes, one in each location.[3230]

1153. The Co-Prosecutors respond that KHIEU Samphân has not demonstrated that the Trial Chamber erred in its interpretation of the law, and that he failed to provide any legal authority to support his contention that the act of enforced disappearance is continuous criminal conduct.[3231] The Co-Prosecutors further argue that the Trial Chamber's finding is irrelevant to the verdict because in some circumstances, the initial enforced disappearance was committed at Kraing Ta Chan.[3232] The Co-Prosecutors contend that as the other inhumane act of enforced disappearances lacked a specific legal definition and elements in 1975, the appropriate legal analysis was whether the crime of other inhumane acts was committed more than once, which the Trial Chamber correctly analysed.[3233] They consider that the two crimes against the same persons are of a discrete nature because they were committed by different perpetrators and caused suffering to two distinct groups of people: first, those left in the communes and worksites, and, second, those detained at Kraing Ta Chan.[3234] They respond that KHIEU Samphân's reliance on the General Comment of the Working Group is misleading and irrelevant as it applies to a person disappeared on one occasion by one perpetrator.[3235]

1154. According to the Lead Co-Lawyers, the Trial Chamber's findings concerning enforced disappearances at Kraing Ta Chan are important to the civil parties affected by the crime.[3236] They argue that KHIEU Samphân's interpretation would shield from liability those who oversee repeated further atrocities against the same group of people.[3237] The Lead Co-Lawyers agree with the Co-Prosecutors that this situation involves cases in which a particular person disappeared on two separate occasions with the disappearance carried out by different direct

[3229] KHIEU Samphân's Appeal Brief (F54), para. 837, quoting Report of the Working Group on Enforced or Involuntary Disappearances, 26 January 2011, UN Doc. A/HRC/16/48 ("Report of the Working Group"), paras 39-1, 39-5 (emphasis added by KHIEU Samphân).
[3230] KHIEU Samphân's Appeal Brief (F54), para. 839.
[3231] Co-Prosecutors' Response (F54/1), para. 852.
[3232] Co-Prosecutors' Response (F54/1), para. 852.
[3233] Co-Prosecutors' Response (F54/1), paras 853-854.
[3234] Co-Prosecutors' Response (F54/1), para. 855.
[3235] Co-Prosecutors' Response (F54/1), para. 857.
[3236] Lead Co-Lawyers' Response (F54/2), para. 605.
[3237] Lead Co-Lawyers' Response (F54/2), para. 607.

perpetrators, and add that each disappearance also involved separate groups of indirect victims and that an environment of fear and suffering was created in each place.[3238]

1155. The Supreme Court Chamber first notes that it cannot ascertain whether the Co-Prosecutors are correct in their assertion that KHIEU Samphân's argument concerning enforced disappearances at Kraing Ta Chan would not disturb the verdict because it addresses only individuals who disappeared from both locations but not persons who were disappeared for the first time at Kraing Ta Chan. The Co-Prosecutors have not cited any findings that there were individuals who were disappeared only from Kraing Ta Chan without first having been disappeared from Tram Kak Cooperatives, and the Trial Chamber's legal findings do not mention any such individuals.

1156. In 1975, enforced disappearance was not a discrete category of crimes against humanity with a specific legal definition and elements.[3239] Rather, what is at issue in the present case is conduct that amounts to the crime against humanity of other inhumane acts, that has been characterised as enforced disappearance. The question now is whether separate instances of other inhumane acts occurred at Tram Kak Cooperatives and at Kraing Ta Chan based on the disappearance of the same individuals from both locations.

1157. The particular elements of the crime of other inhumane acts are: (1) there was an act or omission of similar seriousness to the other acts enumerated as crimes against humanity; (2) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (3) the act or omission was performed intentionally.[3240]

1158. The Trial Chamber found, and KHIEU Samphân has not contested, that the disappearances from Tram Kak Cooperatives and from Kraing Ta Chan, although involving the same disappeared persons, were committed by different direct perpetrators and involved different victims.[3241] At Tram Kak, the victims, in addition to the disappeared persons, were "those left behind without any information as to their fate".[3242] The Trial Chamber found that the widespread arrests and disappearances created an atmosphere of fear that permeated the worksites and caused those who remained in the cooperatives serious mental or physical

[3238] Lead Co-Lawyers' Response (F54/2), para. 608.
[3239] See Case 002/01 Appeal Judgment (F36), para. 589.
[3240] Case 002/01 Appeal Judgment (F36), para. 580.
[3241] Trial Judgment (E465), paras 1204, 2854, 2857.
[3242] Trial Judgment (E465), para. 1204.

suffering.[3243] At Kraing Ta Chan, on the other hand, the victims, in addition to the persons disappeared and their family members and loved ones, were the other inmates in Kraing Ta Chan, who were left to speculate about the fate of those who disappeared and to fear that they too might be removed.[3244] The Trial Chamber found that this caused the inmates long-lasting psychological effects and serious mental and physical suffering, constituting a serious attack on their human dignity.[3245]

1159. While the persons disappeared from each location may have been the same, the disappearances were carried out by different direct perpetrators, at different times, from different locations, and affected different victims who remained in those different locations. In such a situation, the Trial Chamber did not err by considering that there were discrete intentional acts that caused serious mental or physical suffering or injury or constituted a serious attack on human dignity, such as that there amounted to discrete instances of other inhumane acts that occurred in each location.

1160. KHIEU Samphân's reference to the Working Group does not affect this analysis. The Working Group stated, in general comments to its General Comment on enforced disappearance as a continuous crime:

> 1. Enforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.
>
> 2. Even though the conduct violates several rights, including the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment and also violates or constitutes a grave threat to the right to life, the Working Group considers that an enforced disappearance is a unique and consolidated act, and not a combination of acts. Even if some aspects of the violation may have been completed before the entry into force of the relevant national or international instrument, if other parts of the violation are still continuing, until such time as the victim's fate or whereabouts are established, the matter should be heard, and the act should not be fragmented.
>
> 3. Thus, when an enforced disappearance began before the entry into force of an instrument or before the specific State accepted the jurisdiction of the competent body, the fact that the disappearance continues after the entry into force or the acceptance of the jurisdiction gives the institution the competence and jurisdiction to consider the act of enforced disappearance as a whole, and not only acts or omissions imputable to the State that followed the entry into force of the relevant legal instrument or the acceptance of the jurisdiction.[3246]

[3243] Trial Judgment (E465), para. 1204.
[3244] Trial Judgment (E465), paras 2855, 2857.
[3245] Trial Judgment (E465), para. 2857.
[3246] Report of the Working Group, pp. 11-12.

1161. It is evident from the general comments of the Working Group that it was discussing the continuous nature of the crime in the context of liability for the entire crime when the conduct began prior to a state ratifying a particular legal instrument or accepting jurisdiction of a competent body.[3247] It was not specifically addressing the question at issue here, where the same individuals were disappeared from multiple locations, causing serious mental and physical suffering and a serious attack on human dignity to different victims. Accordingly, this challenge is dismissed.

c. Phnom Kraol Security Centre

1162. Phnom Kraol Security Centre was a Sector 105 Security Office that consisted of Phnom Kraol Prison, two related sector offices, K-11 and K-17, and an execution site at nearby Trapeang Pring.[3248] In assessing whether enforced disappearances occurred at Phnom Kraol Security Centre, the Trial Chamber found that detainees were removed without explanation from K-17 and that conditions at K-11 and Phnom Kraol Prison were consistent with those at K-17 and representative of the Security Centre as a whole.[3249] It found that prisoners at the Security Centre were subjected to the disappearance of fellow prisoners without being told the reason for their disappearance, leaving those who remained with the belief that their fellow prisoners had been killed.[3250] It found that the removal of prisoners constituted a deprivation of liberty and that there was a refusal to disclose information to fellow detainees or family members regarding the fate or whereabouts of the disappeared persons and a complete denial of recourse to applicable legal remedies and procedural guarantees enshrined under international law.[3251] The Trial Chamber was satisfied that the disappearances were carried out by DK authorities, as Phnom Kraol was directly subordinate to Sector 105, which was overseen by the Party Centre.[3252] It found that the abduction of prisoners constituted a serious attack on their human dignity and that third parties experienced a long-lasting psychological effect, causing serious mental and physical suffering and constituting a serious attack on their human dignity.[3253] Accordingly, the Trial Chamber found that the enforced disappearances were of a nature and gravity similar to the enumerated crimes against humanity and that the *actus reus*

[3247] See Report of the Working Group, pp. 10-12.
[3248] Trial Judgment (E465), paras 3019, 3027.
[3249] Trial Judgment (E465), para. 3161.
[3250] Trial Judgment (E465), para. 3161.
[3251] Trial Judgment (E465), paras 3161, 3163.
[3252] Trial Judgment (E465), para. 3162.
[3253] Trial Judgment (E465), para. 3164.

was therefore established.[3254] In assessing whether the disappearances were intentional, the Trial Chamber took into consideration the existence of pretence and total absence of reasons furnished for the abduction of prisoners, the climate of uncertainty created by the disappearances, the vulnerability of other inmates exposed to these conditions, and the long-lasting pain and suffering inflicted on fellow inmates, family members, and friends.[3255] It was satisfied that "this egregious disregard for individual and collective rights is consistent with a pattern of wanton and calculated conduct" and that the conduct was intentional, thus establishing the *mens rea*.[3256]

1163. KHIEU Samphân submits that the Trial Chamber had jurisdiction over enforced disappearances only at K-17 rather than at Phnom Kraol Security Centre as a whole but the two persons it heard on the subject of enforced disappearances were detained at Phnom Kraol Prison, rather than K-17.[3257] He argues that the evidence the Trial Chamber relied on was based on hearsay.[3258] He contends that the Trial Chamber relied only on the inculpatory testimony of Sector 105 Secretary SAO Sarun to find that the disappearances were carried out by DK authorities but found that his exculpatory evidence was not credible, applying a double standard.[3259]

1164. The Co-Prosecutors respond that a Trial Chamber may rely on uncorroborated hearsay to establish a crime and the Trial Chamber applied a reasonable and cautious approach of relying on consistent and corroborated accounts of the removal of prisoners from K-17.[3260] Further, KHIEU Samphân failed to explain how the Trial Chamber's reliance on hearsay was unreasonable.[3261] They respond that the Trial Chamber properly decided which parts of SAO Sarun's testimony it found credible and which it did not and, in any event, the finding is independently corroborated by at least two other witnesses.[3262]

1165. The Lead Co-Lawyers respond that KHIEU Samphân is incorrect that there were only two witnesses heard on enforced disappearances and they were not held at K-17.[3263] They

[3254] Trial Judgment (E465), para. 3164.
[3255] Trial Judgment (E465), para. 3165.
[3256] Trial Judgment (E465), para. 3165.
[3257] KHIEU Samphân's Appeal Brief (F54), paras 887-888.
[3258] KHIEU Samphân's Appeal Brief (F54), paras 888-889.
[3259] KHIEU Samphân's Appeal Brief (F54), paras 890-891.
[3260] Co-Prosecutors' Response (F54/1), para. 878.
[3261] Co-Prosecutors' Response (F54/1), para. 879.
[3262] Co-Prosecutors' Response (F54/1), para. 880.
[3263] Lead Co-Lawyers' Response (F54/2), paras 610-613.

contest that the evidence relied on relating to K-11 and Phnom Kraol Prison was hearsay. The Trial Chamber relied on direct evidence to find that a climate of uncertainty and terror was created; those testifying might have had indirect knowledge about the eventual fate of the disappeared persons, but that was not what the evidence was used for.[3264]

1166. The Supreme Court Chamber has already addressed, and rejected, KHIEU Samphân's argument that the Trial Chamber was seised only of enforced disappearances at K-17 rather than at Phnom Kraol Security Centre as a whole.[3265] Furthermore, KHIEU Samphân is incorrect in claiming that the only witnesses the Trial Chamber heard concerning disappearances at K-17 were not held there. The Trial Chamber relied on the testimony of Witnesses CHAN Toi and NETH Savat for its finding that prisoners were removed from detention at K-17, put on trucks and never heard from again.[3266] CHAN Toi and NETH Savat were held at K-17 and spoke of disappearances they witnessed from K-17.[3267]

1167. KHIEU Samphân is also incorrect that the evidence relating to K-11 and Phnom Kraol Prison is hearsay. He quotes some of the Trial Chamber's findings, underlining what he considers to be hearsay:

> At the Security Centre, prisoners were subjected to the disappearance of fellow inmates without being told the reasons for their disappearances, *leaving them with the belief* that they had been killed. One account before the Chamber revealed that *prisoners were told* that they were being returned to their home villages, after which time they were never seen again. *Other witnesses variously heard*, either at the time or shortly after the fall of the DK regime, that prisoners had been transported in the direction of Kratie, with some accounts specifying that prisoners were taken there to be killed. The Chamber has accordingly satisfied itself that prisoners were in fact transported in the direction of Kratie after being removed from Phnom Kraol without explanation. The Chamber is satisfied that the removal of prisoners constitutes the deprivation of liberty.[3268]

1168. However, the Trial Chamber was not relying on the prisoners' beliefs or what they were told or heard in order to establish the truth of those beliefs/statements, that is to determine whether those who had disappeared were killed. Rather, it relied on this evidence in making findings concerning the effect that the disappearances had on fellow inmates and the climate of fear and uncertainty that was created by the disappearances.

[3264] Lead Co-Lawyers' Response (F54/2), paras 614-615.
[3265] See *supra* Section VI.A.2.b.
[3266] Trial Judgment (E465), para. 3090, referring to T. 10 March 2016, E1/399.1, pp. 27, 62; T. 11 March 2016, E1/400.1, p. 38.
[3267] T. 10 March 2016, E1/399.1, pp. 27, 62, 65; T. 11 March 2016, E1/400.1, pp. 15-16, 38.
[3268] KHIEU Samphân's Appeal Brief (F54), para. 888, quoting Trial Judgment (E465), para. 3161 (emphasis added by KHIEU Samphân).

1169. Finally, the Supreme Court Chamber rejects KHIEU Samphân's assertion that the Trial Chamber applied a double standard by improperly relying only on inculpatory portions of SAO Sarun's testimony.[3269] The Trial Chamber is the chamber charged with assessing and evaluating witness testimony and it certainly may accept portions of a witness's testimony while rejecting others. The Trial Chamber explained that SAO Sarun's testimony was "at best equivocal on the question of whether [arrests and detentions were] done on the supreme authority of *Angkar*" and evaluated his assertions in that regard by noting that Witness PHAN Van, son of former Sector 105 Secretary Laing, had testified that the sector did not have authority to order arrests and such decisions emanated from the Party Centre, which supported SAO Sarun's testimony.[3270] The Trial Chamber also explained why it accorded no weight to SAO Sarun's testimony that no arrests occurred during his time as Sector 105 Secretary.[3271]

1170. As none of KHIEU Samphân's arguments concerning enforced disappearances at Phnom Kraol demonstrate that the Trial Chamber erred or that its findings should be overturned, this allegation is therefore dismissed.

3. Forced Marriage and Rape in the Context of Forced Marriage

a. The Legality of Forced Marriage and Rape in the Context of Forced Marriage as the Crimes Against Humanity of Other Inhumane Acts

1171. The Trial Chamber considered whether conduct charged separately as forced marriage, and as rape in the context of forced marriage, was properly brought within the crime against humanity of "other inhumane acts" from a legal standpoint.[3272] In two separate analyses, the Trial Chamber held that there was no obligation to consider whether the charged conduct established an independent crime against humanity.[3273] The only relevant crime is that of other inhumane acts, which the Trial Chamber concluded had long been established under customary international law.[3274] The Supreme Court Chamber notes its previous finding that "other inhumane acts" was accepted as a residual category of crimes against humanity under customary international law by 1975, hence iterating that this statement of the law is correct.[3275]

[3269] See *supra* Section V.E.1.c.
[3270] Trial Judgment (E465), paras 3076-3077.
[3271] Trial Judgment (E465), para. 3078.
[3272] Trial Judgment (E465), paras 728-732, 740-749.
[3273] Trial Judgment (E465), paras 725, 727, 741.
[3274] Trial Judgment (E465), paras 723, 728, 741.
[3275] Case 002/01 Appeal Judgment (F36), paras 576, 589. See also *supra* Section VII.G.1.

1172. The Trial Chamber recalled the Closing Order, which charged that forced marriage occurred nationwide from 1975-1979, as evidenced by victims being forced to enter into conjugal relationships in coercive circumstances.[3276] The Trial Chamber stated that the right to freely enter into marriage is a fundamental right enshrined in the UDHR.[3277] The Trial Chamber acknowledged that the term "forced marriage" has been used in international jurisprudence to cover different factual circumstances,[3278] and it took into account international criminal case law on the gravity of the conduct.[3279] The Trial Chamber assessed whether the conduct alleged as forced marriage was established, and whether such conduct rises to the level of other inhumane acts.[3280]

1173. The Trial Chamber also deliberated on the charges of "rape in the context of forced marriage" in the Closing Order, which alleged that by imposing the consummation of forced marriages, the perpetrators knowingly committed a physical invasion of a sexual nature against the victims in coercive circumstances or where consent of the victim was absent.[3281] The Trial Chamber noted the understanding of rape as of 1975 to be:

> sexual penetration, however slight, of (a) the vagina or anus of the victim, by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.[3282]

The Trial Chamber concluded that this definition excluded males from being victims of rape in the context of forced marriage, and that it would assess whether the conduct could be characterised as another form of sexual violence of such gravity that it amounted to other inhumane acts.[3283] The Trial Chamber determined whether the underlying conduct of rape met the threshold of other inhumane acts after reviewing the facts of the case.[3284]

1174. KHIEU Samphân challenges the legality of forced marriage and rape in the context of forced marriage, as other inhumane acts. He challenges findings on: (1) the charged conduct of forced marriage, and the definition of rape; (2) "formal international unlawfulness", that is, the identification of violated basic rights; (3) the application of the principle of *ejusdem generis*;

[3276] See Trial Judgment (E465), para. 742 & fns 2259-2263, referring to, *inter alia*, Case 002 Closing Order (D427), paras 1442-1447.
[3277] Trial Judgment (E465), para. 743.
[3278] Trial Judgment (E465), para. 743.
[3279] Trial Judgment (E465), para. 747.
[3280] Trial Judgment (E465), para. 743.
[3281] Trial Judgment (E465), para. 729 & fn. 2233, referring to Case 002 Closing Order (D427), para. 1431.
[3282] Trial Judgment (E465), para. 731.
[3283] Trial Judgment (E465), para. 731.
[3284] Trial Judgment (E465), paras 732, 3695-3700.

and (4) the legality of the charged conduct of forced marriage under Cambodian law before the DK regime.[3285] These arguments are considered in turn below.

i. Forced Marriage

1175. The Closing Order charged KHIEU Samphân with the crime against humanity of other inhumane acts through conduct characterised as forced marriage nationwide, alleging that victims were forced to enter into conjugal relationships in coercive circumstances.[3286] The Trial Chamber noted that in "the majority of cases of forced marriage death threats were made, violence was used and people were even executed if they refused to marry",[3287] and that weddings "took place devoid of traditional involvement of the parents" with no respect for traditional rituals, and that marriages were performed at the same time involving between 20 and 60 couples.[3288] The Trial Chamber noted that the Closing Order explicitly cited the "imposition of sexual relations aimed at enforced procreation".[3289] The Trial Chamber stated that it would only determine whether the conduct alleged to amount to forced marriage had been established, and whether it rose to the level of other inhumane acts.[3290]

The Conduct of Forced Marriage

1176. KHIEU Samphân contends that the Trial Chamber erred in making its findings on the conduct of forced marriage because it relied on ICC and Special Court for Sierra Leone ("SCSL") jurisprudence, which did not exist in 1975-1979.[3291] He argues that these cases were not within the temporal jurisdiction of the ECCC.[3292]

[3285] See KHIEU Samphân's Appeal Brief (F54), paras 1098-1155, 1281-1301.
[3286] Trial Judgment (E465), para. 742, referring, *inter alia*, to Case 002 Closing Order (D427), paras 1442-1447.
[3287] Trial Judgment (E465), para. 742, referring to Case 002 Closing Order (D427), para. 1447.
[3288] Trial Judgment (E465), para. 742, referring to Case 002 Closing Order (D427), paras 1446-1447. The Supreme Court Chamber observes that only one of the findings, namely that victims were forced to enter into conjugal relationships in coercive circumstances, was included in the Closing Order as an explicit description of the conduct of forced marriage. The other findings highlighted by the Trial Chamber were all made as part of the assessments of individual criminal responsibility, and *chapeau* elements. The findings that death threats forced individuals to marry, and that ceremonies took place without traditional rituals, were made to demonstrate the existence of a common purpose which included the regulation of forced marriage, as was the finding that some witnesses were forced to consummate their marriages. See Case 002 Closing Order (D427), paras 1446-1447. The finding that there was an imposition of sexual relations aimed at enforced procreation was described as part of the attack against the civilian population. See Case 002 Closing Order (D427), paras 1445, 1447. Nonetheless, this Chamber is satisfied that these findings were all part of the conduct charged as forced marriage.
[3289] Trial Judgment (E465), para. 742, referring to Case 002 Closing Order (D427), para. 1445.
[3290] Trial Judgment (E465), para. 743.
[3291] KHIEU Samphân's Appeal Brief (F54), para. 1105.
[3292] KHIEU Samphân's Appeal Brief (F54), para. 1105.

1177. The Co-Prosecutors respond that the Trial Chamber did not rely on SCSL or ICC jurisprudence to establish the legality of the conduct, but rather used it to delineate that conduct.[3293]

1178. The Trial Chamber noted that the term "forced marriage" has been used in international jurisprudence to describe a range of different factual circumstances.[3294] The Trial Chamber considered the SCSL Appeals Chamber's ruling, in the *AFRC* case, which described forced marriage as "a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as conjugal partner resulting in severe suffering, or physical or psychological injury".[3295] The same description of forced marriage was adopted in the *RUF* case.[3296] The Trial Chamber noted the SCSL Appeals Chamber's ruling that forced marriage differed from sexual slavery because it was "not predominantly a sexual crime".[3297] The Trial Chamber also analysed the ICC Pre-Trial Chamber's decision in *Ongwen*, which stated that the "central element of forced marriage is the imposition of 'marriage' on the victim, that is, the imposition, regardless of the will of the victim, of duties that are associated with marriage [...] with the consequent social stigma".[3298] The *Ongwen* Trial Chamber found that "physical violence was used as a mode of coercion to prevent escape, to rape, and to obtain labour."[3299] As noted by the Trial Chamber, the *Ongwen* Pre-Trial Chamber also determined that "the 'element of exclusivity of this forced conjugal union imposed on the victim is the characteristic aspect of forced marriage' and that the victims of forced marriage 'suffer separate and additional harm to those of the crime of sexual slavery'".[3300] The Trial Chamber was not satisfied that there existed a common understanding of the term of "forced marriage".[3301] Accordingly, the Trial

[3293] Co-Prosecutors' Response (F54/1), para. 673.
[3294] Trial Judgment (E465), para. 743.
[3295] Trial Judgment (E465), para. 744, referring to *Prosecutor v. Brima et al.*, Appeals Chamber (SCSL), Judgment, 3 March 2008 ("*AFRC* Appeal Judgment (SCSL)"), paras 195-196.
[3296] Trial Judgment (E465), para. 744, referring to *Prosecutor v. Sesay et al.*, Appeals Chamber (SCSL), SCSL-04-15-A, Judgment, 26 October 2009 ("*RUF* Appeal Judgment (SCSL)"), paras 735-736.
[3297] Trial Judgment (E465), para. 744, referring to *AFRC* Appeal Judgment (SCSL), para. 195.
[3298] Trial Judgment (E465), para. 745, referring to *Prosecutor v. Ongwen*, Pre-Trial Chamber II (ICC), ICC-02/04-01/15, Decision on the Confirmation of Charges against Dominic Ongwen, 23 March 2016 ("*Ongwen* Confirmation of Charges Decision (ICC)"), para. 93.
[3299] *Prosecutor v. Ongwen*, Trial Chamber IX (ICC), ICC-02/04-01/15, Trial Judgment, 4 February 2021 ("*Ongwen* Trial Judgment (ICC)"), para. 2309.
[3300] Trial Judgment (E465), para. 745, referring to *Ongwen* Confirmation of Charges Decision (ICC), para. 93.
[3301] Trial Judgment (E465), para. 743.

Chamber proceeded to determine whether the alleged conduct of forced marriage in this case had been established and whether it rose to the level of other inhumane acts.[3302]

1179. As a preliminary matter, the Supreme Court Chamber observes that the Trial Chamber did not rely on case law to demonstrate the illegality of this conduct, as argued by KHIEU Samphân. Instead, it viewed the case law as a means of contextualising the conduct of forced marriage and determining whether it met the threshold for the crime against humanity of other inhumane acts. This Chamber considers that this approach enables a Trial Chamber to comply with the principle of *lex certa*. The International Co-Investigating Judge, for instance, considered that a cautious approach to other inhumane acts "has almost always involved reference to international criminal jurisprudence and international human rights and legal instruments to define or outline the elements of the conduct".[3303] KHIEU Samphân's submission that the jurisprudence of the ICC and SCSL is outside the ECCC's temporal jurisdiction is thus without merit.

1180. The Supreme Court Chamber also observes that, based on an examination of the ICC and SCSL case law, the Trial Chamber determined that there was no "common understanding" of the term "forced marriage" due to the different factual circumstances at issue.[3304] This Chamber notes that there is a convergence in international criminal case law, both in terms of understanding the conduct of forced marriage that triggers criminal responsibility and the factual circumstances under which it has occurred thus far. Given that forced marriages differed significantly in the DK regime, this Chamber deems that clarifying the similarities and differences is critical to understanding the scope of the alleged conduct.

1181. The Supreme Court Chamber notes that the conduct of forced marriage has been consistently described by other international criminal courts and tribunals as a forced conjugal association. Justice Doherty, dissenting in part in the *AFRC* Trial Judgment, first described forced marriage as a situation where "a relationship of a conjugal nature with the perpetrator thereby subsum[es] the victim's will and undermin[es] the victim's exercise of their right to self-determination."[3305]

[3302] Trial Judgment (E465), para. 743.
[3303] Case 004 Consolidated Decision on the Requests (D301/5), para. 63.
[3304] Trial Judgment (E465), para. 743. See also Trial Judgment (E465), para. 3525.
[3305] *Prosecutor v. Brima et al*., Trial Chamber II (SCSL), SCSL-04-16-T, Judgement, 20 June 2007 ("*AFRC* Trial Judgment (SCSL)"), Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), para. 69.

1182. The Supreme Court Chamber observes that subsequent rulings expounded on the description of the conduct that amounted to forced marriage, but retained the essential understanding that this conduct constitutes forced sexual intercourse. The Pre-Trial Chamber of the ICC referred to the additional component of "imposition […] of duties that are associated with marriage", concluding that the core conduct of forced marriage was "the element of exclusivity of this forced conjugal union."[3306] In addition, the *Ongwen* Trial Judgment referred to forced household work and other labour as an additional aspect of the conduct.[3307] The ICC's *Al Hassan* Pre-Trial Chamber I, following the Pre-Trial Chamber II in the *Ongwen* case, described how forced marriage consisted of "forcing a person, independently of his/her consent, to establish a union with another person through the use of physical or psychological force, the threat of force or through a coercive environment."[3308] It further elucidated, that the crime of other inhumane acts committed by conduct qualified as "forced marriage" does not require proof of a lack of consent of the victim.[3309]

1183. The Supreme Court Chamber also observes that so far, the incidents of forced marriage in international criminal law have involved "husband" perpetrators and female "wife" victims. The "bush wife" phenomenon first beame known through the establishment of the SCSL and its prosecutions of forced marriage in the Sierra Leonean war in 1991-2002. The ICC also charged the Lord's Resistance Army ("LRA") in Uganda with forced marriages from the 1990s and early 2000s, and Ansar Dine/Al-Qaeda in the Islamic Magreb in Mali from 2012. There, girls and women were abducted, often raped, and forced to "marry" a rebel.

1184. A prominent illustration of the extent to which forced marriage has, as a fact pattern, assumed a male perpetrator and female victim emerges in the dispute over whether forced marriage should be subsumed into the crime of sexual slavery. The *AFRC* Trial Chamber considered *inter alia*, that, sexual violence perpetrated by a male "husband" against his "wife" was the essence of the crime of forced marriage, and that forced marriage should thus be

[3306] *Ongwen* Confirmation of Charges Decision (ICC), para. 93. See also Trial Judgment (E465), para. 745, referring to *Ongwen* Confirmation of Charges Decision (ICC), paras 88, 93.
[3307] See *Ongwen* Trial Judgment (ICC), paras 2289-2308.
[3308] *Le Procureur c. Al Hassan*, La Chambre Préliminaire I (ICC), ICC-01/12-01/18, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 13 Novembre 2019 ("*Al Hassan* Confirmation of Charges Decision (ICC)"), para. 559 (unofficial translation).
[3309] *Al Hassan* Confirmation of Charges Decision (ICC), para. 559 ("*Comme l'a indiqué la Chambre préliminaire II, le comportement spécifique sanctionné par l'article 7-1-k du Statut, sous la forme d'un mariage forcé, consiste à forcer une personne, indépendamment de sa volonté, à établir une union conjugale avec une autre personne par l'emploi de la force physique ou psychologique, la menace de la force ou à la faveur d'un environnement coercitif. Toutefois, le crime d'autres actes inhumains au moyen d'un comportement qualifié de « mariage forcé » n'exige pas la preuve d'une absence de consentement de la part de la victime.*").

subsumed into the crime of sexual slavery.[3310] According to the *AFRC* Appeals Chamber, forced marriage "share[d] certain elements with sexual slavery such as non-consensual sex and deprivation of liberty", but had certain distinctive elements.[3311] It held that by consequence, "forced marriage is not predominantly a sexual crime."[3312]

1185. The Supreme Court Chamber notes that, while other international criminal courts provide a range of descriptions of conduct that constitutes forced marriage, there is emerging consensus on the nature and essence of forced marriage to encompass a forced conjugal association. This Chamber finds that the acts of forcibly marrying males and females violated the basic rights of physical integrity and human dignity applicable in 1975-1979 and are of comparable gravity to the enumerated crimes against humanity. While forced marriage has occurred and continues to occur during conflict time, most commonly as committed by male perpetrators against female victims,[3313] there is no limit to the understanding of the conduct to this fact pattern. Given that this conduct is not an independent crime, but is charged as other inhumane acts, it is difficult to adequately exemplify definitive ways in which it is perpetrated during conflict. This Chamber concludes that victims of forced marriage include both males and females.

"Formal International Unlawfulness"

1186. KHIEU Samphân contends that the Trial Chamber erred in assessing the standard of "formal international unlawfulness" outlined by the Supreme Court Chamber in Case 002/01, that is, whether the conduct of forced marriage "violated basic rights."[3314] He further argues that the Trial Chamber relied solely on one international instrument, the UDHR,[3315] and claims that no other international instruments prohibited forced marriage in 1975-1979.[3316] He cites the International Co-Investigating Judge's reasoning for refusing to conduct an investigation

[3310] *AFRC* Trial Judgment (SCSL), para. 711.
[3311] *AFRC* Appeal Judgment (SCSL), para. 195.
[3312] *AFRC* Appeal Judgment (SCSL), para. 195.
[3313] UN Secretary-General report on forced marriage, in which the vast majority of identified victims are female, see United Nations Security Council, "Conflict-Related Sexual Violence: Report of the Secretary-General", UN Doc. S/2021/312, 30 March 2021, in which the vast majority of identified victims are female.
[3314] KHIEU Samphân's Appeal Brief (F54), paras 1099-1103, referring, *inter alia*, to Case 002/01 Appeal Judgment (F36), para. 584.
[3315] KHIEU Samphân's Appeal Brief (F54), paras 1103-1104, 1111. See also KHIEU Samphân's Appeal Brief (F54), para. 1141.
[3316] KHIEU Samphân's Appeal Brief (F54), paras 1108-1109.

into the crimes of forced pregnancy and insemination to illustrate what he submits is a proper evaluation of the question of international illegality.[3317]

1187. The Co-Prosecutors respond that the Trial Chamber clearly identified a basic right that had been infringed when it found that the right to marry freely is enshrined in the UDHR.[3318] The Co-Prosecutors cite a slew of international legislative materials that also prohibited forced marriage in 1975-1979,[3319] as well as other instruments that "demand respect for family rights."[3320]

1188. The Supreme Court Chamber adopted the concept of "formal international unlawfulness" in its discussion of the parameters of the crime of other inhumane acts in Case 002/01[3321] and considered that:

> relating 'other inhumane acts' to conduct infringing basic rights appertaining to human beings, as identified under international legal instruments, is a tenable concept in that, in addition to the material element traditionally identified through the criterion of *ejusdem generis*, it also introduces a requirement of formal international unlawfulness and, in this way, a further limitation on a blanket authorisation to interpret 'other inhumane acts'.[3322]

1189. It is this Chamber's view that determining "formal international unlawfulness" is not an enquiry into the existence of a criminal prohibition.[3323] In considering "unlawfulness", this Chamber concluded that it is not necessary for the specific charged conduct be expressly criminalised under international law.[3324] Instead, as with recourse to the case law of international criminal courts and tribunals, identifying violated basic rights is one way of

[3317] KHIEU Samphân's Appeal Brief (F54), para. 1110, referring to Case 004 Consolidated Decision on the Requests (D301/5), para. 74.
[3318] Co-Prosecutors' Response (F54/1), para. 668. See also Co-Prosecutors' Response (F54/1), para. 723.
[3319] Co-Prosecutors' Response (F54/1), paras 669-670. The Co-Prosecutors point to Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *entered into force* 30 April 1957, 266 U.N.T.S. 3 ("Supplementary Convention on the Abolition of Slavery"), which Cambodia acceded to on 12 June 1957; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, *entered into force* 9 December 1964, 521 U.N.T.S 231 ("Convention on Consent to Marriage"); the ICCPR and International Covenant on Economic, Social and Cultural Rights, *entered into force* 3 January 1976, 993 U.N.T.S. 3 ("ICESCR"), which each came into force early in the DK regime; Declaration on the Elimination of Discrimination against Women, 7 November 1967, A/RES/22/2263 ("Declaration on the Discrimination Elimination"); Convention on the Elimination of All Forms of Discrimination against Women, *entered into force* 3 September 1981, 1249 U.N.T.S 13 ("CEDAW"), signed by IENG Sary in October 1980. Co-Prosecutors' Response (F54/1), paras 669-670. The Co-Prosecutors also point to regional instruments: African Charter on Human and Peoples' Rights, *entered into force* 21 October 1986, 1520 U.N.T.S 217 ("ACHPR"), the ECHR. Co-Prosecutors' Response (F54/1), para. 671 & fn. 2289.
[3320] Co-Prosecutors' Response (F54/1), para. 671. The Co-Prosecutors point to the 1899 and 1907 Hague Regulations, and the Geneva Convention IV.
[3321] Case 002/01 Appeal Judgment (F36), para. 584.
[3322] Case 002/01 Appeal Judgment (F36), para. 584.
[3323] See *supra* Section VII.G.1.
[3324] Case 002/01 Appeal Judgment (F36), para. 584.

delineating and specifying the crime of other inhumane acts. The Trial Chamber's conduct of this exercise is not governed by the requirement that the crime of other inhumane acts be sufficiently specified.

1190. The exercise of identifying basic rights violated by the charged conduct is one important way in which the crime of other inhumane acts may be rendered compliant with the principle of *lex certa* as this Chamber has previously determined. While the Trial Chamber did not expressly state that it was assessing violated basic rights, it stated that "[t]he right to enter into marriage freely is a fundamental right", enshrined in the UDHR, which states that "[m]arriage shall be entered into only with the free and full consent of the intending spouses."[3325] This Chamber further considers that the fact-pattern at issue in this case, involving both male and female victims of a state-imposed policy of forced marriage, is in contrast to the existing case law that presupposes situations involving a male perpetrator and a female victim. The Supreme Court Chamber will, therefore, consider whether the Trial Chamber properly appraised the question of violated basic rights.

1191. The Supreme Court Chamber finds no error in the Trial Chamber's finding that a basic right had been violated. The UDHR contains an affirmative articulation of the right described by the Trial Chamber. This Chamber also observes that the Trial Chamber did not rely solely on this instrument to delineate the category of other inhumane acts, but also took into account case law from the SCSL and ICC in order to identify the conduct charged as forced marriage, as well as to delineate the comparable gravity of the conduct. Accordingly, the Trial Chamber's approach clearly demonstrates that it weighed the peculiarity of the crime against humanity of other inhumane acts and adopted appropriate reasoning and conclusions.

1192. This Chamber recalls that Justice Doherty, dissenting in the *AFRC* Trial Judgment, stated that the crime of forced marriage was "concerned primarily with the mental and moral suffering of the victim."[3326] Similarly, the *Ongwen* Trial Chamber determined that the harm suffered from forced marriage can include, *inter alia*, "mental trauma" and a "serious attack on the victim's dignity".[3327] While, this Chamber, as outlined above, finds that in the particular circumstances of this case, forced marriage also resulted in a number of acts of physical violation, implying that it was not primarily a crime of mental or moral suffering, this Chamber

[3325] Trial Judgment (E465), para. 743, quoting the UDHR, Art. 16(2).
[3326] *AFRC* Trial Judgment (SCSL), Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), para. 70.
[3327] *Ongwen* Trial Judgment (ICC), paras 2748-2749.

concludes that this is an additional component of the harm. Indeed, between 1975 and 1979, the UDHR recognised these values.

1193. In addition to citing the UDHR which prescribes the right not to be forcibly married, a similar right was expressed in Article 2 of the Supplementary Convention on the Abolition of Slavery, to which Cambodia acceded on 12 June 1957, which calls on States Parties to undertake certain steps "to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority".[3328]

1194. The conduct of forced marriage as charged in this case violated several other rights that were established in 1975-1979. Individuals who entered into marriages under threat of physical punishment or even death faced a serious violation of their physical autonomy.[3329] This Chamber further finds that the harm of forced marriage included a violation of privacy, which was also continuing. The UDHR specifically recognises the right to freedom from interference with privacy and family life, which encompasses the right to personal autonomy, personal development, and the ability to create and develop relationships with other human beings and the outside world.[3330]

1195. The alleged conduct of forced marriage in this case also included forced sexual intercourse with regard to both female and male victims. While this Chamber in Case 001 found that rape was not established as an independent crime against humanity in 1975-1979,[3331] it did so because it was not until reports of widespread or systematic rape in the early 1990s that the elements of rape as a crime against humanity crystallised. Between 1975-1979, the underlying conduct of forced sexual intercourse was, at a minimum, internationally recognised as a violation of basic rights. Furthermore, forced sexual intercourse is a form of cruel, inhuman and degrading treatment that is prohibited under international law and in Cambodia, which

[3328] Supplementary Convention on the Abolition of Slavery, Art. 2.
[3329] Physical autonomy is a component of the right to liberty and security of person, protected by Article 3 of the UDHR. Although the UDHR is not a binding legal instrument, the inclusion of rights in the UDHR indicates the international recognition of these rights. Further, United Nations member states were called upon by the General Assembly to publicise and disseminate the UDHR, in order to encourage its compliance. See UN General Assembly Res. 217 D (III) (10 December 1948). Cambodia has been a member of the United Nations since 1955.
[3330] Article 12 of the UDHR provides that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." (Substantially the same wording as that in Article 12 of the UDHR was thereafter used in Article 17 of the ICCPR. While Cambodia was not a signatory of the ICCPR between 1975 and 1979, the use of the same wording affirmed the international recognition of Article 12 of the UDHR.)
[3331] Case 001 Appeal Judgment (F28), para. 180.

joined the UN in 1955 and ratified the Geneva Conventions in 1958.[3332] Forced sexual intercourse, like forced marriage, certainly violates privacy and physical autonomy. This Chamber thus concludes that this conduct, properly described as forced sexual intercourse in the context of forced marriage, fell within the scope of crimes against humanity of other inhumane acts.

The Legality of Arranged Marriage

1196. KHIEU Samphân raises numerous piecemeal arguments about the relevance of traditional practices of arranged marriage in Khmer society and beyond. The Supreme Court Chamber notes that many of these submissions are inapt and difficult to ascertain, and recalls that the appealing party has the obligation to make clear and accurate submissions. This Chamber observes that some of these submissions pertain to legality, that is, the Trial Chamber's approach in outlining the charged conduct, and will be addressed in this section; others concern the Trial Chamber's findings on the gravity of conduct and the seriousness of harm, and will be addressed in turn.

1197. KHIEU Samphân contends that the 1920 Cambodian Civil Code required parental consent to marriage rather than individual consent.[3333] His Defence Counsel conceded in oral submission on appeal to being mistaken about the 1920 Cambodian Civil Code, and that this Code required individual consent for marriage.[3334] His Defence Counsel argued, however, that the technical requirement for consent in the 1920 Cambodian Civil Code did not imply an obligation to enforce against "forced marriage".[3335] KHIEU Samphân also argues that while "forced marriage" is now condemned by a large number of states, this was not the case in 1975-1979, showing that it was not recognised as a crime.[3336]

1198. According to the Co-Prosecutors, the 1920 Cambodian Civil Code was replaced prior to the Khmer Rouge period, and the applicable Code at least between 1953 and 1970 required individual consent for marriage.[3337] They argue that the gravity of the conduct and

[3332] Article 5 of the UDHR provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" and Article 3 common to Geneva Conventions I to IV prohibits, *inter alia*, cruel treatment and outrages upon personal dignity.
[3333] KHIEU Samphân's Appeal Brief (F54), paras 1123, 1128, 1141. KHIEU Samphân also argues that if *Angkar* took over the role of parental consent, then future spouses' consent was not required. See KHIEU Samphân's Appeal Brief (F54), para. 1162.
[3334] See T. 17 August 2021, F1/10.1, p. 40.
[3335] T. 17 August 2021, F1/10.1, p. 40.
[3336] KHIEU Samphân's Appeal Brief (F54), para. 1141.
[3337] Co-Prosecutors' Response (F54/1), para. 683.

foreseeability of criminal prosecution are also underpinned by a broader survey of national laws in other countries in 1975.[3338]

1199. The Lead Co-Lawyers respond that the DK regime's regulation of marriage policy was dehumanising, and thus a profound attack on human dignity.[3339] The Lead Co-Lawyers argue that although the 1920 Cambodian Civil Code required parental consent, "a correct reading of the Code shows that parental consent was subordinate to that of prospective spouses."[3340] Furthermore, KHIEU Samphân would have been aware that forced marriage was unlawful, under either domestic or international law.[3341]

1200. The Supreme Court Chamber observes that KHIEU Samphân disputes the substance of domestic laws in 1975-1979, claiming that Cambodia permitted forced marriage and did not criminalise it like other states, and cites the Supreme Court Chamber's finding in the Case 001 Appeal Judgment outlining various sources of compliance with the principle of legality.[3342] In it, the Supreme Court Chamber stated that, in addition to treaty laws, customary international law, and general principles of law, a Trial Chamber may consider "domestic law for the purpose of establishing that the accused could reasonably have known that the offense in question or the offense committed in the way charged in the indictment was prohibited and punishable."[3343]

1201. This Chamber considers that the finding highlighted by KHIEU Samphân is inapposite to assessing the legality of conduct charged within the crime of other inhumane acts, which the Trial Chamber correctly determined to be long-established under customary international law. Conduct that falls within the crime of other inhumane acts is not required to be established as an independent criminal prohibition. As a result, there is thus no requirement to conduct any review of legal sources to determine the criminality of forced marriage, and no right or, indeed, wrong source of law for identifying the conduct as other inhumane acts. This Chamber also considers that even if KHIEU Samphân's argument were accepted at its highest level, and forced marriage was expressly legalised under domestic law between 1975-1979, this would not have precluded a finding that criminal conduct occurred, but may be relevant to the issue of foreseeability. As the *United States v. Altstotter et al.* Trial Judgment, stated with regard to

[3338] Co-Prosecutors' Response (F54/1), para. 672, referring to various countries in Asia, Europe, Africa, South America and Oceania. See also Co-Prosecutors' Response (F54/1), para. 683.
[3339] Lead Co-Lawyers' Response (F54/2), paras 695-701.
[3340] Lead Co-Lawyers' Response (F54/2), para. 548.
[3341] Lead Co-Lawyers' Response (F54/2), paras 545-555, 562-565.
[3342] KHIEU Samphân's Appeal Brief (F54), para. 1112, referring to Case 001 Appeal Judgment (F28), para. 96.
[3343] Case 001 Appeal Judgment (F28), para. 96, quoting *Milutinović et al.* Decision (ICTY), para. 40.

Nazi Germany, "[t]he discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants [were] charged."[3344] The Supreme Court Chamber agrees here with the Trial Chamber's assertion that "it is a general principle that a perpetrator cannot rely on the conditions created by their own unlawful conduct to justify certain conduct."[3345]

1202. KHIEU Samphân's representations concerning the substance of Cambodian law between 1975-1979 are accordingly moot. Nonetheless, this Chamber will review the doemestic law refered to by KHIEU Samphân for completeness and to frame the subsequent discussion.

1203. The 1920 Cambodian Civil Code does not subordinate the principle of individual consent to marriage to that of parental consent. Article 133 of the Code did require consent from parents of the putative spouses, but at the same time, protected an individual's right to consent to a spouse. Pursuant to Article 106, "[a]n engagement is the promise two persons have kept taking each other as spouse legally." Article 114 provides that "[s]pouse is the status indicating man and woman having legally registered in a wedding ceremony with mutual consent permissible under the law and not dissolvable at will." The parental right to consent was also mitigated by rights to protect spouses. For example, if parental consent was not provided, spouses were able to request a meeting at the "Relative Council" to try to conciliate and reach agreement pursuant to the provisions of Article 134. If the reconciliation procedure does not result in agreement, the intending spouses could marry without the consent of their parents after a three-month waiting period. Furthermore, if a marriage was "forced", an application could be filed to reject the marriage in accordance with Article 163.

1204. This Chamber also observes that, assuming *arguendo* KHIEU Samphân's initial argument about the Code was correct, and consent for the purposes of marriage was a familial rather than an individual concept, this would not legalise the policy of forced marriage as manifested under the DK regime. Individual and familial consent are inextricably linked by the legal provisions, which reveal that the concept of arranged marriage is rooted in a complex and rich cultural framework. It is preposterous to claim that the concept of parental agreement to

[3344] *United States v. Altstotter et al.*, Opinion and Judgment (United States Military Tribunal), Case No. 35, 4 December 1947, in Trials of Individuals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1946-1949 (1951), Vol. III, p. 1063.
[3345] Trial Judgment (E465), fn. 2075.

marriage implies that any non-parental third party can step into that role and agree to marriage on behalf of an individual as was the case during the DK regime.

1205. The Supreme Court Chamber concludes that KHIEU Samphân claim that "forced marriage" is a new crime that was only recently legalised in various nation states is similarly misguided.[3346] Domestic laws in both civil and common law jurisdictions in 1975-1979 established that marriages entered into either without consent or through coercion were either void or voidable.[3347] KHIEU Samphân's submissions are therefore rejected.

Ejusdem Generis

1206. According to KHIEU Samphân, the Trial Chamber failed to examine the acts and omissions that have been more broadly characterised as other inhumane acts while assessing forced marriage, as required by the *ejusdem generis* principle.[3348] He contends that the SCSL's *AFRC* case shows that forced marriage in this case was not objectively grave.[3349] He submits that the women in the *AFRC* case were subjected to sexual violence, sexual enslavement, and rape committed by the militia, and were stigmatised long after the conflict.[3350]

[3346] KHIEU Samphân's Appeal Brief (F54), para. 1137.
[3347] In Thailand, Article 1507 of the Civil and Commercial Code, 1934 provides that a marriage is voidable if it arose from duress. In India, section 12(1)(c) of the Hindu Marriage Act, 1955 provides that a marriage is voidable if consent was obtained through force, and section 25(iii) of the Special Marriage Act, 1954 provides that marriages are voidable if either party's consent was obtained through coercion or fraud. In Iraq, Article 4 of the Personal Status Law, 1959 requires agreement of the parties to be married, even if one party is represented by an agent. In Tunisia, Book I of the Code of Personal Statutes, 1956 requires consent of both parties to the marriage for it to be valid. In Tanzania, section 38(1)(e) of the Law of Marriage Act, 1971 provides that a marriage is void if the consent of either party was not freely and voluntarily given. In South Africa, section 30 of the Marriage Act, 1961 requires the parties' agreement for a valid marriage to be concluded. A marriage is voidable if concluded under duress. In Nigeria, section 3(1)(d) of the Matrimonial Causes Act, 1970 provides that a marriage is void if consent is not properly obtained, including through duress. Article 146 of the French and Belgian Civil Codes (originally published in 1804) provides that there is no marriage without consent. In England and Wales, section 12(1)(c) of the Matrimonial Causes Act, 1973 provides that marriage is voidable if the parties did not validly consent, including as a result of duress. In Spain, Article 45 of the Civil Code, 1889 provides that there shall be no marriage without valid consent. In Brazil, Article 209 read with Article 183(IX) of the Civil Code of the United States of Brazil, 1916 provided that duress or other invalid consent rendered a marriage voidable. In Mexico, Article 235(III) read with Article 98(II) of the Federal Civil Code, provided that a lack of consent renders a marriage a nullity. In Costa Rica, Article 15(1) of the Family Code, 1974 provides that a marriage is voidable if consent was obtained through violence or grave fear. In Cuba, Article 45(2) of the Family Code, 1975 provides that a marriage is null and void if consent was obtained through coercion or intimidation.
[3348] KHIEU Samphân's Appeal Brief (F54), para. 1148.
[3349] KHIEU Samphân's Appeal Brief (F54), para. 1105.
[3350] KHIEU Samphân's Appeal Brief (F54), para. 1105.

1207. The Co-Prosecutors do not expressly respond to this point, except to state that this Chamber has previously confirmed that there is no requirement that the underlying conduct be criminalised under international law at the time of commissions.[3351]

1208. In Case 002/01, the Supreme Court Chamber determined that the principle of *ejusdem generis* was an "essential safeguard" for rendering the residual category of other inhumane acts sufficiently clear and precise.[3352] This Chamber reiterates that the *ejusdem generis* rule is essential, in order to reflect the *actus reus* elements of other inhumane acts, notably the requirement that the crimes in question be of comparable gravity to other enumerated crimes against humanity.[3353] There is, however, no precise way in which the principle of *ejusdem generis* should be determined or protected.

1209. In Case 002/02, the Trial Chamber evaluated case law on gravity while outlining the legal framework, that is, before making any factual findings. It took into account the SCSL Appeals Chamber's ruling in the *AFRC* case, which considered evidence of the physical and psychological suffering of victims of forced marriage and found that acts of forced marriage were of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery, and sexual violence.[3354] The Trial Chamber also took into account the ICC Pre-Trial Chamber's finding that forced marriage may cause great suffering and could be of a similar character to enumerated crimes against humanity.[3355] The Trial Chamber considered KHIEU Samphân's arguments that forced marriage under the DK regime was not as severe as elsewhere.[3356] It held that whether forced marriage amounted to other inhumane act is a factual assessment based on whether the conduct caused serious mental or physical suffering or injury or constituted a serious attack on human dignity.[3357]

1210. The Supreme Court Chamber notes that the Trial Chamber considered the comparative gravity of forced marriage findings by other international criminal courts and tribunals at the outset of its analysis. Given that the assessment was made in relation to the alleged conduct, this Chamber sees no error in the approach. The Trial Chamber's ruling that the determining

[3351] Co-Prosecutors' Response (F54/1), paras 385-388.
[3352] Case 002/01 Appeal Judgment (F36), para. 578.
[3353] Case 002/01 Appeal Judgment (F36), para. 586.
[3354] Trial Judgment (E465), para. 747, referring to *AFRC* Appeal Judgment (SCSL), paras 182, 186, 192, 195, 200.
[3355] Trial Judgment (E465), para. 747, referring to *Ongwen* Confirmation of Charges Decision (ICC), paras 89-91.
[3356] Trial Judgment (E465), para. 748.
[3357] Trial Judgment (E465), para. 748.

factor in assessing other inhumane acts was whether the alleged conduct satisfied the gravity threshold as a matter of fact was also without error. While the Trial Chamber did not expressly state that it was complying with the principle of *ejusdem generis*, the Supreme Court Chamber concludes that it did. Accordingly, KHIEU Samphân's argument is rejected.

1211. Having reviewed KHIEU Samphân's assertion that the charged conduct of forced marriage was not as grave as forced marriage found in other cases, this Chamber observes that he repeats arguments raised and carefully examined at trial. This Chamber recalls that there is an obligation upon an appellant to identify errors in the Trial Judgment rather than to repeat failed arguments made before the Trial Chamber.[3358] Nonetheless, given the different factual circumstances of the conduct considered to amount to forced marriage in this case, this Chamber will pronounce on the gravity of the alleged conduct. The Supreme Court Chamber first recalls that the Trial Chamber in assessing the gravity of these acts considered the mental and physical suffering inflicted upon individuals through the threats of forcing them to marry, the fact that they had to marry someone whom they did not know, the fear instilled to pressure them to consummate the marriage, and the fact that the conduct was performed intentionally.[3359] It determined that "[t]he severity of the mental suffering caused by being forced to marry in a coercive environment caused serious mental harm with lasting effects on the victims".[3360] The Trial Chamber thus concluded that this conduct was of similar gravity as other enumerated crimes against humanity.[3361]

1212. As mentioned above, the Supreme Court Chamber recalls that forced marriage prosecutions have often involved a female victim taken as a wife, and a male perpetrator as a husband, who is usually the abductor. A number of the findings on the gravity of forced marriage have been responsive to this particularly gendered fact-pattern. The *AFRC* Appeals Chamber held that some victims were psychologically traumatised by being wives, which resulted in them being ostracised from their communities. "In cases where they became pregnant from the forced marriage, both they and their children suffered long-term social stigmatisation."[3362] In assessing gravity, the *AFRC* Appeals Chamber considered, *inter alia*, the vulnerability of the female victims and their young age.[3363] In the *RUF* case, the SCSL Trial

[3358] See *supra* Section II.
[3359] Trial Judgment (E465), para. 3692.
[3360] Trial Judgment (E465), para. 3692.
[3361] Trial Judgment (E465), para. 3692.
[3362] *AFRC* Appeal Judgment (SCSL), para. 199.
[3363] *AFRC* Appeal Judgment (SCSL), para. 200.

Chamber found that "the use of the term 'wife' […] was deliberate and strategic, with the aim of […] psychologically manipulating the women".[3364] That Chamber further found that, in addition to the physical injuries suffered by the "wives", "the conjugal association forced upon the victims carried with it a lasting social stigma which hampers their recovery and reintegration into society".[3365] Such rulings were also endorsed by the ICC Pre-Trial Chamber in the *Al Hassan* case.[3366]

1213. These harms are not, generally, apposite to this case which, as previously stated, involves both men and women victims who were forcibly married to one another. Both men and women were often unknown to each other and forced to marry in mass wedding ceremonies, threatened with punishment or death if they resisted, were forced to engage in sexual intercourse while being monitored, and coerced to bear children for *Angkar*. Additionally, it is the considered opinion of this Chamber that the alleged conduct of forced marriage during the DK regime was deliberately orchestrated to subjugate both males and females, victimising them while further weaponising the male victims to have forced sexual intercourse with female victims while subjecting the same male victims to the same act of forced sexual intercourse against their will.[3367] This, in itself, heightened the gravity of the conduct alleged as forced marriage to the level of crimes against humanity. The Supreme Court Chamber thus considers that the conduct of forced marriage is clearly as grave as other conduct comprising crimes against humanity.[3368]

ii. Rape in the Context of Forced Marriage

[3364] *Prosecutor v. Sesay et al.*, Trial Chamber I (SCSL), SCSL-04-15-T, Judgement, 2 March 2009 ("*RUF* Trial Judgment (SCSL)"), para. 1466.
[3365] *RUF* Trial Judgment (SCSL), para. 1296.
[3366] *Al Hassan* Confirmation of Charges Decision (ICC), para. 555.
[3367] See *infra* Section VII.G.3.iii.c (b-c). This Chamber's finding that NAKAGAWA Kasumi's evidence that forced sexual intercourse "impacted extremely and disproportionately impacted over the man because men were tasked and forced to rape a wife", which was "[an] inhuman act". See *infra* para. 1561. See also this Chamber's consideration of MOM Vun's testimony that militia men forced her husband at gunpoint to have sex with her, during which she described how "[t]hey threatened us again and they used the torch on us and they actually got hold of his penis and to insert it into my thing [sic]. It was so disgusting, but we had no choice", and this Chamber's determination that while MOM Vun gave evidence about her own experience as a female victim of forced marriage, her account also attests to the visible harm to her husband, who was manhandled and forced into sexual activity at gunpoint. The Supreme Court Chamber is satisfied that this evidence was of direct relevance to the Trial Chamber's finding of harm, and should have been considered, See *infra* para. 1562. This Chamber further concluded that the male victims were not rapists but were tools and victim of sexual violence. See *infra* para. 1581.
[3368] See also *Ongwen* Trial Judgment (ICC), paras 2747-2748, where the Trial Chamber noted that forced marriage is similar in nature and gravity to the enumerated acts listed in Article 7(1) of the Statute, but also reflects a course of conduct which differs from those acts.

1214. The Trial Chamber determined that there was no requirement that rape as a specific kind of underlying conduct had been expressly recognised as falling within the category of other inhumane acts by 1975.[3369] The Trial Chamber considered the Closing Order allegation that the Accused was charged with the crime against humanity of other inhumane acts through conduct characterised as rape in the context of forced marriage.[3370] The Trial Chamber considered that the Closing Order alleged that, by imposing the consummation of forced marriage, the perpetrators intended to commit a physical invasion of a sexual nature against a victim in coercive circumstances in which consent was absent.[3371] As noted by the Trial Chamber, in Case 001, the Supreme Court Chamber held in Case 001 that rape required the sexual penetration, however slight, of: (1) the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (2) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.[3372] The Trial Chamber concluded that men fell outside this definition, and stated that it would consider, in the alternative, whether men were subjected to another form of sexual violence amounting to other inhumane acts,[3373] which was additionally charged in the Closing Order.[3374]

The Definition of Rape

1215. KHIEU Samphân submits that the Trial Chamber erred in applying the definition of rape which was established by the Supreme Court Chamber in Case 001 when identifying the elements of the crime of rape in 1975, rather than applying a different definition applicable to conjugal rape.[3375] He argues that the Trial Chamber ignored the fact that conjugal rape was not a crime in Khmer society in 1975,[3376] and it is still not expressly addressed and established in Cambodian law.[3377] He further contends, citing various civil and common law jurisdictions, that numerous countries have different definitions for rape that is committed in a conjugal

[3369] Trial Judgment (E465), para. 728.
[3370] Trial Judgment (E465), para. 729, referring, *inter alia*, to Case 002 Closing Order (D427), paras 1430-1433.
[3371] Trial Judgment (E465), para. 729, referring to Case 002 Closing Order (D427), para. 1431.
[3372] Trial Judgment (E465), para. 731, referring to Case 001 Trial Judgment (E188), para. 362. The Trial Chamber's definition of rape in Case 001 was endorsed by the Supreme Court Chamber. See Case 001 Appeal Judgment (F28), para. 208 & fn. 428.
[3373] Trial Judgment (E465), para. 731.
[3374] Trial Judgment (E465), fn. 2237, where the Trial Chamber stated that "[t]he Closing Order notes that: '[t]he facts characterised as crimes against humanity in the form of rape can additionally be categorised as crimes against humanity of other inhumane acts in the form of sexual violence.' See Closing Order (D427), para. 1433."
[3375] KHIEU Samphân's Appeal Brief (F54), paras 1291-1293.
[3376] KHIEU Samphân's Appeal Brief (F54), paras 1294-1296, 1316.
[3377] KHIEU Samphân's Appeal Brief (F54), paras 1297, 1316.

context.[3378] According to KHIEU Samphân, the Trial Chamber committed an error of law by applying a "classic" definition of rape to the facts alleged.[3379]

1216. The Co-Prosecutors respond that the nature and gravity of the conduct are not altered by the fact it occurred within marriage, and particularly forced marriage.[3380]

1217. According to the Lead Co-Lawyers, conjugal rape was criminalised in the 1956 Cambodian Penal Code, which defined rape without any caveat for conjugal rape.[3381] They submit that while courts in some jurisdictions have read in an exemption for conjugal rape, KHIEU Samphân has not provided any authority for the assertation that this applied in Cambodia.[3382] They further contend that a theoretical exemption for "conjugal rape" would be inapplicable because the marriages themselves were not consensual, and the rapes were perpetrated by DK leaders and cadres rather than the parties to the marriage, so any exemption for conjugal rape that existed would, in any case, be inapplicable.[3383]

1218. As a preliminary note, the Supreme Court Chamber considers that it is necessary to consider whether the Trial Chamber, in identifying the elements of rape, was conducting an appropriate exercise.

1219. This Chamber recalls that as previously outlined, there was no obligation to consider whether an independent crime against humanity was established by the charged conduct.[3384] The Trial Chamber set out the applicable law, noting that:

> none of these categories of conduct had crystallised as independent crimes against humanity by 1975, and they are not charged here as such. The Chamber must accordingly assess all such conduct against the definition of other inhumane acts. In order to carry out such assessment, the Chamber's task is facilitated by setting out its understanding of the constituent elements of such conduct, where it is determined necessary to ensure proper analysis.[3385]

The only relevant crime is the crime of other inhumane acts itself, which the Trial Chamber considered to have long been established under customary international law.[3386] The Trial Chamber correctly stated this standard, finding that there was no requirement that rape, as a

[3378] KHIEU Samphân's Appeal Brief (F54), paras 1298-1299.
[3379] KHIEU Samphân's Appeal Brief (F54), para. 1300.
[3380] Co-Prosecutors' Response (F54/1), paras 680-681.
[3381] Lead Co-Lawyers' Response (F54/2), para. 570.
[3382] Lead Co-Lawyers' Response (F54/2), para. 571.
[3383] Lead Co-Lawyers' Response (F54/2), paras 573-575.
[3384] Trial Judgment (E465), paras 725, 741.
[3385] Trial Judgment (E465), para. 727.
[3386] Trial Judgment (E465), para. 728.

specific kind of underlying conduct, was expressly recognised as a crime by 1975.[3387] Despite correctly stating the standard, the Trial Chamber did not apply it properly. Instead, it sought to identify the "elements" of the crime of rape, as if the charged conduct had to also amount to an independent crime. This Chamber considers an attempt to identify "elements" for conduct within the scope of other inhumane acts to be legally misguided and anachronistic.[3388] The rationale for the crime of other inhumane acts is to capture conduct which is not independently criminalised: therefore, it would be illogical to seek to identify criminal elements of such conduct.

1220. The Supreme Court Chamber determines that the Trial Chamber erred in its identification of the elements of rape in its analysis. Rather, the Trial Chamber should have only considered whether the charged conduct had occurred in fact and whether this conduct otherwise met the elements of the crime of other inhumane acts. As a result, KHIEU Samphân's claim that the Trial Chamber should have found different elements, specifically those of the crime of "conjugal rape", is rendered moot.[3389] In order to correct the Trial Chamber's error, this Chamber will accordingly identify the charged conduct.

1221. The Co-Investigating Judges considered that, based on the factual findings made in the "Marriage" section of the Case 002 Closing Order, the legal elements of the crime of against humanity of rape had been established in the context of forced marriage.[3390] The Co-Investigating Judges found that by imposing the consummation of forced marriages, the perpetrators committed a physical invasion of a sexual nature against a victim in coercive circumstances in which the consent of the victim was absent.[3391] Consummation of marriage was regularly monitored by CPK cadres and couples who refused to consummate the marriage would be arrested.[3392] The *mens rea* was that the perpetrators intended the physical invasion of a sexual nature, with the knowledge that it occurred in coercive circumstances or without the

[3387] Trial Judgment (E465), para. 728.
[3388] See Case 002/01 Appeal Judgment (F36), para. 589.
[3389] The Supreme Court Chamber considers that it is, in any event, hard to imagine such arguments being successful as a challenge even if conduct had in fact been charged as the independent crime of rape. There was a crime of rape in Cambodia in 1975 which had no marital exemption. KHIEU Samphân fails to identify an exception for rape in marriage under Cambodian law. He relies instead on amorphous cultural assertions, such as the argument that women were oppressed in marriage according to the textual doctrine of "Chbab srey," and the claim that amorous feelings were not considered as a prerequisite in traditional marriage. See KHIEU Samphân's Appeal Brief (F54), paras 1317-1318. As to whether other countries had a marital exemption for rape in 1975-1979, KHIEU Samphân fails to explain why this is of relevance for Cambodia in 1975-1979.
[3390] Case 002 Closing Order (D427), para. 1430.
[3391] Case 002 Closing Order (D427), para. 1431.
[3392] Case 002 Closing Order (D427), para. 1432.

consent of the victim.[3393] The Co-Investigating Judges concluded that, "[b]ased on these facts, the crime of rape in the context of forced marriage was one of the crimes used by the CPK leaders to implement the common purpose."[3394]

1222. The formulation outlined in the Closing Order, then, heralds the incorrect approach adopted by the Trial Chamber, focusing on the "elements" of crimes, rather than the conduct of forced consummation. The Closing Order was, however, clearly amended on this point by the Pre-Trial Chamber.[3395] The Pre-Trial Chamber held that while rape had long been prohibited as a war crime, it was not enumerated as a separate crime against humanity from 1975-1979.[3396] Accordingly, the Pre-Trial Chamber found that the Co-Investigating Judges erred in charging rape as an enumerated crime against humanity, but upheld the Co-Investigating Judges' finding that "the facts characterised as crime against humanity in the form of rape can be characterised as crimes against humanity of other inhumane acts and therefore are to be charged as such."[3397] While the Trial Chamber referred to the change in Closing Order in a footnote,[3398] it appears to have followed the Closing Order's language in its unamended form.

1223. The primary conduct which underpins the charge of rape and sexual violence in the Closing Order is the forced consummation of marriage, in other words, a forced act of sexual intercourse between a forcibly married man and woman. The coercive circumstances as charged are demonstrated by the fact that, immediately after the ceremony, couples reported that they were relocated to an area whereby the consummation of marriage was monitored by CPK cadres.[3399] Other witnesses reported a fear of physical violence, imprisonment, or even death if they failed to consummate their marriages.[3400] A coercive atmosphere was also established by the forced marriages themselves which, as outlined above, took place in a situation in which individuals feared death or other forms of punishment.

[3393] Case 002 Closing Order (D427), para. 1431.
[3394] Case 002 Closing Order (D427), para. 1432.
[3395] Case 002, Decision IENG Thirith's and NUON Chea's Appeals Against the Closing Order, 13 January 2011, D427/3/12 ("Case 002 Decision on Appeals Against Closing Order (D427/3/12)"), para. 11(2); Case 002 Decision on Closing Order Appeals (D427/2/15 & D427/3/15), paras 149-166.
[3396] Case 002 Decision on Closing Order Appeals (D427/2/15 & D427/3/15), paras 150-154.
[3397] Case 002 Decision on Closing Order Appeals (D427/2/15 & D427/3/15), para. 154; Case 002 Decision on Appeals Against Closing Order (D427/3/12), para. 11(2).
[3398] Trial Judgment (E465), fn. 7.
[3399] Case 002 Closing Order (D427), para. 1432.
[3400] Case 002 Closing Order (D427), para. 858.

1224. The Supreme Court Chamber considers that the Trial Chamber's error in attempting to identify legal "elements" of crimes within the category of other inhumane acts may have led it to disregard relevant international criminal jurisprudence on "forced sexual intercourse" which could have aided in understanding the conduct charged in this case. As outlined above, consideration of case law is not obligatory, but it is a common way in which a Trial Chamber may identify and delineate conduct within the crime of other inhumane acts.

1225. There is no case law on the issue of a third-party forcing men and women to engage in sexual intercourse in the context of forced marriage. However, the extensive case law that discusses acts of forced sexual intercourse in general is relevant. The circumstantial component of "force", and, the "sexual intercourse" must be taken into account.

1226. The ICTR's *Akayesu* Trial Chamber adopted a broad standard for assessing force in sexual violence cases, concluding that "coercion may be inherent in certain circumstances, such as an armed conflict or the military presence".[3401] The ICC Pre-Trial Chamber III in the *Bemba* Confirmation Decision confirmed this.[3402] The Supreme Court Chamber considers, however, that the facts in this case, the physical presence of armed militia during the consummation, as well as the fear of death or punishment for failure to comply would readily meet the threshold for establishing forcible circumstances.[3403] The *Ongwen* Trial Chamber found that there was "no doubt" that the sexual intercourse to which the LRA fighters regularly subjected their so-called "wives" was carried out through the use of force or threat of force exercised by the LRA fighters against their so-called "wives".[3404]

1227. This Chamber has also considered case law on acts of forced "sexual intercourse". The *Akayesu* Trial Chamber held that the definition of rape cannot be captured in a "mechanical description of objects and body parts", and that a physical invasion of any part of a victim's

[3401] See *Prosecutor v. Akayesu*, Trial Chamber (ICTR), ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Trial Judgment (ICTR)"), para. 688.
[3402] *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009 ("*Bemba* Decision Pursuant to Article 61(7)(a) and (b) (ICC)").
[3403] See, *e.g.*, *Prosecutor v. Ntaganda*, Trial Chamber VI (ICC), ICC- 01/04-02/06, Judgment, 8 July 2019, paras 944, 946 (finding that rapes occurred under coercive circumstances where soldiers used, *inter alia*, "implicit threats of force" by carrying weapons in front of victims, displaying weapons to victims, or "plainly [telling] their victims that they would be killed if they cried out or refused to cooperate"); *Prosecutor v. Karadžić*, Trial Chamber (ICTY), IT-95-5/18-T, Judgement, 24 March 2016 ("*Karadžić* Trial Judgment (ICTY)"), paras 2503-2505 (finding that "serious abuses of a sexual nature" were "inflicted upon the integrity of the victims by means of coercion, threat of force, or intimidation" where, for example, two male detainees "were forced to lick the buttocks of a Bosnian Serb woman, who threatened to slit their throats if they did not comply").
[3404] *Ongwen* Trial Judgment (ICC), para. 2270.

body that is of a sexual nature may constitute rape.[3405] The *Furundžija* Trial Judgment limited this definition, requiring "penetration" of the vagina or anus with a penis or other object, or "penetration" of the victim's mouth by the perpetrator's penis.[3406] The Rome Statute, when read in conjunction with its Elements of Crimes, merged the two approaches, requiring "invasion of any part" of the victim's body with a sexual organ, or of the anal or genital opening of the victim with "any object or part of the body".[3407] The *Bemba* Trial Chamber emphasised that this definition is gender neutral, and applies also to same-sex penetration.[3408] However, notwithstanding the divergences and shifts in the behavioural component of rape in international courts and tribunals, compelled "sexual intercourse" with a male perpetrator and a female penetrated victim has been consistently found to constitute an act of rape.

1228. The ICTY and the SCSL both determined that incidents of sexual violence in which men were forced to perform penetrative sexual acts constituted crimes punishable under the tribunals' respective statutes. These incidents include instances in which men were forced to engaged in sexual intercourse,[3409] to perform oral sex on one another and/or perpetrators,[3410] or to penetrate another victim with a broom handle.[3411] In *Gbao*, for example, the SCSL Trial Chamber found that sexual violence amounted to outrages upon personal dignity and an act of

[3405] *Akayesu* Trial Judgment (ICTR), paras 597-598.
[3406] *Furundžija* Trial Judgment (ICTY), para. 185.
[3407] Elements of Crimes of the International Criminal Court, ICC-PIOS-LT-03-002/15_Eng, 2013 ("ICC Elements of Crimes"), Arts 7 (1) (g)-1, 8 (2) (b) (xxii)-1.
[3408] *Prosecutor v. Bemba*, Trial Chamber III (ICC), ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016 ("*Bemba* Trial Judgment (ICC)"), para. 100.
[3409] See *Karadžić* Trial Judgment (ICTY), paras 2406, 2410 (two men forced to have sexual intercourse); *Prosecutor v. Gbao et al.*, Trial Chamber I (SCSL), SCSL-04-15-T, Judgement, 2 March 2009 ("*Gbao et al.* Trial Judgment (SCSL)"), paras 1205-1208, 1302, 1305-1309, 1347, 1352 (male and female civilians forced to have sexual intercourse); *Stanišić and Župljanin* Trial Chamber II (ICTY), IT-08-91-T, Judgement (Volume 1 of 3), 27 March 2013 ("*Stanišić & Župljanin* Trial Judgment (ICTY)"), para. 1599 (two pairs of fathers and sons and two cousins forced to perform sexual acts on each other, including intercourse).
[3410] See *Karadžić* Trial Judgment (ICTY), paras 2104, 2106, 2410, 2426 (male detainees forced to perform oral sex on one another); *Prosecutor v. Prlić et al.*, Trial Chamber III (ICTY), IT-04-74-T, Judgement (volume 3 of 6), 29 May 2013 ("*Prlić et al.* Trial Judgment (ICTY)"), para. 770 (male detainees forced to perform oral sex on one another); *Stanišić & Župljanin* Trial Judgment (ICTY), paras 475, 489, 1599 (male detainees, including relatives, forced to perform *fellatio* and other sexual acts on one another); *Prosecutor v. Brđanin*, Trial Chamber (ICTY), IT-99-36-T, Judgement, 1 September 2004, para. 824 (male detainees forced to perform *fellatio* on one another); *Prosecutor v. Česić*, Trial Chamber I (ICTY), IT-95-10/1-S, Sentencing Judgement, 11 March 2004 ("*Česić* Sentencing Judgment (ICTY)"), paras 13-14, 35 (brothers forced at gunpoint to perform *fellatio* on one another); *Čelebići* Trial Judgment (ICTY), paras 1065-1066 (brothers forced to perform *fellatio* on each other); *Prosecutor v. Simić et al.*, Trial Chamber II (ICTY), IT-95-9-T, Judgement, 17 October 2003 ("*Simić et al.* Trial Judgment (ICTY),"), para. 728 (male prisoners forced to perform oral sex on each other and a defendant); *Prosecutor v. Todorović*, Trial Chamber (ICTY), IT-95-9/1-S, Sentencing Judgement, 31 July 2001 ("*Todorović* Sentencing Judgment (ICTY)"), paras 9, 38-39 (male detainees forced to perform *fellatio* on one another; one male detainee forced to bite into penis of another).
[3411] See *Stanišić & Župljanin* Trial Judgment (ICTY), para. 1599 (finding that "two pairs of fathers and sons […] and two cousins were made to perform sexual acts on each other, including […] penetration by a broom handle").

terrorism where, *inter alia*, AFRC/RUF rebels "paired up" male and female captives and "ordered [them] to have sex with each other",[3412] and also ordered a couple to have sexual intercourse in the presence of other civilians including their daughter. The Trial Chamber acknowledged that the indictment did not explicitly plead forms of sexual violence against male victims, but found that this defect had been cured by timely disclosure of evidence, allowing the Trial Chamber to conclude that forced sexual intercourse "constituted a severe degradation, harm, and violation" of the personal dignity of both female *and male* victims.[3413] Other instances in which men have been forced to perform sexual acts such as licking the buttocks of a female perpetrator,[3414] or biting the penis of another detainee,[3415] have similarly formed the basis for criminal responsibility.

1229. Case law involving male victims of forced sexual intercourse is uncommon. The ICTY has ruled on a number of occasions, that forced *fellatio* between two men is an act of rape.[3416] This conduct has also been referred to as sexual violence. The UN Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict has defined sexual violence as including "situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner."[3417] Similarly, the ICTY Trial Chamber in *Đorđević et al*. accepted that the *actus reus* of sexual assault may be demonstrated by the perpetrator requiring others to perform sexual acts.[3418] The ICC's

[3412] *Gbao et al.* Trial Judgment (SCSL), paras 1207-1208, 1307, 1309, 1347, 1352.
[3413] *Gbao et al.* Trial Judgment (SCSL), paras 1205, 1302, 1305-1306.
[3414] See *Karadžić* Trial Judgment (ICTY), paras 2104, 2112, 2505-2506, 2512, 2582.
[3415] See *Todorović* Sentencing Judgment (ICTY), para. 38. See also, *e.g.*, *Prosecutor v. Krajišnik*, Trial Chamber (ICTY), IT-00-39-T, Judgement, 27 September 2006, para. 800 (male detainees forced to engage in unspecified "degrading sexual acts with each other").
[3416] The ICTY Trial Chamber in *Todorović* accepted that the perpetrator caused acts of sexual violence between other persons, including biting a victim's penis, kicking genitalia and forcing oral sex between prisoners. See *Todorović* Sentencing Judgment (ICTY), paras 38-40. The ICTY *Češić* case remains the only case to charge and convict forced *fellatio* as an act of rape; See *Česić* Sentencing Judgment (ICTY), paras 13-14, 107 (the factual basis indicates that the victims were brothers, were forced to act at gunpoint and were watched by others). The Supreme Court Chamber here observes that, in the appeal hearing, the Co-Prosecutors reiterated their trial submission that with regard to male victims of the policy of forced consummation, the Trial Chamber "did not need to adhere to a legal definition of rape, but as a descriptive term, rape is, of course, correct." T. 17 August 2021, F1/10.1, p. 54.
[3417] UN Commission on Human Rights, Report of Special Rapporteur "Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict", UN Doc. E/CN.4/Sub.2/1998/13, paras 21-22.
[3418] *Prosecutor v. Đorđević et al*., Trial Chamber II (ICTY), IT-05-87/1-T, Judgment, 23 February 2011, para. 1768, referring to *Prosecutor v. Milutinović et al.*, Trial Chamber (ICTY), IT-05-87-T, Judgement, 26 February 2009 ("*Milutinović et al.* Trial Judgment (ICTY)"), para. 201.

Elements of Crimes define sexual harm as including situations where "a perpetrator caused another person or persons to engage in an act of a sexual nature."[3419]

1230. The Supreme Court Chamber concurs with the case law of other international tribunals that forced sexual acts involving both male and female victims have been consistently found to constitute sexual violence.

"Formal International Unlawfulness"

1231. KHIEU Samphân argues that the Trial Chamber failed to properly apply the requirement of "formal international unlawfulness" when making its findings on rape in the context of forced marriage.[3420] He argues that the Trial Chamber erred in relying only on the 1956 Penal Code of Cambodia, and did not undertake an evaluation of international instruments.[3421]

1232. The Co-Prosecutors respond that the Trial Chamber was not required to find specific prohibitions of conjugal rape in international law as of 1975, as the test for "other inhumane acts" is whether the conduct violates a "basic right […] and is of a similar nature and gravity as other enumerated [crimes against humanity]".[3422] They respond that rape in any context violates human dignity and freedom, amongst other basic rights.[3423]

1233. The Lead Co-Lawyers respond that while there was no obligation to expressly consider the legality of specific acts,[3424] conjugal rape was illegal under national and international law in the 1975-1979 period, and even if an exemption for conjugal rape had existed, it would be inapplicable to "the regime of forced sexual intercourse charged in this case".[3425]

[3419] See ICC Elements of Crimes, Art. 7 (1) (g)-6 Crime against humanity of sexual violence, Art. 8 (2) (b) (xxii)-6 War crime of sexual violence, Art. 8 (2) (e) (vi)-6, War crime of sexual violence, with the same material element: "1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent."
[3420] KHIEU Samphân's Appeal Brief (F54), paras 1281, 1284, 1288, 1294-1295. See also KHIEU Samphân's Appeal Brief (F54), paras 1282, 1285.
[3421] KHIEU Samphân's Appeal Brief (F54), paras 1281, 1284, 1288, 1294-1295. See also KHIEU Samphân's Appeal Brief (F54), paras 1282, 1285.
[3422] Co-Prosecutors' Response (F54/1), para. 676, quoting Case 002/01 Appeal Judgment (F36), para. 586.
[3423] Co-Prosecutors' Response (F54/1), paras 675-679.
[3424] Lead Co-Lawyers' Response (F54/2), para. 568.
[3425] Lead Co-Lawyers' Response (F54/2), paras 569-583.

1234. The Supreme Court Chamber recalls that an assessment of "formal international unlawfulness" is not an exercise in identifying a criminal prohibition, but is one way in which the crime of other inhumane acts is rendered appropriately specific, in accordance with the principle of *lex certa*. There was no obligation for the Trial Chamber to identify a source of law which established an independent crime of marital rape, and the argument that this was the appropriate approach is, therefore, dismissed.[3426]

1235. This Chamber also observes that the Trial Chamber did not, in fact, conduct an assessment of legality in the manner described by KHIEU Samphân. The Trial Chamber held that there was no requirement that rape as a specific kind of underlying conduct was recognised as falling within the category of crime by 1975.[3427] It then elucidated that the definition of rape "suggested by the Co-Prosecutors goes beyond the understanding of rape as at 1975 that is sexual penetration ". The Trial Chamber, however, applied the aforementioned definition of rape as an initial step in assessing whether rape as an other inhumane act was committed, and determined that men could not be victims of rape in the context of forced marriage.[3428] While the Trial Chamber considered whether similar conduct could be characterised as sexual violence of such serious gravity that it amounts to other inhumane acts, it recalled that the only relevant issue to assess was whether the conduct in question fulfilled the definition of other inhumane acts.[3429] As outlined previously, the assessment of conduct infringing basic rights appertaining to human beings, as identified under international legal instruments, is one limitation on the interpretation of other inhumane acts.[3430]

1236. Although the Trial Chamber failed to conduct an analysis of the basic rights violated by the forced consummation of marriage, the Supreme Court Chamber recalls that there was no doubt that the underlying conduct of forced sexual intercourse was, in 1975-1979, at a minimum, internationally recognised as a violation of basic rights. As discussed, rape has been historically prohibited in international law, expressly in the 1863 Lieber Code,[3431] implicitly

[3426] See *supra* Section VII.G.1.
[3427] Trial Judgment (E465), paras 728-730.
[3428] Trial Judgment (E465), para. 731.
[3429] Trial Judgment (E465), para. 731.
[3430] Case 002/01 Appeal Judgment (F36), para. 584.
[3431] Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Order No. 100 by President Abraham Lincoln, Washington D.C., 24 April 1863 ("Lieber Code"), Art. 44 provides:

> "All wanton violence committed against persons in the invaded country … all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer or private, in the act of committing

by the Hague Regulations of 1899 and 1907,[3432] and as a listed crime against humanity in the Control Council Law No. 10.[3433] Further, the 1949 Geneva Convention IV, to which Cambodia was a signatory between 1975 and 1979, provides that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault".[3434] Additionally, forced sexual intercourse comprises a form of cruel, inhumane and degrading treatment, prohibited in international law and in Cambodia, since it joined the UN in 1955 and acceded to the Geneva Conventions in 1958.[3435]

1237. The Supreme Court Chamber, further finds that the marital context in which these acts took place was irrelevant to the determination of whether basic rights were violated. Here, this Chamber agrees with the position adopted by the ECtHR in *S.W. v. United Kingdom*, where it explained that in any system of law, including criminal law, "there is an inevitable element of judicial interpretation […] a need for elucidation of doubtful points and for adaptation to changing circumstances."[3436] The ECtHR found that "there was an evident evolution, […] consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating marital rape generally as within the scope of the offence of rape."[3437] Further, the ECtHR found that the "essentially debasing character of rape is so manifest" that the applicant's conviction could not be said to be at variance with the object and purpose of Article 7 of the European Convention on Human Rights, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment.[3438] While the charged conduct at issue here is forced sexual intercourse in the context of marriage, rather than the offence of "rape", this Chamber considers that it cannot reasonably be argued that coerced sexual intercourse is not a violation of a wide range of basic rights.

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such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior."

[3432] Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 29 July 1899, Art. 46; Convention (III) relative to the Opening of Hostilities, 18 October 1907, Art. 46, each of which protect the "family honour and rights" of an occupied territory's population.

[3433] Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, *in* 3 Official Gazette Control Council for Germany 50-55, Art. II(1)(c).

[3434] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 12 August 1949, 75 UNTS 287, Art. 27.

[3435] Article 5 of the UDHR provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" and Article 3 common to Geneva Conventions I to IV prohibits cruel treatment and outrages on personal dignity.

[3436] *S.W. v. United Kingdom* (ECtHR), para. 36.

[3437] *S.W. v. United Kingdom* (ECtHR), para. 43.

[3438] *S.W. v. United Kingdom* (ECtHR), para. 44.

Ejusdem Generis

1238. KHIEU Samphân submits that the Trial Chamber erred because it did not apply the rule of *ejusdem generis* when considering the crime of rape in the context of forced marriage.[3439] Had it examined the case law of other courts and tribunals, it would have determined that the charged acts of forced consummation were not of a similar nature and severity to other conduct brought within the scope of other inhumane acts.[3440]

1239. The Co-Prosecutors respond that the conduct is of similar nature and gravity to enumerated crimes against humanity.[3441] The Trial Chamber's conclusion of gravity is bolstered by the ICC *Ongwen* Pre-Trial Chamber's ruling that coerced sexual intercourse in marriage amounted to rape,[3442] as well as the SCSL's findings, in the *AFRC* and *RUF* cases, that it was both a war crime of outrages upon personal dignity and the other inhumane act of sexual slavery.[3443]

1240. The Supreme Court Chamber finds no error in the Trial Chamber's decision not to consider the question of the comparable gravity of the conduct when outlining the legal standard it would apply. What was important was that it conducted this assessment as a matter of fact, having made its legal findings.[3444] It would have been an error to conduct this analysis in the abstract in the section of the Trial Judgment dealing with the applicable law.

1241. This Chamber recalls, however, that it has previously found that the Trial Chamber erred in seeking to identify "elements" of the crime of rape, and that, by consequence of this error, the Trial Chamber disregarded its obligation to properly specify conduct within the crime of other inhumane acts. It did not, for example consider whether basic rights were violated by the charged conduct. The Supreme Court Chamber considers that a similar logic may have also led the Trial Chamber not to consider international criminal case law on the gravity of the conduct. This Chamber recalls that the Trial Chamber did, by contrast, consider such case law when assessing the gravity of forced marriage.[3445]

[3439] KHIEU Samphân's Appeal Brief (F54), para. 1290.
[3440] KHIEU Samphân's Appeal Brief (F54), para. 1290.
[3441] Co-Prosecutors' Response (F54/1), para. 677.
[3442] Co-Prosecutors' Response (F54/1), para. 682, referring to *Ongwen* Confirmation of Charges Decision (ICC); *AFRC* Appeal Judgment (SCSL); *RUF* Appeal Judgment (SCSL).
[3443] *AFRC* Appeal Judgment (SCSL), paras 181-202; *RUF* Appeal Judgment (SCSL), paras 736-740.
[3444] See Trial Judgment (E465), paras 3697-3698. See also Trial Judgment (E465), para. 3701.
[3445] Trial Judgment (E465), para. 747.

1242. The Supreme Court Chamber notes that various forms of sexual violence have been recognised by international tribunals as "other inhumane acts". The ICTY's first case, *Prosecutor v. Tadić*, held that acts of male sexual assault, including mutilation, *fellatio*, and indecent assault, constituted cruel treatment as war crimes and inhumane acts as crimes against humanity.[3446] Other examples of treatment with a sexual component which has been brought within the scope of other inhumane acts include forced sterilisation or experimentation with reproductive functioning.[3447] The ICTR defined sexual violence as "any act of a sexual nature which is committed on a person under circumstances which are coercive."[3448] Under this definition, the ICTR found that sexual violence not involving physical contact, such as forcing women and girls to do exercises naked in a public area, sit naked in mud or march naked in public, fell within the scope of the crime of "other inhumane acts".[3449] The ICTR further accepted that sexual violence against dead bodies including castration, mutilation and public displays of genitalia fell within the crime of "other inhumane acts".[3450] The ICTY has accepted that enforced prostitution may constitute a type of other inhumane acts,[3451] as it is "indisputably a serious attack on human dignity pursuant to most international instruments on human rights".[3452]

1243. Other international courts and tribunals, such as the SCSL and the ICC, have distinguished sexual violence from "other inhumane acts" with a sexual or gendered component like forced marriage because their statutes criminalise sexual violence separately from "other inhumane acts".[3453] However, the *AFRC* Appeals Chamber emphasised that the

[3446] *Prosecutor v. Tadić*, Trial Chamber (ICTY), IT-94-1-T, Opinion and Judgment, 7 May 1997 ("*Tadić* Trial Judgment (ICTY)").
[3447] *United States. v. Brandt et al.* ("Medical Case"), Judgment, 19 August 1946, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No.* 10, Vol. I, p. 13, Vol. II, pp. 177, 226, 238-239, 278-279.
[3448] *Akayesu* Trial Judgment (ICTR), para. 688.
[3449] *Akayesu* Trial Judgment (ICTR), paras 688, 697.
[3450] See *Prosecutor v. Niyitegeka*, Trial Chamber, ICTR-96-14-T, Judgement and Sentence, 16 May 2003 ("*Niyitegeka* Trial Judgment (ICTR)"), paras 462, 463, 467, in which the Trial Chamber accepted that encouragement of the castration and placing on a spike of genitals, and ordering the undressing of the body of a dead Tutsi woman, and insertion of a sharp piece of wood into her genitalia, comprised "other inhumane acts". See also *Prosecutor v. Kajelijeli*, Trial Chamber (ICTR), ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 ("*Kajelijeli* Trial Judgment (ICTR)"), paras 935-936, in which the Trial Chamber found that the act of cutting off and licking a Tutsi girl's breast was "of a comparable gravity to the other acts listed as crimes against humanity", though the Trial Chamber ultimately held that there was insufficient evidence that the accused was individually criminally responsible for such conduct.
[3451] *Kupreškić et al.* Trial Judgment (ICTY), para. 566; *Prosecutor v. Kvočka et al.*, Trial Chamber (ICTY), IT-98-30/1-T, Judgement, 2 November 2001, para. 208.
[3452] *Kupreškić et al.* Trial Judgment (ICTY), para. 566.
[3453] The reasons given by both the SCSL and ICC for distinguishing forced marriage from other sexual violence highlight the implications of separate criminalisation of sexual violence on the types of gendered and sexualised crimes categorised as "other inhumane acts". See *AFRC* Appeal Judgment (SCSL), para. 186, in which the *AFRC*

lengthy list of sexual crimes in the SCSL Statute did not preclude other sexual or gendered crimes comprising "other inhumane acts", because it is a category of offences that should not be restrictively interpreted.[3454] The ECCC Law does not list any sexual violence aside from rape as a crime against humanity,[3455] and the breadth of sexual and gendered crimes that may fall within the scope of "other inhumane acts" in the ECCC is thus greater than in the SCSL and ICC.

1244. In determining whether the required threshold of gravity or seriousness has been met, international criminal courts and tribunals have accepted that the enquiry must take place on a case-by-case basis, with regard to the nature and context of an act, the personal circumstances of the victims, and the physical, mental and moral effects of the perpetrator's conduct on the victims.[3456] The ICC's *Ntaganda* Trial Chamber referred to the "inherent gravity of sexual violence crimes", without distinction between rape and other acts of sexual violence.[3457] In practice, international tribunals upon finding the conduct described as sexual violence to have occurred, as a matter of fact have generally stated that the conduct is sufficiently serious to constitute a crime against humanity, without further evaluation.[3458] The Supreme Court Chamber notes that such statements have generally been made in conjunction with findings regarding the mental and physical suffering caused to the victims including the witnesses and communities affected. For example, the ICTR's *Kajelijeli* Trial Chamber held that the identified acts of sexual violence were of "a comparable gravity to the other acts listed as crimes against humanity, which would clearly cause great mental suffering to any members of the Tutsi community who observed them". [3459] These findings create the impression that the seriousness of the act and severity of suffering caused are interconnected.

Appeals Chamber accepted that forced marriage constituted "other inhumane acts" only to the extent that it inflicts harm on victims that is distinct from the listed offences of sexual slavery and sexual violence. See also *Ongwen* Trial Judgment (ICC), paras 2747-2751, in which the ICC Trial Chamber held, *inter alia*, that, the harm suffered as a result of forced marriage extends beyond that inflicted by sexual slavery, rape and sexual violence, and is thus distinct from listed crimes against humanity.

[3454] *AFRC* Appeal Judgment (SCSL), paras 185-186.

[3455] ECCC Law, Art. 5.

[3456] *AFRC* Appeal Judgment (SCSL), para. 184; *Katanga and Chui* Confirmation of Charges Decision (ICC), para. 449; *Vasiljević* Appeal Judgment (ICTY), para. 165.

[3457] *Prosecutor v. Ntaganda*, Trial Chamber VI (ICC), ICC-01/04-02/06, Sentencing Judgment, 7 November 2019 ("*Ntaganda* Sentencing Judgment (ICC)"), para. 96.

[3458] See, *e.g.*, *Niyitegeka* Trial Judgment (ICTR), para. 465; *Kajelijeli* Trial Judgment (ICTR), paras 935-936. See also *AFRC* Appeal Judgment (SCSL), para. 200, in which the *AFRC* Appeals Chamber explained that it had taken into account the conduct and its effects, and was of the view that the conduct met the requisite gravity threshold, without providing any further details about its deliberations regarding gravity.

[3459] *Kajelijeli* Trial Judgment (ICTR), para. 935 (the identified acts included "[c]utting a woman's breast off and licking it, and piercing a woman's sexual organs with a spear"). See also *Niyitegeka* Trial Judgment (ICTR), para.

1245. In *Prosecutor v. Dorđević*, the ICTY Appeals Chamber appears to have considered, *proprio motu*, the gravity of sexual assaults that formed a basis of defendant's conviction for persecution as a crime against humanity. The Appeals Chamber ultimately determined that the sexual assaults "reach[ed] the same level of gravity" as other crimes against humanity because "sexual assault by definition constitutes an infringement of a person's physical or moral integrity", and because the "sexual assaults in question were committed against young women, by multiple perpetrators, and in a general context of fear, intimidation, and harassment".[3460] The Supreme Court Chamber finds, therefore, that acts of sexual violence have, when proven, always been found to be as grave as other specifically charged conduct.

iii. Conclusion

1246. The Supreme Court Chamber has considered and dismissed KHIEU Samphân's challenges to the Trial Chamber's findings on the legality of forced marriage as an other inhumane act. With regard to the Trial Chamber's findings on the legality of "rape" and "other acts of sexual violence", the Supreme Court Chamber has determined that the Trial Chamber erred in identifying and defining the elements of crimes for conduct within the crime of other inhumane acts. This Chamber has concluded that the charged conduct is forced sexual intercourse in the context of marriage, and clarifies that this conduct is charged equally to both men and women, and that this conduct properly described as forced sexual intercourse in the context of forced marriage, fell within the scope of the crime against humanity of other inhumane actsIt has otherwise considered and dismissed all of KHIEU Samphân's challenges in relation to the legality of this conduct.

b. Factual Findings on the Regulation of Marriage Policy

i. Introduction

1247. The Trial Chamber held that the objectives of the regulation of marriage policy were increased population,[3461] and the control over sexual interactions out of marriage.[3462] It took account of evidence that there was an official CPK policy of consent to marriage, but found that this was disregarded in practice and that individuals were generally forcibly married in

465 ("The Chamber finds that the acts […] are acts of seriousness comparable to others enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians").
[3460] *Đorđević* Appeal Judgment (ICTY), para. 900.
[3461] Trial Judgment (E465), paras 3558, 3690.
[3462] Trial Judgment (E465), para. 3559.

coercive circumstances, including threat of death.[3463] The Trial Chamber found that wedding ceremonies usually took place without the involvement of tradition or family members, and often occurred on a mass basis.[3464] After the ceremonies, individuals were monitored to ensure that the marriage was consummated.[3465] Failure to consummate marriages risked death or re-education, and so couples concealed non-consummation.[3466] Instructions to organise marriages were given by the upper echelon to the lower authorities,[3467] and were then disseminated to zones, sectors, districts, communes and villages through meetings or study sessions.[3468] The Trial Chamber also found that KHIEU Samphân was personally involved in relaying instructions about the implementation of the marriage policy.[3469]

1248. KHIEU Samphân raises challenges to the Trial Chamber's factual findings on the objectives of the policy, the constituent events of the regulation of marriage and the implementation of the policy. These arguments are considered in turn below.

ii. Objectives of the Policy

1249. The Trial Chamber held that one of the purposes of the regulation of marriage was to facilitate the increase of population;[3470] and the other was control over sexual interactions outside of marriage.[3471] KHIEU Samphân challenges each of these findings, and argues that the Trial Chamber erred in failing to consider contradictions between the two findings.

Increased Population Growth

1250. The Trial Chamber was satisfied that one of the purposes of the regulation of marriage was to facilitate the increase of population.[3472] It considered, pointing to speeches by senior officials, including KHIEU Samphân, that the CPK's claimed objective was to improve the well being of the population and increase population growth in order to develop Cambodia into a strong and economically independent country.[3473] The Trial Chamber also found that, while not explicitly stated, another objective of the increase in population was to increase the number

[3463] Trial Judgment (E465), paras 3617-3625.
[3464] Trial Judgment (E465), paras 3631-3632, 3639-3640, 3691.
[3465] Trial Judgment (E465), paras 3641-3644, 3660, 3696.
[3466] Trial Judgment (E465), paras 3645-3647.
[3467] Trial Judgment (E465), para. 3564.
[3468] Trial Judgment (E465), para. 3566.
[3469] Trial Judgment (E465), paras 4248, 4270, 4304.
[3470] Trial Judgment (E465), para. 3558.
[3471] Trial Judgment (E465), paras 3559-3563.
[3472] Trial Judgment (E465), para. 3558.
[3473] Trial Judgment (E465), para. 3549.

of available soldiers, particularly from 1977 when the situation along the Vietnam border intensified.[3474] The Trial Chamber held, considering the evidence of cadre witnesses, that the objective of increasing the population via forced marriage was disseminated across the country through meetings and training sessions.[3475] Further, numerous witnesses and civil parties stated that during their wedding ceremonies that had to commit to producing children for *Angkar* in order to increase the population.[3476]

1251. KHIEU Samphân argues, first, that the Trial Chamber erred in relying on CPK documents and speeches on population growth, given that these statements focused on improving health and not forced marriage.[3477] Second, he alleges that the Trial Chamber misrepresented cadre evidence on the population increase, and argues further that it was inconsistent to rely on this evidence while disregarding the principle of consent.[3478] Third, he alleges errors in the Trial Chamber's assessment of the testimonies of civil parties who claimed to have committed to producing children for *Angkar*.[3479]

a) CPK Statements on Population Growth

1252. The Trial Chamber found that "[t]he CPK claimed that its objective was to improve the well being of the population, and that this would permit it to increase population growth in order to develop Cambodia into a strong and economically independent country."[3480] It considered documents and speeches by POL Pot,[3481] KHIEU Samphân,[3482] IENG Sary,[3483] and NUON Chea,[3484] as well as issues of the *Revolutionary Flag* from 1976-1978.[3485]

1253. KHIEU Samphân argues that the Trial Chamber "[d]istort[ed] and deform[ed]" CPK documents and speeches regarding population growth, none of which mentioned the policy of forced marriage.[3486] Rather, these documents showed that the CPK intended to achieve the

[3474] Trial Judgment (E465), para. 3557.
[3475] Trial Judgment (E465), para. 3556.
[3476] Trial Judgment (E465), para. 3556.
[3477] KHIEU Samphân's Appeal Brief (F54), para. 1224.
[3478] KHIEU Samphân's Appeal Brief (F54), para. 1225.
[3479] KHIEU Samphân's Appeal Brief (F54), paras 1228-1232.
[3480] Trial Judgment (E465), para. 3549.
[3481] Trial Judgment (E465), para. 3550.
[3482] Trial Judgment (E465), para. 3551.
[3483] Trial Judgment (E465), para. 3552.
[3484] Trial Judgment (E465), para. 3553.
[3485] Trial Judgment (E465), paras 3554-3555.
[3486] KHIEU Samphân's Appeal Brief (F54), para. 1224.

objective of population growth through improving the living conditions and health of the population, not by forced marriage.[3487]

1254. The Co-Prosecutors respond that the Trial Chamber did not omit to consider the CPK's stated wish to achieve population growth by improved living conditions, but reasonably found that the CPK's actions showed this was not its genuine intention.[3488]

1255. The Supreme Court Chamber observes that while the speeches and publications relied upon by Trial Chamber each refer to the necessity to increase population as soon as possible to increase economic and social prosperity,[3489] none expressly refer to the regulation of marriage as a means of achieving this goal. Indeed, the CPK statements, in isolation, read as if the population was to be increased through general improvements in health and not by the regulation of marriage policy. In POL Pot's speech, for example, he states that "[w]e continue to strive to improve the conditions of the life and health of the population, because we hope to increase our population to 15 to 20 million in the course of the next 10 years or more."[3490] In his April 1978 speech, KHIEU Samphân, similarly spoke of the need to "improve the living conditions and rapidly increase the size of the population while at the same time giving the people basic political, ideological and organizational education."[3491] NUON Chea's speech at the Asian parliamentarians' conference in Beijing in October 1981 spoke of the population increase, and attributed this to the emphasis which had been placed on "solving and improving the people's living conditions."[3492] The *Revolutionary Flag* issue in December 1976-January 1977 contained the statement that "[f]or our population to constantly increase, the livelihood of our people must rise and they must be in good health."[3493]

1256. This evidence, taken alone, does not support the conclusion that population increase was to occur as a result of the regulation of marriage policy. The Supreme Court Chamber observes, however, that the Trial Chamber's finding that the regulation of marriage policy was aimed at increasing the population based on more than just the CPK statements highlighted.

[3487] KHIEU Samphân's Appeal Brief (F54), para. 1224.
[3488] Co-Prosecutors' Response (F54/1), para. 711.
[3489] See Trial Judgment (E465), paras 3550-3555.
[3490] *Text of POL Pot Speech at 27 Sep KCP Anniversary Meeting* (in FBIS collection), 4 October 1977, E3/290, ERN (EN) 00168651, p. 35.
[3491] *KHIEU Samphan's Speech at Anniversary Meeting* (in SWB/FE/5908/A3 collection), 15 April 1977, E3/201, ERN (EN) 00419514.
[3492] *Interviews with DK Leader on Population Policy and Struggle against Vietnam* (in SWB/FE/6869/A3 collection), 2 November-10 December 1981, E3/686, ERN (EN) S00030349.
[3493] *Revolutionary Flag*, December 1976-January 1977, E3/25, ERN (EN) 00491436, p. 42.

The Trial Chamber also considered evidence from CPK cadres that the population increase was linked to forced marriage, as well as evidence from civil parties and witnesses about the attestations they were required to make during their wedding about their future production of children.[3494] This Chamber further observes that the Trial Chamber omitted to expressly consider a relevant finding from elsewhere in the Trial Judgment in its analysis. The Trial Chamber found that during a meeting held at Wat Ounalom, KHIEU Samphân "instructed that all ministries were to arranged marriages so that couples could produce children in order to augment forces to defend the country."[3495] This statement directly linked the regulation of marriage policy to the policy to increase population. For these reasons, the Supreme Court Chamber finds no error in in the Trial Chamber's reliance on CPK statements regarding the need to increase population.

b) Cadre Evidence on Increasing the Population Through Forced Marriage

1257. The Trial Chamber considered the evidence of SAO Sarun, Secretary of Sector 105, that *Angkar* wanted to increase the population, and therefore "encouraged" male and female combatants to get married.[3496] It also took account of MEAS Voeun's evidence, as Deputy Commander of Division 1, that marriages "were encouraged in order to increase Cambodia's population",[3497] as well as CHIN Saroeun's evidence, as a combatant in the Northeast Zone, that the purpose of getting married was to increase the population in the provinces.[3498]

1258. KHIEU Samphân argues that the Trial Chamber "distorted" the evidence of cadres SAO Sarun, MEAS Voeun, and CHIN Saroeun on increased population, given that they actually viewed children being born "as the logical conclusion of marriage."[3499] He submits that the Trial Chamber also erred in rejecting the evidence of these cadres on the policy of consent, while accepting evidence regarding population growth.[3500] According to him, the Trial Chamber should have considered the evidence of CHUON Thy, who heard POL Pot talking

[3494] Trial Judgment (E465), para. 3556.
[3495] Trial Judgment (E465), para. 4248.
[3496] T. 29 March 2016 (SAO Sarun), E1/410.1, p. 69. (he heard that *Angkar* wanted to increase the population because their numbers were small, and therefore "male and female combatants were encouraged to get married").
[3497] According to Witness MEAS Voeun, the Deputy Commander of Division 1, marriages were encouraged in order to increase Cambodia's population because Vietnam had a larger population. See T. 3 February 2016 (MEAS Voeun), E1/387.1, pp. 37-39 (who also states that marriages were arranged by his superiors).
[3498] Witness CHIN Saroeun, a combatant in the Northeast Zone, understood that the purpose of having people married was to increase the population in the provinces. See T. 3 August 2016 (CHIN Saroeun), E1/454.1, pp. 74-78.
[3499] KHIEU Samphân's Appeal Brief (F54), para. 1225.
[3500] KHIEU Samphân's Appeal Brief (F54), para. 1225. He also argues that the Trial Chamber should have considered the evidence of CHUON Thy on the question of consent.

about increased population, and stated that there was never any question of forced marriages being linked to it.[3501]

1259. The Co-Prosecutors respond that the Trial Chamber made reasonable findings on the CPK cadre evidence, and that the Trial Chamber was entitled to rely on it despite rejecting it on the policy of consent.[3502]

1260. The Supreme Court Chamber considers that the Trial Chamber accurately described the evidence of cadres SAO Sarun, MEAS Voeun, and CHIN Saroeun, who each stated that they had heard that the drive to ensure that persons were married was linked to the need to increase the population.[3503] KHIEU Samphân's argument that this evidence was misrepresented is therefore rejected. This Chamber also disregards KHIEU Samphân's argument that the cadres he pointed to stated that consummation of marriage was "natural". None of the cadres did, as a matter of fact, given this evidence,[3504] and, even if they had, this would not have detracted from the fact that whatever usually happened in marriage, forced marriages were criminal, rather than habitual, conduct.

1261. As for cadre evidence on non-consent, the Trial Chamber considered the evidence of certain cadres that there was a principle of consent to marriage under the CPK regime.[3505] One of the cadres relied upon by the Trial Chamber in the finding on the purposes of the regulation of marriage, MEAS Voeun, was also considered in that analysis on the policy of consent. The Trial Chamber took account of his evidence that "marriages in his section were organised based on the consent of the individuals and were not forced."[3506] Overall, however, it held that it would reject such evidence, including MEAS Voeun's evidence, because of the greater volume of evidence showing that the principle of consent was disregarded in the context of a climate

[3501] KHIEU Samphân's Appeal Brief (F54), para. 1226.
[3502] Co-Prosecutors' Response (F54/1), para. 711.
[3503] See T. 29 March 2016 (SAO Sarun), E1/410.1, p. 69 (Witness SAO Sarun, the Secretary of Sector 105, confirmed without specifying when, that he heard that Angkar wanted to increase the population because their numbers were small, and therefore "male and female combatants were encouraged to get married"); T. 3 February 2016 (MEAS Voeun), E1/387.1, p. 38 (confirming that he had heard about the policy to increase Cambodia's population because Vietnam was more populated, and also confirming that the drive to have the troops get married was linked to the need to increase population); T. 3 August 2016 (CHIN Saroeun), pp. 74-78 T. 3 August 2016 (CHIN Saroeun), pp. 74-78 (confirming his understanding that the purpose of his marriage was to increase the population in the province).
[3504] *Contra* KHIEU Samphân's Appeal Brief (F54), para. 1225.
[3505] Trial Judgment (E465), para. 3617, referring to the evidence of RIEL Son, OR Ho, PECH Chim, MEAS Voeun, TEP Och and YOU Vann.
[3506] Trial Judgment (E465), para. 3617, referring to T. 8 October 2012 (MEAS Voeun), E1/131.1, p. 64.

of coercion.[3507] The Supreme Court Chamber finds no error in the Trial Chamber's decision to rely on MEAS Voeun's evidence regarding the purposes of the policy, and to reject it on the principle of consent. As discussed further below, it made the latter finding on the basis of extensive other evidence which contradicted the official policy of consent to marriage. These arguments are therefore dismissed.

c) Civil Party Statements on Procreation

1262. KHIEU Samphân argues that the Trial Chamber erred in its consideration of civil party evidence that they were forced to attest to procreate during their marriage ceremonies, in relying on such evidence at all,[3508] and in failing to consider exculpatory evidence.[3509]

1263. The Trial Chamber considered that "numerous" witnesses and civil parties had to commit to producing children for *Angkar* to increase the population during their wedding ceremonies,[3510] highlighting in particular the evidence of Civil Parties PEN Sochan, NGET Chat, and SOU Sotheavy.[3511] To the extent that KHIEU Samphân argues that the Trial Chamber relies solely on civil party evidence, this misrepresents the finding, which is based on both witness and civil party evidence. The Supreme Court Chamber also recalls that it is well-established that a Trial Chamber may rely on a civil party evidence for determinations of guilt.[3512] There is, therefore, no error, in principle, in the Trial Chamber's reliance on on civil party evidence to support the conclusion that a population increase policy existed.

1264. Regarding the allegation that the Trial Chamber failed to consider contradictions in civil party evidence, this Chamber observes that KHIEU Samphân does not particularise his submissions and refers only to his Closing Brief.[3513] These arguments are therefore dismissed as unsubstantiated. The Supreme Court Chamber also finds that the fact that certain civil parties stated that couples were instructed in their forced marriage ceremonies to "love one another"[3514] is irrelevant, particularly as a number of the civil parties pointed to by KHIEU

[3507] Trial Judgment (E465), para. 3623.
[3508] KHIEU Samphân's Appeal Brief (F54), para. 1228.
[3509] KHIEU Samphân's Appeal Brief (F54), para. 1229.
[3510] Trial Judgment (E465), para. 3556.
[3511] Trial Judgment (E465), para. 3556.
[3512] See Case 002/01 Appeal Judgment (F36), para. 313, referring to Internal Rules, Rules 59 and 91(1).
[3513] See KHIEU Samphân's Appeal Brief (F54), para. 1228, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), paras 2321-2322, 2450-2451.
[3514] See KHIEU Samphân's Appeal Brief (F54), para. 1229, fn. 2317:
PREAP Sokhoeurn: T. 20.10.2016, E1/487.1, at 15.32.40: "On the wedding day, I heard the Party's leader that Angkar wanted to increase the force, so marriage would have to be arranged so that children could be produced and the population could be increased. So after the wedding we were required to love each other,

Samphân gave evidence that they were also instructed to produce children in order to increase the population, in the same ceremonies.[3515] These submissions are, consequently, all dismissed.

Control over Sexual Relations Outside Marriage

1265. The Trial Chamber found that the CPK policy regulating marriage was aimed at controlling sentimental or sexual interactions between men and women outside marriage, as such relationships were considered as potentially endangering the revolution.[3516] In support, the Trial Chamber pointed to the 12 precepts of the revolution as outlined in an edition of *Revolutionary Youth*, which included prohibiting any conduct that "violates females", as this would impact male-female morality.[3517] It held that CPK cadres and the general population were educated to avoid committing moral offences,[3518] and male and female relationships without the approval of *Angkar* were prohibited and were considered a moral offence.[3519] Moral offences and subsequent measures were then reported to the Party Centre.[3520] Once *Angkar* married couples, it was not possible for them to divorce during the regime.[3521]

1266. The Supreme Court Chamber observes, as a preliminary matter, that the Closing Order identifies only one purpose of the regulation of marriage policy, being that "sexual relations aimed at enforced procreation were imposed".[3522] It further indicated that the fact that witnesses were forced to consummate their union corroborates "the existence of a common purpose

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produce the children for the Party and live together. During the time, I did not know about how to produce the children." (emphasis added, passage not used by the Chamber); SOU Sotheavy: T. 23.08.2015, E1/462.1, 15.05.46, before 15.18.08, after 15.11.12. The ceremony involved a commitment to love each other, to become husband and wife. See also CHEA Deap: T. 30.08.2016, E1/466.1, before 14.02.22, at 15.32.44 ("Ils ont dit que nous devions nous aimer, we should love each other and we should build happiness for our marriage couples and we should not produce many children as we had to help Angkar as much as possible."); MOM Vun: T. 16.09.2016, E1/475.1, before 13.41.53 ("Cadres who married us, the 60 couples, made an announcement that the newlywed couples had to love one another, to take care of one another, and to strive to engage in production to increase the produce, so that our economics could develop and that we could smash the enemies"); PEN Sochan: T. 12.10.2016, E1/482.1, at 14.02.37 (undertaking by the future spouses to take responsibility for the rest of their lives); SAY Naroeun: T. 25.10.2016, E1/489.1, at 10.49.44 ("And we had to love each other from the time onward and had to work hard to produce rice from this quota to that quota and to produce babies, as many as possible.").

[3515] See T. 20 October 2016 (PREAP Sokhoeurn), E1/487.1, ERN (EN) 1361569, p. 104 ("On the wedding day, I heard the Party's leader that Angkar wanted to increase the force, so marriage would have to be arranged so that children could be produced and the population increased"); See T. 23 August 2016 (SOU Sotheavy), E1/462.1, p. 79 ("during her wedding, the chief announced that "[t]he population of Cambodia is not that great and for us, male and female youths we strive to work best. And for that reason Angkar required us to get married to increase the population.")

[3516] Trial Judgment (E465), para. 3559.

[3517] Trial Judgment (E465), para. 3650.

[3518] Trial Judgment (E465), para. 3652.

[3519] Trial Judgment (E465), paras 3651, 3653.

[3520] Trial Judgment (E465), paras 3651, 3653.

[3521] Trial Judgment (E465), para. 3668.

[3522] Case 002 Closing Order (D427), para. 1445.

established by the senior leaders of the CPK that marriages were necessary to increase the population."[3523] The Trial Chamber, by contrast, identified two purposes of the regulation of marriage policy, the increase in population, and the control of sexual relations outside marriage.[3524] Rule 67(2) provides that a Closing Order must set out a description of material facts and their legal characterisation. Pursuant to this Rule, and as established in the jurisprudence of the ECCC, the Trial Chamber is not bound by the legal characterisations adopted by the Co-Investigating Judges or the Pre-Trial Chamber in the Closing Order.[3525] This Chamber observes, however, that elsewhere in the Closing Order, the Co-Investigating Judges made other factual findings on the purposes of the regulation of marriage policy. Specifically, they found that "[o]ne of several objectives of this policy was to control the interaction between individuals, such that they were only permitted to marry and have sexual relations in accordance with CPK policy."[3526] This Chamber, accordingly, considers that the Trial Chamber permissibly found that there were two purposes of the regulation of marriage policy based on the factual findings in the Closing Order.

1267. KHIEU Samphân alleges that the Trial Chamber disregarded the moral principles of the CPK,[3527] and erred in finding that sexual misconduct was reported to the Party Centre.[3528] He also argues that the Trial Chamber erred in finding that it was not possible to be divorced under the regime, and that couples were forced to stay together by CPK sanctions.[3529]

a) CPK Statements

1268. KHIEU Samphân argues that the Trial Chamber "concealed" the moral principles of the CPK, ignoring similarities between the control of relationships which took place under both the DK regime, and traditional Khmer society.[3530]

[3523] Case 002 Closing Order (D427), para. 1447.
[3524] Trial Judgment (E465), paras 3559-3563.
[3525] Case 002/01 Appeal Judgment (F36), para. 56. See also Trial Judgment (E465), para. 153, referring to Case 001 Trial Judgment (E188), paras 492-500; Case 002 JCE Decision (E100/6), paras 24-25.
[3526] Case 002 Closing Order (D427), para. 217.
[3527] KHIEU Samphân's Appeal Brief (F54), para. 1218.
[3528] KHIEU Samphân's Appeal Brief (F54), para. 1219.
[3529] KHIEU Samphân's Appeal Brief (F54), para. 1220.
[3530] KHIEU Samphân's Appeal Brief (F54), para. 1218.

1269. The Co-Prosecutors respond that KHIEU Samphân wrongly conflates the situation under the DK regime with that under traditional Khmer culture, ignoring the reality that individuals lived in a climate of fear of fatal consequences.[3531]

1270. The Lead Co-Lawyers respond that under the DK regime, absolute prohibitions perverted traditional cultural ideas.[3532] They cite testimony from several civil parties, including that of Civil Party SENG Soeun, who testified as to "two instances where couples who were in love were found to have 'violated the morality' and were killed, for the reason that they had not reported their relationship to the upper echelon."[3533]

1271. The Trial Chamber expressly took account of the moral precepts of the CPK in the disputed analysis, as outlined in an edition of *Revolutionary Youth*.[3534] It considered that the precepts emphasised the importance of male-female morality, and found that a failure to protect this would "impact the revolution and put the movement at risk."[3535] KHIEU Samphân's submission that the Trial Chamber "concealed" these precepts is therefore dismissed. The Supreme Court Chamber also considers that, while other evidence pointed to by KHIEU Samphân demonstrates that sexual contact between young people was prohibited outside marriage under traditional Khmer society,[3536] he fails to demonstrate why this was of relevance to the finding that sexual relations were controlled by the DK regime. Any superficial similarity in manifestation does not belie the wholly different purposes of the practices, as well as the coercive nature of the regulation of marriage under the DK regime.[3537] These arguments are, therefore, also dismissed.

b) Reports to the Party Centre

[3531] Co-Prosecutors' Response (F54/1), para. 708.
[3532] Lead Co-Lawyers' Response (F54/2), para. 661.
[3533] Lead Co-Lawyers' Response (F54/2), para. 661, referring to T. 29 August 2016 (SENG Soeun), E1/465.1, p. 79.
[3534] Trial Judgment (E465), para. 3560.
[3535] Trial Judgment (E465), para. 3560. See also Trial Judgment (E465), fn. 11947, referring to *Revolutionary Youth*, October 1978, E3/765, ERN (EN) 00539994, p. 19 ("6th Precept: Do not behave in any way that violates females. Generally speaking, do not do anything that impacts male-female morality, because this issue impacts our honor and our influence as revolutionaries and impacts the clean and pure and dignified traditions of our people. Therefore, this impacts our people. This is one thing. But even more importantly, when we impact male-female morality, that is the true corrupt and rotten nature of the enemies of all types and this enables the enemy to attract us. Therefore, this is dangerous for us and is dangerous for the revolutionary movement.").
[3536] T. 24 April 2013 (CHUON Thy), E1/183.1, p. 21 ("Cambodian people had to respect the traditions, which means we cannot have sexual contact before the marriage"); T. 23 April 2015 (PECH Chim), E1/291.1, p. 6 ("We also tried to follow the tradition that the couples had to get married before consummating"); T. 2 February 2015 (CHANG Srey Mom), E1/255.1, p. 9 ("We physically stayed together as man and wife").
[3537] See KHIEU Samphân's Appeal Brief (F54), fns 2288-2289.

1272. The Trial Chamber considered a DK Report dated 16 July 1978 which stated that when *Angkar* assigned people to the Northwest Zone, a man had "committed moral offenses", and "got educated for two to three times."[3538] The Trial Chamber also considered another DK report from 4 August 1978 which stated that unspecified "activities" occurred "between some male and female youths as well as men and women or even between married men and youths. In Tasal cooperative of District 27 on 21-7-78, Soeung, a militia of Tasal cooperative, violated a moral code by raping a girl from Sector Koh Kong."[3539] The Trial Chamber also relied on a DK telegram from 23 April 1978, in which SAO Sarun, Sector 105 Secretary, stated that "Comrade Sot was previously implicated in confessions had committed immoral acts with a woman, clarifying that both the man and the woman had been arrested, and seeking the views of the Party Centre."[3540]

1273. KHIEU Samphân challenges the finding that sexual misconduct was reported to the Party Centre.[3541] These documents referred only to *Angkar*; not to the Party Centre, nor to KHIEU Samphân himself, and were also not predominantly concerned with the regulation of marriage, which was mentioned only in passing.[3542]

1274. The Co-Prosecutors respond that the Trial Chamber "consistently found that telegrams and reports sent with the annotation 'to *Angkar*' were addressed to the Party Centre", of which KHIEU Samphân was a senior member.[3543]

1275. The Supreme Court Chamber rejects the assertion that these reports were not adequately specific. The documents cited by the Trial Chamber clearly describe the moral offences which were being reported, and the fact that the same documents also consider other matters is, consequently, irrelevant. The Supreme Court Chamber also recalls that *Angkar* and the CPK Party were one and the same, and has upheld the Trial Chamber's finding that KHIEU Samphân held a unique position within the Party Centre.[3544] His submissions in this respect are accordingly dismissed.

[3538] Trial Judgment (E465), fn. 11955, referring to DK Report, 16 July 1978, E3/1092, ERN (EN) 00289923, p. 3.
[3539] Trial Judgment (E465), fn. 11955, referring to DK Report, 4 August 1978, E3/1094, ERN (EN) 00315373, p. 6.
[3540] Trial Judgment (E465), fn. 11955, referring to DK Telegram, 23 April 1978, E3/156, ERN (EN) 00296220.
[3541] KHIEU Samphân's Appeal Brief (F54), para. 1219.
[3542] KHIEU Samphân's Appeal Brief (F54), para. 1219.
[3543] Co-Prosecutors' Response (F54/1), paras 942, 947.
[3544] See *infra* Section VIII.A.b.ii.

c) Divorce and Sanctions

1276. The Trial Chamber considered POL Pot's evidence about the possibility of divorce. It took account of his statements that "[s]hould the parties concerned find it impossible to cohabit any longer, they have the choice of divorce",[3545] and that separation was "very rare", because "both the husband and wife have a high political consciousness."[3546] The Trial Chamber found that this was propaganda, considering the evidence of numerous witnesses and civil parties which showed that couples did not have the right to divorce because of the risk of sanctions.[3547] The Trial Chamber found, therefore, that once *Angkar* married couples, it was not possible for them to divorce during the regime.[3548]

1277. KHIEU Samphân argues that the Trial Chamber erred in finding that it was not possible to be divorced under the regime, and that couples were forced to stay together by CPK sanctions.[3549] In his submission, the Trial Chamber ignored POL Pot's statements that divorce was permitted, despite their corroboration,[3550] and erroneously relied on civil party evidence that couples were sanctioned, despite that the fact that these persons did not give "any specific and substantiated" example of sanctions.[3551]

1278. The Co-Prosecutors respond that the Trial Chamber correctly considered POL Pot's interview was propaganda, and argue that divorce was impossible because individuals could not express dissatisfaction with their spouses in the prevailing climate of fear.[3552]

1279. The Supreme Court Chamber considers that the Trial Chamber's finding that "[p]eople who did not get along did not dare to seek divorce for fear of being reprimanded, being sent for re-education or killed",[3553] constitutes specific and substantied examples of sanctions. The Trial Chamber based this finding on the evidence of seven witnesses and civil parties,[3554] and

[3545] Trial Judgment (E465), para. 3666, referring to *Pol Pot 5 August Interview with Belgian Visitors Reported* (in FBIS collection), 26 September 1978, E3/76, ERN (EN) 00170426.
[3546] Trial Judgment (E465), para. 3667, referring to *Pol Pot 5 August Interview with Belgian Visitors Reported* (in FBIS collection), 26 September 1978, E3/76, ERN (EN) 00170426.
[3547] Trial Judgment (E465), para. 3668.
[3548] Trial Judgment (E465), para. 3669.
[3549] KHIEU Samphân's Appeal Brief (F54), para. 1220.
[3550] KHIEU Samphân's Appeal Brief (F54), para. 1220.
[3551] KHIEU Samphân's Appeal Brief (F54), para. 1220.
[3552] Co-Prosecutors' Response (F54/1), para. 709.
[3553] Trial Judgment (E465), para. 3668.
[3554] See Trial Judgment (E465), para. 3668, fns 12240-12244, referring to the evidence of LING Lrysov, SOU Soeathvy, PHNEOU Yav, CHEA Deap, YOS Phal and MEAS Lai Hour. The Trial Chamber also made another finding that "if a person was caught by the authorities having an inappropriate male-female relationship, they

the fact that KHIEU Samphân highlights others who, in his submission, do not refer to explicit sanctions, is, accordingly, irrelevant.[3555] The Trial Chamber provided reasons to support its finding and KHIEU Samphân's submission to the contrary is dismissed. Further, as regards POL Pot's evidence, the Trial Chamber considered it fully and KHIEU Samphân merely disagrees with the appraisal of POL Pot's evidence, without showing error. This submission is also rejected.

Alleged Contradictions between the Goals of the Policy

1280. KHIEU Samphân next raises challenges which he describes as challenging the "objective of population growth".[3556] This Chamber considers these arguments, in essence, to be an allegation of contradictions between the two goals of the policy of the regulation of marriage: the goal of population increase, and the goal of controlling sexual relations. He argues that the Trial Chamber found that couples were generally separated, after marriage, and should therefore have considered that these separation measures "did not in any way foster the chances of pregnancy."[3557] These, he submits, contradict the Trial Chamber's finding that the regulation of marriage policy was also aimed at increasing the population.[3558]

1281. The Co-Prosecutors respond that there is no contradiction between these two goals.[3559] Specifically, they argue that "the Party exercised absolute control so that neither goal suffered" by "closely monitoring newlywed couples to ensure that they consummated their unions in the short time they had together" and by "institut[ing] a system of short visitations for further relations that would serve the aim of population growth while not detracting from production".[3560]

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would be subjected to re-education or punishment". Trial Judgment (E465), para. 3563, fn. 11958, referring to the evidence of KAING Guek Eav and NOP Ngim.

[3555] See generally KHIEU Samphân's Appeal Brief (F54), fn. 2296, referring to SAO Sarun, CHUON Thy and MEAS Voeun. This Chamber also rejects KHIEU Samphân's assertion that the Trial Chamber erred in finding YOS Phal credible because he stated that he did not dare to divorce, and yet remained married to his wife after the regime fell. See KHIEU Samphân's Appeal Brief (F54), fn. 2296. As this Chamber finds below, whether a person remained in a forced marriage after the regime fell did not alter the coercive circumstances in which the marriages took place.

[3556] KHIEU Samphân's Appeal Brief (F54), para. 1221.

[3557] KHIEU Samphân's Appeal Brief (F54), para. 1222.

[3558] Trial Judgment (E465), para. 3558. See also KHIEU Samphân's Appeal Brief (F54), para. 1341 (arguing that the Trial Chamber found that newly married couples were compelled to have sexual relations for the purposes of "producing" children to increase the population.)

[3559] Co-Prosecutors' Response (F54/1),para. 710.

[3560] Co-Prosecutors' Response (F54/1), para. 710.

1282. This Chamber will first consider whether, as claimed by KHIEU Samphân, "procreation" was integral to the finding that forced marriage was intended to lead to population increase. This Chamber notes that the Trial Chamber makes no explicit reference to impregnation or sexual intercourse in its finding that the regulation of marriage policy was orientated towards an increase in population. This is in contrast to the Closing Order, which identified, as the sole purpose of the regulation of marriage policy, that "sexual relations aimed at enforced procreation were imposed".[3561] This Chamber also notes the International Co-Investigating Judges' decision in 2016, in which the request to investigate the crimes of forced pregnancy or forced impregnation as other inhumane acts was rejected.[3562]

1283. However, in making its findings on the criminality of the policy, the Trial Chamber held that newly-wedded couples "were coerced into marriage and its consummation to fulfil the will of *Angkar* and produce children for the revolution to build and defend the country against enemies."[3563] The Trial Chamber found that numerous witnesses and civil parties had to commit to producing children for *Angkar* to increase the population during their wedding ceremonies,[3564] and held that civil parties were told that *Angkar* wanted them to produce as many children as possible.[3565] The Trial Chamber also considered the evidence of former cadres SAO Sarun, MEAS Voeun, and CHIN Saroeun, who stated that they had heard that the drive to ensure that persons were married was linked to the need to increase the population, and that children followed from marriage.[3566] The Supreme Court Chamber considers that the production of children is, furthermore, the only logical way in which the regulation of marriage would lead to an increase in population. Consequently, while it would have been greatly preferable for the Trial Chamber to have made this explicit, this Chamber is satisfied that the Trial Chamber found that the regulation of marriage policy was intended to increase the population by virtue of pregnancies, and, logically, by achieving live births.

[3561] Trial Judgment (E465), para. 3686, referring to Case 002 Closing Order (D427), para. 1445.
[3562] Case 004 Consolidated Decision on the Requests (D301/5). This decision rejected the arguments that either forced pregnancy and forced impregnation should be investigated.
[3563] Trial Judgment (E465), para. 4065, referring to Section 14: Regulation of Marriage, para. 3646. The Supreme Court Chamber notes that the paragraph referred to in this finding refers only to consummation of marriage, and does not contain any discussion of pregnancy.
[3564] Trial Judgment (E465), para. 3556.
[3565] Trial Judgment (E465), para. 4452, referring to the evidence of SAY Naroeun and NGET Chat.
[3566] T. 29 March 2016 (SAO Sarun), E1/410.1, p. 69 (Witness SAO Sarun, the Secretary of Sector 105, confirmed without specifying when, that he heard that *Angkar* wanted to increase the population because their numbers were small, and therefore "male and female combatants were encouraged to get married"); T. 3 February 2016 (MEAS Voeun), E1/387.1, p. 38 (confirming that he had heard about the policy to increase Cambodia's population because Vietnam was more populated, and also confirming that the drive to have the troops get married was linked to the need to increase population); T. 3 August 2016 (CHIN Saroeun), E1/454.1, pp. 74-78.

1284. The Supreme Court Chamber has considered whether there is a contradiction between the inference that population increase was engendered by pregnancies, and the findings pointed to by KHIEU Samphân. These findings are contained in a section of the Trial Judgment entitled "Separation",[3567] which were made as part of the Trial Chamber's finding that *Angkar* controlled sexual relationships after marriage.[3568] The Trial Chamber found that after the wedding ceremony, arrangements were made for couples to spend some time together.[3569] Subsequently, couples were separated, and instructed to return to their respective units or worksites.[3570] The Trial Chamber also found that after being separated, couples were allowed to meet once every seven to 15 days.[3571] Civil Party CHANG Srey Mom stated that *Angkar* decided when couples were allowed to see each other.[3572] Civil Party MEAN Leouy stated that he and his wife were set to work at a place where men and women had to sleep separately.[3573] After couples were sent back to their respective units, some were required to ask for permission to see their spouses.[3574]

1285. This Chamber considers that these findings show that couples were frequently kept apart after marriage. While the overall purpose is expressed as being aimed at controlling relationships outside of marriage, they demonstrate that the authorities also controlled relationships within marriages. The Supreme Court Chamber further observes that the Trial Chamber made no clear findings on pregnancies occurring after, and as a consequence of, forced marriages.[3575] The only explicit finding on the occurrence of sexual intercourse in the context of marriage was in the acts of forced consummation which took place immediately after the ceremonies, or shortly thereafter.[3576] The Trial Chamber considered the evidence of Civil Party SAY Naroeun, who became pregnant after this act, and stated that she was required to work and was not given enough food, as a result of which she became very skinny. [3577] She

[3567] Trial Judgment (E465), section 14.3.8.4, p. 1851.
[3568] Trial Judgment (E465), para. 3664.
[3569] Trial Judgment (E465), para. 3662, referring, *inter alia*, to para. 3641.
[3570] Trial Judgment (E465), para. 3662.
[3571] Trial Judgment (E456), para. 3663.
[3572] Trial Judgment (E465), para. 3663.
[3573] Trial Judgment (E465), para. 3663.
[3574] Trial Judgment (E465), para. 3664.
[3575] *Contra* KHIEU Samphân's Appeal Brief (F54), para. 1341 (arguing that the Trial Chamber found that newly married couples were compelled to have sexual relations for the purposes of "producing" children to increase the population.)
[3576] While the International Co-Investigating Judge's decision not to investigate impregnation or forced pregnancy turned primarily on the assessment on the legality of these acts, the Intenational Co-Investigating Judge also held that there was "no evidence of any efforts by the DK regime to ensure that women became pregnant following their marriages." Case 004 Consolidated Decision on the Requests (D301/5), para. 88. See also generally Case 004 Consolidated Decision on the Requests (D301/5), Section H "Lack of evidence to support the allegations."
[3577] Trial Judgment (E465), para. 4452.

subsequently lost the baby because she got malaria and did not have any medication.[3578] The Trial Chamber considered her evidence as part of its analysis on the traumatising effects of forced marriage, but did not make any express finding on the possibility of pregnancies.

1286. The Supreme Court Chamber considers that it would have been preferable for the Trial Chamber to reason through these apparent contradictions between the two goals of the regulation of marriage policy. This Chamber also considers, however, that the finding that couples were often separated after marriage does not preclude the possibility that meetings occurred frequently enough to facilitate pregnancies. The Trial Chamber considered the evidence of numerous civil parties and witnesses who stated that they were allowed to meet between once a week and every 15 days,[3579] including one civil party who stated that she was separated from her husband only after she became pregnant.[3580] This Chamber also considers that what is important is the finding that the regulation of marriage had a purpose, which was, furthermore, part of the common purpose. It makes no difference whether the purpose, in this case procreation, was actually achieved. For these reasons, this Chamber rejects KHIEU Samphân's arguments of inconsistency, and concludes that the Trial Chamber reasonably determined that there were two purposes to the regulation of marriage policy.

iii. The Elements of the Regulation of Marriage Policy

1287. The Trial Chamber found that, despite the existence of an official CPK principle of consent, marriages were coercively arranged on a nationwide basis in the 1975-1979 period.[3581]

[3578] Trial Judgment (E465), para. 4452.
[3579] See Trial Judgment (E465), fn. 12231, referring to T. 30 August 2016 (CHEA Deap), E1/466.1, pp. 74-75, 100-101 (stating that after the wedding took place, she and her husband were allowed to meet every 10-15 days. After that, her husband was employed to work at Kirirum mountain and then they only met once every one or two months); T. 25 October 2016 (SAY Naroeun), E1/489.1, pp. 41, 49 (explaining that she stayed with her husband for three days after the marriage and they were required to go back to their respective units. Once every week, they were allowed to meet each other again to spend the night together); T. 10 August 2015 (KAN Thorl), E1/327.1, pp. 79-81 (stating that after the wedding ceremony, couples were allowed to stay together for three days. After that, they were allowed to meet once every 10 days); T. 25 June 2015 (KONG Uth), E1/322.1, pp. 36-37 (testifying that she did not spend the night of the wedding with her husband but she was instructed to stay with her husband three nights after that. Subsequently, they went to work in different locations and are allowed to meet every tenth day); T. 31 August 2016 (PHAN Him), E1/467.1, p. 94 (stating that following the marriage, her husband came to visit her once per week); T. 23 August 2016 (OM Yoeurn), E1/462.1, p. 7 (explaining that after the wedding, she and her husband were allowed to meet after 10-15 days); T. 23 August 2016 (SOU Sotheavy), E1/462.1, p. 88; T. 24 August 2016 (SOU Sotheavy), E1/463.1, p. 48 (stating that she and her wife were allowed to meet every 10 days); T. 17 February 2015 (PHNEOU Yav), E1/264.1, p. 33 (explaining that after the marriage, the couples were told to go back to their respective units and they saw each other again after 10 days).
[3580] See Trial Judgment (E465), fn. 12231, referring to T. 16 September 2016 (MOM Vun), E1/475.1, pp. 58-61 (stating that after she got pregnant, her husband was sent to a different worksite and he was allowed to visit her a few days every two months).
[3581] Trial Judgment (E465), paras 3538, 3670.

In some instances, couples were able to arrange their own marriages,[3582] and distinctive arrangements were, in addition, made for soldiers who were disabled as a consequence of wounds suffered in the battlefield to be married.[3583] Wedding ceremonies usually took place without the involvement of tradition or family members, and often occurred on a mass basis.[3584] After the ceremonies, individuals were kept together and monitored to ensure that consummation took place.[3585] Failure to consummate marriages risked death or re-education, and so couples concealed non-consummation.[3586]

1288. KHIEU Samphân raises challenges to the Trial Chamber's findings on: (1) the CPK principle of consent to marriage; (2) marriages of disabled soldiers; (3) the nature and conduct of the wedding ceremonies; (4) the climate of force in which consummation of marriage took place; and (5) the monitoring and concealment of failure to consummate marriages. Each of these is considered in turn below.

The CPK Principle of Consent to Marriage

1289. The Trial Chamber considered CPK documents showing that there was an official principle of consent to marriage,[3587] which was corroborated by the evidence of a number of former CPK cadres.[3588] The Trial Chamber considered, however, that the evidence of consent discussed by the cadres may not have been genuine, and also observed that cadres tended to minimise their own responsibility.[3589] The Trial Chamber considered that there were some instances of consent to marriage, as well as some examples of refusals without prejudicial consequence.[3590] Overall, however, the CPK required individuals to unconditionally follow Party discipline, including orders as to marriage,[3591] and that numerous witnesses and civil parties described weddings as forced or involuntary.[3592] Individuals generally consented to marriage out of fear, including the fear of being placed in danger, subjected to accusations, sent for re-education, being moved to another location, or killed.[3593] Accordingly, the Trial

[3582] Trial Judgment (E465), paras 3599-3560.
[3583] Trial Judgment (E465), para. 3586.
[3584] Trial Judgment (E465), paras 3639-3640, 3691.
[3585] Trial Judgment (E465), paras 3641, 3644, 3660, 3696.
[3586] Trial Judgment (E465), para. 3647.
[3587] Trial Judgment (E465), para. 3542.
[3588] Trial Judgment (E465), para. 3617.
[3589] Trial Judgment (E465), para. 3623.
[3590] Trial Judgment (E465), paras 3617, 3623, 3625.
[3591] Trial Judgment (E465), para. 3618.
[3592] Trial Judgment (E465), para. 3619.
[3593] Trial Judgment (E465), para. 3620.

Chamber found that despite the principle of consent, there was no meaningful policy of consent in practice.[3594]

1290. KHIEU Samphân argues that Trial Chamber "chose to ignore" the principle of consent to marriage that was set out as part of the doctrine of the CPK.[3595] In support, he alleges errors in: (1) the Trial Chamber's findings on CPK statements which, in his submission attested to the principle of consent;[3596] (2) the rejection of cadre evidence, which also demonstrated that this principle existed;[3597] (3) reliance on civil party and witness evidence on an alleged coercive environment, which was unrepresentative, inaccurately presented, and included findings on crimes not charged in this case;[3598] and (4) the treatment of expert witnesses François PONCHAUD, NAKAGAWA Kasumi, and Peg LEVINE.[3599]

1291. The Co-Prosecutors respond that there was no error in the Trial Chamber's decision not to rely on the principle of consent as outlined in CPK documentation or attested to by cadres.[3600] The Trial Chamber made reasonable findings on the civil party and witness evidence on the coercive environment, and did not make findings on uncharged crimes.[3601] The Trial Chamber also made reasonable findings regarding the expert evidence of François PONCHAUD, NAKAGAWA Kasumi and Peg LEVINE.[3602]

a) CPK Statements

1292. The Trial Chamber found that a policy on family building was "set out notably" in an edition of *Revolutionary Youth* from 2 February 1974, entitled "Revolutionary and Non-Revolutionary World Views Regarding the Matter of Family Building.[3603] The Trial Chamber considered that marriage was based on two principles of the Party as set out in a "subsequent" issue of *Revolutionary Youth*: "First, both parties agree. Second, the collective agrees, and then it's done. Why should this impact male-female morality?"[3604] Overall, the Trial Chamber found, pointing *inter alia* to a speech by KHIEU Samphân, that while individual consent was

[3594] Trial Judgment (E465), para. 3623.
[3595] KHIEU Samphân's Appeal Brief (F54), para. 1191.
[3596] KHIEU Samphân's Appeal Brief (F54), paras 1193, 1213-1215.
[3597] KHIEU Samphân's Appeal Brief (F54), paras 1194-1195, 1200.
[3598] KHIEU Samphân's Appeal Brief (F54), paras 1196, 1258, 1261-1262, 1274.
[3599] KHIEU Samphân's Appeal Brief (F54), paras 1195, 1209.
[3600] Co-Prosecutors' Response (F54/1), para. 690.
[3601] Co-Prosecutors' Response (F54/1), paras 693, 717, 721.
[3602] Co-Prosecutors' Response (F54/1), paras 244, 691, 749.
[3603] Trial Judgment (E465), para. 3540, referring to Revolutionary and Non-Revolutionary World Views Regarding the Matter of Family Building, 2 June 1975, E3/775.
[3604] Trial Judgment (E465), para. 3542, referring to *Revolutionary Youth*, October 1978, E3/765.

part of the marriage principles of the Party, in practice, the agreement of both parties was less important than the adherence to *Angkar*'s directives.[3605]

1293. KHIEU Samphân argues that the Trial Chamber erred in stating that the moral principles of the CPK were set out in the 1978 *Revolutionary Youth* Issue because the principles had been in place since 1968.[3606] The Trial Chamber also erred in its assessment of *Revolutionary Flag* and *Revolutionary Youth* publications and a speech by KHIEU Samphân from April 1978, given that these documents contained no explicit reference to marriage and were phrased as they were because they were revolutionary publications.[3607]

1294. The Co-Prosecutors argue that the Trial Chamber properly weighed all the evidence before it to find that the principle of consent to marriage "was not prioritized in practice," and was instead subordinated to *Angkar*'s directive.[3608]

1295. In this finding, the Trial Chamber expressly observed that "the individual's consent was part of the marriage principles of the Party".[3609] Thus, to the extent that KHIEU Samphân argues that the Trial Chamber ignored this principle, his submission is dismissed. The Supreme Court Chamber also observes that the Trial Chamber did not, contrary to KHIEU Samphân's argument, find that the principle of consent only came into existence in 1978. Instead, it pointed to the principles as set out in the 1978 *Revolutionary Youth* issue and used the articulation of the principles in this publication to reflect the "CPK policy on the regulation of marriage and discipline" throughout the earlier period.[3610] KHIEU Samphân's argument to the contrary is dismissed.

1296. This Chamber next observes that the 1975 *Revolutionary Youth* issue referred to by the Trial Chamber expressly refers to "family-building".[3611] The Trial Chamber found that this

[3605] Trial Judgment (E465), para. 3548, referring to *Phnom Penh Rally Marks 17th April Anniversary* (in SWB/FE/5791/B collection), 16 April 1978, E3/562, ERN (EN) S00010563 (concerning a resolution adopted during a mass meeting on the occasion of the third anniversary of 17 April 1975 in which KHIEU Samphân delivered a speech, which *inter alia* included the following solemn general pledge: "(12) To subordinate resolutely all personal and family interests to the collective interests of the nation, class, people and revolution"). See Trial Judgment (E465), fn. 11927.
[3606] KHIEU Samphân's Appeal Brief (F54), para. 1193, referring to Trial Judgment (E465), para. 3542.
[3607] KHIEU Samphân's Appeal Brief (F54), paras 1213-1215, 2117.
[3608] Co-Prosecutors' Response (F54/1), para. 688.
[3609] Trial Judgment (E465), para. 3548.
[3610] See Trial Judgment (E465), sub-heading 14.3.2.1 (The CPK policy on the regulation of marriage and discipline), p. 1794.
[3611] See Trial Judgment (E465), para. 3540, referring to *Revolutionary Youth*, Revolutionary and Non-Revolutionary World Views Regarding the Matter of Family Building, 2 June 1975, E3/775.

publication underlined "the importance of the family as the basis for human society to prosper and advance",[3612] quoting an extract from the publication, which stated that "we consider matters of family as being inseparable from matters of the entire nation and people."[3613] KHIEU Samphân's submission that none of the documents he cites does make such a reference is therefore dismissed.[3614]

1297. This Chamber also finds no error in the Trial Chamber's findings that other revolutionary statements underpinned its finding that *Angkar* intended to prevail over individual choice. The Trial Chamber considered statements in the 1975 *Revolutionary Youth* calling for the abolition of private possessions, which showed that *Angkar*'s decisions based on collective interest were to take precedence over personal choices or sentiment,[3615] as well as KHIEU Samphân's 1978 speech, which showed that personal and family interests were to be subordinated to the revolution.[3616] The other issues of *Revolutionary Youth* considered by the Trial Chamber demonstrated that individuals must be fully committed to building the nation, and abolishing sentiment.[3617] The repercussions of failure to comply with *Angkar*'s will are, furthermore, supported by the emphasis in the 1975 *Revolutionary Flag* publication on the "complete" eradication and purification of "incorrect views".[3618] The Supreme Court Chamber

[3612] Trial Judgment (E465), para. 3540.
[3613] See Trial Judgment (E465), para. 3540, referring to *Revolutionary Youth*, Revolutionary and Non-Revolutionary World Views Regarding the Matter of Family Building, 2 June 1975, E3/775, pp. 3-4.
[3614] KHIEU Samphân's Appeal Brief (F54), para. 1214.
[3615] See Trial Judgment (E465), para. 3544, referring to *Revolutionary Youth*, November 1975, E3/750.
[3616] Trial Judgment (E465), para. 3548, referring to *Phnom Penh Rally Marks 17th April Anniversary* (in SWB/FE/5791/B collection), 16 April 1978, E3/562, ERN (EN) S00010563 (concerning a resolution adopted during a mass meeting on the occasion of the third anniversary of 17 April 1975 in which KHIEU Samphân delivered a speech, which, *inter alia*, included the following solemn general pledge: "(12) To subordinate resolutely all personal and family interests to the collective interests of the nation, class, people and revolution").
[3617] Trial Judgment (E465), para. 3548, referring to *Revolutionary Youth*, January 1977, E3/772, ERN (EN) 00541712, p. 13 ("[W]e the youth of this generation must pay a great deal of attention to building ourselves well following the Party's revolutionary stances in every field and not be bothered with or become entangled with miscellaneous issues surrounding our individual persons that might cause us to build ourselves slowly or attract us into falling backwards again."); *Revolutionary Youth*, August 1975, E3/733, ERN (EN) 00357870, p. 3 ("Our Kampuchean youth have the task of defending the country and constructing the country to be firm, mighty, skilled and esteemed and glorious extremely rapidly following the Party's new direction of socialist revolution absolutely."); *Revolutionary Youth*, October 1975, E3/729, ERN (EN) 00357911, p. 12 ("Our revolutionary youth must constantly keep building, strengthening, expanding and arming themselves the four essential proletarian qualities of the Party: the highest sacrifice, the sharpest combat, unconditional respect for organizational discipline, and unceasing innovation and building. [...] Along with this, it is imperative to constantly have a high spirit of revolutionary vigilance, vigilance in outlook and stance, vigilance in organization, vigilance in routine daily life, absolutely respecting the organizational discipline of the Party, absolutely respecting and implementing the Party's line and organizational provisions."); *Revolutionary Youth*, December 1975, E3/730, ERN (EN) 00363433, p. 12 ("In terms of organization, it is imperative to concentrate on educating and refashioning our youth to have correct and solid organization, to have unconditional and awakened respect for organizational discipline.").
[3618] Trial Judgment (E465), para. 3541, referring to Revolutionary and Non-Revolutionary World Views Regarding the Matter of Family Building, 2 June 1975, E3/775, ERN (EN) 00417947, p. 8 ("[T]he revolutionary

is satisfied that the Trial Chamber correctly summarised the evidence it considered and reasonably concluded that it showed that the decisions of *Angkar* trumped individual choice.

1298. The Supreme Court Chamber also rejects KHIEU Samphân's argument that the Trial Chamber should have treated the statements made in these publications or in his speech differently in light of the revolutionary context in which they were made. He fails to provide offer any relevant evidence to support his claim that this Chamber should adopt a reading of the text that contradicts a plain English interpretation of it.

1299. The Supreme Court Chamber notes that the Trial Chamber did not directly rely on the speech cited by KHIEU Samphân when concluding that "*Angkar* was placed above the parents or was even intended to replace them."[3619] The Trial Chamber referred instead to the *Revolutionary Flag* publication from 1978. The Trial Chamber did, however, take the speech into account when determining that the parties' agreement to marry was less important than the adherence to *Angkar*'s directives, because "the latter was considered to be the expression of the collective interests of the nation, the worker-peasant class, the people and the revolution, to which personal and family interest were to be subordinated."[3620] The Supreme Court Chamber considers that the wording of this finding corresponds closely to the specific statements KHIEU Samphân made in the speech.[3621] KHIEU Samphân's argument to the contrary is dismissed.

b) Cadre Evidence

1300. The Trial Chamber considered the evidence of former CPK cadres RIEL Son, OR Ho, PECH Chim, MEAS Voeun, TEP Och, and YOU Vann when finding that marriages were arranged based on the "consent" of individuals.[3622] The Trial Chamber rejected the evidence of

youth, must completely eradicate and purify all incorrect views and stances toward these matters of family building, such as free morality and being in a hot panic wanting to build a family while we are too young, or being free and not respecting organisational discipline and not respecting the collective in building a family, for example.")

[3619] See Trial Judgment (E465), para. 3539.

[3620] See Trial Judgment (E465), para. 3548.

[3621] See Trial Judgment (E465), fn. 11927, referring to *Phnom Penh Rally Marks 17th April Anniversary* (in SWB/FE/5791/B collection), 16 April 1978, E3/562, ERN (EN) S00010563 (concerning a resolution adopted during a mass meeting on the occasion of the third anniversary of 17 April 1975 in which KHIEU Samphân delivered a speech, which *inter alia* included the following solemn general pledge: "(12) To subordinate resolutely all personal and family interests to the collective interests of the nation, class, people and revolution").

[3622] Trial Judgment (E465), para. 3617, referring to T. 18 March 2015 (RIEL Son), E1/279.1, p. 39; T. 19 May 2015 (OR Ho), E1/301.1, p. 71; T. 22 April 2015 (PECH Chim), E1/290.1, pp. 40-41, 49; T. 23 April 2015 (PECH Chim), E1/291.1, pp. 4, 7-9; T. 8 October 2012 (MEAS Voeun), E1/131.1, p. 64; T. 22 August 2016 (TEP Poch),

the former cadres on the existence of a principle of consent, noting "that consent given to them may not have been genuine and their tendency to minimise their own responsibility."[3623] The Trial Chamber considered cadre PECH Chim to be an exception to this point, given his admission "that those who were reluctant to respond at the wedding ceremony did not consent to the marriage."[3624]

1301. KHIEU Samphân submits that the Trial Chamber erred in rejecting cadre evidence, given that the majority of cadres had assurances of non-prosecution (so were not fearful of incrimination), and that their evidence was corroborated by the official documents of the CPK and other witnesses who were not cadres.[3625] He alleges a number of errors of fact in the Trial Chamber's findings on the cadre evidence it did consider, as well as in disregarding other relevant evidence which confirmed the principle of consent.[3626]

1302. The Co-Prosecutors respond that the Trial Chamber did not reject cadre evidence solely on the basis of their minimisation of personal responsibility, but on broader evidence demonstrating that there was a general climate of fear which made consent redundant.[3627] As for civil party and witness evidence on the importance of consent, many also testified to a pervasive climate of fear in which genuine consent was impossible.[3628]

1303. The Supreme Court Chamber notes that the Trial Chamber chose not to rely on cadre evidence, not only because of the tendency of the cadres to minimise their own responsibility but also, and more materially, because the consent that they described was not genuine due to a "general climate of fear."[3629] The fact that some cadres were offered assurances of non-prosecution[3630] has no bearing on this broader finding. The Supreme Court Chamber also finds it irrelevant whether the cadre themselves administered weddings.[3631] To the extent that KHIEU Samphân is correct that the cadre did not perform wedding ceremonies, this would

E1/461.1, p. 84; T. 14 January 2016 (YOU Vann), E1/376.1, p. 69; T. 18 January 2016 (YOU Vann) E1/377.1, p. 50.
[3623] Trial Judgment (E465), para. 3623.
[3624] Trial Judgment (E465), para. 3623.
[3625] KHIEU Samphân's Appeal Brief (F54), paras 1194-1195.
[3626] KHIEU Samphân's Appeal Brief (F54), para. 1200.
[3627] Co-Prosecutors' Response (F54/1), para. 690.
[3628] Co-Prosecutors' Response (F54/1), para. 689.
[3629] Trial Judgment (E465), para. 3623.
[3630] See KHIEU Samphân's Appeal Brief (F54), fn. 2225.
[3631] See KHIEU Samphân's Appeal Brief (F54), para. 1194.

further endorse the conclusion that their evidence addressed the point of principle, rather than its implementation in practice.

1304. The Supreme Court Chamber has next considered the argument that the Trial Chamber should have considered widespread evidence, which, in his view, showed that the cadres were right that there was a principle of consent in practice. The Supreme Court Chamber recalls its earlier finding that CPK documentation, while reflecting the principle of consent in theory, also showed that individuals were encouraged to submit to *Angkar* in practice. As a result, the Trial Chamber has explained why this evidence does not establish overall corroboration of cadre evidence. The Supreme Court Chamber will consider below whether there is any error in the Trial Chamber's findings on civil party and witness evidence on the principle of consent, but otherwise finds no error in the Trial Chamber's findings in relation to the evidence of cadres RIEL Son, OR Ho, MEAS Voeun, TEP Och, and YOU Vann.

1305. As to PECH Chim's evidence, KHIEU Samphân argues that the Trial Chamber concealed the parts of his testimony in which he stressed the importance of the principle of consent[3632] and also ignored his evidence showing that the principle was incorrectly applied in practice.[3633] Contrary to KHIEU Samphân's assertion, the Trial Chamber expressly considered PECH Chim's evidence on the principle of consent, finding that "Witness PECH Chim testified that for a wedding to be organised, both individuals had to consent."[3634] The Trial Chamber also examined his evidence "that it was obvious that those who were reluctant to respond at the wedding ceremony did not consent to the marriage."[3635] KHIEU Samphân's objections are dismissed since he simply argues that the Trial Chamber should have reached a different conclusion about these portions of evidence, without demonstrating any error. KHIEU Samphân also fails to show how PECH Chim's evidence that he was personally unaware of the practices at offices further out in the forest is relevant to the application of the principle of consent.[3636]

1306. KHIEU Samphân argues that the Trial Chamber particularly erred in rejecting the testimony of cadres YOU Vann and PRAK Yut on the principle of consent,[3637] and completely

[3632] KHIEU Samphân's Appeal Brief (F54), para. 1200.
[3633] KHIEU Samphân's Appeal Brief (F54), para. 1200.
[3634] Trial Judgment (E465), para. 3617.
[3635] Trial Judgment (E465), para. 3617.
[3636] See T. 23 April 2015 (PECH Chim), E1/291.1, p. 8. *Contra* KHIEU Samphân's Appeal Brief (F54), para. 1200.
[3637] KHIEU Samphân's Appeal Brief (F54), paras 1205-1206.

ignored the evidence of cadres KHOEM Boeurn, NEANG Ouch, PHNOEU Yav and PHAN Chhen.[3638] He also references the evidence of cadres KAN Thorl, CHUM Seng, TAK Boy and CHHUY Huy which "confirmed the need for consent in marriage."[3639]

1307. The Supreme Court Chamber notes that while the Trial Chamber did not expressly consider the evidence of these witnesses in its analysis of cadre evidence,[3640] it found as a general proposition that it rejected the evidence of cadres on the existence of a meaningful principle of consent. The Supreme Court Chamber has found that the Trial Chamber acted reasonably in doing so. Thus, while some of the evidence highlighted by KHIEU Samphân shows that other cadres gave similar evidence about the existence of an official policy of consent,[3641] the Supreme Court Chamber believes that the Trial Chamber had already considered this set of evidence and reached reasonable conclusions. KHIEU Samphân's arguments are therefore dismissed.

1308. According to KHIEU Samphân, the Trial Chamber erred in ignoring cadre evidence that the CPK party line was not applied correctly.[3642] In support, he points to the evidence of PECH Chim and MOENG Vet, as well as his own closing arguments.[3643] The Supreme Court Chamber notes that PECH Chim stated that some officials "did not give people clear instructions",[3644] and that MOENG Vet highlighted that individual understanding of regulations varied.[3645] The Supreme Court Chamber finds this argument to be a reformulation of KHIEU Samphân's assertion that the Trial Chamber erred in disregarding cadre evidence

[3638] KHIEU Samphân's Appeal Brief (F54), para. 1201.
[3639] KHIEU Samphân's Appeal Brief (F54), para. 1203.
[3640] Trial Judgment (E465), para. 3617, referring to T. 18 March 2015 (RIEL Son), E1/279.1, p. 39; T. 19 May 2015 (OR Ho), E1/301.1, p. 71; T. 22 April 2015 (PECH Chim), E1/290.1, pp. 40-41, 49; T. 23 April 2015 (PECH Chim), E1/291.1, pp. 4, 7-9; T. 8 October 2012 (MEAS Voeun), E1/131.1, p. 64; T. 22 August 2016 (TEP Poch), E1/461.1, p. 84; T. 14 January 2016 (YOU Vann), E1/376.1, p. 69; T. 18 January 2016 (YOU Vann) E1/377.1, p. 50.
[3641] The evidence of certain cadres supports KHIEU Samphân's proposition. See T. 14 January 2016 (YOU Vann), E1/376.1, p. 77 (giving evidence about the organisation of marriages, and referring to the fact that a man and woman agreed to marry each other); T. 4 May 2015 (KHOEM Boeun), E1/296.1, p. 23 (couples had to agree to the marriage); T. 17 February 2015 (PHNEOU Yav), E1/264.1, p. 34 (possibility of refusing to marry). However, KHIEU Samphân does not provide an accurate citation to the evidence of PRAK Yut; while the evidence of NEANG Ouch refers to a lack of freedom to choose the marriage. See T. 10 March 2015 (NEANG Ouch), E1/274.1, p. 34 (actually says that in some places there was no freedom to choose marriage). KHIEU Samphân also fails to provide any reference to the evidence of PHAN Chen and his allegation of error in relation to this cadre is thus dismissed as unsubstantiated, See KHIEU Samphân's Appeal Brief (F54), para. 1201, fns 2239-2240.
[3642] KHIEU Samphân's Appeal Brief (F54), para. 1271.
[3643] KHIEU Samphân's Appeal Brief (F54), para. 1272.
[3644] T. 22 April 2014 (PECH Chim), E1/290.1, p. 46.
[3645] T. 27 July 2016 (MOENG Vet), E1/449.1, p. 43.

indicating an official policy of consent. This argument has been dismissed as outlined above, and this further argument is also dismissed.

c) Witness and Civil Party Evidence on Forcible Circumstances

1309. The Trial Chamber found that numerous witnesses and civil parties described weddings as forced or involuntary.[3646] Individuals consented to marriage out of fear, including the fear of being placed in danger, subjected to accusations, sent for re-education, being moved to another location, or killed.[3647]

1310. KHIEU Samphân argues that the Trial Chamber erred in its assessment of civil party and witness evidence. In his view, the Trial Chamber should not have relied on unrepresentative civil party evidence "specifically selected to evoke traumatic experiences in the context of their marriage."[3648] He argues that the Trial Chamber erred by treating cases in which marriages were refused without any prejudicial consequences as exceptions rather than the rule.[3649] He argues that the Trial Chamber failed to take into account the representativeness of these testimonies at the national level, and in rejecting his trial arguments on that point.[3650] He argues that the Trial Chamber misrepresents the evidence of certain civil parties and witnesses, and should not have considered MOM Vun's evidence that she was raped as a punishment for not marrying, given its finding that rape was not included as a charge in this case.[3651]

1311. The Co-Prosecutors respond that it is only logical that testimony given in the forced marriage segment would contain greater detail of the marriage policy, as this was the main reason that the witnesses were called.[3652] The Trial Chamber was permitted to consider any civil party testimony on the guilt of the Accused, including, in this case, on the existence of a policy.[3653] In relation to cases of refusal without prejudicial consequences, the Co-Prosecutors submit that KHIEU Samphân simply offers an alternative explanation of the facts.[3654] The Co-Prosecutors respond that the Trial Chamber summarised MOM Vun's evidence that she was

[3646] Trial Judgment (E465), para. 3619.
[3647] Trial Judgment (E465), para. 3620.
[3648] KHIEU Samphân's Appeal Brief (F54), paras 1261, 1274.
[3649] KHIEU Samphân's Appeal Brief (F54), para. 1269.
[3650] KHIEU Samphân's Appeal Brief (F54), paras 1196, 1258, 1261.
[3651] KHIEU Samphân's Appeal Brief (F54), para. 1262.
[3652] Co-Prosecutors' Response (F54/1), para. 693.
[3653] Co-Prosecutors' Response (F54/1), para. 693.
[3654] Co-Prosecutors' Response (F54/1), para. 721.

raped as a consequence of her refusal to be married, and that her lack of knowledge about other similar instances of rape is irrelevant.[3655]

1312. The Lead Co-Lawyers argue that KHIEU Samphân's own examples do not support his claim that individuals were able to refuse marriage without prejudicial consequences, and that in any case, the fact that certain "privileged" people were able to refuse marriage would not negate the incidence of forced marriage more generally.[3656] The Lead Co-Lawyers further argue that KHIEU Samphân's selective quotation from civil party testimony obscures the nature and import of that evidence, which confirms the absence of a meaningful policy of consent.[3657] They respond that MOM Vun's evidence was representative as she attested to the fact that violence compelled people into marriages.[3658]

1313. Regarding the general challenge to the Trial Chamber's reliance on civil party evidence, on the basis of its unrepresentative nature, KHIEU Samphân supports his allegation of error only through reference to arguments presented in his Closing Brief.[3659] The Supreme Court Chamber considers, however, that KHIEU Samphân mischaracterises the Trial Judgment. The Trial Chamber's findings were based not just based on civil party evidence but also on the evidence of numerous witnesses.[3660] The Supreme Court Chamber finds no error in a lack of "representativeness" in the Trial Chamber's reliance on evidence drawn mainly from the marriage policy segment, given that it is logical that testimony given in this part would focus on the details and context of the forced marriage policy.

1314. KHIEU Samphân next argues that the Trial Chamber misrepresents the evidence of three of the witnesses, SEN Srun and IN Yoeung and Civil Party SIENG Chanthy, referred to in footnotes in the Trial Chamber's analysis of coercion.[3661] The Trial Chamber relied on SEN Srun's evidence that many people were forced to marry.[3662] Contrary to KHIEU Samphân's assertion, however, it did not rely on SEN Srun's evidence to find that she herself was forced

[3655] Co-Prosecutors' Response (F54/1), para. 717.
[3656] Lead Co-Lawyers' Response (F54/2), paras 647-648.
[3657] Lead Co-Lawyers' Response (F54/2), paras 644-646.
[3658] Lead Co-Lawyers' Response (F54/2), para. 638.
[3659] KHIEU Samphân's Appeal Brief (F54), para. 1261, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), paras 2321-2328, 2440-2444, 2450-2451.
[3660] Trial Judgment (E465), paras 3619-3623.
[3661] KHIEU Samphân's Appeal Brief (F54), para. 1262, fn. 2398, referring to Trial Judgment (E465), paras 3619-3620.
[3662] Trial Judgment (E465), para. 3619, fn. 12081, referring to T. 14 September 2015 (SEN Srun), E1/346.1, p. 53 (many were forced to get married).

to marry.[3663] Nor did the Trial Chamber "ignore" IN Yoeung's evidence that she had "volunteered" to marry, but rather reasonably relied on IN Yoeung's statement that she feared being relocated if she refused.[3664] Similarly, the Trial Chamber did not find that SIENG Chanthy "was forced to marry",[3665] but considered her evidence that her sister did not protest her own marriage due to fear of being killed.[3666] These witnesses also did not "expressly state" that they did not fear reprisals, but instead gave evidence supporting the Trial Chamber's conclusion. In the Supreme Court Chamber's view, the evidence of these witnesses before the Trial Chamber strongly establishes that coercion negates consent during the DK regime.

1315. This Chamber has next considered the argument that the Trial Chamber erred in considering MON Vun's evidence on rape. The Trial Chamber considered MOM Vun's evidence that she was told to remarry after her husband was taken away, as well as her evidence that she was raped by five militiamen two days before the date of the marriage arranged for her.[3667] It also considered her evidence that she believed that she was raped because she refused to marry and therefore agreed to marry for the sake of her children's survival.[3668]

1316. The Supreme Court Chamber notes that the Closing Order found that "intimate relationships outside of marriage were considered to be against the collectivist approach of the CPK."[3669] The Closing Order found that people who were suspected of immoral conduct, including rape, were often re-educated or killed.[3670] By consequence, the Co-Investigating Judges found that the official CPK policy regarding rape was to prevent its occurrence and punish the perpetrators.[3671] The Co-Investigating Judges held, therefore, only considered the crime of rape in the context of forced marriage.[3672] Contrary to KHIEU Samphân's contention, the Trial Chamber's approach to MOM Vun's evidence does not contradict this approach. The Trial Chamber made no finding on the occurrence of the alleged rape as an independent crime, as is evidenced by its usage of italics, but focused instead on MOM Vun's account of her experience, and her perception of the cause behind it. There is no error in this approach. The

[3663] *Contra* KHIEU Samphân's Appeal Brief (F54), fn. 2398.
[3664] Trial Judgment (E465), para. 3620, fn. 12089, referring to T. 3 February 2016 (IN Yoeung), E1/387.1, pp. 91-92 (stating that she felt that if she had refused, she would have been taken to another location).
[3665] *Contra* KHIEU Samphân's Appeal Brief (F54), fn. 2398.
[3666] Trial Judgment (E465), para. 3620, fn. 12090, referring to T. 1 March 2016 (SIENG Chanthy), E1/394.1, p. 21 (her sister did not dare to protest the marriage because she feared being taken away and killed).
[3667] Trial Judgment (E465), para. 3621.
[3668] Trial Judgment (E465), para. 3621.
[3669] Case 002 Closing Order (D427), para. 1428.
[3670] Case 002 Closing Order (D427), para. 1428.
[3671] Case 002 Closing Order (D427), para. 1429.
[3672] See Trial Judgment (E465), para. 187.

Supreme Court Chamber also rejects the assertion that MOM Vun should have been able to offer accounts of other rapes: she appropriately testified about matters within her own knowledge.

1317. The Supreme Court Chamber has reviewed the evidence that KHIEU Samphân argues was disregarded by the Trial Chamber. While some of the witnesses and civil parties highlighted by KHIEU Samphân give evidence that consensual types of marriage arrangement existed in the DK regime,[3673] this evidence is fully compatible with, and does not undermine, the Trial Chamber's finding that some individuals were able to consent to marriage.[3674] Further, the evidence of the same individuals often explicitly refers to the policy of forced marriage, and the climate of force and coercion.[3675] KHIEU Samphân's allegations of error are therefore dismissed.

1318. This Chamber has also considered the Trial Chamber's appraisal of the evidence of EM Phoeung, a former monk, and Civil Party SUN Vuth, who each stated that they had "refused a marriage without detrimental consequences."[3676] The Trial Chamber concluded that "these situations were exceptional and may be explained by specific circumstances", and proceeded to find that "the overwhelming majority of the evidence shows that people could not refuse to marry without suffering consequences."[3677] In particular, the Trial Chamber explained how each individual stated that he felt that it was peculiar that no consequences were suffered, and

[3673] See T. 23 August 2016 (OM Yoeurn), E1/462.1, p. 28 (referring to one example of marriage which was voluntary and not forced); T. 23 January 2015 (OUM Suphany), E1/251.1, p. 105 (married her fiancé whom she loved); T. 26 May 2015 (MEAS Laihour), E1/305.1, p. 11 (marriage was agreed between families and then facilitated by Angkar); T. 25 June 2015 (KONG Uth), E1/322.1, p. 54 (Counsel put to her that it was her parent's choice, but earlier she had said that it was the chief who chose and that parents were subsequently informed of it. Was not clarified); T. 5 September 2016 (NOP Ngim), E1/469.1, p. 54 (non-forced marriages for people from unit and those in love). She also talks of how she was unaware of her marriage until the wedding day); T. 29 August 2016 (SENG Soeun), E1/465.1, p. 85 (difficult to say whether he consented or was forced); T. 29 July 2015 (MAM Soeurn), E1/325.1, p. 30 (stating that sometimes men wanted to get married and women did not, and that men and women got married because they loved each other). Some of KHIEU Samphân's submissions are not particularised, and will not be considered further. See, *e.g*., KHIEU Samphân's Appeal Brief (F54), para. 1198, fn. 2234, referring to Annexes B1 and B5.
[3674] Trial Judgment (E465), para. 3619.
[3675] See T. 18 February 2016 (SAO Han), E1/265.1, pp. 26-27 (discussing resolutions made at marriage, not consensual, also makes clear that parents were not included); T. 12 February 2015 (RY Pov), E1/262.1, pp. 28-29 (arranged to be forcibly married but it didn't go ahead); T. 27 January 2015 (CHOU Koemlan), E1/253.1, p. 24 (actually states that persons were forced to marry in the testimony highlighted); T. 29 January 2015 (CHANG Srey Mom), E1/254.1, p. 18 (married reluctantly under the regime); T. 19 September 2016 (HENG Lai Heang), E1/476.1, p. 53 (stated that she did refuse marriage proposals but was ultimately unable to continue to do so due to fear of being in trouble); T. 25 August 2016 (YOS Phal), E1/464.1, p. 28 (stating that men and women were emaciated and that he had no idea whether they had any prior relationship with one another); T. 31 August 2016 (PHAN Him), E1/467.1, pp. 91-92 (gave evidence that she initially refused but then was forced).
[3676] Trial Judgment (E465), para. 3625.
[3677] KHIEU Samphân's Appeal Brief (F54), para. 1269, referring to Trial Judgment (E465), para. 3625.

offered explanations for this apparent anomaly.[3678] The Supreme Court Chamber considers that KHIEU Samphân merely disagrees with these findings, without demonstrating any error. His allegations are therefore dismissed.

d) Expert Evidence

1319. KHIEU Samphân argues that the Trial Chamber erred in its approach to expert evidence. The Trial Chamber erred in failing to recall François PONCHAUD as a witness, given his work on the twelve moral principles,[3679] and distorted NAKAGAWA Kasumi's evidence.[3680] The Trial Chamber also "wrongfully dismissed" the testimony of Peg LEVINE, who stated that generally there was not a policy of forced weddings throughout the nation.[3681]

1320. The Co-Prosecutors respond that the Trial Chamber's decision to deny François PONCHAUD's appearance was well grounded in law, given that the witness had already testified in Case 002/01 on numerous topics including forced marriage.[3682] With respect to NAKAGAWA Kasumi, the Co-Prosecutors submit that KHIEU Samphân, not the Trial Chamber, distorts her testimony by misleadingly quoting partial testimony excerpts.[3683] Finally, the Co-Prosecutors argue that the Trial Chamber properly identified its reservations concerning Peg LEVINE's evidence through reasoned analysis.[3684]

1321. On 3 November 2016, the Trial Chamber found that it would be repetitious to call François PONCHAUD to testify in Case 002/02,[3685] and it would also cause undue delay to the proceedings.[3686] The Supreme Court Chamber has already considered and dismissed KHIEU Samphân's more general challenges to the Trial Chamber's decision not to recall François PONCHAUD's evidence.[3687] KHIEU Samphân points to François PONCHAUD's evidence on the twelve moral principles, but fails to offer any new arguments in respect of the Trial Chamber's approach. These arguments are therefore dismissed.

[3678] KHIEU Samphân's Appeal Brief (F54), para. 1269, referring to Trial Judgment (E465), para. 3625.
[3679] KHIEU Samphân's Appeal Brief (F54), para. 1195, referring to KHIEU Samphân's Appeal Brief (F54), Title II, Biased Approach to the Guiding Principles of Criminal Proceedings, Chapter III, Section II "Judges Who Considered the Trials as a Single Trial," para. 168. See also T. 17 August 2021, F1/10.1, p. 40.
[3680] KHIEU Samphân's Appeal Brief (F54), para. 1209.
[3681] KHIEU Samphân's Appeal Brief (F54), para. 1209.
[3682] Co-Prosecutors' Response (F54/1), para. 691.
[3683] Co-Prosecutors' Response (F54/1), para. 243.
[3684] Co-Prosecutors' Response (F54/1), para. 244.
[3685] Decision on Request to Hear HEDER and PONCHAUD (E408/6/2), para. 7.
[3686] Decision on Request to Hear HEDER and PONCHAUD (E408/6/2), para. 6.
[3687] See *supra* Section V.D.6.a.

1322. In relation to NAKAGAWA Kasumi, the Trial Chamber considered that she was appointed as an expert because of her extensive work and research experience.[3688] The Trial Chamber noted that she had followed a strict methodology, and demonstrated her specialised knowledge through testimony in court.[3689] The Trial Chamber described how NAKAGAWA Kasumi "concluded that she did not have enough evidence to say whether there was a policy from the top level to organise forced marriage as it was not part of her study."[3690] The Trial Chamber also observed, however, that her evidence was that by late 1977-1978, mass weddings were organised among couples whose marriages fit the definition of being forced.[3691] The Trial Chamber found that her opinion was generally well-reasoned and consistent, and demonstrated caution reaching her conclusions.[3692]

1323. The Supreme Court Chamber observes that the Trial Chamber relied on NAKAGAWA Kasumi's evidence that there was a policy of forced marriage as part of a general body of evidence.[3693] In the portion of testimony highlighted by the Trial Chamber and cited by KHIEU Samphân,[3694] NAKAGAWA Kasumi does not, in fact, caveat her conclusion on the lack of evidential basis for a policy of forced marriage by explaining that "it was not part of her study", as claimed by the Trial Chamber.[3695] Her evidence was, in fact, that she did not "have enough evidence to say that there was a policy from the top level to organize forced marriages."[3696] While the Trial Chamber's summary of NAKAGAWA Kasumi's evidence is inaccurate, this Chamber is nevertheless satisfied that her other evidence did confirm the existence of widescale forced marriages.[3697] Furthermore, while the Trial Chamber found that NAKAGAWA Kasumi's evidence "was generally well reasoned and consistent",[3698] and it also held that this would be evaluated "in the context of the evidence before it".[3699] As outlined above, the Trial Chamber concluded that the principle of consent to marriages was disapplied in practice, taking into consideration contemporaneous documentary evidence, as well as the testimony of civil parties and witnesses. KHIEU Samphân's challenges to these other findings have already been

[3688] Trial Judgment (E465), para. 3533.
[3689] Trial Judgment (E465), para. 3533.
[3690] Trial Judgment (E465), para. 3533.
[3691] Trial Judgment (E465), para. 3533.
[3692] Trial Judgment (E465), para. 3534.
[3693] See Trial Judgment (E465), para. 4065, referring generally to Regulation of Marriage section.
[3694] KHIEU Samphân's Appeal Brief (F54), para. 1209.
[3695] See Trial Judgment (E465), para. 3533.
[3696] T. 13 September 2016 (NAKAGAWA Kasumi), E1/472.1, p. 93.
[3697] T. 13 September 2016 (NAKAGAWA Kasumi), E1/472.1, p. 93 (stating that there was a policy of mass weddings, and that forced weddings took place in most regions).
[3698] Trial Judgment (E465), para. 3534.
[3699] Trial Judgment (E465), para. 3534.

considered and dismissed. The Supreme Court Chamber finds no error in the Trial Chamber's conclusion to determine that a policy of forced marriages existed.

1324. Regarding Peg LEVINE's evidence, the Trial Chamber considered her evidence that the marriages under the DK regime were "conscripted" rather than "forced."[3700] She concluded that people were not forced to marry during the DK regime, and further expressed the view that there was no policy on weddings at the beginning of the regime, though this had developed by 1978.[3701] The Trial Chamber considered, however, that the "preponderance of evidence" before the Trial Chamber on the experience of forced marriage meant that this evidence must be dismissed as erroneous.[3702] While KHIEU Samphân disagrees with this approach, he fails to demonstrate any error on appeal. His argument is accordingly dismissed.

Marriages of Disabled Persons

1325. The Trial Chamber concluded that "[a]rrangements were made for soldiers who were disabled as a consequence of wounds suffered in the battlefield to be married."[3703] In this respect, it relied on an extract from NORODOM Sihanouk's book,[3704] the evidence of witnesses and civil parties regarding the weddings of disabled soldiers,[3705] and CPK ideological discourse, including the "speeches made by KHIEU Samphân, on the duty to serve the revolution and respect the Party discipline unconditionally."[3706] The Trial Chamber found that, based on ideological values, females were "expected to sacrifice themselves for 'patriotic' reasons and for the benefit of the revolution."[3707] Further, even though some male cadres were allowed to choose their wives, their spouses were forced to marry without being asked.[3708]

1326. KHIEU Samphân argues that the Trial Chamber reached "contradictory findings" when finding that marriages between disabled soldiers and young women were implemented according to a policy promoted by the highest levels of the CPK.[3709] He contests the Trial Chamber's reliance on NORODOM Sihanouk's book, arguing that the Trial Chamber failed to take account of the low evidentiary value of this account, and should have assessed this

[3700] Trial Judgment (E465), para. 3530.
[3701] Trial Judgment (E465), para. 3530.
[3702] Trial Judgment (E465), para. 3531.
[3703] Trial Judgment (E465), para. 3586.
[3704] Trial Judgment (E465), para. 3586.
[3705] Trial Judgment (E465), paras 3586-3589.
[3706] Trial Judgment (E465), para. 3590.
[3707] Trial Judgment (E465), para. 3590.
[3708] Trial Judgment (E465), para. 3591.
[3709] KHIEU Samphân's Appeal Brief (F54), para. 1264, referring to Trial Judgment (E465), para. 3690.

evidence more carefully.[3710] Second, he challenges witness and civil party evidence on the marriage of disabled soldiers, alleging an error in the Trial Chamber's "selective and directed" use of testimonies from SOU Sotheavy, NOP Ngim, MES Am, MAK Chhoeun, and SENG Soeurn.[3711] KHIEU Samphân next argues that when finding that the marriages took place in accordance with CPK policy, the Trial Chamber erred in stating its reliance on speeches of his, but failing to refer to any speech in the corresponding footnote.[3712] KHIEU Samphân also argues that the Trial Chamber erroneously relied on PRAK Yut's testimony because her marriage took place in 1974, and was therefore "out of context evidence", and also because she stated that she loved her husband and was not forced.[3713] Finally, he argues that the Trial Chamber erred in distorting the evidence when finding that even if male cadres were allowed to choose their spouses, women were forced.[3714]

1327. The Co-Prosecutors respond that the Trial Chamber carefully considered the evidentiary value of the NORODOM Sihanouk's book elsewhere in the Trial Judgment, and took account of it when making this assessment.[3715] Next, the Co-Prosecutors submit that the speech is not unspecified, as the Trial Judgment clearly refers to a meeting chaired by KHIEU Samphân in which he instructed ministries to arrange marriages.[3716] The Co-Prosecutors further argue that SOU Sotheavy testified that none of the women involved in the ceremonies were able to refuse.[3717] With respect to PRAK Yut, the Co-Prosecutors argue that KHIEU Samphân fails to view her testimony in its entirety.[3718] The Co-Prosecutors argue that KHIEU Samphân's own evidence confirms that the women could not and did not freely consent to marriage.[3719]

1328. The Lead Co-Lawyers respond that at least in relation to the women, there was no possibility to consent to the marriages.[3720] The Lead Co-Lawyers also submit that the Trial Chamber did not err by treating purported instances of consent to marriage as outliers, citing evidence from three women who testified that they were forced to marry disabled soldiers.[3721]

[3710] KHIEU Samphân's Appeal Brief (F54), para. 1266.
[3711] KHIEU Samphân's Appeal Brief (F54), para. 1266.
[3712] KHIEU Samphân's Appeal Brief (F54), para. 1265.
[3713] KHIEU Samphân's Appeal Brief (F54), fn. 2416.
[3714] KHIEU Samphân's Appeal Brief (F54), para. 1268.
[3715] Co-Prosecutors' Response (F54/1), para. 718.
[3716] Co-Prosecutors' Response (F54/1), para. 719, referring to Trial Judgment (E465), para. 3569.
[3717] Co-Prosecutors' Response (F54/1), para. 719.
[3718] Co-Prosecutors' Response (F54/1), fn. 2472.
[3719] Co-Prosecutors' Response (F54/1), para. 720.
[3720] Lead Co-Lawyers' Response (F54/2), para. 644.
[3721] Lead Co-Lawyers' Response (F54/2), para. 644.

The Lead Co-Lawyers argue that, when viewed in context, the civil party testimony relied on by KHIEU Samphân confirms the absence of consent.[3722]

1329. The Supreme Court Chamber observes that the Trial Chamber expressly stated that NORODOM Sihanouk's book would be relied upon only to corroborate other evidence, because the Defence did not have an opportunity to test the statements in court.[3723] The Supreme Court Chamber therefore considers that the Trial Chamber treated this evidence with appropriate caution. Further, given that the Trial Chamber relied on other evidence in support of the findings on the marriages of disabled soldiers, the Supreme Court Chamber is persuaded that the text was only accorded corroborative weight in this analysis by the Trial Chamber.[3724] KHIEU Samphân's arguments to the contrary, as well as his specific allegations about inconsistencies in the book, are dismissed.[3725]

1330. The Supreme Court Chamber has considered whether, as claimed by KHIEU Samphân, the Trial Chamber erred in its appraisal of certain of the witnesses and civil parties relied upon concerning marriages of disabled soldiers. This Chamber considers that KHIEU Samphân points to selective parts of the testimony and does not consider the evidence as a whole. SOU Sotheavy stated, as KHIEU Samphân argues, that the marriages were not "forced",[3726] but also testified that none of the women involved dared refuse, showing that the marriages were indeed forced.[3727] While NOP Ngim described herself as "quite senior or mature", again, as KHIEU Samphân claims, a reading of her entire testimony shows that she invoked her age to explain why fleeing was riskier,[3728] not to explain her consent to marrying a former disabled soldier.[3729] MES Am's evidence that a couple had ultimately got along well does not detract from the most relevant part of his evidence: that a soldier was forced to marry in the first place.[3730] Further,

[3722] Lead Co-Lawyers' Response (F54/2), paras 644-646.
[3723] See Trial Judgment (E465), para. 3401.
[3724] The Supreme Court Chamber notes that when the Trial Chamber considered evidence on the CPK ideological discourse, it held that this was consistent with the "testimony" summarised above, with no reference to NORODOM Sihanouk's book. See Trial Judgment (E465), para. 3590.
[3725] Given this finding, the Supreme Court Chamber will not consider further the challenges raised by KHIEU Samphân to the reliability of the statements in the book, which go to its alleged "excessiveness" and inconsistencies. See KHIEU Samphân's Appeal Brief (F54), fn. 2409.
[3726] *Contra* KHIEU Samphân's Appeal Brief (F54), para. 1266.
[3727] T. 23 August 2016 (SOU Sotheavy), E1/462.1, p. 96 ("I saw the disable[d] soldiers coming to get married It was not a — it was not forced. The women were asked to get married to those disable[d] soldiers and none of them dare[d] to refuse").
[3728] T. 5 September 2016 (NOP Ngim), E1/469.1, p. 114.
[3729] *Contra* KHIEU Samphân's Appeal Brief (F54), para. 1266.
[3730] T. 21 September 2016 (MES Am), E1/478.1, pp. 100-101. MES Am also gave evidence that there was an upper echelon direction to increase and organise forces through producing children.

the fact that MAK Chhoeun, a disabled soldier, testified that he had a consensual marriage[3731] does not diminish the evidence that many marriages were forced, and also, more notably, does not account for the fact that it was non-consensual for most women. Finally, KHIEU Samphân does not offer a basis for his assertion that SENG Soeurn testified that she had "learned by hearsay of arranged marriages for disabled people", or explain the relevance of the assertion.[3732]

1331. The Supreme Court Chamber has next considered the argument that the Trial Chamber erred in stating that it relied on a speech of KHIEU Samphân, while not referring to any speech. This Chamber observes that the impugned finding[3733] does, in fact, refer to a speech by KHIEU Samphân, by reference in the corresponding footnote to a previous paragraph of the Trial Judgment in which the Trial Chamber had accepted evidence from a civil party regarding a lecture given by KHIEU Samphân.[3734] The Supreme Court Chamber further finds that the other documents cited by the Trial Chamber also support the statement made in the text.[3735] As a result, the Supreme Court Chamber finds no error in the Trial Chamber's approach.

1332. The Supreme Court Chamber notes that KHIEU Samphân does not provide any reference in support of his claim that PRAK Yut's marriage took place in 1974,[3736] and further observes that this witness demonstrated confusion about whether her wedding took place in 1973 or 1975.[3737] The Trial Chamber was entitled to rely on evidence outside the temporal scope of the Closing Order "to demonstrate a deliberate pattern of conduct".[3738] Regarding the assertion that PRAK Yut was not forced to marry, KHIEU Samphân again points to a portion of her evidence with disregard for its broader context. While she stated that she and her husband "loved each other",[3739] she also stated that she had no choice but to follow her husband's

[3731] T. 12 December 2016 (MAK Chhoeun), E1/511.1, p. 98.
[3732] See KHIEU Samphân's Appeal Brief (F54), para. 1266.
[3733] Trial Judgment (E465), para. 3590, fn. 12019.
[3734] Trial Judgment (E465), para. 3569 ("According to the Civil Party, KHIEU Samphan lectured cadres on the necessity of remaining detached from one's parents and instructed that all ministries had to arrange marriages for all male and female youths so that the couples could produce children and there would be more forces to defend the country."), referring to T. 30 August 2016 (CHEA Deap), E1/466.1, pp. 66-67.
[3735] The body of the text refers to CPK's ideological discourse "on the duty to serve the revolution and respect the Party discipline unconditionally" (see Trial Judgment (E465), para. 3590), and the corresponding footnote refers to numerous statements from the *Revolutionary Youth* and *Revolutionary Flag* publications that support the notion of unconditional duty and discipline for the Party (Trial Judgment (E465), fn. 12019).
[3736] See KHIEU Samphân's Appeal Brief (F54), fn. 2416 (providing reference only to PRAK Yut's evidence on her alleged consent to marriage).
[3737] T. 19 January 2016 (PRAK Yut), E1/378.1, pp. 37-38.
[3738] Trial Judgment (E465), para. 60. See Section VI.E.
[3739] T. 19 January 2016 (PRAK Yut), E1/378.1, pp. 43-44.

instruction to be married.[3740] Regarding CHEAM Kin's testimony, KHIEU Samphân again attempts to draw a false distinction between marriages which were "arranged" and those which were forced.[3741] As previously held, this mischaracterises the evidence and is thus dismissed.

1333. This Chamber has considered the challenges to the Trial Chamber's finding "that even though some male cadres were allowed to choose their wives, their spouses were forced to marry without being asked."[3742] The Supreme Court Chamber finds no merit in the claim that the Trial Chamber "withheld" evidence in reaching its conclusion on the marriage of male cadres, as KHIEU Samphân submits.[3743] KHIEU Samphân cites three portions of evidence to support the contention that there was other evidence the Trial Chamber should have considered, none of which supports his case. BEIT Boeurn testified that she personally was able to marry consensually,[3744] which is entirely consistent with the Trial Chamber's finding that some individuals did marry consensually.[3745] RUOS Suy testified, as a male cadre, about the existence of a policy of consent, but did not provide any specifically relevant evidence regarding females marrying disabled soldiers.[3746] The Supreme Court Chamber recalls that the Trial Chamber was within its discretion to reject the cadre evidence on the existence of a policy of consent.[3747] Furthermore, PHAN Him's evidence suggesting that she had married reluctantly[3748] confirms the Trial Chamber's finding that women did not have the freedom to freely marry. As a result, the evidence highlighted by KHIEU Samphân does not support the proposition he advances. Moreover, the isolated portions of evidence highlighted must be weighed against the wide range of witness, civil party and expert evidence found by the Trial Chamber to support its conclusions.[3749] KHIEU Samphân's arguments are therefore dismissed.

Wedding Ceremonies

1334. The Trial Chamber found that the CPK's policy of forced marriages generally involved the removal of parents from the marriage of their children, and the abandonment of traditional

[3740] T. 19 January 2016 (PRAK Yut), E1/378.1, p. 44.
[3741] See KHIEU Samphân's Appeal Brief (F54), para. 1268, fn. 1416 ("CHEAM Kin's written statement also did not allow the Chamber to find that there was a forced marriage in his case"), referring to T. 13 March 2014 (CHEAM Kin), E3/9524, p. 5 (the statement that "Angkar organized our marriage.")
[3742] Trial Judgment (E465), para. 3591.
[3743] KHIEU Samphân's Appeal Brief (F54), para. 1268.
[3744] See T. 28 November 2016 (BEIT Boeurn), E1/502.1, p. 40.
[3745] Trial Judgment (E465), paras 3623, 3625.
[3746] See Written Record of Interview of RUOS Suy, 7 July 2015, E3/10620, pp. 15-16 (stating that as a matter of principle, men and women could choose their spouses).
[3747] See *supra* Section VII.G.3.b.iii.
[3748] See T. 31 August 2016 (PHAN Him), E1/467.1, p. 117.
[3749] See Trial Judgment (E465), para. 3591, fns 12020-12023.

practices.[3750] The Trial Chamber also found that, during the DK regime, "collective weddings were a widespread practice across Cambodia",[3751] with the number of couples ranging from one couple to 70-80.[3752] The Trial Chamber found that during the wedding ceremonies, couples were instructed to make a commitment or resolution to *Angkar*.[3753] Undertakings of spouses reflected "absolute compliance with the directives of the *Angkar*", which took precedence over personal and family interests.[3754]

1335. KHIEU Samphân first argues that the Trial Chamber disregarded the evidence of cadres, and witnesses and civil parties which showed parents continued to be involved in wedding ceremonies.[3755] He then submits that the Trial Chamber erred in relying on the "extreme" accounts of EK Hoeun and SOU Sotheavy to draw the general conclusion that mass marriages took place, and further erred when it failed to consider exculpatory evidence of cadres PECH Chim and SAO Sarun, which showed the "true purposes" of collective marriage.[3756] KHIEU Samphân also challenges the Trial Chamber's conclusion that undertakings of spouses reflected "absolute compliance with the directives of the Angkar", which took precedence over personal and family interests.[3757] He argues that the evidence shows that sometimes, no such commitment was made,[3758] and that in fact, the true purpose of ceremonies was just to "formalise or legalise unions".[3759]

1336. The Co-Prosecutors respond that while KHIEU Samphân points to a few examples of parental presence, this is not incompatible with the Trial Chamber's finding.[3760] Further, while the cases of EK Hoeun and SOU Sotheavy may have been extreme, they were not unique.[3761] PECH Chim's evidence that more individuals themselves wanted to marry is belied by the extensive evidence of couples being informed of their marriages just before the ceremonies.[3762] Further, the evidence that ceremonies were being used in a widespread and systematic manner

[3750] Trial Judgment (E465), paras 3639-3640, 3691.
[3751] Trial Judgment (E465), para. 3631.
[3752] Trial Judgment (E465), para. 3632.
[3753] Trial Judgment (E465), para. 3633.
[3754] KHIEU Samphân's Appeal Brief (F54), para. 1256, referring to Trial Judgment (E465), paras 3633-3634.
[3755] KHIEU Samphân's Appeal Brief (F54), para. 1254 (cadres SAO Sarun, PECH Chim, KHOEM Boeurn, PAN Chhuong, HENG Lai Heang; "ordinary witnesses" CHANG Srey Mom, MEAS Laihour, KONG Uth, SEN Srun, MATH Sor, THANG Phal, HIM Man, MEY Savoeun, SIENG Chanthy).
[3756] KHIEU Samphân's Appeal Brief (F54), para. 1256, referring to Trial Judgment (E465), paras 3633-3634. See also Trial Judgment (E465), para. 3548.
[3757] KHIEU Samphân's Appeal Brief (F54), para. 1256, referring to Trial Judgment (E465), paras 3633-3634.
[3758] KHIEU Samphân's Appeal Brief (F54), paras 1256-1257.
[3759] KHIEU Samphân's Appeal Brief (F54), para. 1257.
[3760] Co-Prosecutors' Response (F54/1), para. 701.
[3761] Co-Prosecutors' Response (F54/1), para. 702.
[3762] Co-Prosecutors' Response (F54/1), para. 702.

disproved the argument that certain local officials were merely exercising discretion as a matter of practicality.[3763]

1337. The Supreme Court Chamber observes that little of the evidence highlighted by KHIEU Samphân in fact attests to parental attendance.[3764] In fact, most of the evidence makes no mention of parental involvement,[3765] and some of it expressly affirms that there was none.[3766] This Chamber also observes that, in any event, the Trial Chamber's findings do not preclude the prospect of parental attendances at weddings in some instances. The Trial Chamber determined that "in rare instances" couples' parents were present during the wedding ceremony,[3767] but that the "majority" of evidence demonstrates that family members "usually" did not attend wedding ceremonies.[3768] KHIEU Samphân's arguments that the Trial Chamber overlooked evidence of parental attendance at weddings is accordingly dismissed as misrepresenting both the evidence and the Trial Judgment.

1338. This Chamber has considered the Trial Chamber's approach to the evidence of EK Hoeun and SOU Sotheavy, whose testimonies, according to KHIEU Samphân, were wrongly relied upon to reach findings about the general occurrence of mass weddings.[3769] The Trial Chamber found how "[i]n rare instances, wedding ceremonies could reach hundreds of couples".[3770] The Trial Chamber then considered both EK Hoeun's evidence that he attended a wedding of 400 couples in September 1978 when he arrived in the Central Zone, as well as

[3763] Co-Prosecutors' Response (F54/1), para. 702.
[3764] See T. 29 January 2015 (CHANG Srey Mom), E1/254.1, p. 24 (stating that family were present); T. 28 September 2015 (HIM Man), E1/350.1, p. 17 (married fiancé with parental involvement); T. 1 March 2016 (SIENG Chanthy), E1/394.1, p. 23 (attended wedding of sister); T. 19 September 2016 (HENG Lai Heang), E1/476.1, p. 15 (parents did attend).
[3765] T. 23 January 2015 (OUM Suphany), E1/251.1, p. 104 (discussing family involvement in run up to wedding, does not describe presence of parents at the ceremony); T. 26 May 2015 (MEAS Laihour), E1/305.1, p. 11 (discussing family involvement in run up to wedding, does not describe presence of parents at the ceremony); T. 25 June 2015 (KONG Uth), E1/322.1, p. 33 (stating that was Angkar who arranged the marriage, no reference to parental involvement); T. 14 September 2015 (SEN Srun), E1/346.1, pp. 57-58 (parents involved in arranging the marriage but were prohibited from arranging it on own terms); T. 13 January 2016 (MATH Sor), E1/375.1, p. 77 (mass marriage which did not take place in accordance with tradition); T. 6 January 2016 (THANG Phal), E1/371.1, p. 72 (gives no evidence about presence of family or involvement of family); T. 1 December 2015 (PAN Chhuong), E1/360.1, p. 37 (refers to involvement of parents in match but not in mass ceremonies); T. 19 September 2016 (HENG Lai Heang), E1/476.1, p. 15 (parents did attend).
[3766] T. 17 August 2016 (MEY Savoeun), E1/459.1, p. 90 (expressly says relatives were not allowed to attend the wedding); T. 19 May 2015 (OR Ho), E1/301.1, p. 72 (expressly says that parents did not attend the marriage and were not informed)
[3767] Trial Judgment (E465), para. 3639.
[3768] Trial Judgment (E465), paras 3639-3640.
[3769] See KHIEU Samphân's Appeal Brief (F54), fn. 3484, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), para. 2450.
[3770] See Trial Judgment (E465), para. 3632.

SOU Sotheavy's statement that she was married in a ceremony of 117 couples.[3771] Contrary to KHIEU Samphân's submission, therefore, the Trial Chamber explicitly considered the evidence of these individuals to be illustrative of an unusual situation a "rare instance."[3772] By contrast, the Trial Chamber found, based on the evidence of numerous civil parties and witnesses, that more generally "the number of couples married in a single wedding ceremony ranged from one couple to 70-80 couples."[3773] KHIEU Samphân misrepresents the Trial Judgment and his submission is dismissed.

1339. Turning to KHIEU Samphân's assertion that the Trial Chamber ignored exculpatory evidence in reaching its conclusion that mass marriages occurred, this Chamber finds that KHIEU Samphân misunderstands the nature of the allegedly exculpatory evidence. Given the finding that numerous mass weddings were organised as "a widespread practice",[3774] based on extensive witness evidence,[3775] as well as the instructions which couples undertook to *Angkar* during the ceremony,[3776] the Supreme Court Chamber finds no error in the conclusion that marriages were performed on a systematic basis.

1340. Finally, the Supreme Court Chamber finds that KHIEU Samphân simply disagrees with the Trial Chamber's findings on commitments made during ceremonies, and fails to demonstrate an error. The Trial Chamber expressly found that "[i]n limited cases, no commitment was made",[3777] but found nonetheless that such a commitment generally occurred, given the extensive witness and civil party evidence demonstrating this.[3778] The Supreme Court Chamber likewise finds no relevance in KHIEU Samphân's contention that evidence proved that ceremonies formalised unions, given that this was self-evident, and that it does not therefore impugn any relevant legal or factual finding.

[3771] See Trial Judgment (E465), para. 3632. This Chamber uses the term "she" in light of SOU Sotheavy's self-description as a transgendered person. Although SOU Sotheavy is a biological male, she states that she has worn female clothing since the age of ten and she "wore a long skirt and had my long hair tied up, and I behaved like a woman," even during the early days of her captivity by the Khmer Rouge. See T. 23 August 2016, (SOU Sotheavy), E1/462.1, p. 73; Victim Information Form, 27 May 2013, E3/4607, p. 7.
[3772] See Trial Judgment (E465), para. 3632.
[3773] See Trial Judgment (E465), para. 3632.
[3774] Trial Judgment (E465), para. 3631.
[3775] Trial Judgment (E465), para. 3632.
[3776] Trial Judgment (E465), para. 3633.
[3777] Trial Judgment (E465), para. 3634.
[3778] Trial Judgment (E465), para. 3633.

Forced Sexual Intercourse in the Context of Forced Marriage

1341. The Trial Chamber found that after the wedding ceremonies, arrangements were usually made by the local authorities for newly wedded couples to sleep in an assigned location specifically to have sexual intercourse.[3779] Militiamen were commonly ordered to monitor the couples at night to ensure that they had sexual intercourse.[3780] Both men and women felt compelled to engage in sexual intercourse, and couples who were discovered not to have engaged in sexual intercourse were re-educated or threatened with being killed or receiving punishment.[3781] In certain instances, rape was used as punishment for failure to consummate a marriage.[3782] Couples who did not consummate their marriage had to hide the fact and pretend that they loved each other to avoid negative consequences.[3783]

1342. KHIEU Samphân challenges the conclusion that forced sexual intercourse took place pursuant to any policy,[3784] as well as the findings on monitoring of forced consummation,[3785] acts of "rape" as punishment,[3786] and the fact that there was a lack of evidence, in some cases, of an express statement of coercion to consummate the marriages.[3787] He also argues that the Trial Chamber's analysis of concealment of forced consummation shows numerous legal and factual errors.[3788]

1343. The Supreme Court Chamber recalls that it has found above that the Trial Chamber erred in directing itself to consider whether the elements of rape as an independent crimes were established, and in having found that men could not be victims of rape or other acts of sexual violence.[3789] This Chamber has, furthermore, found that the Trial Chamber should, instead, have considered only whether the conduct which was described in the Closing Order was established. This conduct was, in this case coerced sexual intercourse between forcibly married couples, involving both male and female victims. This Chamber will consider, throughout consideration of KHIEU Samphân's challenges below, whether the Trial Chamber's error

[3779] Trial Judgment (E465), para. 3696.
[3780] Trial Judgment (E465), para. 3696.
[3781] Trial Judgment (E465), para. 3696.
[3782] Trial Judgment (E465), para. 3658.
[3783] Trial Judgment (E465), para. 3647.
[3784] KHIEU Samphân's Appeal Brief (F54), paras 1362-1363, 1365, 1370.
[3785] KHIEU Samphân's Appeal Brief (F54), paras 1345-1348.
[3786] KHIEU Samphân's Appeal Brief (F54), paras 1368-1369, fn. 2591.
[3787] KHIEU Samphân's Appeal Brief (F54), paras 1372, 1375.
[3788] KHIEU Samphân's Appeal Brief (F54), para. 1374.
[3789] Co-Prosecutors' Response (F54/1), para. 738.

impacted its assessment of other factual findings, and, if necessary, will correct any consequential errors.

a) Findings on Forced Sexual Intercourse

1344. The Supreme Court Chamber observes that there is a distinctive sub-section of the Trial Judgment named "Forced Sexual Intercourse between Spouses".[3790] In this section, the Trial Chamber considered the evidence of six female individuals, namely OM Yoeurn, MOM Vun, PREAP Sokhoeurn, PEN Sochan, CHEA Deap, PHAN Him, as well as SOU Sotheavy's evidence about her wife, a seventh female victim, and found overall that it was satisfied that "these women, with the exception of PHAN Him, were forced to consummate their marriages."[3791]

1345. As a preliminary matter, this Chamber notes that this section does not refer to all victims of the policy of forced sexual intercourse. This applies even to the female victims who are expressly outlined in this section. In the further sub-sections on "coercive environment", and "monitoring", the Trial Chamber considered the evidence of further female victims CHANG Srey Mom, SAY Naroeun, CHUM Samoeurn, NGET Chat, HENG Lai Heang, IN Yoeung, MEAS Laihour, NOP Ngim, and KHIN Vat.[3792] This Chamber considers that all of these women were victims of the policy of forced sexual intercourse, not excluding the possibility that other women, not specifically referred to, also were victims.

1346. Of material significance in this regard, the finding on "Forced Sexual Intercourse between Spouses" completely excludes male victims. This Chamber recalls that the Closing Order charged acts of forced consummation in relation to both male and female victims of forced marriage, and, furthermore, the Trial Chamber made findings elsewhere showing that men, as well as women, were forced to consummate their marriages. The Trial Chamber considered the evidence of victims KUL Nem and YOS Phal in the sections "the coercive environment" and "monitoring", as well as male victim NHIM Khol in the section on

[3790] Trial Judgment (E465), paras 3648-3661.
[3791] Trial Judgment (E465), para. 3659.
[3792] Trial Judgment (E465), paras 3646, 3663, 3673, fns 12173, 12176, 12183, 12187, 12196 (CHANG Srey Mom); paras 3641, 3646, fns 12173, 12180, 12189, 12190-12191 (SAY Naroeun); para. 3647, fns 12176, 12200 (CHUM Samoeurn); fns 12173, 12176 (NGET Chat); para. 3643, fns 12175-12176, 12185 (HENG Lai Heang); para. 3645, fn. 12188 (IN Yoeung); fns 12175-12176 (MEAS Laihour); para. 2641, fn. 12178 (NOP Ngim); fn. 12176 (KHIN Vat).

"monitoring" and Civil Party PRAK Doeun in the section on the coercive environment.[3793] Additionally, the Trial Chamber considered the evidence of male victims EM Oeun in the section on the impact of forced marriage[3794] and MEAN Leouy in the section on "Separation".[3795] The Trial Chamber also considered MOM Vun's evidence as to the experience of her husband.[3796] This Chamber is satisfied that the Trial Chamber found, at a minimum, these male persons to be victims of forced consummation.

1347. The Supreme Court Chamber also observes, in a similar vein, that elsewhere in this analysis, the Trial Chamber limited its finding on coercion to female victims. The Trial Chamber held that "women […] were forced to consummate their marriages, either because they acted out of fear for their lives or physical security and therefore did not genuinely consent, or because they were physically forced to engage in sexual intercourse with their husbands."[3797] This Chamber recalls that the charged conduct is, as outlined above, gender-neutral. The Trial Chamber, elsewhere in the same analysis, also formulates the coercive environment in a gender-neutral way, holding that "genuine consent to consummation of a marriage was not possible in an environment where couples had not consented to enter into same marriage in the first place, knew that consummation was required, compliance was monitored, and in case of noncompliance, forced."[3798] For these reasons, the Supreme Court Chamber is satisfied that the Trial Chamber found that both men and women were subjected to a coercive environment in which consent was lacking.

b) Whether there Was a "Policy" of Forced Sexual Intercourse

1348. KHIEU Samphân challenges the conclusion that forced sexual intercourse took place pursuant to a policy.[3799] In his submission, expert witness NAKAGAWA Kasumi stated that there was a "policy to protect women",[3800] and NAKAGAWA Kasumi, as well as PRAK Yut and Peg LEVINE, also stated that consummation of marriage was "self-evident", rather than coerced.[3801]

[3793] Trial Judgment (E465), para. 3646, fns 12176, 12189, 12195 (KUL Nem); para. 3647, fns 12173, 12176, 12201, 12328 (YOS Phal); fn. 12177 (PRAK Doeun).
[3794] Trial Judgment (E465), fns 12274, 12287 (EM Oeun).
[3795] Trial Judgment (E465), para. 3663, fn. 12233 (MEAN Leouy).
[3796] Trial Judgment (E465), paras 3642, 3650.
[3797] Trial Judgment (E465), para. 3659.
[3798] Trial Judgment (E465), para. 3661.
[3799] KHIEU Samphân's Appeal Brief (F54), paras 1362-1363, 1365, 1370.
[3800] KHIEU Samphân's Appeal Brief (F54), para. 1370.
[3801] KHIEU Samphân's Appeal Brief (F54), paras 1362-1363, 1365, 1370.

1349. The Co-Prosecutors respond that the testimony of NAKAGAWA Kasumi establishes that no policy to protect women existed in practice.[3802] The Trial Chamber was well within its discretion in determining which parts of evidence to accept and which to reject, including with respect to Peg LEVINE's testimony.[3803]

1350. The Supreme Court Chamber consider KHIEU Samphân mischaracterises the nature of NAKAGAWA Kasumi's evidence on forced sexual intercourse. In the portion of evidence he refers to, NAKAGAWA Kasumi discussed the example of women who were raped because they refused to marry.[3804] She attested that this was an abuse of power by the local cadres, in violation of the official policy.[3805] This Chamber recalls, however, that what was prosecuted in this case were the acts of sexual violence which took place within marriage, whereby couples were forced to have sexual intercourse with each other at the demand of the DK regime.[3806] NAKAGAWA Kasumi's evidence did not relate to this finding and KHIEU Samphân's submission is dismissed.

1351. The Supreme Court Chamber has next considered KHIEU Samphân's submission that the Trial Chamber should have considered evidence showing that it was considered logical or inevitable, rather than coerced, to consummate marriages. The Trial Chamber considered PRAK Yut's evidence that "after the marriage, it is common sense that [couples] had to consummate their marriage. Then, if not, what was the purpose of marriage?"[3807] The Trial Chamber, therefore, expressly considered evidence that consummation followed naturally from marriage, and KHIEU Samphân's submission that it disregarded it is dismissed. Furthermore, KHIEU Samphân fails to look at the evidence as a whole. PRAK Yut stated that couples "had to consummate" the marriage,[3808] and while observing that she was unable to "enforce measures", she also stated that the persons in question "would be brought to the district to be educated".[3809] Re-education was, as discussed elsewhere, a form of punishment in its own right.

1352. KHIEU Samphân similarly argues that the expert witnesses attested that sexual intercourse logically followed from marriage, rather than taking place pursuant to a policy.

[3802] Co-Prosecutors' Response (F54/1), para. 745.
[3803] Co-Prosecutors' Response (F54/1), para. 749.
[3804] See T. 14 September 2016 (NAKAGAWA Kasumi), E1/473.1, p. 79.
[3805] See T. 14 September 2016 (NAKAGAWA Kasumi), E1/473.1, p. 78.
[3806] Case 002 Closing Order (D427), paras 1430-1433. See also Trial Judgment (E465), paras 3695-3701.
[3807] Trial Judgment (E465), para. 3645, referring to T. 19 January 2016 (PRAK Yut), E1/378.1, p. 53.
[3808] T. 19 January 2016 (PRAK Yut), E1/378.1, pp. 55-56.
[3809] T. 19 January 2016 (PRAK Yut), E1/378.1, pp. 55-56.

Expert witness Peg LEVINE stated that consummation of marriage generally occurred in marriages,[3810] and NAKAGAWA Kasumi also stated that children were expected to follow after marriage.[3811] Other witnesses, however, made clear that this followed from a marriage which was forced upon them by *Angkar*.[3812] This Chamber considers that KHIEU Samphân merely disagrees with the finding without showing error, and this argument is dismissed.

c) The Climate of Coercion

1353. The Trial Chamber found that both men and women felt compelled to have sexual intercourse, and were re-educated or threatened with being killed or receiving punishment.[3813] KHIEU Samphân disputes findings of fact going to monitoring by armed militia after the wedding ceremonies and acts of rape as punishment; and also argues that the Trial Chamber should have considered, regarding certain individuals, that they did not make an express statement as to the occurrence of "forced" consummation.

(i) Monitoring by Armed Militia After the Wedding Ceremonies

1354. The Trial Chamber found that after wedding ceremonies, arrangements were usually made by the local authorities for newly-wedded couples to sleep in an assigned location, specifically to have sexual intercourse.[3814] Militiamen were ordered to monitor the couples at night to make sure that they had sexual intercourse.[3815]

1355. KHIEU Samphân challenges the findings which, in the Trial Chamber's view, demonstrated that monitoring took place. He argues that the Trial Chamber relied selectively on civil party evidence. Further, the civil parties offered "diverse" accounts as to the purpose of the alleged monitoring after wedding ceremonies omitting to say that it happened at all, or stating that it happened generally, or to ensure religious observance and the impact of monitoring which often did not lead to sexual intercourse.[3816] Certain individuals testified only

[3810] T. 10 October 2016 (Peg LEVINE), E1/480.1, p. 83 ("Of course, I'm not wanting to make the implication that the way in which this happened under DK was tasteful, but consummation of marriage, typically in the Western world when we talk about the honeymoon period, is expected").
[3811] T. 13 September 2016 (NAKAGAWA Kasumi), E1/472.1, p. 52.
[3812] See, *e.g.*, T. 5 September 2016 (NOP Ngim), E1/469.1, p. 52 ("Angkar organized us to get married. Then we had to live together so that we could live together as husband and wife and probably, later on, have children.").
[3813] Trial Judgment (E465), para. 3696.
[3814] Trial Judgment (E465), paras 3641, 3696.
[3815] Trial Judgment (E465), paras 3641, 3644, 3660, 3696.
[3816] KHIEU Samphân's Appeal Brief (F54), paras 1345-1348.

about what they heard, and not saw.[3817] According to KHIEU Samphân, the Trial Chamber could not have found that the monitoring was conducted according to a policy.[3818]

1356. The Co-Prosecutors respond that the Trial Chamber's findings included evidence from other segments of the trial, and were fully representative.[3819] Further, the evidence does not demonstrate a diversity of experience, and uniformly linked the patrols to forced consummation.[3820]

1357. The Supreme Court Chamber will first consider the arguments about representativeness. It notes that the Trial Chamber considered the evidence of eight civil parties[3821] and ten witnesses,[3822] as well as three persons who appeared as both witnesses and civil parties,[3823] when making its findings on the occurrence of monitoring.[3824] KHIEU Samphân's assertion that the Trial Chamber relied selectively only on the evidence from civil parties fails to reflect the Trial Judgment and is rejected. Similarly, there is no error in the "representativeness" of the Trial Chamber's assessment.[3825] It is unsurprising that witnesses and civil parties giving evidence specifically about their experience of forced marriage would also testify most vividly about how consummation of marriage was monitored. The fact that witnesses testifying on other crimes did not mention this practice, particularly in the absence of questioning on the issue, is irrelevant.[3826]

1358. The Supreme Court Chamber has considered KHIEU Samphân's allegation that the civil party evidence was "diverse", a term which this Chamber assumes to mean "inconsistent" for the purposes of monitoring. In support, he points to several of the civil parties relied upon

[3817] KHIEU Samphân's Appeal Brief (F54), paras 1347-1348.
[3818] KHIEU Samphân's Appeal Brief (F54), para. 1353.
[3819] Co-Prosecutors' Response (F54/1), para. 737.
[3820] Co-Prosecutors' Response (F54/1), para. 738.
[3821] CHEA Deap; SOU Sotheavy; PEN Sochan; PREAP Sokhoeurn; KUL Nem; CHUM Samoeurn; OM Yoeurn; SAY Naroeun.
[3822] PHNEOU Yav; MEAS Laihour; MAM Souerm; HENG Lai Heang; NOP Ngim; NGET Chat; CHANG Srey Mom; KHIN Vat; NAKAGAWA Kasumi; KAING Guek Eav.
[3823] YOS Phal, CHOU Koemlan, PRAK Doeun.
[3824] See Trial Judgment (E465), para. 3641, fns 12175-12176.
[3825] *Contra* KHIEU Samphân's Appeal Brief (F54), paras 1356-1360.
[3826] The Supreme Court Chamber notes that all but one of the witnesses and civil parties pointed to by KHIEU Samphân omitted to mention the practice of monitoring, rather than giving evidence that it did not occur. See KHIEU Samphân's Appeal Brief (F54), paras 1356-1360. KHIEU Samphân points to only one written statement, by cadre PRAK Yut, to the effect that there was no pressure to consummate the marriage. See KHIEU Samphân's Appeal Brief (F54), fn. 2576, referring to Written Record of Interview of PRAK Yut, 30 September 2014, E3/9499, p. 23.

by the Trial Chamber in its analysis of monitoring.[3827] This Chamber concludes that none of the individuals he mentions gave inconsistent evidence as to the purpose of monitoring. OM Yoeurn and PREAP Sokhoeurn both gave evidence that militia monitored couples to check on consummation, and did not make reference to any further purpose of monitoring.[3828] PREAP Sokhoeurn stated that under the regime, individuals were subject to more general surveillance,[3829] while also giving evidence that couples were specifically monitored on the night of weddings.[3830] MEAS Laihour provided clear evidence that the militia "came to watch over whether we got along with each other and whether we consummated our marriage",[3831] and did not indicate, contrary to KHIEU Samphân's assertion, that the purpose of monitoring was to ensure observance of religious rituals.[3832] HENG Lai Heang's evidence that non-compliant couples were monitored is entirely consistent with the Trial Chamber's findings that monitoring took place as part of the coercive regime;[3833] as is CHANG Srey Mom's evidence that monitoring might have occurred to determine if a couple was "getting along" or saying bad things about *Angkar*.[3834]

1359. The Supreme Court Chamber also rejects the submission that evidence was "diverse" when it comes to the purposes of monitoring. The Trial Chamber stated that the intention of monitoring was to ensure that marriages were consummated, which was supported by the evidence. The Trial Chamber was not required to find that the marriages actually were

[3827] See Trial Judgment (E465), paras 3641-3643. See also KHIEU Samphân's Appeal Brief (F54), para. 1345, fn. 2546, 2548-2549, referring to OM Yoeurn, PREAP Sokhoeurn, CHUM Samoeurn, MEAS Laihour, HENG Lai Heang, CHANG Srey Mom.
[3828] T. 24 June 2015 (CHUM Samoeurn), E1/321.1, pp. 65-66 (explaining that the militiamen would eavesdrop the married couples to check if they had consummated the marriage); T. 24 October 2016 (PREAP Sokhoeurn), E1/488.1, pp. 7-8 (stating that couples were under surveillance throughout the night of their wedding); T. 23 August 2016 (OM Yoeurn), E1/462.1, pp. 8, 47 ("And if we did not consummate our marriage, then measures would be taken. And for that reason, I agreed to sleep with my husband [...] Madam, can you tell the Chamber at which point that you have sex with your husband? A. It was a month later [...] I was so afraid so I agreed to sleep with him.")
[3829] See KHIEU Samphân's Appeal Brief (F54), para. 1345, fn. 2546.
[3830] T. 24 October 2016 (PREAP Sokhoeurn), E1/488.1, pp. 7-8 (stating that couples were under surveillance throughout the night of their wedding).
[3831] See Trial Judgment (E465), fn. 12175, referring to T. 26 May 2015 (MEAS Laihour), E1/305.1, p. 19. *Contra* KHIEU Samphân's Appeal Brief (F54), para. 1345. See also Trial Judgment (E465), fn. 12176, referring to T. 26 May 2015 (MEAS Laihour), E1/305.1, pp. 17-18 (stating that after her marriage, militiamen conducted surveillance to see whether she and her husband had celebrated traditional religious and to see whether they had consummated the marriage).
[3832] See KHIEU Samphân's Appeal Brief (F54), para. 1345.
[3833] T. 19 September 2016 (HENG Lai Heang), E1/476.1, p. 16 ("Q: After your marriage, were you required to consummate your marriage and, if so, were you monitored by the militiamen? A. For those who agreed with each other, they were not monitored. But for those who did not get along with each other, they were monitored and investigated").
[3834] T. 29 January 2015 (CHANG Srey Mom), E1/254.1, pp. 28-29 (stating that on the first night that she spent with her husband, militiamen eavesdropped from below her house).

consummated. Whether couples felt compelled to immediately consummate the marriage, or were too afraid to do so on the night they were monitored,[3835] the overall finding that monitoring of consummation occurred is uninterrupted. KHIEU Samphân's challenge on this point is dismissed. The Supreme Court Chamber also fails to see how it is relevant to evidence that some of the monitoring was conducted by young people, seeing as many of the same accounts also made clear that such individuals were instructed by more senior members to conduct the monitoring.[3836]

1360. The Supreme Court Chamber has also considered KHIEU Samphân's challenge to the evidence of what three civil parties overheard. The Trial Chamber summarised CHEA Deap's evidence in a footnote to its finding that monitoring occurred, stating that "after the wedding, she was told to be careful because they would be monitored at night. On the first night together, she heard footsteps outside the door".[3837] The Trial Chamber also considered CHUM Samouern's evidence that militiamen would "eavesdrop" on married couples to check that they had consummated the marriage.[3838] KHIEU Samphân fails to explain why the Trial Chamber was not entitled to rely on this evidence as part of the raft of testimony showing that monitoring occurred, most of which, by virtue of the events occurring at night and outside the room where couples were located, was also based on what witnesses and civil parties could overhear rather than see. Evidence of what individuals heard is well-established as a form of direct identification evidence in international criminal law.[3839] KHIEU Samphân's submission is dismissed.

[3835] See KHIEU Samphân's Appeal Brief (F54), para. 1346, fn. 2551, referring to T. 25 October 2016 (NGET Chat), E1/489.1, p. 4; T. 29 September 2015 (CHAO Lang), E1/339.1, p. 71.
[3836] *Cf.* KHIEU Samphân's Appeal Brief (F54), para. 1346, fn. 2552 (citing testimony of SOU Sotheavy, PEN Sochan, and MOM Vun, and NGET Chat) with T. 23 August 2015 (SOU Sotheavy), E1/462.1, p. 56 (testifying "yes" in response to question regarding whether she had heard about an order to the militiamen to monitor whether couples were having sex in her village); T. 12 October 2016 (PEN Sochan), E1/482.1, p. 107 (testifying that "the militiamen went to tell Comrade Om to have me re-fashioned" for failing to consummate her marriage); T. 16 September 2016 (MOM Vun), E1/475.1, p. 78 (testifying that militiamen were "implementing [] instructions" to monitor newlywed couples).
[3837] Trial Judgment (E465), fn. 12176, referring to T. 30 August 2016 (CHEA Deap), E1/466.1, pp. 73-75 (explaining that after the wedding, she was told to be careful because they would be monitored at night. On the first night together, she heard footsteps outside the door).
[3838] Trial Judgment (E465), fn. 12176, referring to T. 24 June 2015 (CHUM Samoeurn), E1/321.1, pp. 65-66 (explaining that the militiamen would eavesdrop the married couples to check if they had consummated the marriage).
[3839] See, *e.g.*, *Lukić & Lukić* Appeal Judgment (ICTY), paras 302-305, relying on the evidence of one witness on the basis that he had heard a perpetrator introduce himself.

1361. Regarding NOP Ngim, the Trial Chamber stated that she "believed that she and her husband were monitored by the militiamen."[3840] In this finding, the Trial Chamber cites to portions of NOP Ngim's evidence in which she clearly explains her conclusion that she was monitored, [3841] including the statement that she personally saw the militiamen.[3842] This Chamber finds no error in this conclusion.

1362. The Supreme Court Chamber notes that the Trial Chamber did not expressly consider the evidence offered by NOP Ngim's husband, PREAP Kap. In his Written Record of Interview, he was asked whether the Khmer Rouge assigned eavesdroppers to spy on newly-married couples.[3843] In response, he stated that "no such case happened to my wife and me. I never heard such information from anyone either."[3844] This Chamber considers that it might have been preferable for the Trial Chamber to expressly explain this apparent contradiction. This Chamber recalls that the written evidence of a witness who has not appeared before the Trial Chamber and who was not examined by the Chamber and the parties must generally be afforded lower probative value than the evidence of a witness testifying before the Chamber.[3845] NOP Ngim, in contrast to her husband, gave clear and extensive trial testimony. The Supreme Court Chamber also recalls that NOP Ngim was forcibly married to her husband, who was a disabled soldier who had lost his eyesight, in a ceremony involving 40 women.[3846] This Chamber does not consider it implausible that NOP Ngim and her husband had different recollections of the time immediately after their marriage. For these reasons, this Chamber finds no error in the Trial Chamber's decision not to expressly take account of this inconsistency in evidence.

[3840] Trial Judgment (E465), para. 3641.
[3841] Trial Judgment (E465), para. 3641, fn. 12178, referring to T. 5 September 2016 (NOP Ngim), E1/469.1, pp. 51-52, 60-61, 76, 78, 108-109.
[3842] T. 5 September 2016 (NOP Ngim), E1/469.1, p. 60 ("I knew they came to monitor me because we saw them at night").
[3843] Written Record of Interview of PREAP Kap, 3 November 2014, E3/9818, p. 14.
[3844] Written Record of Interview of PREAP Kap, 3 November 2014, E3/9818, p. 14.
[3845] Case 002/01 Appeal Judgment (F36), para. 296.
[3846] Trial Judgment (E465), para. 3588. See also Trial Judgment (E465), fn. 12015, referring to Written Record of Interview of PREAP Kap, 3 November 2014, E3/9818, ERN (EN) 01053908-01053911, pp. 8-13 (PREAP Kap, a disabled soldier (who had lost his eyesight) and the husband of NOP Ngim, provided that *Ta* Mok took 100 disabled soldiers from the unit for disabled persons located in Takhmau to the Northwest Zone. When they arrived Battambang, he was among the 40 disabled soldiers who were selected by *Ta* Mok to get married in Samlaut. He also confirmed that at the end, only 38 disabled soldiers were married because two women escaped). See also Trial Judgment (E465), para. 3679, fn. 12274, referring to T. 5 September 2016 (NOP Ngim), E1/469.1, pp. 40-43 (stating that she was forced to marry a blind military. She explained that: "I also cried. I was disappointed, very disappointed since I had never seen my would-be husband before the marriage day [...] If I had refused, I would have been killed so I had to bear the situation").

1363. The Supreme Court Chamber has considered KHIEU Samphân's argument that the Trial Chamber erred in finding that monitoring of forced consummation took place as part of a policy. The Supreme Court Chamber finds that to the extent that the evidence pointed to by KHIEU Samphân demonstrates that some of the militiamen were young,[3847] this is immaterial to the question of whether monitoring occurred, or took place in accordance with CPK principles. Furthermore, contrary to KHIEU Samphân's assertions, the Trial Chamber expressly considered KAING Guek Eav *alias* Duch's evidence that to his knowledge, "there were no measures to organize surveillance", and that the persons who spied on couples were "immoral cadres" who were punished, pointing, specifically to Comrade Pang.[3848] The Trial Chamber considered, however, that this evidence must be considered against the large volume of other evidence which showed that "newlywed couples were monitored to check whether they had consummated the marriage",[3849] and also held that Comrade Pang was not, in fact, arrested because he had asked his subordinate to spy for him.[3850]

1364. In light of the Trial Chamber's finding that KAING Guek Eav *alias* Duch's evidence was rebutted by the extent of evidence to the contrary, the Supreme Court Chamber finds no error in the Trial Chamber's decision not to expressly consider the portions of evidence pointed to by KHIEU Samphân from the testimonies of witnesses THUCH Sith and YEAN Lon, which in any event, simply repeat reference to the moral principles of the CPK.[3851]

(ii) Acts of "Rape" as Punishment

1365. As part of its findings on the coercive circumstances individuals experienced, the Trial Chamber considered PEN Sochan's evidence that she refused to consummate her marriage for the first two nights, and was beaten by her husband and threatened with death by her Unit Chief

[3847] See KHIEU Samphân's Appeal Brief (F54), para. 1346, fn. 2552, referring to the testimonies of SOU Sotheavy, NGET Chat, PEN Sochan, and MOM Vun. The Supreme Court Chamber also considers that the evidence of PEN Sochan highlighted by KHIEU Samphân, which demonstrates that militiamen treated the process of monitoring as "a game", further underlines the abusiveness of the practice rather than the contrary. See T. 12 October 2016 (PEN Sochan), E1/482.1, p. 88 (stating that militiamen have been deployed throughout the night to keep monitoring, and "it was a game to them").
[3848] Trial Judgment (E465), fn. 12177, referring to Written Record of Interview of KAING Guek Eav, 2 December 2009, E3/5789, p. 4.
[3849] Trial Judgment (E465), fn. 12177, referring to Written Record of Interview of KAING Guek Eav, 2 December 2009, E3/5789, p. 4.
[3850] Trial Judgment (E465), fn. 12177, referring to Written Record of Interview of KAING Guek Eav, 2 December 2009, E3/5789, p. 4.
[3851] KHIEU Samphân's Appeal Brief (F54), para. 1354, referring to T. 21 November 2016 (THUCH Sithan), E1/500.1, p. 74 (stating that the issue of consummation of marriage was not raised because it was at that time seen as a morality issue); T. 16 June 2015 (YEAN Lon), E1/317.1, p. 71 (stating that it was not true that anyone was tasked with watching newly-married couples in your commune).

if she did not consummate it.[3852] In its further findings on the experience of forced sexual intercourse between spouses, however, the Trial Chamber did consider PEN Sochan's evidence that after refusing to consummate her marriage, she was raped by her husband while five militiamen watched as part of the analysis of harm caused to her. It also considered OM Yoeurn's evidence that she resisted her husband's attempt to violently force her to have sex, following which her husband complained to his military commander, who in turn then "raped" OM Yoeurn.[3853] OM Yoeurn felt that she had been "raped" as a warning for refusing to consummate her marriage, so she agreed to have sex with her husband later on.[3854]

1366. KHIEU Samphân challenges the Trial Chamber's reliance on "rapes" experienced by PEN Sochan[3855] and OM Yoeurn as acts of punishment.[3856] In his submission, he argues that PEN Sochan's rape was an "extreme case" because it was perpetrated at the direction of "young militiamen[]" who had a "very archaic view of marriage."[3857] He further argues that OM Yoeurn's rape was not representative of CPK policy and outside the scope of the Trial Chamber's referral because it was committed by her husband's superior as a punishment for failure to consummate her marriage, and therefore contravened the CPK's ban on extramarital relations.[3858]

1367. The Co-Prosecutors submit that KHIEU Samphân fails to establish that the rapes of PEN Sochan and OM Yoeurn were exceptional or inconsistent with CPK policies.[3859]

1368. The Lead Co-Lawyers respond that "the constant implicit threat of punishment imposed through the coercive environment" and "in some cases more explicit threats and actual violence" were used to forced couples to have sexual intercourse.[3860] As a result, "[v]oicing refusal was effectively impossible when any resistance raised the possibility of serious violence or death."[3861] The fact that some civil parties were unaware of the reason why militia patrols were monitoring couples "does not undermine evidence supporting the existence of a consistent practice."[3862] Finally, the Trial Chamber properly relied on the "core aspects" of certain civil

[3852] Trial Judgment (E465), para. 3646.
[3853] Trial Judgment (E465), para. 3646.
[3854] Trial Judgment (E465), para. 3646.
[3855] KHIEU Samphân's Appeal Brief (F54), para. 1368.
[3856] KHIEU Samphân's Appeal Brief (F54), para. 1369, fn. 2591.
[3857] KHIEU Samphân's Appeal Brief (F54), para. 1368.
[3858] KHIEU Samphân's Appeal Brief (F54), para. 1369.
[3859] Co-Prosecutors' Response (F54/1), para. 744.
[3860] Lead Co-Lawyers' Response (F54/2), para. 638.
[3861] Lead Co-Lawyers' Response (F54/2), para. 641.
[3862] Lead Co-Lawyers' Response (F54/2), para. 642.

parties' testimonies, "which were corroborated by other evidence."[3863] It was therefore well within the Trial Chamber's discretion to conclude that "stated CPK and moral principles were not always followed in practice", and that the rape of Civil Party PEN Sochan was not exceptional.[3864]

1369. The Supreme Court Chamber recalls that rape is not charged as an independent crime against humanity in this case,[3865] and that what matters for the purposes of conduct charged is that it occurred and met the threshold of other inhumane acts. The charged conduct in this case is forced sexual intercourse, which men and women were forced to engage in after being forcibly married by the regime. This charged conduct does not include forced sexual intercourse committed by militiamen. This Chamber considers that the Trial Chamber correctly indicated these restricted parameters of charging by placing the act of "rape" in inverted commas when describing these two experiences.

1370. This Chamber notes, however, that elsewhere in the Trial Judgment, the Trial Chamber made a finding which could suggest a distinction between PEN Sochan's experience at the hands of her husband, and OM Yoeurn's at the hands of militiamen. When finding that individuals married in coercive circumstances, the Trial Chamber considered the evidence of OM Yoeurn, as well as MOM Vun that they were "raped" by persons outside the marriage as punishment, in OM Yoeurn's case for failure to consummate the marriage, and in MOM Vun's, for failure to remarry.[3866] In relation to this evidence, the Trial Chamber held that these acts were "beyond the scope of rape within the context of marriage as they were not committed by a husband on his wife, but by a cadre or militiamen",[3867] but would be considered as part of the "context of fear and of violence."[3868]

1371. The Supreme Court Chamber agrees with the first and last parts of this finding: acts of sexual violence committed by militia were not charged in the present case. With respect to the middle section, the Supreme Court Chamber recalls its finding above that the conduct charged

[3863] Lead Co-Lawyers' Response (F54/2), para. 652.
[3864] Lead Co-Lawyers' Response (F54/2), para. 798.
[3865] See Case 002 Closing Order (D427), paras 1429-1433. See also, *e.g.*, Trial Judgment (E465), paras 3695, 4331.
[3866] Trial Judgment (E465), para. 3650-3651.
[3867] Trial Judgment (E465), para. 3658.
[3868] Trial Judgment (E465), para. 3658.

in this case was coerced sexual intercourse between forcibly married couples, involving both male and female victims. In this sense, the coercive environment was gender neutral.[3869]

1372. The Supreme Court Chamber has also considered KHIEU Samphân's challenges to the Trial Chamber's treatment of NAKAGAWA Kasumi's evidence regarding OM Yoeurn's experience. He states that this showed that OM Yoeurn's experience was "in no way representative of CPK policy", which banned extramarital relations.[3870] While NAKAGAWA Kasumi testified that there was a policy against rape, and even a "strict policy",[3871] she also stated that "the higher authority failed to implement that policy."[3872] The Trial Chamber's conculsions as to OM Yoeurn's experience on the basis of NAKAGAWA Kasumi's evidence were therefore reasonable.

(iii) Lack of Express Statement of Coercive Circumstances

1373. KHIEU Samphân argues that the Trial Chamber failed to consider that various civil parties and witnesses did not expressly state that the consummation was forced.[3873] According to him, expert witness Peg LEVINE also stated that it was not forced.[3874]

1374. The Co-Prosecutors argue that Peg LEVINE "also testified that 76 out of 192 respondents in her study reported that sexual intercourse was prescribed, and 19 reported compliance with prescription."[3875]

1375. Four of the individuals pointed to by KHIEU Samphân were expressly considered by the Trial Chamber in its analysis of coercive circumstances NOP Ngim, PHAN Him, SENG Soeun, and PREAP Sokhoeurn.[3876] KHIEU Samphân fails to particularise any challenge to SENG Soeun's evidence, and this argument is accordingly rejected. This Chamber also observes that two of the remaining individuals do, contrary to KHIEU Samphân's assertion, expressly state that the consummation occurred in forcible circumstances, in the evidence cited

[3869] See also Trial Judgment (E465), fn. 12185, referring to T. 14 September 2016 (NAKAGAWA Kasumi), E1/473.1, pp. 3-4 ("the consequences would be a punishment. It could be ranged from punishment in a form of detention in the re-education center for education in many ways, or it could be a punishment in the forms of sexual violence against either the wife or husband or to both, or it could be a punishment to death.").
[3870] KHIEU Samphân's Appeal Brief (F54), para. 1369.
[3871] T. 14 September 2016 (NAKAGAWA Kasumi), E1/473.1, p. 77.
[3872] T. 14 September 2016 (NAKAGAWA Kasumi), E1/473.1, p. 77.
[3873] KHIEU Samphân's Appeal Brief (F54), paras 1372, 1375.
[3874] KHIEU Samphân's Appeal Brief (F54), para. 1373, referring to T. 10 October 2016 (Peg LEVINE), E1/480.1, p. 84.
[3875] Co-Prosecutors' Response (F54/1), para. 749.
[3876] See, *e.g.*, Trial Judgment (E465), paras 3641, 3648-3649, 3655, 3657.

by the Trial Chamber. NOP Ngim, a member of the Samlaut District Committee, believed that she and her husband were monitored by the militiamen to ensure that consummation of marriage took place, and also stated that she was in fear of her life when she agreed to get married.[3877] The Trial Chamber also considered PREAP Sokhoeurn's evidence that she was asked by militiamen where she was going on the night of her wedding as she left the building they had been taken to,[3878] demonstrating that she was being monitored by armed militia. It also considered her further evidence that cadres threatened her with death if she did not have sexual intercourse.[3879] The fact that her husband then had forcible sexual intercourse with her, having stated his fear for their lives, is a further coercive circumstance,[3880] but does not detract from the fact that such circumstances were already clearly established. In any event, PREAP Sokhoeurn's evidence was that her husband "did that according to *Angkar*'s order so that he would not die",[3881] demonstrating the climate of coercion even further. KHIEU Samphân's arguments in relation to these individuals are dismissed.

1376. As for PHAN Him's evidence, the Trial Chamber found that she stated that after she was threatened with being married by *Angkar*, she started to feel pity for her husband and eventually, after one-and-a-half months, did not object to consummating the marriage.[3882] It then excluded her from the finding that forced sexual intercourse had taken place. The Trial Chamber found that the women it had considered "with the exception of PHAN Him, were forced to consummate their marriages, either because they acted out of fear for their lives or physical security and therefore did not genuinely consent, or because they were physically forced to engage in sexual intercourse with their husbands."[3883]

1377. This Chamber considers that KHIEU Samphân's specific submission, which was that the Trial Chamber erred in relying on PHAN Him's evidence of coercion, must be rejected. The Trial Chamber found that PHAN Him had consented to have sexual intercourse with her husband, and thus did not rely on her evidence to demonstrate a coercive environment. This

[3877] Trial Judgment (E465), para. 3641, referring to T. 5 September 2016 (NOP Ngim), E1/469.1, pp. 51-52, 60-61, 76, 78, 108-109.
[3878] Trial Judgment (E465), para. 3641, referring to T. 24 October 2016 (PREAP Sokhoeurn), E1/488.1, pp. 7-8.
[3879] Trial Judgment (E465), para. 3653.
[3880] Trial Judgment (E465), para. 3653, referring to T. 20 October 2016 (PREAP Sokhoeurn), E1/487.1, pp. 86-87, 88-90, 94; Written Record of Interview of PREAP Sokhoeurn, 8 October 2011, E3/9820, ERN (EN) 01050572-01050574, pp. 15-17; T. 20 October 2016 (PREAP Sokhoeurn), E1/487.1, pp. 102-104.
[3881] T. 24 October 2016 (PREAP Sokhoeurn), E1/488.1, p. 75.
[3882] Trial Judgment (E465), para. 3655, referring to T. 31 August 2016 (PHAN Him), E1/467.1, p. 115. See also fn. 12092.
[3883] Trial Judgment (E465), para. 3659.

Chamber also observes that the question of consent has not, previously, been considered relevant in demonstrated coercive circumstances. While the Supreme Court Chamber will not disrupt the Trial Chamber's finding of fact in this instance, it considers that it would have been preferable for the Trial Chamber to consider the question of PHAN Him's ability to consent more fully.

1378. KHIEU Samphân also points to the Written Records of Interview of SREY Soeum, and the expert testimony of PEG Levine, which he claims the Trial Chamber ignored. While Peg LEVINE stated that no one in her individual research sample was threatened with death,[3884] she also gave evidence that 76 out of 192 respondents in her study reported that sexual intercourse was "prescribed."[3885] This evidence clearly supports the conclusion that coercive circumstances existed. There is no requirement that coercion be demonstrated by explicit threats of death. As for SREY Soeum, in the evidence pointed to by KHIEU Samphân, she stated that over time, she "accepted" sexual relations with her husband, as they were married. However, she also explained her grief at being forcibly married, and explained that she did not want to sleep with her husband at first and was very stressed by the thought.[3886] The Supreme Court Chamber is of the view that this evidence does not support the conclusion that she consented to sexual intercourse, as her freedom to consent was obviated by the circumstances in which she found herself. KHIEU Samphân's arguments in relation to both of these witnesses are rejected.

d) Concealment of Non-Consummation

1379. The Trial Chamber held, considering the evidence of Civil Parties CHUM Samoeurn and YOS Phal, that those who did not consummate their marriage had to hide the fact and pretend that they loved each other to avoid negative consequences.[3887] The Trial Chamber also found, considering the evidence of witnesses YOU Vann, PRAK Yut, and SUN Vuth, that in general, when authorities discovered that couples had not consummated their marriages, there was a follow-up process in which authorities called in individuals and talked to them.[3888]

[3884] T. 10 October 2016 (Peg LEVINE), E1/480.1, p. 84.
[3885] See Trial Judgment (E465), para. 3654.
[3886] Written Record of Interview of SREY Souem, 16 December 2014, E3/9826, ERN (EN) 01067749.
[3887] Trial Judgment (E465), para. 3647.
[3888] Trial Judgment (E465), para. 3656.

Couples were summoned by superiors and threatened with consequences if they did not consummate their marriages.[3889]

1380. KHIEU Samphân argues that the Trial Chamber relied on limited civil party evidence, and failed to take account of the fact that individuals were reticent not because they were afraid, but because modesty was an important part of traditional Khmer culture.[3890] KHIEU Samphân also argues that YOU Vann, PRAK Yut and SUN Vuth whose evidence was relied upon to show that measures were taken against newlyweds who did not consummate their marriages, actually gave evidence that no such measures were taken.[3891] The Trial Chamber erred in failing to take into account other testimony that showed that superiors acted as counsellors to newlyweds, rather than as wielders of punishment.[3892]

1381. The Co-Prosecutors respond that there was ample evidence to support the finding that re-education was used as a threat for failure to comply with CPK policies, including consummation of marriage.[3893] The Co-Prosecutors argue that a number of the testimonies cited by KHIEU Samphân in fact confirm that individuals were re-educated for failure to consummate their marriages.[3894] For example, the Co-Prosecutors highlight PRAK Yut's testimony that couples who did not consummate their marriages "would be brought to the district to be educated".[3895]

1382. The Lead Co-Lawyers cite various pieces of evidence supporting the finding that couples were threatened with violent consequences if they did not consummate their marriages.[3896]

1383. Regarding KHIEU Samphân's first challenges to the Trial Chamber's finding on the evidence of CHUM Samoeurn and YOS Phal, the Trial Chamber considered CHUM Samoeurn's evidence that "she did not know what would happen if it was discovered that she and her husband had not consummated their marriage."[3897] The Trial Chamber also considered YOS Phal's evidence that he had agreed with his wife "to keep the nature of their relationship

[3889] Trial Judgment (E465), para. 3657.
[3890] *See* KHIEU Samphân's Appeal Brief (F54), para. 1374.
[3891] KHIEU Samphân's Appeal Brief (F54), para. 1375.
[3892] KHIEU Samphân's Appeal Brief (F54), para. 1376.
[3893] *See* Co-Prosecutors' Response (F54/1), paras 743, 750.
[3894] Co-Prosecutors' Response (F54/1), para. 750, fn. 2573.
[3895] Co-Prosecutors' Response (F54/1), para. 743, quoting T. 19 January 2016 (PRAK Yut), El/378.1, pp. 55-56.
[3896] Lead Co-Lawyers' Response (F54/2), paras 829-830 (describing SOU Sotheavy's testimony that she avoided consummation for several weeks and was subsequently summoned by the village chief and threatened).
[3897] Trial Judgment (E465), para. 3647.

to themselves".[3898] KHIEU Samphân argues that the Trial Chamber erred in relying "only on two civil party statements",[3899] and did not consider that they felt that they had to conceal consummation because of Khmer traditional modesty.[3900]

1384. To the extent that KHIEU Samphân argues that these individuals gave only out-of-court statements and the Trial Chamber relied "only on two civil party statements" [3901] this submission is dismissed: the civil parties both gave in-court evidence, which was relied upon by the Trial Chamber.[3902] To the extent that he argues that the Trial Chamber should not have considered civil party evidence, this Chamber recalls that it is well-established that the Trial Chamber may rely on civil party evidence in determinations of guilt.[3903] This Chamber also finds no merit in KHIEU Samphân's submission that the individuals were acting from reticence due to the Khmer context of romantic love, rather than a fear of consequences. This assertion is a hypothesis unsupported by any evidence, whereas the finding that individuals feared the consequences of non-consummation is based on extensive witness and civil party evidence.[3904]

1385. This Chamber has next considered challenges to the finding if the authorities discovered that couples had not consummated their marriages, there was a follow-up process in which authorities called in individuals and talked to them.[3905] In making this finding, the Trial Chamber considered YOU Vann's evidence that if a husband and wife did not consummate their marriage, a village chief would meet with them to "re-educate them", following which they generally agreed to consummate the marriage.[3906] The Trial Chamber also considered that PRAK Yut stated that refusal to consummate the marriage would be followed by being brought to the district to be re-educated,[3907] and SUN Vuth's evidence that if a woman did not love her husband, she would be re-educated.[3908] KHIEU Samphân argues that these witnesses gave evidence showing that no measures were taken,[3909] and also argues that the Trial Chamber erred

[3898] Trial Judgment (E465), para. 3647.
[3899] KHIEU Samphân's Appeal Brief (F54), para. 1374.
[3900] KHIEU Samphân's Appeal Brief (F54), para. 1374.
[3901] KHIEU Samphân's Appeal Brief (F54), para. 1374.
[3902] Trial Judgment (E465), para. 3647, referring to T. 24 June 2015 (CHUM Samoeurn), E1/321.1, p. 64; T. 25 August 2016 (YOS Phal), E1/464.1, p. 37.
[3903] See Case 002/01 Appeal Judgment (F36), para. 313, referring to Internal Rules, Rules 59 and 91(1).
[3904] See, *e.g.*, Trial Judgment (E465), para. 3646.
[3905] Trial Judgment (E465), para. 3656.
[3906] T. 14 January 2016 (YOU Vann), E1/376.1, pp. 77-80.
[3907] T. 19 January 2016 (PRAK Yut), E1/378.1, pp. 54-55.
[3908] T. 31 March 2016 (SUN Vuth), E1/412.1, pp. 5-6.
[3909] KHIEU Samphân's Appeal Brief (F54), para. 1375.

in failing to take into account other testimony that showed that superiors acted as counsellors to newlyweds, rather than as wielders of punishment.[3910]

1386. This Chamber has reviewed the evidence and is satisfied that the Trial Chamber correctly describes it. The Supreme Court Chamber also notes that SUN Vuth attested to punishment for separation, as well as re-education, as did YOU Vann.[3911] As outlined previously, PRAK Yut stated that when couples did not consummate their marriage she "did not have any measure to enforce upon them", but also stated that the couples would be brought to the district to be educated, which is a form of punishment in itself.[3912] The Supreme Court Chamber has also considered the testimonies cited by KHIEU Samphân which he claims support the showing of an advisory function, but observes that these testimonies generally point to a policy of "re-education", as opposed to counselling.[3913] KHIEU Samphân therefore shows no error in the Trial Chamber's conclusion that the consummation of marriage was monitored.

iv. The Implementation of the Regulation of Marriage Policy

1387. The Trial Chamber made a number of findings on the oversight and reporting structure regarding the marriage policy. It found that: (1) instructions to organise marriages were given by the upper echelon to the lower authorities, and once the lower authorities matched individuals to marry, the proposed selection required approval by the upper authorities;[3914] (2) reports relating to marriages were communicated to the upper echelon;[3915] (3) militiamen who monitored couples to ensure that marriages were consummated reported to the authorities;[3916] and (4) KHIEU Samphân was personally involved in relaying instructions about the implementation of the marriage policy.[3917] KHIEU Samphân challenges each of these findings and his arguments are outlined and addressed below.

[3910] KHIEU Samphân's Appeal Brief (F54), para. 1376.
[3911] T. 14 January 2016 (YOU Vann), E1/376.1, pp. 78-80 (SUN Vuth describes a situation where a couple had separated and received punishment (p. 10), and discussed re-education as a response to other couples whom he believed may have separated (p. 14). YOU Vann explicitly discusses evidence of the policy of non-consummation in the section pointed to by KHIEU Samphân, testifying that individuals who failed to consummate their marriages were reeducated).
[3912] T. 19 January 2016 (PRAK Yut), E1/378.1, p. 54
[3913] See T. 31 March 2016 (SUN Vuth), E1/412.1, p. 5; T. 14 January 2016 (YOU Vann), E1/376.1, p. 79; T. 19 January 2016 (PRAK Yut), E1/378.1, p. 55; T. 2 December 2015 (PRAK Doeun), E1/361.1, p. 100.
[3914] Trial Judgment (E465), paras 3564, 3594, 3602.
[3915] Trial Judgment (E465), para. 3568.
[3916] Trial Judgment (E465), para. 3643.
[3917] Trial Judgment (E465), paras 4248, 4270, 4304.

Instructions from the Upper Echelon to Arrange Marriages and Approval of Matches Arranged by Lower-Level Cadres

1388. The Trial Chamber found that instructions to organise marriages were given by the upper echelon to the lower authorities,[3918] highlighting the evidence of witness SAO Sarun that POL Pot gave instructions in relation to weddings.[3919] The Trial Chamber found that instructions were then disseminated to zones, sectors, districts, communes and villages through meetings or study sessions.[3920] The Trial Chamber took account of Civil Party NOP Ngim's evidence that *Ta* Mok matched the couples, and while the authorisation to proceed with weddings emanated from the higher level, the matching was done by lower-level cadres.[3921] The Trial Chamber found, considering the evidence of SENG Soeun and MOM Vun, that once lower authorities matched individuals to marry, the proposed selection required approval by the upper authorities.[3922]

1389. KHIEU Samphân submits that the Trial Chamber should have found that approval by a higher authority is not evidence of a policy of forced marriage, but is instead a common practice in "most countries".[3923] KHIEU Samphân argues that the Trial Chamber adopted a "biased" approach when relying upon the evidence of witnesses and civil parties to find that instructions were provided by the upper echelon, while simultaneously disregarding their evidence on the principle of consent.[3924] He submits that the Trial Chamber relied on the "isolated case" of SENG Soeun to disprove the rule that an authority organising weddings had to seek consent, and failed to take into account this witness's evidence that it was possible for couples to withdraw from marriages if they disliked one another.[3925] NOP Ngim's evidence was distinctive to "his personal case as a manager under Ta Mok, and was not true for the people in the cooperatives".[3926]

1390. The Co-Prosecutors respond that in contrast to other countries, the individual consent requirement was "an empty formality".[3927] The Co-Prosecutors argue that "the only agreement that mattered was that of CPK's upper echelon: *Angkar*'s directive was final whether an

[3918] Trial Judgment (E465), para. 3564.
[3919] Trial Judgment (E465), para. 3565.
[3920] Trial Judgment (E465), para. 3566.
[3921] Trial Judgment (E465), para. 3597.
[3922] Trial Judgment (E465), paras 3594, 3602.
[3923] KHIEU Samphân's Appeal Brief (F54), para. 1249.
[3924] KHIEU Samphân's Appeal Brief (F54), paras 1245-1246.
[3925] KHIEU Samphân's Appeal Brief (F54), para. 1250.
[3926] KHIEU Samphân's Appeal Brief (F54), para. 1250.
[3927] Co-Prosecutors' Response (F54/1), para. 700.

individual genuinely consented or not".[3928] The Co-Prosecutors also argue that "[t]he practices of matching, organising and conducting marriages were so similar across the country that they established patterns that clearly demonstrated forced marriage was part of a centralised CPK policy".[3929]

1391. The Lead Co-Lawyers respond that, although Civil Party SENG Soeun stated that couples had the option to withdraw from their marriages, his further testimony makes clear couples did not do so because they feared being killed.[3930] Further, the Lead Co-Lawyers argue that "Civil Party SENG Soeun did not know what happened to those who withdrew and whether 'they faced issues later on'."[3931]

1392. The Supreme Court Chamber finds, first, no merit in the submission that the arrangement described by the Trial Chamber was analogous to non-criminal systems. Any superficial similarity is belied by the fact that marriages were being forced upon individuals by the CPK regime in a situation where consent was impossible. KHIEU Samphân's submission on this matter is dismissed.

1393. KHIEU Samphân raises a number of challenges to the Trial Chamber's reliance on cadre evidence. The Trial Chamber considered the evidence of seven cadres when making its findings on instructions: PECH Chim, District Secretary in Tram Kak from mid-1976 until early 1977, KHOEM Boeun, Chief of Cheang Tong commune in Tram Kak district who later served in the Tram Kak District Committee,[3932] SAO Sarun, Secretary of Sector 105,[3933] MEAS Voeun, Deputy Commander of Division 1 in the West Zone and then a Secretary of Sector 103,[3934] SOU Souern, District Secretary from late 1975,[3935] SENG Soeurn, subsequently Secretary of Sector 505,[3936] and HENG Lai Heang, a lower level cadre.[3937]

1394. This Chamber observes that, in further portions of evidence highlighted by KHIEU Samphân, these witnesses all described how the CPK regime implemented the principle of

[3928] Co-Prosecutors' Response (F54/1), para. 700.
[3929] Co-Prosecutors' Response (F54/1), para. 705.
[3930] Lead Co-Lawyers' Response (F54/2), para. 646.
[3931] Lead Co-Lawyers' Response (F54/2), para. 646, referring to T. 29 August 2016 (SENG Soeun), E1/465.1, p. 24.
[3932] Trial Judgment (E465), para. 3565.
[3933] Trial Judgment (E465), para. 3565.
[3934] Trial Judgment (E465), para. 3566.
[3935] Trial Judgment (E465), para. 3566.
[3936] Trial Judgment (E465), para. 3566.
[3937] Trial Judgment (E465), para. 3566.

consent to marriage.[3938] The Trial Chamber did not expressly consider the evidence offered by these individuals on the principle of consent to marriage in its findings on instructions. Elsewhere in the Trial Judgment, however, the Trial Chamber considered rejected the evidence of MEAS Voeun and a number of other cadres on the existence of a principle of consent, noting "that consent given to them may not have been genuine and their tendency to minimise their own responsibility."[3939] The Trial Chamber considered, however, that PECH Chim was an exception to this point, given his admission "that those who were reluctant to respond at the wedding ceremony did not consent to the marriage."[3940] The Supreme Court Chamber considers that the Trial Chamber's reasoning explains why it did not consider that the evidence cadres offered on the principle of consent was reliable, as well as underlining, in the case of PECH Chim, that he did not offer evidence on this principle in any event. This Chamber finds there to be no error in the Trial Chamber's decision to rely on other portions of these witnesses' evidence. KHIEU Samphân ignores the well-established principle that a trial chamber may choose to rely on portions of a witness's evidence and disregard other segments,[3941] and his argument is dismissed.

1395. Regarding the Trial Chamber's reliance on SENG Soeun's evidence, the Trial Chamber considered evidence that the decision to approve marriages was taken at the district level, while the commune level was responsible for the marriage of male and female youths in their respective communes.[3942] Contrary to KHIEU Samphân's contention, however, the Trial Chamber did not base its conclusion solely on this evidence, but also on MOM Vun's evidence that instructions originated from the district level.[3943] SENG Soeun also did not give evidence that couples were able to leave marriage arrangements without consequences. While he stated

[3938] T. 22 April 2015 (PECH Chim), E1/290.1, p. 49 (in which the witness described the process of organising marriages, including the need to be sure the couples had consented); T. 5 May 2015 (KHOEM Boeun), E1/297.1, p. 71 (in which the witness described the organisation of marriages, including consultation with communes, the district, the parents and the couples); T. 6 June 2012 (SAO Sarun), E1/82.1, p. 69 (in which the witness confirmed that Pot Pol gave an instruction to ask for approval of the marriage from the couple and their parents); T. 8 October 2012 (MEAS Voeun), E1/131.1, p. 64 (in which the witness described the procedure followed at marriage ceremonies, including a requirement that the couple see each other first, and decide whether they liked each other); T. 19 September 2016 (HENG Lai Heang), E1/476.1, p. 51 (in which the witness explained that a matched couple were only married if they agreed, and that their refusal was not a serious problem); T. 4 June 2015 (SOU Soeurn), E1/310.1, pp. 74-76 (in which the witness explained the process for marriages between people in relationships to be approved); T. 29 August 2016 (SENG Soeun), E1/465.1, pp. 23-25 (in which the witness confirmed that an announcement was made at wedding ceremonies that if parties to a matched couple did not like one another, they should withdraw themselves, and that some people did so).
[3939] Trial Judgment (E465), para. 3623.
[3940] Trial Judgment (E465), para. 3617.
[3941] See Case 002/01 Appeal Judgment (F36), para. 357.
[3942] Trial Judgment (E465), para. 3596.
[3943] Trial Judgment (E465), para. 3595.

that couples were theoretically permitted to "walk away" from marriage ceremonies, he also stated that he believed that doing so would have resulted in sanction.[3944]

1396. The Supreme Court Chamber has next considered KHIEU Samphân's challenges to the Trial Chamber's reliance on NOP Ngim's evidence that *Ta* Mok matched the couples.[3945] KHIEU Samphân first points to evidence which, he claims, shows that she and other women should have "expressed refusal when being forced to marry disabled persons".[3946] The evidence in question simply describes NOP Ngim's experience of forced marriage, and does not show what KHIEU Samphân claims. The further evidence pointed to by KHIEU Samphân does not demonstrate that NOP Ngim's evidence was not generally applicable. While NOP Ngim described how sometimes individuals who loved each got married, she also expressly stated that in her section, marriages were forced.[3947] These submissions are, accordingly, also dismissed.

Reports on Marriage to the Upper Echelon

1397. The Trial Chamber found that reports relating to marriages were communicated to the upper echelon.[3948] It found that a report dated 16 July 1978 from Office 401 to *Angkar* in relation to family building stated that "10 new families have been created in District 26, Sector 32, while there is no confirmation on this issue in Sectors 31 and 37".[3949] In another report to *Angkar* dated 4 August 1978, 42 couples were reported married. The report also mentioned the case of a man who had committed suicide by hanging himself, an incident that happened 15 days after his marriage was arranged by *Angkar*. The report further mentions that a recent investigation to search for a motive behind the suicide found nothing noticeable.[3950]

1398. KHIEU Samphân argues that reliance on these two reports did not allow the practice to be generalised to the whole country, and that reference to the "Party Centre" was not specific

[3944] T. 29 August 2016 (SENG Soeun), E1/465.1, pp. 24-26 (discusses evidence of forced marriage, said he thought couples could walk away but may have been sanctioned); T. 4 June 2015 (SOU Soeurn), E1/310.1, p. 80 (does give evidence that Chief of commune would ask people if they consented to be married).
[3945] Trial Judgment (E465), para. 3597.
[3946] KHIEU Samphân's Appeal Brief (F54), para. 1250, referring to T. 5 September 2016 (NOP Ngim), E1/469.1, after 11.02.
[3947] KHIEU Samphân's Appeal Brief (F54), para. 1250, referring to T. 5 September 2016 (NOP Ngim), E1/469.1, p. 54.
[3948] Trial Judgment (E465), para. 3568.
[3949] Trial Judgment (E465), para. 3568, referring to DK Report, 16 July 1978, E3/1092, ERN (EN) 00289924, p. 4.
[3950] Trial Judgment (E465), para. 3568, referring to DK Report, 4 August 1978, E3/1094, ERN (EN) 00315373, p. 6.

enough to show centralised reporting.[3951] He also argues that the documents only mention the number of married couples, and so do not reflect any evidence of instructions.[3952]

1399. The Co-Prosecutors respond that KHIEU Samphân misrepresents the Trial Chamber's findings, as the reports demonstrated only the specific finding that reports were sent to the upper echelon, whereas the broader finding as to the CPK leadership's instruction and endorsement rested upon ample evidence.[3953]

1400. This Chamber considers that the 16 July 1987 report of 10 new families being created in District 26 does support the indication of reporting on forced marriages, whereas the forced nature of marriages is not a focus of the 4 August 1978 report. This Chamber observes, however, that while the Trial Chamber focuses on the documentary reports in the text of its finding, it also considered, in the supporting footnote, the evidence of cadre CHUON Thy, who stated that as regiment commander in Division 1, he "had to report the number of couples to the upper echelons. Other units did the same. Because the situation during that time was in turmoil during 1978-1979, they forced multi-couple weddings."[3954] The Supreme Court Chamber finds no error, overall, in the Trial Chamber's conclusion that reporting of forced marriages took place, based on this evidence as a whole.

1401. Moreover, these two reports were specific evidence of reporting back to the upper echelon, but formed part of a wider body of evidence showing that the upper echelon provided marriage instructions to the lower levels.[3955] They were not, contrary to KHIEU Samphân's assertion, the sole basis for the finding that there was an instruction to arrange marriages. The the Trial Chamber also did not, contrary to KHIEU Samphân's submission, find that these reports were themselves evidence of instructions. It found only that reports demonstrating that marriages had occurred were communicated back to the upper echelon.[3956] These submissions are, therefore, also dismissed.

[3951] KHIEU Samphân's Appeal Brief (F54), para. 1247.
[3952] KHIEU Samphân's Appeal Brief (F54), para. 1247.
[3953] Co-Prosecutors' Response (F54/1), para. 698.
[3954] See Trial Judgment (E465), fn. 19975, referring to Written Record of Interview of CHOUN Thy, 18 September 2015, E3/10713, ERN (EN) 01168345, p. 8.
[3955] See Trial Judgment (E465), paras 3564-3567.
[3956] Trial Judgment (E465), para. 3568.

Reports on the Monitoring of the Consummation of Marriage

1402. The Trial Chamber found that militiamen who monitored couples to ensure that marriages were consummated reported to the authorities, relying on the evidence of CHANG Srey Mom, KOL Set, and SUN Vuth.[3957] The Trial Chamber also considered MOM Vun's evidence that militiamen received instructions to monitor newly-wed couples from Rom, the chief of the worksite, and Sea, the unit chief.[3958] It considered the evidence of a mobile unit worker in the Southwest Zone, RY Pov, who was instructed to monitor the activities of newlywed couples and report to nearby units.[3959] It also considered HENG Lai Heang's evidence, having served in the Commune Committee in one of the communes of Sector 505, that people were assigned to monitor couples in order to obtain information on their reactions after marriage.[3960]

1403. KHIEU Samphân challenges the Trial Chamber's conclusion that militia were reporting on the outcome of the monitoring to the authorities, disputing reliance on the evidence of Civil Party RY Pov, and of HENG Lai Heang.[3961] KHIEU Samphân submits that RY Pov was not credible because he gave evidence of reporting in relation to newlyweds from other units, which would have required large numbers of personnel movements.[3962] KHIEU Samphân also argues that the Trial Chamber erred in disregarding conflicting evidence on the Case File. He points the testimony of NEANG Ouch, a chief of the Tram Kak district, as corroborated by the evidence of YEAN Lon, a militiaman from the Central Zone, that they had no knowledge of the militia engaging in monitoring of consummation, and that it was not the militia's role to do so.[3963]

1404. The Co-Prosecutors respond that these testimonies do little to replace the ample evidence that militias monitored couples.[3964] They submit that KHIEU Samphân's argument in relation to RY Pov is nothing more than supposition,[3965] while HENG Lai Heang's testimony corroborates other testimony showing that information was collected and reported up the chain of command.[3966] The Co-Prosecutors also respond that the testimonies of NEANG Ouch and

[3957] Trial Judgment (E465), para. 3643.
[3958] Trial Judgment (E465), para. 3642.
[3959] Trial Judgment (E465), para. 3642.
[3960] Trial Judgment (E465), para. 3642.
[3961] KHIEU Samphân's Appeal Brief (F54), para. 1348.
[3962] KHIEU Samphân's Appeal Brief (F54), para. 1348.
[3963] KHIEU Samphân's Appeal Brief (F54), para. 1348.
[3964] Co-Prosecutors' Response (F54/1), para. 741.
[3965] Co-Prosecutors' Response (F54/1), para. 740.
[3966] Co-Prosecutors' Response (F54/1), para. 740.

YEAN Lon do not undermine the finding that militias were monitoring couples, as that finding was "supported by ample evidence."[3967]

1405. The Supreme Court Chamber finds that KHIEU Samphân offers no evidential basis for this assertion about logistical difficulties, and his argument is therefore dismissed. KHIEU Samphân also argues that RY Pov referred only to reports to heads of units, and did not suggest "that senior officials at the upper echelons were made aware of such practices, much less the CPK leadership."[3968] The Supreme Court Chamber finds that this mischaracterises the Trial Judgment, which found that reports were made to "the authorities", not directly to the CPK senior leadership.[3969]

1406. As for HENG Lai Heang, the Trial Chamber relied upon her evidence that people were assigned to monitor couples in order to obtain information on their reactions after marriage, as well as her testimony that a couple who did not get along would be reported to senior chiefs to take action in the form of re-education and, if necessary, reprimand.[3970] KHIEU Samphân claims the Trial Chamber misstated HENG Lai Heang's evidence when it held that "senior officials" received the information; when in truth, she stated that this information went only to unit chiefs.[3971] The Supreme Court Chamber has reviewed the relevant portions of HENG Lai Heang's evidence. She stated that the collection of reports took place at unit level, but were then provided to "superior chiefs and then the superior chiefs would take action."[3972] KHIEU Samphân misrepresents this witness's evidence, and his argument is dismissed.

1407. The Supreme Court Chamber recalls that the Trial Chamber based its conclusion that the militia monitored consummation on the evidence of multiple witnesses and civil parties. The Supreme Court Chamber finds no error in the Trial Chamber's decision not to consider NEANG Ouch's isolated testimony that it was not the role of the militia to monitor couples. The Supreme Court Chamber also observes that while YEAN Lon's evidence supports the conclusion that the militia had other duties, which is not in dispute, it does not corroborate NEANG Ouch's evidence on the non-involvement of the militia in monitoring consummation in addition. These arguments are therefore dismissed.

[3967] Co-Prosecutors' Response (F54/1), para. 698.
[3968] KHIEU Samphân's Appeal Brief (F54), para. 1350.
[3969] Trial Judgment (E465), para. 3643.
[3970] Trial Judgment (E465), para. 3643.
[3971] KHIEU Samphân's Appeal Brief (F54), para. 1351.
[3972] T. 19 September 2016 (HENG Lai Heang), E1/476.1, p. 57.

KHIEU Samphân's Personal Involvement in the Regulation of Marriage

1408. The Trial Chamber found that KHIEU Samphân was personally involved in relaying instructions about the implementation of the marriage policy, in order to rapidly increase DK's population.[3973] In reaching this conclusion, it relied upon the in-court evidence of civil party CHEA Deap that she had attended a meeting at Wat Ounalom in Phnom Penh which was chaired by KHIEU Samphân, during which he lectured cadres on remaining detached from one's parents, and instructed that ministries had to arrange marriages for all youths.[3974] The Trial Chamber found that the evidence that all ministries had to arrange marriages was corroborated by Ministry of Commerce cadre RUOS Suy's evidence about marriage quotas,[3975] and further supported by a 1978 speech made by KHIEU Samphân about improving the conditions of the population,[3976] and an extract from NORODOM Sihanouk's book, discussing KHIEU Samphân's role in marrying disabled soldiers.[3977]

1409. The Supreme Court Chamber considers that KHIEU Samphân's arguments go to three matters: (a) an alleged error in the Trial Chamber's sole or primary reliance on civil party evidence, in the case of CHEA Deap;[3978] (b) alleged inconsistencies in CHEA Deap's evidence, regarding identification;[3979] and (c) corroboration by/contradictions with other evidence.[3980] These will be considered in turn below.

a) Sole or Primary Reliance on Civil Party Evidence

1410. KHIEU Samphân submits that the Trial Chamber breached "all rules of evidence" in relying solely on CHEA Deap's evidence to find that he gave instructions on marriage to have children and increase the forces, given that CHEA Deap was a civil party, and was not required to take an oath.[3981]

[3973] Trial Judgment (E465), paras 4248, 4270, 4304.
[3974] Trial Judgment (E465), para. 3569.
[3975] Trial Judgment (E465), para. 3570.
[3976] Trial Judgment (E465), paras 3570-3571.
[3977] Trial Judgment (E465), para. 3571.
[3978] KHIEU Samphân's Appeal Brief (F54), para. 1235. See also KHIEU Samphân's Appeal Brief (F54), para. 1918.
[3979] KHIEU Samphân's Appeal Brief (F54), paras 1233-1242, 2117.
[3980] KHIEU Samphân's Appeal Brief (F54), paras 1238, 1240-1241
[3981] KHIEU Samphân's Appeal Brief (F54), para. 1235. See also KHIEU Samphân's Appeal Brief (F54), para. 1918.

1411. The Co-Prosecutors respond that it is established that a finder of fact can rely on a single witness to make a finding, even absent corroboration.[3982] They further respond that the Supreme Court Chamber has clearly held that the Trial Chamber may rely on civil party testimony to make determinations of guilt.[3983]

1412. The Lead Co-Lawyers submit that no legal authority or point of principle supports the view that evidence from civil parties has less probative value than other evidence.[3984]

1413. This Chamber observes that the Trial Chamber did not consider only CHEA Deap's evidence in the disputed finding. It also considered evidence by Ministry of Commerce cadre RUOS Suy,[3985] as well as a speech made by KHIEU Samphân,[3986] and NORODOM Sihanouk's book.[3987] No source of evidence other than CHEA Deap's, however, attested to KHIEU Samphân's personal involvement in arranging marriages. RUOS Suy provided out-of-court evidence in his Written Record of Interview that his ministry unit was assigned monthly minimum quotas for marriages in 1977 and 1978, making no reference to KHIEU Samphân.[3988] In KHIEU Samphân's own speech, he spoke about how personal interests were to be subordinated to the revolution,[3989] but made no reference to a policy of forced marriage. NORODOM Sihanouk's book recalled KHIEU Samphân praising fervent patriotic young girls for their sacrifices to the nation by marrying disabled veterans, but does not attest to his role in personally instructing marriage. The Trial Chamber, furthermore, appeared by its language to rely on these sources of evidence to corroborate CHEA Deap's evidence.[3990] The Supreme Court Chamber finds, therefore, that CHEA Deap's civil party evidence is the only direct

[3982] Co-Prosecutors' Response (F54/1), para. 712.
[3983] Co-Prosecutors' Response (F54/1), para. 712.
[3984] Lead Co-Lawyers' Response (F54/2), para. 771.
[3985] Trial Judgment (E465), para. 3570.
[3986] Trial Judgment (E465), paras 3570-3571.
[3987] Trial Judgment (E465), para. 3571.
[3988] Trial Judgment (E465), para. 3570.
[3989] Trial Judgment (E465), para. 3548, referring to *Phnom Penh Rally Marks 17th April Anniversary* (in SWB/FE/5791/B collection), 16 April 1978, E3/562, ERN (EN) S00010563 (concerning a resolution adopted during a mass meeting on the occasion of the third anniversary of 17 April 1975 in which KHIEU Samphân delivered a speech, which *inter alia* included the following solemn general pledge: "(12) To subordinate resolutely all personal and family interests to the collective interests of the nation, class, people and revolution").
[3990] See Trial Judgment (E465), paras 3570 (finding that "the allegation that all ministries had to arrange marriages is corroborated by RUOS Suy), 3571 (finding that KHIEU Samphân's statements in his speech "echo his call at Wat Ounalom"), 3571 (finding that the other evidence is "consistent with" NORODOM Shihanouk's book). The Trial Chamber also found earlier in the Trial Judgment that NORODOM Shihanouk's book would only be relied upon to corroborate other evidence, because the Defence did not have an opportunity to test the statements in court. See Trial Judgment (E465), para. 3401.

evidence for the finding that KHIEU Samphân was personally involved in disseminating instructions to marry.

1414. This Chamber has also considered whether, as is claimed by KHIEU Samphân, the finding is at the heart of his criminal responsibility insofar as it relates to the regulation of marriage policy. The Trial Chamber relied on the finding about his instructions at Wat Ounalom, and this finding alone, to find that KHIEU Samphân "personally promoted the Party's policy to rapidly increase the DK's population".[3991] On the basis of this finding of fact, the Trial Chamber concluded that he "not only shared support for the common purpose, but that he actively instructed on its implementation through the various policies",[3992] and relied on this finding to determine that KHIEU Samphân intended the commission of crimes as part of the CPK's nationwide policy regulating marriage.[3993] The Trial Chamber also relied on this finding when concluding that KHIEU Samphân had knowledge of crimes committed against Buddhists in the time period.[3994] Accordingly, this Chamber agrees that the finding was based primarily on CHEA Deap's evidence, and was also at the heart of KHIEU Samphân's conviction in so far as it relates to the regulation of marriage policy.

1415. It is well-established that civil party evidence is not of inherently less probative value than other forms of evidence.[3995] It is, furthermore, similarly enshrined that civil party testimony may form part of the evidence relied upon to determine guilt.[3996] Civil parties are particularly well-placed to make statements about their suffering.[3997] If a civil party is a victim of an alleged crime, for example, he or she will often be particularly well-placed to report on the events that form the basis of the allegation.[3998] The Trial Chamber correctly articulated this standard,[3999] and also correctly observed that the probative value of the testimony can be assessed on the basis of a number of factors, including the demeanour of the person testifying,

[3991] Trial Judgment (E465), paras 4248-4249.
[3992] Trial Judgment (E465), para. 4274.
[3993] Trial Judgment (E465), para. 4304, referring to Trial Judgment (E465), para. 4248.
[3994] See Trial Judgment (E465), para. 4242 ("Behind the scenes, KHIEU Samphan was fervently instructing the arrangement of marriages in the absence of monks and in a manner fundamentally inconsistent with Buddhist traditions."); fn. 13849, referring to, *inter alia*, para. 3569.
[3995] Case 002/01 Appeal Judgment (F36), para. 313.
[3996] Case 002/01 Appeal Judgment (F36), para. 306.
[3997] Trial Judgment (E465), para. 67.
[3998] Case 002/01 Appeal Judgment (F36), para. 312.
[3999] Trial Judgment (E465), para. 67.

consistency or inconsistency with material facts, ulterior motives, corroboration and all the circumstances of the case.[4000]

1416. A different question is whether a finding at the heart of criminal responsibility may be *solely* or *primarily* based upon civil party testimony. It is a well-established principle of international criminal law that a trier of fact can rely on a single witness to support a finding of guilt, even in the absence of corroboration.[4001] This Chamber has also held that there is no general rule that a finding beyond reasonable doubt cannot be entered unless there is more than one item of evidence to support it.[4002] The same principle, however, has not been established in relation to participating victims in international criminal courts. The Supreme Court Chamber in Case 002/01 held that civil party evidence may be relied upon in determining guilt, its findings also showed that such evidence would generally not be relied upon in isolation: civil parties may "testify to issues *relating to* the guilt of an accused",[4003] and the Trial Chamber may "*take into account*" such testimony when making its factual findings.[4004] The Supreme Court Chamber also held that the Internal Rules are based on the assumption that civil parties "may provide information relating to" the guilt of the accused,[4005] and that questioning by the Co-Investigating Judges under Rule 59 may "touch upon" issues relevant to the guilt of the suspects.[4006]

1417. This Chamber observes that while it is well-established that a civil party's evidence is admissible and can be probative, it is not identical to witness evidence. Rule 23(4) provides that a "Civil Party cannot be questioned as a simple witness in the same case", reflecting Article 312 of the Cambodian Code of Criminal Procedure, which stipulates that "[a] civil party may never be heard as a witness". The distinctive status of a civil party is something that may be of relevance when assessing the probative value and/or credibility of the testimony.[4007] This Chamber has also held that specific factors applicable to civil party testimony, such as the fact that they take no oath, are able to consult with counsel during testimony, and are not subject to

[4000] Trial Judgment (E465), para. 3528. See also Case 002/01 Appeal Judgment (F36), para. 314.
[4001] See, *e.g.*, *Nahimana et al.* Appeal Judgment (ICTR), para. 949.
[4002] Case 002/01 Appeal Judgment (F36), para. 424.
[4003] Case 002/01 Appeal Judgment (F36), para. 312.
[4004] Case 002/01 Appeal Judgment (F36), para. 312.
[4005] Case 002/01 Appeal Judgment (F36), para. 312.
[4006] Case 002/01 Appeal Judgment (F36), para. 312.
[4007] Case 002/01 Appeal Judgment (F36), paras 312-313.

sanctions for false testimony, are "factors […] to be considered when assessing the probative value and weight of individual civil party testimony."[4008]

1418. For these reasons, the Supreme Court Chamber considers that it would be unusual for a finding at the heart of individual criminal responsibility rest solely upon civil party evidence. This Chamber holds, however, that it does not exclude the possibility that a finding of individual criminal responsibility could rest primarily upon civil party evidence. In such cases, this Chamber would expect such evidence to be carefully considered by the Trial Chamber, including an evaluation of any inconsistencies, and an assessment of any corroborative evidence. Whether the Trial Chamber complied with this standard will be considered below, after the evaluation of KHIEU Samphân's other challenges.

b) Alleged Inconsistencies in CHEA Deap's Evidence

1419. KHIEU Samphân alleges a number of material inconsistencies in CHEA Deap's evidence, regarding her identification of him, arguing that she did not name him in her first civil party statement.[4009] He argues that the Trial Chamber erred in finding that the meeting at Wat Ounalom took place the end of 1975 or early 1976, given that CHEA Deap's evidence was that the Borei Keila meeting took place at the time HU Nim was arrested which was in early 1977.[4010] Elsewhere in the Trial Judgment, the Trial Chamber relied on CHEA Deap's evidence in relation to the Borei Keila meeting to demonstrate KHIEU Samphân's knowledge of HU Nim's arrest, in 1977.[4011]

1420. The Co-Prosecutors respond that CHEA Deap was extensively questioned during trial on her early omission of KHIEU Samphân's name, and explained that she could not recall who helped her to fill in the two initial forms with civil party details in.[4012] The Trial Chamber, considering her overall demeanour, reasonably found her to be credible and reliable.[4013] The Co-Prosecutors respond that the Trial Chamber relied on CHEA Deap's evidence regarding the

[4008] Case 002/01 Appeal Judgment (F36), para. 315.
[4009] KHIEU Samphân's Appeal Brief (F54), paras 1234-1235.
[4010] KHIEU Samphân's Appeal Brief (F54), para. 1237.
[4011] KHIEU Samphân's Appeal Brief (F54), para. 1237.
[4012] Co-Prosecutors' Response (F54/1), para. 713.
[4013] Co-Prosecutors' Response (F54/1), para. 713.

meeting at Ounalom Pagoda not Borei Keila.[4014] They argue that, if anything, this demonstrates the care with which the Trial Chamber exercised its discretion to accept and reject evidence.[4015]

1421. The Trial Chamber considered the fact that CHEA Deap did not initially name KHIEU Samphân in her civil party statements.[4016] Taking into account that the Parties had the opportunity to confront CHEA Deap on this matter, and that her evidence was reliable and consistent throughout,[4017] the Trial Chamber did not find that this omission rendered her evidence unreliable. It also held, in this regard, that it would ascribe "greater weight to information from in-court statements".[4018] The Supreme Court Chamber recalls that it is well-established that in-court testimony has greater weight than out of court statements.[4019] This Chamber further observes that CHEA Deap was questioned by the Defence on why she failed to mention KHIEU Samphân's name in her first statements, and stated that she did not know why.[4020] KHIEU Samphân disagrees with the Trial Chamber's conclusion on this evidence but demonstrates no error. His argument is therefore dismissed. The Supreme Court Chamber also finds no inconsistency in CHEA Deap's explanation for how she first came to be able to identify KHIEU Samphân. CHEA Deap was asked how she knew it was KHIEU Samphân speaking on the podium, and stated that she "could recognize him well."[4021] However, she then immediately clarified that she had not seen KHIEU Samphân in person before the first time she saw him, but had expected him to be there, and was then told by others that it was him.[4022] KHIEU Samphân fails to demonstrate any inconsistency that the Trial Chamber should have considered, and his submission is dismissed.

1422. The Trial Chamber found that CHEA Deap could not recall the exact date that she met KHIEU Samphân at Wat Ounalom, but concluded that her evidence showed that this meeting took place "about six or seven months after the liberation of Phnom Penh in April 1975".[4023] In the citation to this finding, the Trial Chamber quotes CHEA Deap's testimony that she had

[4014] Co-Prosecutors' Response (F54/1), para. 714.
[4015] Co-Prosecutors' Response (F54/1), fn. 2446.
[4016] Trial Judgment (E465), para. 3569.
[4017] Trial Judgment (E465), para. 3569.
[4018] Trial Judgment (E465), para. 3569.
[4019] See, *e.g.*, Case 002/01 Appeal Judgment (F36), para. 447.
[4020] T. 31 August 2016 (CHEA Deap), E.1/467.1, pp. 65-68.
[4021] T. 31 August 2016 (CHEA Deap), E1/467.1, p. 48.
[4022] T. 31 August 2016 (CHEA Deap), E1/467.1, pp. 48-49. See also T. 30 August 2016 (CHEA Deap), E1/466.1, pp. 88-89 ("I met him for the first time at Borei Keila stadium and that happened in 1975 [...] And the second time that I met him was at the Ounalom Pagoda when he chaired a conference for male and female youths that day and the conference lasted for the whole day").
[4023] Trial Judgment (E465), para. 3569.

met KHIEU Samphân twice, first at Borei Keila in 1975, and the second time at Ounalom Pagoda, as well as her evidence that she entered Phnom Penh in April 1975, got married six or seven months after arriving in Phnom Penh, and met KHIEU Samphân before her marriage.[4024] The cited evidence does not therefore support the Trial Chamber's finding that the Wat Ounalom meeting took place six or seven months after arriving in Phnom Penh, but instead locates the Borei Keila meeting as having occurred in that timeframe. Elsewhere in the Trial Judgment, the Trial Chamber made a finding, in reliance on another portion of CHEA Deap's evidence, that the Borei Keila meeting took place in April 1977, at the time of HU Nim's arrest.[4025]

1423. The Supreme Court Chamber notes that CHEA Deap first stated that she saw KHIEU Samphân at Borei Keila,[4026] but later clarified that the first meeting took place at Wat Ounalom, and consistently maintained this evidence.[4027] She also consistently maintained the evidence that she entered Phnom Penh in April 1975, got married six or seven months after arriving in Phnom Penh, and met KHIEU Samphân before her marriage.[4028] This Chamber finds, then, that the Trial Chamber correctly described CHEA Deap's evidence in the text of the Trial Judgment, when it found that her evidence showed that it was the Wat Ounalom meeting that occurred in 1975, and cited only to a partial selection of her evidence. While the footnote was incomplete, this does not negate that the statement made by the Trial Chamber was correct as a summary of the evidence, and amounts merely to an error of citation rather than anything more material. The Supreme Court Chamber also notes that the Trial Chamber, later in the

[4024] Trial Judgment (E465), para. 3569, fn. 11977, referring to T. 30 August 2016 (CHEA Deap), E1/466.1, pp. 88-89 ("I met him for the first time at Borei Keila stadium and that happened in 1975 [...] And the second time that I met him was at the Ounalom Pagoda when he chaired a conference for male and female youths that day and the conference lasted for the whole day"); T. 31 August 2016 (CHEA Deap), E1/467.1, pp. 40-43 (stating that she entered Phnom Penh in April 1975, that she got married about 6 or 7 months after arriving in Phnom Penh and confirming that she met KHIEU Samphân before her marriage).
[4025] Trial Judgment (E465), para. 4227 ("After HU Nim's arrest in April 1977, KHIEU Samphan publicly called for his messengers to be interrogated. HU Nim was executed at S-21 in July 1977. The Chamber is satisfied that KHIEU Samphan knew of HU Nim's arrest and death at the time."), referring to T. 30 August 2016 (CHEA Deap), E1/466.1, pp. 6, 66. See also CHEA DEAP's evidence about both meetings taking place in 1975-1976.
[4026] T. 30 August 2016 (CHEA Deap), E1/466.1, p. 87, first at Wat Ounalom and second meeting at Borei Keila stadium. This was when Hu Nim and Hou Youn were put on trial; T. 30 August 2016 (CHEA Deap), E1/466.1, pp. 88-89, saying that the first time she met him was at the Wat Ounalom pagoda and that was before she met him at Borei Keila.
[4027] T. 30 August 2016 (CHEA Deap), E1/466.1, pp. 87-89, stating that she first saw him at Wat Ounalom and second at Borei Keila stadium.
[4028] Trial Judgment (E465), para. 3569, fn. 11977, referring to T. 30 August 2016 (CHEA Deap), E1/466.1, pp. 88-89 ("I met him for the first time at Borei Keila stadium and that happened in 1975 [...] And the second time that I met him was at the Ounalom Pagoda when he chaired a conference for male and female youths that day and the conference lasted for the whole day"); T. 31 August 2016 (CHEA Deap), E1/467.1, pp. 40-43 (stating that she entered Phnom Penh in April 1975, that she got married about 6 or 7 months after arriving in Phnom Penh and confirming that she met KHIEU Samphân before her marriage).

same paragraph, observed that there were "later meetings" with KHIEU Samphân, citing the Borei Keila meeting.[4029] For these reasons, this Chamber finds there to be no error.

c) Corroboration by Other Evidence

1424. The Trial Chamber relied on RUOS Suy's evidence, given in his Written Record of Interview, that his ministry unit was assigned monthly minimum quotas for marriages in 1977 and 1978.[4030]

1425. KHIEU Samphân submits that RUOS Suy's written statement should not have been relied upon due to its low probative value, that it was insufficient to show that instructions were actually implemented, and that it was not corroborated by PHAN Him's evidence, despite the fact that this witness worked in the same ministry.[4031] He points to various individuals who, in his submission, did not corroborate CHEA Deap's evidence that the instruction to have children was repeated at all meetings.[4032] Finally, he claims an alleged contradiction in failure to consider CPK statements showing that young individuals were discouraged from marriage.[4033]

1426. The Co-Prosecutors respond that the Trial Chamber was entitled to rely on out-of-court evidence such as RUOS Sy's statement and that there was no error in this regard.[4034] They submit that CHEA Deap's evidence regarding KHIEU Samphân's training session at Wat Ounalom was corroborated in part by other evidence, and sufficiently analysed by the Trial Chamber.[4035]

1427. The Supreme Court Chamber recalls that the written evidence of a witness who has not appeared before the Trial Chamber, and who was not, therefore, examined by the Trial Chamber and the parties, must generally be afforded lower probative value than the evidence of a witness testifying before the Chamber.[4036] The Trial Judgment properly reflects a concern about the probative value of out-of-court evidence: "the Chamber also considers the identification, examination, bias, source and motive or lack thereof of the authors and sources of the evidence. Absent the opportunity to examine the source or author of the evidence, less

[4029] See Trial Judgment (E465), para. 3569 ("She further confirmed that the latter point was raised in all study sessions and meetings she attended), referring to T. 30 August 2016 (CHEA Deap), E1/466.1, pp. 66-67.
[4030] Trial Judgment (E465), para. 3570.
[4031] KHIEU Samphân's Appeal Brief (F54), paras 1238, 1240-1241.
[4032] KHIEU Samphân's Appeal Brief (F54), para. 1241, fn. 2355.
[4033] KHIEU Samphân's Appeal Brief (F54), para. 1238.
[4034] Co-Prosecutors' Response (F54/1), fn. 2449.
[4035] Co-Prosecutors' Response (F54/1), para. 714.
[4036] Case 002/01 Appeal Judgment (F36), para. 296.

weight may be assigned to that evidence".[4037] While the Trial Chamber does not expressly characterise the evidence as out of court, it did observe that the evidence was "offered to [Office of the Co-Investigating Judges] investigators", making clear that it was fully aware of the provenance of the evidence when relying on it. This Chamber finds no error in the Trial Chamber's overall approach to relying on this portion of out-of-court evidence.[4038]

1428. The Supreme Court Chamber has next considered the specific challenges to RUOS Suy's evidence which, according to KHIEU Samphân, is not adequately specific and was undermined by other evidence. In the portion of the statement referred to by the Trial Chamber,[4039] RUOS Suy stated that there was a plan which required his unit, the State Warehouse unit, to have 100 couples married per month.[4040] He further stated that the marriages began in 1976, and that strict measures were implemented from 1977, when 100 couples per month had to get married.[4041] RUOS Suy also explained that the order was issued by the ministry chairman, and stated that it came about because "they wanted population growth."[4042] He gave further specific evidence regarding the implementation of the policy, including the observation that a quota to implement 100 couples did not mean that those 100 couples all needed to be married at once – ceremonies could take place up to three times per month.[4043] This Chamber rejects the argument that any of this evidence is not clear or specific.

1429. This Chamber also dismisses the assertion that RUOS Suy's alleged evidence on consent to marriages should have been found to undermine his evidence as to quotas for marriage. In the portion of evidence highlighted by KHIEU Samphân, he states that "meetings were arranged in the context of work, and if a man loved a woman, he asked whether she agreed to marry or not."[4044] The Supreme Court Chamber disagrees that this evidence does, in fact, attest to a principle of consent, as it showed clearly that marriages were being "arranged" by the CPK regime, and that male cadres within that regime had some discretion over their choice

[4037] Trial Judgment (E465), para. 34.
[4038] Trial Judgment (E465), para. 3570.
[4039] See Trial Judgment (E465), para. 3570, fn. 11980.
[4040] See Trial Judgment (E465), para. 3570, fn. 11980, referring to Written Record of Interview of RUOS Suy, 7 July 2015, E3/10620, ERN (EN) 01147808-01147811, pp. 15-18.
[4041] See Trial Judgment (E465), para. 3570, fn. 11980, referring to Written Record of Interview of RUOS Suy, 7 July 2015, E3/10620, ERN (EN) 01147808-01147811, pp. 15-18.
[4042] See Trial Judgment (E465), para. 3570, fn. 11980, referring to Written Record of Interview of RUOS Suy, 7 July 2015, E3/10620, ERN (EN) 01147808-01147811, pp. 15-18.
[4043] See Trial Judgment (E465), para. 3570, fn. 11980, referring to Written Record of Interview of RUOS Suy, 7 July 2015, E3/10620, ERN (EN) 01147808-01147811, pp. 15-18.
[4044] Written Record of Interview of RUOS Suy, 7 July 2015, E3/10620, pp. 15, 19. See also Written Record of Interview of RUOS Suy, 7 July 2015, E3/10620, pp. 15 ("The marriage age was over 20 years old"), 17, 19 (women have the right to refuse or accept the proposed marriage").

of bride. This is entirely consistent with the Trial Chamber findings.[4045] This Chamber also recalls, that, even if RUOS Suy offered evidence on a CPK principle of consent, it has repeatedly affirmed the Trial Chamber's decision to disregard cadre evidence on this specific matter, while relying on other portions of their evidence.[4046] These submissions are therefore dismissed.

1430. This Chamber has next considered whether, as KHIEU Samphân claims, the Trial Chamber erred in failing to consider an inconsistency between the evidence of PHAN Him, who was also a cadre in the Commerce department, and of RUOS Suy. In the portions of evidence highlighted by KHIEU Samphân, PHAN Him stated that she had not personally heard of a quota for the numbers of marriages that were taking place.[4047] She does, however, state that she herself was forced to marry by the regime, and also attests to mass ceremonies taking place.[4048] Furthermore, elsewhere in the Trial Judgment, the Trial Chamber considered the evidence of PHAN Him showing the full involvement of the DK regime in arranging and implementing forced marriages.[4049] This Chamber finds that PHAN Him offers no evidence which contradicts that of RUOS Suy, and there was therefore no matter to be considered.

1431. Neither, in the view of this Chamber, is any contradiction presented by the evidence of PHAN Him and RUOS Suy as well as civil parties NOP Ngim and SENG Soeun, regarding the frequency of the discussions on the increase of population. While CHEA Deap stated that the instruction to increase the population through children took place "at all meetings",[4050] it is self-evident that she was expressing a general position, as she made no claim to have been at, nor could possibly have been at all meetings. KHIEU Samphân offers no evidence that any of these individuals were present at the specific meetings that CHEA Deap attended, which are the only material findings for these purposes. This Chamber also notes that in any event, NOP

[4045] See Trial Judgment (E465), para. 3591.
[4046] See *supra* Section VII.G.3.b. For these reasons, the Supreme Court Chamber also dismisses KHIEU Samphân's further submission that a contradiction is presented by the evidence of BEIT Boeurn on the principle of consent, see KHIEU Samphân's Appeal Brief (F54), fn. 2342.
[4047] See KHIEU Samphân's Appeal Brief (F54), para. 1241, fn. 2352, referring to T. 31 August 2016 (PHAN Him), E1/467.1, pp. 88-96.
[4048] See T. 31 August 2016 (PHAN Him), E1/467.1, pp. 88-96.
[4049] See Trial Judgment (E465), fn. 12148, referring to T. 31 August 2016 (PHAN Him), E1/467.1, pp. 88, 93 (indicating that during her wedding, the minister of commerce, *Ta* Rith, and his deputy, her direct supervisor *Ta* Hong, and a few female unit chiefs attended the weddings).
[4050] See T. 30 August 2016 (CHEA Deap), E1/466.1, p. 89; T. 31 August 2016 (PHAN Him), E1/467.1, p. 101.

Ngim referred to individuals " ma[king] jokes" about the production of children being exactly the purposes of marriage.[4051] These submissions are, therefore, dismissed.

1432. Finally, the Supreme Court Chamber has considered the argument that the Trial Chamber should have considered that CHEA Deap's evidence was undermined by other CPK statements deterring youthful marriages. While some cadres stated that there was a preference for waiting for individuals to be older, the Trial Chamber considered numerous instances of situations involving marriages of young persons.[4052] These arguments are, accordingly, dismissed.

d) Overall Finding on the Reliance on CHEA Deap's Civil Party Evidence

1433. The Supreme Court Chamber finds that the Trial Chamber relied on CHEA Deap's evidence as the sole direct evidence linking KHIEU Samphân with the regulation of marriage policy. This Chamber however, dismisses the allegations of inconsistencies in CHEA Deap's evidence, as well as on the question of corroboration. For these reasons, the Supreme Court Chamber considers the Trial Chamber's approach to be reasonable.

c. Legal Findings on Forced Marriage, Rape in the Context of Forced Marriage and Sexual Violence in the Context of Forced Marriage as the Crimes Against Humanity of Other Inhumane Acts

i. Introduction

1434. The Trial Chamber correctly articulated the elements of other inhumane acts as follows:

1) "The *actus reus* of other inhumane acts as a crime against humanity requires an act or omission that caused serious mental or physical suffering or injury or constituted a serious attack on human dignity."[4053]

2) "The *mens rea* of other inhumane acts as a crime against humanity requires that the act or omission was performed intentionally."[4054]

1435. The Trial Chamber found that the crime of other inhumane acts was established through conduct characterised as forced marriage.[4055] In considering the gravity of these acts, the Trial

[4051] See T. 5 September 2016 (NOP Ngim), E1/469.1. p. 69.
[4052] Trial Judgment (E465), para. 3583.
[4053] Trial Judgment (E465), para. 724.
[4054] Trial Judgment (E465), para. 724.
[4055] Trial Judgment (E465), sub-section 14.4.1.

Chamber considered the mental and physical suffering inflicted on individuals through the threats of forcing them to marry, the fact that they had to marry someone they did not know, the fear instilled to pressure them to consummate the marriage, and that the conduct was performed intentionally.[4056] Given that this conduct was performed intentionally, the Trial Chamber was satisfied that conduct characterised as forced marriage was established and met the threshold of other inhumane acts.[4057]

1436. The Trial Chamber also recalled its findings that after wedding ceremonies, individuals were monitored to ensure that they had sexual intercourse.[4058] It found that both men and women felt compelled to have sexual intercourse.[4059] It found that the conduct constituted "rape" with regard to female victims, cumulatively caused serious mental and suffering or injury, and constituted a serious attack on the human dignity of the victims.[4060] The Trial Chamber held that while men were also unable to refuse to consummate the marriage, there was not "clear evidence concerning the level of seriousness of this kind of conduct and its impact on males."[4061] Accordingly, while acknowledging that men were subjected to sexual violence that was contrary to human dignity, the Trial Chamber was unable to reach a finding on the seriousness of the mental and physical suffering suffered by those men.[4062]

1437. KHIEU Samphân appeals the Trial Chamber's conclusion that serious mental and physical suffering was established for the victims of forced marriage. He argues that the Trial Chamber failed to consider the social pressure in traditional Khmer weddings, and that it erroneously made generalisations based on specific cases which are not representative of all the evidence.[4063]

1438. The Co-Prosecutors appeal the Trial Chamber's findings regarding male victims of forced consummation.

ii. Forced Marriage

1439. KHIEU Samphân raises a number of challenges to the Trial Chamber's findings on the conduct of forced marriage. He argues, first, that the Trial Chamber erred in the findings it

[4056] Trial Judgment (E465), para. 3692.
[4057] Trial Judgment (E465), para. 3693.
[4058] Trial Judgment (E465), para. 3696.
[4059] Trial Judgment (E465), para. 3696.
[4060] Trial Judgment (E465), paras 3697-3700.
[4061] Trial Judgment (E465), para. 3701.
[4062] Trial Judgment (E465), para. 3701.
[4063] KHIEU Samphân's Appeal Brief (F54), paras 1156-1188.

made on the *actus reus* of forced marriage, pointing to the factual distinction between arranged marriage and forced marriage, as well as the findings on non-consent.[4064] Second, he argues that the Trial Chamber erred in failing to consider the context of arranged marriage in its assessment of seriousness.[4065] Third, he challenges various of the Trial Chamber's findings on serious mental or physical suffering caused to individual civil parties and witnesses.[4066] These arguments will be considered in turn below.

The Actus Reus *of Forced Marriage*

1440. KHIEU Samphân challenges the Trial Chamber's approach to identifying the *actus reus* of forced marriage. In the findings pointed to by KHIEU Samphân, the Trial Chamber held that traditional arranged marriage in Cambodian culture was "very different from forced marriages in the DK regime."[4067] The Trial Chamber found that arranged marriage in Cambodian culture pre-DK was based on a mutual trust between parents and children, and generally did not include an element of force.[4068] CPK policy deemed that *Angkar* could replace parents or be put above them.[4069] Generally, arranged marriages did not include an element of force, and to what extent and how often social pressure in traditional marriages impacted the ability to freely consent was not therefore of relevance for the facts charged in these proceedings.[4070] Overall, the Trial Chamber found that it was "hardly conceivable that "these revolutionary measures could, somehow, be compared with parents' behaviour toward their children in traditional Khmer society."[4071] The Trial Chamber also held, with regard to the coercive environment, that individuals "were married in a widespread climate of fear and the consent purportedly given either before or during the wedding ceremonies did not amount in most cases to genuine consent."[4072]

1441. KHIEU Samphân argues that the Trial Chamber based its findings about the *actus reus* of forced marriage on a false distinction between forced marriage and traditional arranged marriage,[4073] and on "sociological" evidence by expert witness NAKAGAWA Kasumi.[4074] He

[4064] KHIEU Samphân's Appeal Brief (F54), paras 1153-1154,
[4065] KHIEU Samphân's Appeal Brief (F54), para. 1160.
[4066] KHIEU Samphân's Appeal Brief (F54), para. 1188.
[4067] Trial Judgment (E465), para. 3688.
[4068] Trial Judgment (E465), para. 3688.
[4069] Trial Judgment (E465), para. 3689.
[4070] Trial Judgment (E465), para. 3688.
[4071] Trial Judgment (E465), para. 3689.
[4072] Trial Judgment (E465), para. 3690.
[4073] KHIEU Samphân's Appeal Brief (F54), para. 1154.
[4074] KHIEU Samphân's Appeal Brief (F54), para. 1120.

also disagrees that, as a matter of fact, there were differences between arranged marriage and forced marriage.[4075] In his submission, the social pressure in the context of arranged marriage was no different from the finding that the regime took place in a coercive environment.[4076] He submits that the Trial Chamber also erred in finding that consent purportedly given during wedding ceremonies in most cases did not amount to consent.[4077] This was again not a proper *actus reus* finding, as it was required to be "for the characterisation of the crime and KHIEU Samphân's responsibility",[4078] and was, in any event, unreasonable on the evidence.[4079]

1442. The Co-Prosecutors respond that KHIEU Samphân wrongly attempts to conflate marriage practices before and during the DK period, disregarding the overly coercive circumstances that prevailed when the CPK was in power.[4080] The Co-Prosecutors further submit that "there was no evidence that the consent legally given by 'a functional, caring family system was voluntarily transferred to the Party'."[4081]

1443. The Lead Co-Lawyers similarly argue that the conflation of forced marriages and arranged marriages is flawed.[4082] The Lead Co-Lawyers submit that forced and arranged marriages can be distinguished by the role of consent, "or at least, by consent through delegation of a decision to family members", and that the CPK did not have authority to substitute itself for a couple's parents.[4083] Further, KHIEU Samphân fails to acknowledge that the regulation of marriage occurred "as part of a systematic and widespread attack on a civilian population."[4084] Finally, the Lead Co-Lawyers argue that "the brutality of the regime" of forced marriage under the CPK renders the conduct "well beyond any practices that potential perpetrators might have believed were lawful."[4085]

1444. First, the Supreme Court Chamber rejects the assertion that the Trial Chamber was required to make findings about the *actus reus* of forced marriage. As outlined previously, there is no requirement that conduct charged as part of the crime of other inhumane acts be found to amount to an independent crime. What matters is that the charged conduct is found to have

[4075] KHIEU Samphân's Appeal Brief (F54), para. 1120.
[4076] KHIEU Samphân's Appeal Brief (F54), para. 1160.
[4077] KHIEU Samphân's Appeal Brief (F54), para. 1153, referring to Trial Judgment (E465), para. 3690.
[4078] KHIEU Samphân's Appeal Brief (F54), para. 1154.
[4079] KHIEU Samphân's Appeal Brief (F54), para. 1153, referring to Trial Judgment (E465), para. 3690.
[4080] Co-Prosecutors' Response (F54/1), paras 685, 723.
[4081] Co-Prosecutors' Response (F54/1), para. 685, quoting Trial Judgment (E465), para. 3688.
[4082] Lead Co-Lawyers' Response (F54/2), paras 556-561.
[4083] Lead Co-Lawyers' Response (F54/2), para. 557.
[4084] Lead Co-Lawyers' Response (F54/2), para. 525.
[4085] Lead Co-Lawyers' Response (F54/2), para. 560.

occurred, and to have met the *actus reus* elements of the crime of other inhumane acts. Had the Trial Chamber made *actus reus* findings about forced marriage as a crime, therefore, this would have been an error. This Chamber also considers that the Trial Chamber was not, in the present case, making *actus reus* findings with regard to either the distinction between arranged marriage and forced marriage, or the non-consensual environment. The Trial Chamber correctly recalled the scope of charged conduct as outlined in the Closing Order,[4086] and summarised the core factual findings it had with respect response to those charges.[4087] With regard to the distinction between forced marriage and arranged marriage, this question was also addressed in order to deal with arguments raised by the Defence at trial. The Trial Chamber was not therefore obliged to make *actus reus* findings on the conduct of forced marriage, and did not, as a matter of fact, do so.

1445. Second, the Supreme Court Chamber considers that KHIEU Samphân's submissions on the alleged similarities between arranged marriage and forced marriage fail, for several reasons, to meet the standard of appellate review, because the distinction between arranged and forced marriage was a finding of fact which did not have any impact on KHIEU Samphân's conviction. The Trial Chamber considered the distinctions between arranged and forced marriage because the Defence had raised them, not in order to establish "the *actus reus*" of forced marriage. There is, therefore, no appealable point.

1446. This Chamber also observes that KHIEU Samphân makes controversial allegations about the alleged similarities between arranged and forced marriage, and further recalls that the facts in the present case are distinctive in a number of regards. Recalling that the Supreme Court Chamber has jurisdiction to consider "legal issues that would not lead to the invalidation of the judgment but is nevertheless of general significance to the ECCC's jurisprudence",[4088] this Chamber will accordingly briefly consider these issues.

1447. First, this Chamber notes that the Trial Chamber did not find that situations of arranged marriage were "free of constraint" or social pressure, but instead found that any social pressure in that context was not relevant for the facts charged in these proceedings.[4089] KHIEU Samphân

[4086] The Trial Chamber outlined the charges in the Closing Order, which alleged that the individuals were forced to enter into conjugal relationships in coercive circumstances, weddings took place devoid of traditional parental involvement, and on a mass basis; and that sexual relations aimed at enforced procreation were imposed. Trial Judgment (E465), para. 3686.
[4087] Trial Judgment (E465), paras 3690-3691.
[4088] Case 002/01 Appeal Judgment (F36), fn. 3061.
[4089] Trial Judgment (E465), para. 3688.

accordingly misrepresents the Trial Judgment. Furthermore, the evidence KHIEU Samphân points to does not demonstrate that there was "social pressure" before the DK regime. It confirms that parents were involved in traditional practices of marriage before 1975,[4090] but were then forcibly supplanted by the DK regime.[4091]

1448. This Chamber is also of the view that, even if there was overwhelming evidence of social pressure in traditional marriages, this would not demonstrate equivalence between these marriages and the DK regime. There are glaring differences between the two practices. Part of these relate to the lack of tradition: as the Trial Chamber highlighted, parents of individuals were not generally involved in marriages under the CPK regime, traditional rituals were abandoned and many couples were married at the same time.[4092] Judge Sebutinde, in her Separate Concurring Opinion to the *AFRC* Trial Judgment, highlighted this as an important difference between arranged and traditional marriages, observing that "during the whole process of early or arranged marriage in times of peace, the consent and participation of both parents and families is paramount and the union is marked by religious or traditional ceremonies."[4093] Justice Doherty, dissenting in the same case, similarly observed that arranged marriages "entail the involvement and agreement of the families and seniors of the prospective bride and groom, and in particular the approval of the family of the female spouse, as well as the fulfilment of certain ceremonies and rituals relating to the marriage."[4094] The Supreme Court Chamber agrees that these are important distinctions.

1449. This Chamber further considers that there are more fundamental differences between arranged marriages and forced marriages than the absence of traditions. In many cases, individuals did not know who their spouse was going to be in advance of arriving at the wedding venue.[4095] Marriages, furthermore, took place in a climate of widespread fear, in which the space for consent to marriage or the consummation of marriage was vitiated by the

[4090] T. 23 August 2016 (OM Yoeurn), E1/462.1, p. 27 ("at that time, we - - had to follow our parents' decision"); T. 26 May 2015 (MEAS Laihuor), E1/305.1, p. 85 ("I followed the advice of my parents"); T. 13 September 2016 (Kasumi NAKGAWA), E1/472.1, p. 43 (stating that before the Khmer Rouge regime, "[c]hildren's life were [sic] decided by the parents"); T. 14 September 2016 (Kasumi NAKGAWA), E1/473.1, pp. 20-21.
[4091] T. 26 January 2015 (OUM Suphany), E1/252.1, p. 22 (stating that her mother-in-law forced her to get married, or be separated by *Angkar*); T. 25 June 2015 (KANG Ut), E1/322.1, p. 33 (stating that it was *Angkar* that arranged the marriage).
[4092] Trial Judgment (E465), para. 3691.
[4093] *AFRC* Trial Judgment (SCSL), Separate Concurring Opinion of the Hon. Justice Julia Sebutinde Appended to Judgement Pursuant to Rule 88 I, para. 11.
[4094] *AFRC* Trial Judgment (SCSL), Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), para. 26.
[4095] Trial Judgment (E465), para. 3691.

constant threat of physical harm.[4096] Taking these findings holistically, the Supreme Court Chamber fully agrees with the Trial Chamber that it was "hardly conceivable" that the actions of the DK regime could be compared with parents' behaviour towards their children in traditional Khmer society.[4097]

1450. This Chamber has next considered KHIEU Samphân's challenges to the finding regarding individual consent to marriages. The Trial Chamber carefully considered the circumstances in which individuals formally consented to marriage. The Trial Chamber also found, however, that arrangements were made for disabled former soldiers to be married,[4098] and that some persons stated that they had "refused a marriage without detrimental consequences."[4099] The Trial Chamber held that while some individuals were able to genuinely marry a person they had selected or who had been proposed to them, the overwhelming majority of witnesses and civil parties had no choice or right to refuse.[4100] Individuals consented to marriage out of fear, including the fear of being placed in danger, subjected to accusations, sent for re-education, being moved to another location, or killed.[4101] The Supreme Court Chamber has considered, and dismissed, KHIEU Samphân's challenges to these findings above. Taking these findings as a whole, the conclusion that consent was impossible in "most cases" is an accurate reflection of the factual findings. KHIEU Samphân's argument to the contrary is dismissed.

The Relevance of Traditional Arranged Marriages to an Assessment of Gravity

1451. KHIEU Samphân next raises challenges to the Trial Chamber's treatment of traditional arranged marriages, alleging that it should have considered this as part of its assessment of gravity. KHIEU Samphân argues that to properly assess the gravity of an act, it was necessary to take into account the context in which an act is committed, which the Trial Chamber failed to do.[4102] The Trial Chamber should have found that the practice of arranged marriage in traditional Cambodian society meant that comparable marriages under the DK regime were less harmful.[4103] The Trial Chamber should also have considered, in its assessment of the gravity of forced marriage, that "forced marriage" remains decriminalised in Cambodia and the

[4096] Trial Judgment (E465), para. 3691.
[4097] Trial Judgment (E465), para. 3690.
[4098] Trial Judgment (E465), para. 3586.
[4099] Trial Judgment (E465), para. 3625.
[4100] Trial Judgment (E465), para. 3619.
[4101] Trial Judgment (E465), para. 3620.
[4102] KHIEU Samphân's Appeal Brief (F54), para. 1126.
[4103] KHIEU Samphân's Appeal Brief (F54), paras 1159-1162.

ASEAN countries,[4104] and most states prefer to use civil law as a route to addressing "forced marriage".[4105] International conventions also still do not reflect any criminalisation of "forced marriage".[4106]

1452. The Co-Prosecutors respond that "the seriousness of the act is assessed on a case-by-case basis, while the facts must be assessed for their gravity holistically",[4107] and that the Trial Chamber's "holistic gravity assessment clearly demonstrated that men and women who were forced into marriage during the DK regime suffered mental and physical trauma that still lingers".[4108]

1453. The Lead Co-Lawyers state that KHIEU Samphân cites no authority for his claim that the gravity element should be assessed with reference to the state of national and international law.[4109]

1454. The Supreme Court Chamber agrees that an assessment of suffering should "include the cultural environment in which the act or omission took place and in which the effects of the act are felt."[4110] The Trial Chamber correctly outlined this standard, holding that the question of the seriousness of harm would be assessed on a case-by case basis, taking into account the nature of the act or omission, the context in which it occurred and the personal circumstances of the victim.[4111] The Supreme Court Chamber also finds that, contrary to KHIEU Samphân's submission, the Trial Chamber fully complied with this standard. As outlined above, it considered the distinction between arranged marriage and forced marriage in its findings on the conduct of forced marriage, in response to Defence arguments on this at trial.[4112] It also considered the distinction between arranged and forced marriage when making a finding as to gravity, finding that, the conclusion that, victims were subject to "severe discrimination and mistreatment" meant that, the actions were incomparable with the parents' conduct towards their children in traditional Khmer society.[4113] The Supreme Court Chamber finds that the Trial Chamber clearly considered the context in which the offences took place,

[4104] KHIEU Samphân's Appeal Brief (F54), paras 1299, 1133-1136; T. 17 August 2021, F/10.1, p. 40.
[4105] KHIEU Samphân's Appeal Brief (F54), para. 1138.
[4106] KHIEU Samphân's Appeal Brief (F54), paras 1099-1107, 1131.
[4107] Co-Prosecutors' Response (F54/1), para. 725.
[4108] Co-Prosecutors' Response (F54/1), para. 726.
[4109] Lead Co-Lawyers' Response (F54/2), para. 666.
[4110] *AFRC* Trial Judgment (SCSL), Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), para. 56.
[4111] Trial Judgment (E465), para. 725.
[4112] Trial Judgment (E465), paras 3687-3688.
[4113] Trial Judgment (E465), para. 3691.

and KHIEU Samphân merely disagrees with this assessment. This submission is therefore dismissed.

1455. The Supreme Court Chamber also considers it to be an unsupportable proposition that the experience of traditional marriage would somehow diminish the harm caused by being forcibly married. Indeed, such a context would heighten, rather than detract from, a finding of serious harm. For individuals brought up in a traditional culture with well-established practices of familial involvement in choosing marriage partners and traditional ceremonies, the experience of being forcefully married, absent any such ritual, could be presumed to be particularly harmful.

1456. The Supreme Court Chamber has considered KHIEU Samphân's argument that the Trial Chamber erred in failing to consider the fact that other countries still do not criminalise conduct which he describes as "forced marriage." This Chamber recalls its previous finding that the emergence of new, more specific human rights norms "may" serve to provide additional confirmation of the international unlawfulness of prior conduct, "and" be used as a tool to assess whether the conduct in question reaches the requisite level of gravity.[4114] Such an exercise is, however, not mandatory as a legal assessment: the Trial Chamber was not obliged to conduct it and KHIEU Samphân's allegation of error in that regard is therefore dismissed. This Chamber also finds that KHIEU Samphân's submission that there is no criminalisation of forced marriage is confused, as he simultaneously acknowledges that there is such a criminalisation. KHIEU Samphân observes, for example, that the mutual consent of spouses is embedded in the notion that appeared in the Cambodian legal framework via the 1993 Constitution[4115] and the 1989 Law on marriage and family.[4116] He also concedes that numerous countries do, in fact, criminalise forced marriage,[4117] as well as the Council of Europe's Convention on Preventing and Combating Violence Against Women and Domestic Violence, which prohibits forced marriage.[4118]

[4114] Case 002/01 Appeal Judgment (F36), para. 585.
[4115] Constitution of the Kingdom of Cambodia 1993, Art. 45(3) ("Marriage shall be done according to the conditions set by the law and based on the principles of mutual consent and monogamy.")
[4116] Law of 1989 on the Marriage and Family, 26 July 1989.
[4117] KHIEU Samphân's Appeal Brief (F54), para. 1137, referring to German Penal Code, 19 February 2005; Norwegian Penal Code, Law of 2007, Art. 222 (2); Belgian Penal Code, First Law 2005 and Second Law of 2013; Penal Code of the Republic of Benin, Law of 9 January 2012; Swiss Criminal Code, Law 2012, Art. 212; French Penal Code, 5 August 2013, Art. 222 (14) (4).
[4118] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, *entered into force* 1 August 2014, CETS 210, Art. 37.

1457. This Chamber also notes that, in any event, the conduct of forced marriage has become increasingly recognised as a violation of a human rights norm. The right not to be forcefully married has been enshrined by a number of instruments,[4119] and a number of international criminal tribunals have reflected this shift. The ICC Pre-Trial Chamber II held in the *Ongwen* case, considering *inter alia* the Article of the UDHR referred to by the Trial Chamber in outlining the conduct of forced marriage, that forced marriage "violates the independently recognised basic right to consensually marry and establish a family. This basic right is indeed the value (distinct from *e.g.* physical or sexual integrity, or personal liberty) that demands protection through the appropriate interpretation of article 7(1)(k) of the Statute".[4120] The importance of this basic right was again highlighted by the Trial Chamber in the same case: "Every person enjoys the fundamental right to enter a marriage with the free and full consent of another person. Marriage creates a status based on a consensual and contractual relationship – it is an institution and also an act or rite."[4121] the ICC Pre-Trial Chamber I indicated in the *Al Hassan* case that "[t]he interests protected by the criminalisation of forced marriage correspond in particular to the violation of the right to marry, to choose a spouse and establish a family consensually, recognised by international human rights law".[4122] This Chamber considers that these new more specific norms further support the conclusion that forced marriage was extremely grave conduct.

Serious Mental or Physical Suffering or Injury

1458. The Trial Chamber made various findings of fact on the impact of forced marriage.[4123] It found that witnesses and civil parties testified as to "their shocking experiences and negative emotions" when they found out that they had to marry someone that they did not know.[4124] It found that many wept and were upset, disappointed and fearful during the wedding

[4119] See ICCPR, Art. 23; ICESCR, Art. 10(1); Human Rights Committee, General Comment No. 28, HRI/GEN/1/Rev.9, Vol. I, 29 March 2000; Convention on Consent to Marriage, Art. 1 (1); CEDAW, Art. 16(1)(b); Declaration on the Discrimination Elimination, Art. 6(2); ACHPR, Protocol on the Rights of Women in Africa, *entered into force* 25 November 2005, Art. 6; Cairo Declaration on Human Rights in Islam, *entered into force* 5 August 1990, A/CONF.157/PC/62/Add.18, Art. 19(I); American Convention on Human Rights, *entered into force* 18 July 1978 ("ACHR"), Art. 17-3; ECHR, Art. 8; Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* 1 November 1988, Art. 5.
[4120] *Ongwen* Confirmation of Charges Decision (ICC), para. 94.
[4121] *Ongwen* Trial Judgment (ICC), para. 2748.
[4122] *Al Hassan* Confirmation of Charges Decision (ICC), para. 554 ("*Les intérêts protégés par la criminalisation 581uerrilla581uerrrcé correspondent notamment à l'atteinte au droit de se marier, de choisirI(e) époux/se et de fonder une famille de manière consensuelle reconnus en droit international des droits de l'homme*").
[4123] Trial Judgment (E465), paras 3679-3682.
[4124] Trial Judgment (E465), para. 3679.

ceremonies.[4125] The Trial Chamber also held that victims who were forced to marry described the difficulty of remarrying while still grieving the loss of their partners.[4126] Victims regretted the fact that their marriages were not done in accordance with tradition, and the absence of parents and family members made many victims feel remorse, disappointment, and emotional pain.[4127] These experiences had a long-lasting impact on the victims, and many of them are still haunted by them to this day.[4128] The Trial Chamber also made findings on the impact of forced consummation.[4129]

1459. In its legal findings, the Trial Chamber considered that conduct described as forced marriage had occurred, and had caused serious mental and physical suffering of similar gravity to other crimes against humanity.[4130] The Trial Chamber took account of the mental and physical suffering inflicted on individuals through the threats of forcing them to marry, the fact that they had to marry someone they did not know, the fear instilled to pressure them to consummate the marriage, and that the conduct was performed intentionally.[4131] It considered that the severity of the mental suffering caused by being forced to marry in a coercive environment caused serious mental harm with lasting effects on the victims.[4132]

1460. KHIEU Samphân raises a number of challenges to the evidence relied upon, or alleged ignored by the Trial Chamber in its factual findings on the impact of forced marriage.[4133] The Supreme Court Chamber observes that these challenges are made to individual pieces of evidence on a piecemeal and convoluted basis, and KHIEU Samphân at no point attempts to explain how any of these individual errors would invalidate the Trial Judgment. This Chamber recalls that the standard of review is one of "reasonableness in reviewing an impugned finding of fact, not whether the finding is correct".[4134] Further, a factual error will only occasion a miscarriage of justice if it is shown "that the Trial Chamber's factual errors create a reasonable doubt as to an accused's guilt."[4135] This Chamber considers, nonetheless, that KHIEU

[4125] Trial Judgment (E465), para. 3679.
[4126] Trial Judgment (E465), para. 3680.
[4127] Trial Judgment (E465), para. 3681.
[4128] Trial Judgment (E465), para. 3682.
[4129] Trial Judgment (E465), paras 3683-3685.
[4130] Trial Judgment (E465), para. 3692.
[4131] Trial Judgment (E465), para. 3692.
[4132] Trial Judgment (E465), para. 3692.
[4133] Trial Judgment (E465), paras 3679-3682, fns 12274-12287, referring to CHANG Srey Mom, CHEA Deap, EM Oeun, KHET Sokhan, KHIN Vat, KUL Nem, LING Lrysov, MOM Vun, NGET Chat, NOP Ngim, MEAS Saran, OM Yoeurn, PEN Sochan, PO Dina, PREAP Sokhoeurn, SAY Naroeun, SOU Sotheavy, SUM Pet, SUON Yim, VA Limhun, YOS Phal, Peg LEVINE and NAKAGAWA Kasumi.
[4134] Case 002/01 Appeal Judgment (F36), para. 88, referring to Case 001 Appeal Judgment (F28), para. 17.
[4135] Case 002/01 Appeal Judgment (F36), para. 88, referring to Case 001 Appeal Judgment (F28), para. 18.

Samphân's arguments go to alleged errors in the Trial Chamber's: (1) overall reliance on civil party evidence; (2) findings on the lack of tradition; (3) failure to take account of traumatic events other than forced marriage; (4) failure to consider the development of feelings during marriages; (5) findings on credibility; and (6) reliance on SOU Sotheavy's evidence.

a) Standard for Assessing Serious Mental or Physical Suffering or Injury

1461. The Supreme Court Chamber recalls that to amount to other inhumane acts, the acts or omissions must be of a nature and gravity similar to other enumerated crimes against humanity.[4136] The Trial Chamber held that this assessment requires a case-specific analysis of the impact of the conduct on the victims and a determination as to whether the conduct is comparable to the enumerated crimes against humanity.[4137] It further held that the assessment should be "holistic", and may take into consideration the nature of the act or omission, the context in which it occurred and the personal circumstances of the victim.[4138] There is no requirement that the suffering have long-term effects on the victim, although this may be relevant to the determination of the seriousness of the act or omission in question.[4139] This Chamber also recalls its finding in Case 002/01 that not all acts will meet the requisite seriousness for the crime of other inhumane acts,[4140] and that this standard has been applied "restrictively" by other international courts and tribunals.[4141] Destruction of property, being forced to remain in a country and forced requisition of a private property for military purposes have been found to be acts which might not meet the necessary threshold of seriousness.[4142] Even acts of physical harm, such as alleged beatings, may not always establish the necessary harm: this must be considered on a case-by-case basis.[4143]

1462. While harm will be subjectively considered, an act of proven forcible sexual intercourse that is usually prosecuted as the crime of "rape" – has often been assumed to cause serious harm. In Case 001, this Chamber upheld the ICTY *Kunarac* Appeals Chamber's ruling that "some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is

[4136] Trial Judgment (E465), para. 725. See also Case 002/01 Trial Judgment (E313), paras 438-439.
[4137] Trial Judgment (E465), para. 725.
[4138] Trial Judgment (E465), para. 725.
[4139] Trial Judgment (E465), para. 725.
[4140] *Lukić and Lukić* Appeal Judgment (ICTY), para. 634 ("The Appeals Chamber considers that not all acts committed in detention can be presumed to meet the requisite seriousness.").
[4141] Case 002/01 Appeal Judgment (F36), para. 581.
[4142] Case 002/01 Appeal Judgment (F36), para. 581.
[4143] *Lukić and Lukić* Appeal Judgment (ICTY), para. 634.

obviously such an act."[4144] The ICC's *Bemba* Pre-Trial Chamber also found that "severe pain and suffering" is an "inherent specific material element[] of the act of rape".[4145] Other cases have expanded this to broader acts of sexual violence. In *Prosecutor v. Akayesu*, an ICTR Trial Chamber declared that "rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm."[4146] Similarly, in *Prosecutor v. Kunarac et al.*, the ICTY Appeals Chamber stated that "[s]exual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture."[4147] In *Prosecutor v. Prlić et al*., an ICTY Trial Chamber found that the sexual abuse to which five male detainees had been subjected when soldiers forced them to perform oral sex on one another "caused serious psychological suffering and constituted a serious attack on their dignity" sufficient to establish the crimes of inhuman treatment and persecution.[4148] The seriousness of the sexual violence in *Prlić* was not disputed, and the Trial Chamber did not refer to specific evidence of harm to support its finding of "serious psychological suffering."

b) Reliance on the Evidence of Civil Parties

1463. KHIEU Samphân submits, with a footnote reference to his Closing Brief, that the Trial Chamber erred in failing to correctly apply the methodology for evaluating the evidence of civil parties.[4149] He argues that the Trial Chamber erred in relying on the "story" told by the civil parties, which was "selected to be particularly painful", and did not represent, statistically, the majority of the experiences of people married under the regime.[4150]

1464. The Co-Prosecutors respond that the Trial Chamber correctly took civil party evidence into account when making factual findings.[4151] They argue that KHIEU Samphân's purported "statistical" challenge to the Trial Chamber's reliance on civil party evidence is "premised on

[4144] Case 001 Appeal Judgment (F28), para. 208. The Supreme Court Chamber observes, but does not uphold, the isolated finding on rape made by the ICTY *Stakić* Trial Chamber, which suggested that rape was an inherently worse offence for women. See *Stakić* Trial Judgment (ICTY), para. 803 ("[f]or a woman, rape is by far the ultimate offense, sometimes even worse than death because it brings shame on her.")
[4145] *Bemba* Decision Pursuant to Article 61(7)(a) and (b) (ICC), para. 204.
[4146] *Akayesu* Trial Judgment (ICTR), para. 731 (emphasis added) (holding that acts of rape and other forms of sexual violence, which included instances of forced public nudity, constituted genocidal acts).
[4147] *Kunarac et al.* Appeal Judgment (ICTY), para. 150.
[4148] *Prlić et al.* Trial Judgment (ICTY), para. 770.
[4149] KHIEU Samphân's Appeal Brief (F54), para. 2165.
[4150] KHIEU Samphân's Appeal Brief (F54), para. 1166.
[4151] Co-Prosecutors' Response (F54/1), para. 693.

numerous false assumptions and is replete with errors, invalidating the very conclusions it is alleged to support."[4152] By way of example, they submit that many of the individuals whom KHIEU Samphân categorises as "consenting" to marriage did not in fact consent.[4153]

1465. The Lead Co-Lawyers similarly dismiss KHIEU Samphân's "statistical" approach as "fundamentally flawed".[4154] The Lead Co-Lawyers note that civil parties and witnesses in the marriage segment of the trial were questioned directly and extensively about their experiences of marriage, whereas the questioning or follow-up on the issue of marriage in other segments of the trial was comparatively limited. The Lead Co-Lawyers also argue that the extensive inculpatory material elicited during the marriage segment "was in part a result of the decision by the Defence not to propose sources of exculpatory materials", and to put forward only one expert witness.[4155]

1466. This Chamber finds that KHIEU Samphân mischaracterises the Trial Judgment when he argues that the Trial Chamber relied solely on civil party evidence. While the Trial Chamber refers to illustrative civil party testimony in the footnote of the specific finding that the "experiences have had a long-lasting impact on the victims and many of them are still haunted by this to this day",[4156] this was a summary statement at the conclusion of a broader section entitled "Impact of 'forced marriage'", which detailed the harm caused to numerous witnesses and civil parties.[4157] This argument is unconvincing. The Supreme Court Chamber finds that the Trial Chamber articulated its approach to addressing civil party evidence. The Trial Chamber concluded, contrary to KHIEU Samphân's Closing Brief arguments at trial, which he reiterates on appeal, that there was no presumption that the evidence of civil parties was unreliable.[4158] It held that it would evaluate their credibility and reliability on a case-by-case basis, taking into account the credibility of the evidence and other relevant factors.[4159] KHIEU Samphân demonstrates no error in this careful approach but simply rehashes trial arguments without showing any error on the part of the Trial Chamber, thus his submission is dismissed.

c) Absence of Tradition in Ceremonies

[4152] Co-Prosecutors' Response (F54/1), para. 692.
[4153] Co-Prosecutors' Response (F54/1), para. 693.
[4154] Lead Co-Lawyers' Response (F54/2), para. 692.
[4155] Lead Co-Lawyers' Response (F54/2), para. 694.
[4156] Trial Judgment (E465), para. 3682.
[4157] See Trial Judgment (E465), paras 3679-3681.
[4158] Trial Judgment (E465), para. 3528.
[4159] Trial Judgment (E465), para. 3528.

1467. The Trial Chamber found, relying on the evidence of a number of civil parties and witnesses, that "[v]ictims regretted the fact that their marriages were not done in accordance with tradition."[4160] It found that the absence of family made many victims feel remorse, disappointment and emotional pain.[4161] The Trial Chamber pointed specifically to civil party LING Lrysov's evidence that she was "really disappointed" that her parents were not allowed to attend, as well as KHIN Vat's evidence that it was "unfortunate that her parents were not aware of her marriage".[4162]

1468. KHIEU Samphân challenges the Trial Chamber's conclusion that "long-lasting harm" was caused by the failure to conduct traditional marriage ceremonies with the involvement of parents, arguing that the evidence of MOM Vun, LING Lyrsov and KHIN Vat did not show any such harm.[4163] KHIEU Samphân points to MOM Vun's statement that 60 couples were married in the same ceremony, and cried because there was no permission from their parents,[4164] and submits that her "reactions on the day of the ceremony do not allow us to conclude" that serious mental harm had taken place.[4165] KHIEU Samphân also submits that evidence that LING Lyrsov was "really disappointed", and that KHIN Vat "felt that it was unfortunate that her parents were not aware of her marriage", does not show any serious harm.[4166]

1469. Regarding the absence of tradition, the Co-Prosecutors respond that the Trial Chamber's holistic assessment of gravity clearly demonstrated that men and women forced into marriage suffered lingering physical and mental trauma, including the emotional pain caused by the absence of tradition.[4167] The Co-Prosecutors also argue that the disappointment described was long-lasting, and this specific harm was only one facet of the impact.[4168]

1470. The Lead Co-Lawyers respond that KHIEU Samphân ignores testimony from the Civil Parties regarding the suffering they endured from other parts of their marriages.[4169] The Lead

[4160] Trial Judgment (E465), para. 3681.
[4161] Trial Judgment (E465), para. 3681.
[4162] Trial Judgment (E465), para. 3681.
[4163] KHIEU Samphân's Appeal Brief (F54), paras 1163-1164.
[4164] See KHIEU Samphân's Appeal Brief (F54), para. 1164, referring to Trial Judgment (E465), para. 3681.
[4165] See KHIEU Samphân's Appeal Brief (F54), para. 1164, referring to Trial Judgment (E465), para. 3681.
[4166] See KHIEU Samphân's Appeal Brief (F54), para. 1164, referring to Trial Judgment (E465), para. 3681. See also KHIEU Samphân's Appeal Brief (F54), para. 1187, referring to Written Record of Interview of SREY Soeum, 20 February 2015, E3/9826, ERN (EN) 01067748 ("In the past I was disappointed because I was not able to marry like we do now […] Now time has passed so that grief has gradually faded away.")
[4167] Co-Prosecutors' Response (F54/1), para. 726.
[4168] Co-Prosecutors' Response (F54/1), para. 728.
[4169] Lead Co-Lawyers' Response (F54/2), para. 689.

Co-Lawyers submit that MOM Vun's testimony as a whole reflects "the trauma inflicted on her by being forced to marry".[4170] The Lead Co-Lawyers further submit that "different people suffered in different ways from their forced marriages, and also expressed their suffering in different ways", and that the Trial Chamber thus correctly adopted a holistic approach to assessing evidence of harm.[4171]

1471. The Supreme Court Chamber recalls that the Trial Chamber concluded that overall, the experience of forced marriage "had a long-lasting impact on the victims."[4172] In reaching this conclusion, the Trial Chamber took account of the lack of tradition in ceremonies, but also considered multiple other harms incurred by being forced into marriage.[4173] These accounts included vivid accounts of physical fear and emotional distress during the process of getting married,[4174] being forced to remarry when still grieving the loss of a husband,[4175] and life-long regret.[4176] The Trial Chamber did not make a finding on the suffering caused by the lack of tradition in isolation, but considered this as one of the myriad harms caused by being forced into marriage.[4177] KHIEU Samphân accordingly mischaracterises the Trial Judgment, and his submission is dismissed.

1472. The Supreme Court Chamber finds no error in the conclusion that the lack of traditional ceremonies and familial involvement did, in fact, cause long-term harm. As outlined above, there was a material difference between traditional practices of marriage and forced marriage under the DK regime. The Supreme Court Chamber further observes that LING Lrysov and KHIN Vat each stated that they were subject to threats to marry,[4178] while MOM Vun testified that she was raped as a consequence of refusing to be married.[4179] Thus, these specific individuals also testified to having experienced, along with the unpleasantness of their wedding day, significant physical and mental harm. These submissions are therefore dismissed.

d) Other Traumatic Events

[4170] Lead Co-Lawyers' Response (F54/2), para. 689.
[4171] Lead Co-Lawyers' Response (F54/2), para. 690.
[4172] Trial Judgment(E465), para. 3682.
[4173] See Trial Judgment (F465), paras 3679-3682.
[4174] Trial Judgment (E465), para. 3679 (referring to the "shocking experiences and negative emotions" when witnesses and civil parties found out that they had to marry someone unknown).
[4175] Trial Judgment (E465), para. 3680, referring to the evidence of MOM Vun.
[4176] Trial Judgment (E465), para. 3680, referring to the evidence of YOS Phal.
[4177] See Trial Judgment (E465), paras 3679-3682.
[4178] T. 29 July 2015 (KIN Vat), E1/325.1, p. 59; T. 29 July 2015 (LING Lyrsov), E1/325.1, pp. 90-91.
[4179] T. 16 September 2015 (MOM Vun), E1/475.1, p. 49.

1473. KHIEU Samphân argues that the Trial Chamber ignored the evidence of three civil parties, NGET Chat, CHEA Deap and KUL Nem, that it was not forced marriage, but other traumatic events, that "caused their greatest suffering".[4180]

1474. The Co-Prosecutors respond that there is no requirement that forced marriage must cause graver suffering than any other crime to which victims have been subjected.[4181]

1475. The Supreme Court Chamber observes that in its findings on harm suffered, the Trial Chamber referred to CHEA Deap's evidence that she was not happy, and "wept almost every day" after the ceremony.[4182] It also took account of KUL Nem's evidence that he "felt the sorrow and the pain inside me" after his forced marriage.[4183] The Trial Chamber also considered NGET Chat's evidence that she was forced to remarry without her consent after her husband was taken away, at which point she was still weeping for the loss of her husband.[4184]

1476. The Trial Chamber did not, in these findings or elsewhere, take account of evidence of the other harms these witnesses experienced, which were highlighted by KHIEU Samphân. This Chamber observes that NGET Chat expressed her grief at her husband's death,[4185] CHEA Deap recalled her younger brother and other relatives who died during the period,[4186] and KUL Nem revealed the agony of not being able to conceive a child.[4187] The Supreme Court Chamber finds, however, no error in the Trial Chamber's decision not to consider this evidence. There is no requirement, express or implied, that the harm caused by a charged conduct be the only harm experienced by that individual. Indeed, this further attested to the damage specifically experienced by these individuals. KHIEU Samphân's arguments are rejected with regard to the evidence of NGET Chat, CHEA Deap and KUL Nem are rejected, as well as to the extent he raises them in regards to SAY Naroeun.[4188]

[4180] KHIEU Samphân's Appeal Brief (F54), para. 1169.
[4181] Co-Prosecutors' Response (F54/1), para. 730.
[4182] Trial Judgment (E465), para. 3679, referring to T. 30 August 2016 (CHEA Deap), E1/466.1, p. 77.
[4183] Trial Judgment (E465), fn. 12274, referring to T. 24 October 2016 (KUL Nem), E1/488.1, p. 90.
[4184] Trial Judgment (E465), para. 3680, referring to T. 25 October 2016 (NGET Chat), E1/489.1, p. 26.
[4185] KHIEU Samphân's Appeal Brief (F54), fn. 2177, referring to T. 25 October 2016 (NGET Chat), E1/489.1, p. 8.
[4186] KHIEU Samphân's Appeal Brief (F54), fn. 2177, referring to T. 31 August 2016 (CHEA Deap), E1/467.1, p. 33.
[4187] KHIEU Samphân's Appeal Brief (F54), para. 1167.
[4188] Compare KHIEU Samphân's Appeal Brief (F54), para. 1167, distinguishing SAY Naroeun from NGET Chat and KUL Nem because she questioned the Accused about the lack of feelings involved in the marriage," with KHIEU Samphân's Appeal Brief (F54), para. 1177, fn. 2195, describing SAY Naroeun as one of the three civil parties who "did not emphasise the suffering experienced as a result of their marriage". The Supreme Court Chamber considers that the same logic applies to SAY Naroeun, and notes in addition that her evidence about

e) Development of Feelings During Forced Marriage

1477. KHIEU Samphân contends that the Trial Chamber failed to consider evidence that seven individuals changed their feelings over time, showing that they were not harmed by forced marriage.[4189] He argues that NOP Ngim, OM Yoeurn, YOS Phal and PHAN Him each developed feelings for their partners.[4190] NOP Ngim stated that she and her spouse loved each other after marriage;[4191] OM Yoeurn remarried her husband after the regime fell;[4192] and PHAN Him described how sentiments evolved before she consummated her marriage.[4193] The witness statements of SUON Yim, SUM Pet, and KHET Sokhan showed how they "overcame" their experiences,[4194] while SENG Soeun and HENG Lai Heang did not demonstrate long-term suffering as the result of their marriage.[4195] SUON Yim's gave evidence about her "lack of physical or mental problems" after sexual relations.[4196] SUM Pet stated that he and his wife "tried to compromise",[4197] while KHET Sokhan "mentions" the suffering of an undesired marriage, but decided to carry on living with her husband.[4198]

1478. In relation to evidence that individuals developed feelings over time, the Co-Prosecutors submit that KHIEU Samphân adopts an overly narrow view of the evidence, which, if considered holistically, clearly demonstrates that the gravity threshold was established.[4199] Further, the Co-Prosecutors submit that KHIEU Samphân mischaracterizes certain testimony, such as that of OM Yoeurn, who the Co-Prosecutors argue "never developed feelings" for her husband, and decided to reunite with him after the regime because of "pressure from her family and village elders".[4200]

1479. The Lead Co-Lawyers respond that KHIEU Samphân's claim that victims' suffering diminished over time is of minimal legal relevance, as there is no legal requirement that

losing her virginity and the importance of love for marriage further underlines the shortfalls of an argument that no harm was suffered.

[4189] KHIEU Samphân's Appeal Brief (F54), paras 1169, 1171, 1174, 1178, 1185, referring to NOP Ngim, OM Yoeurn, YOS Phal, PHAN Him, SUON Yim, SUM Pet and KHET Sokhan.
[4190] KHIEU Samphân's Appeal Brief (F54), paras 1169, 1171, 1174, 1178, 1185.
[4191] KHIEU Samphân's Appeal Brief (F54), paras 1169, 1178.
[4192] KHIEU Samphân's Appeal Brief (F54), para. 1169.
[4193] KHIEU Samphân's Appeal Brief (F54), para. 1178.
[4194] KHIEU Samphân's Appeal Brief (F54), para. 1171.
[4195] KHIEU Samphân's Appeal Brief (F54), para. 1178.
[4196] KHIEU Samphân's Appeal Brief (F54), fn. 2179.
[4197] KHIEU Samphân's Appeal Brief (F54), fn. 2179.
[4198] KHIEU Samphân's Appeal Brief (F54), fn. 2179.
[4199] Co-Prosecutors' Response (F54/1), para. 727.
[4200] Co-Prosecutors' Response (F54/1), para. 756.

suffering be long-lasting for the crime of other inhumane acts to be established.[4201] KHIEU Samphân also disregards evidence showing civil parties experienced immediate harm at the time of marriage;[4202] and misrepresents the evidence of KHIEV Horn and HORNG Orn, who did not state that they developed feelings.[4203] The Lead Co-Lawyers also submit that KHIEU Samphân disregards evidence of the various reasons why people stayed in marriages.[4204]

1480. The Supreme Court Chamber first recalls that as a matter of law, no requirement exists that a victim's suffering take place on a long-term basis.[4205] While the Trial Chamber found that marriage "had a long-lasting impact on the victims",[4206] it was not required to make such a finding. Not all acts will meet the requisite seriousness,[4207] and the standard has been applied "restrictively" by other international courts and tribunals.[4208] This Chamber also recalls that certain acts such as rape are considered by their nature to constitute pain and suffering,[4209] such a standard has not, however, been established with regard to the conduct of forced marriage. The Supreme Court Chamber recalls, however, that such conduct has been invariably described as grave.

1481. This Chamber also considers that, in the present situation, the harm of forced marriage was established at the point that individuals were forced into marriage with strangers, often at fear of death. Absent an indication that such marriage had not been forced upon an individual which in effect would mean that the charged conduct was not established, this Chamber finds it impossible to imagine a situation in which harm would not be subjectively established at the time of the marriage itself. This has several consequences. First, the harm engendered by forced marriage need not be specifically elucidated, because it is inherent. Furthermore, from this perspective, a positive experience of the marriage is essentially irrelevant to the appraisal of harm. Such an experience is testament to the resilience and perhaps more importantly to the luck of the individuals involved, but in no way detracts from the harm caused by the forced marriage itself. This also means that the continuation of the marriage does not detract from the

[4201] Lead Co-Lawyers' Response (F54/2), para. 676.
[4202] Lead Co-Lawyers' Response (F54/2), para. 677, referring to KUL Nem, KEO Theary, SREY Soeum, SUON Yim, SUON Yim, VA Limhun.
[4203] Lead Co-Lawyers' Response (F54/2), para. 678.
[4204] Lead Co-Lawyers' Response (F54/2), paras 679-680, referring to KUL Nem, KHET Sokhan, OM Yoeurn, SAY Naroeun, YOS Phal, TES Ding and YOS Phal.
[4205] Trial Judgment (E465), para. 725.
[4206] Trial Judgment (E465), para. 3682.
[4207] *Lukić and Lukić* Appeal Judgment (ICTY), para. 634 ("The Appeals Chamber considers that not all acts committed in detention can be presumed to meet the requisite seriousness").
[4208] Case 002/01 Appeal Judgment (F36), para. 581.
[4209] See Case 001 Appeal Judgment (F28), para. 207. See also *Kunarac et al.* Appeal Judgment (ICTY), para. 150.

harm it caused. On the latter point, this Chamber endorses Justice Doherty's Partly Dissenting Opinion in the *AFRC* Trial Judgment. Justice Doherty considered the fact that victims may remain in a forced marriage for a number of reasons, including "inability to find an alternative life style, an obligation to rear the children born of the forced marriage, rejection by their family or community or acceptance of their lot."[4210] However, "a decision to remain in the forced marriage or its transformation into a consensual situation does not retroactively negate the original criminality of the act."[4211]

1482. This Chamber has considered KHIEU Samphân's challenges against this backdrop. Several individuals testified that they evolved feelings over time, HORNG Orn "started to like" her husband;[4212] and KEO Theary stated that she and her husband felt the same way as other couples in due course.[4213] NOP Ngim stated that she and her husband "loved each other" after the forced wedding.[4214] The Trial Chamber also, however, considered NOP Ngim's evidence that she cried at her wedding, but had to bear it because she would have been killed otherwise.[4215] This Chamber finds it impossible to accept that the crime engendered by forcing marriage at pain of death is in anyway ameliorated by the comfort the two spousal victims found in one another in the case of NOP Ngim. PHAN Him stated that she did not love her husband at first, but came to do so.[4216] VA Limhun grew to love her husband and MEAS Saran petitioned for reparation in relation to the death of the husband she was allegedly forcibly married to.[4217]

1483. As regards the rest of the civil parties and witnesses, KHIEU Samphân mischaracterises their evidence or adopts a highly selective view. He submits, for example, that YOS Phal

[4210] *AFRC* Trial Judgment (SCSL), Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), para. 45.
[4211] *AFRC* Trial Judgment (SCSL), Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriages), para. 45.
[4212] Written Record of Interview of HORNG Orn, 15 December 2009, E3/5558, ERN (EN) 00381009-00381010.
[4213] Written Record of Interview of KEO Theary, 8 December 2014, E3/9662, p. 19 (felt same way as other couples married by consent after some years together).
[4214] See T. 5 September 2016 (NOP Ngim), E1/469.1, p. 40.
[4215] Trial Judgment (E465), para. 3679, fn. 12274, referring to T. 5 September 2016 (NOP Ngim), E1/469.1, p. 40 (stating that she was forced to marry a blind military. She explained that: "I also cried. I was disappointed, very disappointed since I had never seen my would-be husband before the marriageIy [...] If I had refused, I would have been killed so I had to bear the situation").
[4216] T. 31 August 2016 (PHAN Him), E1/467.1, p. 115 (stating that "at first" the spouses did not have feelings towards each other, and did not love one another).
[4217] Written Record of Interview of VA Limhun, 15 September 2014, E3/9756, pp. 15-16 (she loved her husband and never thought about leaving him); Written Record of Interview of MEAS Saran, 29 December 2014, E3/9736, pp. 18-19 (evidence that there were no problems with sexual intercourse with her second husband).

"developed feelings for the wife he married",[4218] disregarding the fact that the relevant testimony stated that YOS Phal took care of his wife like a sibling.[4219] While SUM Pet gave evidence that he and his wife "tried to compromise",[4220] his evidence makes clear that this was merely an attempt to survive an impossible and harmful situation.[4221] KHIEU Samphân points to SUON Yim's evidence that she had mentioned "lack of physical or mental problems following her sexual relations", but fails to acknowledge her evidence on the previous page of her statement, which was that she agreed to sexual intercourse due to fear of being killed.[4222] KHET Sokhan's statement that she decided to live with her husband,[4223] must be viewed in conjunction with her other evidence that she was forced to marry him against her wishes, and decided to stay with him only because her parents had died.[4224] The Trial Chamber also considered OM Yoeurn's evidence that she was "terribly worried", did not want to get married, and could not eat at the time of marriage,[4225] as well as her testimony that she was raped after her marriage,[4226] and remarried solely under family pressure.[4227] YOS Phal provided a heartrending account of his continued suffering following the loss of his fiancée, describing his life as "pitiful" and filled with pain, sorrow, and suffering in the evidence cited by the Trial Chamber.[4228] KHIEU Samphân's submissions are all accordingly dismissed.

1484. As outlined above, the Supreme Court Chamber rejects the contentions that, as a matter of principle, the development of future relationships absolves the harm of forced marriage or that individuals were required to specifically attest to the harm they experienced. The Supreme Court Chamber also notes that KHIEU Samphân fails to analyse the evidence in its entirety when arguing that witnesses and civil parties began to develop feelings for their partners. Each of the individuals he mentions emphasised the context of coercion, thus the harm suffered, is clear.[4229]

[4218] KHIEU Samphân's Appeal Brief (F54), para. 1174.
[4219] T. 25 August 2016 (YOS Phal), E1/464.1, p. 29.
[4220] Written Record of Interview of SUM Pet, 4 August 2014, E3/9824, p. 10.
[4221] Written Record of Interview of SUM Pet, 4 August 2014, E3/9824, p. 10.
[4222] Written Record of Interview of SUON Yim, 24 November 2014, E3/9829, p. 10 (she agreed to continue having sexual intercourse due to being afraid of being taken to be killed).
[4223] Written Record of Interview of KHET Sokhan, 27 November 2013, E3/9830, p. 14.
[4224] Written Record of Interview of KHET Sokhan, 27 November 2013, E3/9830, pp. 13-14.
[4225] Trial Judgment (E465), para. 3679, referring to T. 22 August 2016 (OM Yoeurn), E1/461.1, pp. 98-99.
[4226] T. 23 August 2016 (OM Yoeurn), E1/462.1, p. 15.
[4227] T. 22 August 2016 (OM Yoeurn), E1/461.1, p. 94; T. 23 August 2016 (OM Yoeurn), E1/462.1, p. 12.
[4228] Trial Judgment (E465), para. 3681, referring to T. 25 August 2016 (YOS Phal), E1/464.1, pp. 61-62.
[4229] Accounts showing that couples stayed together or remarried due to familial pressure, for example, do not demonstrate any freedom of choice. Written Record of CHEA Thy, 17 June 2008, E3/5184, ERN (EN) 00225528-00225529 (he and his wife moved to her home village after the regime fell); Written Record of Interview of KHIEV Horn, 9 September 2009, E3/5559, ERN (EN) 00377369-00377370 (living together as siblings and

1485. Regarding the alleged lack of evidence on the specific harm, the Supreme Court Chamber observes the incongruity of pointing to the absence of evidence of suffering in the testimony of witnesses and civil parties who testified outside the marriage segment, in relation to other crimes, and were not specifically questioned on such an experience. Furthermore, KHIEU Samphân mischaracterises the evidence once more. Two of the witnesses he mentions provide no explicit evidence of harm.[4230] Every other individual mentioned by KHIEU Samphân provides explicit evidence that clearly demonstrates their suffering, oftentimes in evidence directly adjacent to the portions cited by KHIEU Samphân. KHET Sokhang and HENG Lai Heang both expressly describe their suffering; while MEY Savoeun, CHUM Samoeurn and THUCH Sithan describe the fear and feelings of compulsion that accompanied their forced marriages.[4231] KHIEU Samphân's arguments on this point are also dismissed.

f) Credibility of Civil Parties EM Oeun and MOM Vun

1486. KHIEU Samphân alleges that the Trial Chamber erred in failing to consider EM Oeun's evidence that he could have refused to get married,[4232] and in finding MOM Vun credible.[4233] In support, he cites her allegedly inconsistent evidence about the identity and fate of her first husband, repeating arguments he made at trial,[4234] and argues that the Trial Chamber's conclusion that these inconsistencies should be considered as "minor" is incorrect, given that the Trial Chamber then relied on the existence and death of her first husband to make findings about suffering.[4235]

remarrying after the regime fell at family's request); T. 2 September 2015 (MEAN Loeuy), E1/340.1, p. 68 (similarly, MEAN Loeuy's statement that he "had" to love his wife once married reflects his traditional values and demonstrates the full harm caused by forced marriage, rather than mirroring arranged marriage); T. 2 February 2015 (CHANG Srey Mom), E1/255.1, p. 9 (CHANG Srey Mom stated that she and her husband stayed together "because of the fear"); Written Record of Interview of VA Limhun, 15 September 20214, E3/9756, ERN (EN) 01046942-01046943 (VA Limhun stated that she felt she had to marry due to fear of being killed, and the fact that she grew to love her husband is accordingly irrelevant).

[4230] T. 29 August 2016 (SENG Soeurn), E1/465.1, pp. 26-27 (SENG Soeun stated that he had married his superior's cousin at his senior officer's insistence, made no mention of suffering). See also T. 30 August 2016 (SENG Soeurn), E1/466.1, pp. 57-58; T. 17 October 2016 (CHEAL Choeun), E1/484.1, pp. 24-25.

[4231] T. 17 August 2016 (MEY Savoeun), E1/459.1, p. 66 (does not mention suffering from marriage but does mention being compelled to comply by fear); T. 24 June 2015 (CHUM Samoeurn), E1/321.1, pp. 62-63 (she separated three days after the wedding, but graphically describes her fear on her wedding night); T. 21 November 2016 (THUCH Sithan), E1/500.1, p. 72 (says she had to force herself to marry her husband because of fear of a worse alternative).

[4232] KHIEU Samphân's Appeal Brief (F54), para. 1172.

[4233] KHIEU Samphân's Appeal Brief (F54), para. 1173.

[4234] KHIEU Samphân's Appeal Brief (F54), para. 1173.

[4235] KHIEU Samphân's Appeal Brief (F54), para. 1173.

1487. The Co-Prosecutors respond that EM Oeun's testimony that he was able to choose his wedding date does little to undermine his other testimony demonstrating that his marriage was forced and caused suffering.[4236] They further submit that MOM Vun's credibility has already been subjected to identical challenges and consequently dismissed by the Trial Chamber.[4237]

1488. The Trial Chamber considered EM Oeun's evidence that "as a youth, I believe that we wanted our freedom to choose our own wife, and if you were forced to get married to someone whom you do not love, that was very painful [...] My wife did not love me either, so, whenever we stayed together at night, we cry to each other."[4238] In relation to MOM Vun, it considered her evidence that she was forced to marry against her will, and that everyone wept at the mass wedding, which involved 60 couples.[4239]

1489. The Supreme Court Chamber finds that KHIEU Samphân misrepresents EM Oeun's evidence. EM Oeun stated that he chose to have his forced marriage on a date when his family could attend, not that he had discretion about whether or not he could enter into it.[4240] As is apparent from the evidence considered by the Trial Chamber, EM Oeun clearly attested to the pain he experienced when he was forced to marry against his will.[4241] KHIEU Samphân demonstrates no error and this submission is dismissed.

1490. In relation to MOM Vun, the Trial Chamber carefully considered certain inconsistencies in her evidence between her Civil Party Applications and in-court testimonies.[4242] The Trial Chamber expressly took account of KHIEU Samphân's trial argument that there was a material inconsistency because MOM Vun initially stated that her husband disappeared in 1975 when summoned to attend a study session, and then in later evidence failed to mention his disappearance, stating that he was a palm tree climber in 1977.[4243] It determined that the inconsistencies raised "especially with regard to dates" did not impact MOM Vun's overall credibility.[4244]

[4236] Co-Prosecutors' Response (F54/1), para. 732.
[4237] Co-Prosecutors' Response (F54/1), para. 733.
[4238] Trial Judgment (E465), fn. 12274, referring to T. 23 August 2012 (EM Oeun), E1/113.1, pp. 104-105.
[4239] Trial Judgment (E465), para. 3680, referring to T. 16 September 2016 (MOM Vun), E1/475.1, pp. 47, 101.
[4240] T. 23 August 2012 (EM Oeun), E1/113.1, p. 107.
[4241] Trial Judgment (E465), fn. 12274, referring to T. 23 August 2012 (EM Oeun), E1/113.1, pp. 104-105.
[4242] Trial Judgment (F465), para. 3649, referring to KHIEU Samphân's Closing Brief (E457/6/4/1), para. 2398.
[4243] KHIEU Samphân's Closing Brief (E457/6/4/1), para. 2398.
[4244] Trial Judgment (E465), para. 3649.

1491. The Supreme Court Chamber finds no error in the Trial Chamber's decision to rely upon MOM Vun's vivid evidence about the harm of remarriage, despite having expressly acknowledged a degree of confusion about the precise date of her husband's disappearance. In addition, the Supreme Court Chamber notes that in any event, KHIEU Samphân had the opportunity to cross-examine MOM Vun on this point during the trial, and she explained that 1975 was the correct date.[4245] Accordingly, these challenges are dismissed.

g) SOU Sotheavy

1492. KHIEU Samphân contends that the Trial Chamber erred in drawing "generalised inferences" about the harm of forced marriage from SOU Sotheavy's personal experiences, rather than evaluating how she "suffered most" as a transgendered woman forced into marriage.[4246]

1493. The Co-Prosecutors respond that the Trial Chamber did not rely on SOU Sotheavy's testimony alone for its findings regarding the harms inflicted as a result of forced marriage.[4247] The Co-Prosecutors therefore submit that SOU Sotheavy's experience "was not the exception."[4248]

1494. The Lead Co-Lawyers respond that it is correct that SOU Sotheavy suffered differently in certain respects because of her identity as a transgender woman, but submit that KHIEU Samphân has identified no legal basis for arguing that the "heightened suffering of transgender people is irrelevant in assessing the crime of other inhumane acts."[4249] The Lead Co-Lawyers argue that "[t]he suffering of transgender people is no less valid and relevant than that of others."[4250]

1495. The Supreme Court Chamber notes that the Trial Chamber expressly considered SOU Sotheavy's evidence about the pain she and her wife experienced by consequence of the forced marriage,[4251] while acknowledging that she was "a transgender woman."[4252] The Trial Chamber

[4245] See T. 20 September 2016 (MOM Vun), E1/477.1, pp. 8-11.
[4246] KHIEU Samphân's Appeal Brief (F54), para. 1170.
[4247] Co-Prosecutors' Response (F54/1), para. 731.
[4248] Co-Prosecutors' Response (F54/1), para. 731.
[4249] Lead Co-Lawyers' Response (F54/2), para. 824.
[4250] Lead Co-Lawyers' Response (F54/2), para. 824.
[4251] Trial Judgment (E465), para. 3649, referring to T. 23 August 2016 (SOU Sotheavy), E1/462.1, p. 93.
[4252] Trial Judgment (E465), para. 3679. This Chamber considers the Trial Chamber's other findings on SOU Sotheavy's experience of harm of forced sexual intercourse, in which her transgender status was not acknowledged, further below.

considered this evidence along with the evidence of a number of other witnesses and civil parties, holistically taking into consideration their "shocking experiences and negative emotions when they found out that they had to marry someone they did not know."[4253] The Trial Chamber did not rely solely on SOU Sotheavy's evidence to support any general finding, and KHIEU Samphân's submission to the contrary is dismissed. The Supreme Court Chamber will consider the Trial Chamber's treatment of SOU Sotheavy's evidence more generally below. The Supreme Court Chamber has considered, and dismissed, all of KHIEU Samphân's challenges to the Trial Chamber's conclusion that conduct charged as forced marriage met the elements of the crime of other inhumane acts.

iii. Forced Sexual Intercourse in the Context of Forced Marriage

1496. KHIEU Samphân argues that the Trial Chamber erred in failing to consider that the acts of sexual intercourse took place in the context of marriage, and in its appraisal of serious mental or physical suffering. The Co-Prosecutors appeal the Trial Chamber's finding that there was insufficient evidence of serious mental or physical harm of suffering with regard to male victims of forced consummation, as well as its findings on human dignity. Overall, in the Co-Prosecutors' submission, the Trial Chamber's approach demonstrated implicit judicial gender bias.

The Conduct of Forced Sexual Intercourse

1497. The Supreme Court Chamber has found above that when considering the legality of conduct charged as rape as an other inhumane act, the Trial Chamber erred in directing itself to consider whether the elements of the "crimes" of rape, and having found that men could not be victims of rape "other acts of sexual violence" were established. The Trial Chamber should, instead, have considered only whether the conduct which was described in the Closing Order was established, and whether this conduct met the necessary standards of seriousness and gravity such as to meet the threshold for the crime of other inhumane acts. This Chamber corrected the error, when assessing the legality issues raised by KHIEU Samphân, and held that the charged conduct was, in this case, acts of coerced sexual intercourse between recently married couples. There was, however, no need to consider whether the crimes of "rape" and "other acts of sexual violence", were established.

[4253] Trial Judgment (E465), para. 3679.

1498. The Supreme Court Chamber has also considered, above, the Trial Chamber's factual findings on the occurrence of forced sexual intercourse. The Trial Chamber found that after the wedding ceremonies, arrangements were usually made by the local authorities for newly wedded couples to sleep in an assigned location specifically to have sexual intercourse.[4254] Militiamen were commonly ordered to monitor the couples at night to make sure that they had sexual intercourse.[4255] Both men and women felt compelled to have sexual intercourse, and were re-educated or threatened with being killed or receiving punishment.[4256] Couples who did not consummate their marriage had to hide the fact and pretend that they loved each other to avoid negative consequences.[4257] This Chamber found no error in these findings.

1499. In its legal findings, the Trial Chamber began by observing that there was no requirement that rape as a specific kind of underlying conduct should be found to fall within the category of other inhumane acts by 1975.[4258] The Trial Chamber then held that in the specific circumstances it considered, "a woman's lack of physical resistance [did] not indicate consent".[4259] The Trial Chamber found that the conduct constituted "rape" with regard to those female victims, and cumulatively caused serious mental and suffering or injury, and constituted a serious attack on the human dignity of the victims.[4260] The Trial Chamber recalled its finding that male victims were excluded from the definition of rape in 1975, and considered, instead, whether they had been subjected to another act of sexual violence that amounts to other inhumane acts.[4261] The Trial Chamber found that they had not, because while men were also unable to refuse to consummate the marriage, there was no "clear evidence concerning the level of seriousness of this kind of conduct and its impact on males".[4262]

1500. This Chamber considers that the Trial Chamber was correct, insofar as it went, when it held that there was no requirement that rape "as a specific kind of underlying conduct" be found to fall within the scope of the crime of other inhumane acts. The Trial Chamber stopped short, however, of observing the more fundamental principle, namely, that there is no requirement that conduct charged under the heading should amount to any specific crime. As outlined

[4254] Trial Judgment (E465), para. 3696.
[4255] Trial Judgment (E465), para. 3696.
[4256] Trial Judgment (E465), para. 3696.
[4257] Trial Judgment (E465), para. 3647.
[4258] Trial Judgment (E465), para. 728.
[4259] Trial Judgment (E465), para. 3697.
[4260] Trial Judgment (E465), paras 3697-3700.
[4261] Trial Judgment (E465), para. 3701.
[4262] Trial Judgment (E465), para. 3701.

above, the Trial Chamber made this finding in its statement of the legal standard, where it held that the specific conduct underlying the crime of other inhumane acts need not, in itself, be expressly criminalised under international law.[4263] The Trial Chamber also observed that other inhumane acts functions "as a residual category, criminalising conduct which meets the criteria of crimes against humanity, but does not fit within one of the other specific underlying crimes against humanity."[4264] The Trial Chamber did not, however, comply with this standard when making its findings on the experience of forced consummation. The Trial Chamber directed itself to consider exactly what it had stated that it would not do: whether an independent crime of "rape" or, in the case of male victims, other acts of sexual violence had been established. This Chamber finds, therefore, that the Trial Chamber repeated and compounded its earlier error in articulating the legal elements by making findings on the existence or otherwise, in the case of male victims of the same elements.

1501. The Supreme Court Chamber considers that the Trial Chamber should have confined its legal assessment simply to the question of whether the charged conduct was found to have occurred as a matter of fact, and whether this conduct met the elements of the crime of other inhumane acts, namely, an act or omission that caused serious mental or physical suffering or injury, or constituted a serious attack on human dignity.[4265] This Chamber has considered, then, what the findings on charged conduct are in the present case. At the start of its legal findings, the Trial Chamber found that after wedding ceremonies, arrangements were made by local authorities for newly wedded couples to sleep in an assigned location, specifically to have sexual intercourse.[4266] Militiamen were commonly ordered to monitor the couples to ensure that they had sexual intercourse.[4267] Both men and women who were compelled to have sexual intercourse, and couples who were found not to have had sexual intercourse were re-educated or threatened with being killed or receiving punishment.[4268] The Supreme Court Chamber considers that this summary is accurate, and recalls that it has considered, and dismissed, challenges to these factual findings above.

1502. This Chamber also notes, however, that in one finding, the Trial Chamber restricted its lack of consent to women, holding that "a woman's" lack of physical resistance did not indicate

[4263] Trial Judgment (E465), para. 725.
[4264] Trial Judgment (E465), para. 724.
[4265] Section VII.G.3.a.ii (Rape in the Context of Forced Marriage).
[4266] Trial Judgment (E465), para. 3696.
[4267] Trial Judgment (E465), para. 3696.
[4268] Trial Judgment (E465), para. 3696.

consent.[4269] This Chamber clarifies that, as indeed is supported by the Trial Chamber's factual findings, the finding about the lack of consent, and the way it is to be determined, applies equally to both men and women. Once more, this Chamber reiterates that forced sexual intercourse was a crime which involved both male and female victims.

Female Victims: KHIEU Samphân's Appeal

1503. The Trial Chamber found that both men and women felt compelled to have sexual intercourse with their new spouse, and that, in the case of women, this conduct amounted to the conduct of rape.[4270] The Trial Chamber further found that the rapes that occurred in forced marriage cumulatively caused serious mental and physical suffering or injury and constituted a serious attack on the human dignity of the victim.[4271] The Trial Chamber considered in particular the mental and physical suffering inflicted upon those individuals who were raped as part of the requirement that marriage would be consummated, and that such acts were performed intentionally.[4272] Considered holistically, this conduct was of similar gravity to other enumerated crimes against humanity.[4273]

1504. KHIEU Samphân raises two challenges to the Trial Chamber's findings. First, he argues that the Trial Chamber erred in failing to take into account the context of traditional arranged marriage, as it should have done in its assessment of gravity.[4274] Second, he argues that the Trial Chamber erred in making its findings on serious mental or physical suffering or injury. In support, he points to the fact that various individuals did not expressly state that they were harmed,[4275] and the Trial Chamber's alleged reliance on "exceptional" instances of rape to make its general findings about the coercive environment.[4276]

1505. The Co-Prosecutors respond that the Trial Chamber did take into account the context of traditional arranged marriage.[4277] The Co-Prosecutors further submit that "[t]he very act of rape establishes suffering or harm without having to be explicitly stated."[4278]

[4269] Trial Judgment (E465), para. 3697.
[4270] Trial Judgment (E465), paras 3697-3700.
[4271] Trial Judgment (E465), para. 3697.
[4272] Trial Judgment (E465), para. 3698.
[4273] Trial Judgment (E465), para. 3698.
[4274] KHIEU Samphân's Appeal Brief (F54), paras 1297-1299, 316, 1319-1320. See also KHIEU Samphân's Appeal Brief (F54), paras 1284-1285.
[4275] KHIEU Samphân's Appeal Brief (F54), para. 1307.
[4276] KHIEU Samphân's Appeal Brief (F54), para. 1308.
[4277] Co-Prosecutors' Response (F54/1), para. 757, referring to Trial Judgment (E465), paras 3684-3685.
[4278] Co-Prosecutors' Response (F54/1), para. 758.

1506. The Lead Co-Lawyers argue that none of the civil parties or witnesses testified that sexual relations in the context of traditional arranged marriages caused them to experience serious suffering.[4279] The Lead Co-Lawyers also respond to KHIEU Samphân's argument that civil parties were not sufficiently explicit about the suffering caused by forced consummation of marriage by explaining that "sexual issues are a taboo subject" about which civil parties may have been reluctant to speak unless asked directly, and that expert evidence confirmed that trauma can "create barriers to speaking about sexual violence".[4280] The Lead Co-Lawyers further argue that "additional care is required when evaluating the testimony of those who remain in marriages that they were forced to enter, or who have children from those marriages."[4281] Finally, the Lead Co-Lawyers argue that the Trial Chamber properly treated instances of rape as evidence of the coercive environment of "intimidation, threats, and violence" under which individuals were forced to consummate their marriages.[4282]

a) Relevance of Arranged Marriage

1507. According to KHIEU Samphân, the Trial Chamber ignored the cultural and legal context when finding that the forced consummation of marriage caused serious harm.[4283] He submits that the Trial Chamber failed to take account of the fact that in traditional culture, for a married couple, sexual intercourse was "a right for the man and a duty for the woman".[4284] Even before the DK regime, women had little freedom in their contact with men and were required to submit to sexual intercourse.[4285] KHIEU Samphân further submits that prohibitions against rape in marriage "remain incomplete or completely absent" in numerous nation states.[4286] In his submission, the lack of criminalisation of conjugal rape should have been considered to impact the gravity of the offence.[4287]

1508. The Co-Prosecutors argue that the nature and gravity of the conduct is not diminished by the fact that non-consensual intercourse took place in the course of marriage, because certain acts are by the nature considered to constitute severe pain and suffering.[4288] The Co-Prosecutors

[4279] Lead Co-Lawyers' Response (F54/2), para. 673.
[4280] Lead Co-Lawyers' Response (F54/2), paras 684, 687.
[4281] Lead Co-Lawyers' Response (F54/2), para. 686.
[4282] Lead Co-Lawyers' Response (F54/2), para. 791.
[4283] KHIEU Samphân's Appeal Brief (F54), paras 1297-1299, 1316, 1319-1320. See also KHIEU Samphân's Appeal Brief (F54), paras 1284-1285.
[4284] KHIEU Samphân's Appeal Brief (F54), para. 1319.
[4285] KHIEU Samphân's Appeal Brief (F54), para. 1320.
[4286] KHIEU Samphân's Appeal Brief (F54), paras 1298-1299.
[4287] KHIEU Samphân's Appeal Brief (F54), para. 1297.
[4288] Co-Prosecutors' Response (F54/1), para. 680.

add that the Trial Chamber did, in fact, consider the relevant Cambodian social and cultural context when assessing the impact that forced consummation of marriage had on individuals.[4289]

1509. The Supreme Court Chamber observes that, contrary to KHIEU Samphân's submission, the Trial Chamber carefully considered the traditional social culture of Cambodia as part of its assessment of harm to female victims. The Trial Chamber held that the loss of virginity "featured prominently in the minds of many victims", because in Cambodia, there was a strong emphasis on women remaining pure until marriage.[4290] By consequence, the Trial Chamber held that "in this cultural and social context, the loss of virginity of Cambodian women resulted in additional suffering to the victims, in some cases exacerbated by unwanted pregnancies."[4291] KHIEU Samphân's argument that the Trial Chamber failed to take this background into account is therefore dismissed.

1510. This Chamber has next considered the argument that because it was traditional for sexual intercourse to occur in marriages, this means that consummation of marriage under the DK regime was "logical", rather than forced. This Chamber considers, however, that none of the evidence he cites to supports this point. Expert witness Peg LEVINE stated that consummation of marriage generally occurred in marriages,[4292] and NAKAGAWA Kasumi also stated that children were expected to follow after marriage.[4293] Other witnesses, however, made clear that this followed from a marriage which was forced upon them by *Angkar*.[4294] This Chamber also considers, furthermore, that regardless of traditional practices and assumptions of marriage, the charged conduct in the present case was specifically forced sexual intercourse. Numerous witnesses and civil parties explained how this was monitored by armed militia. Evidence also showed that individuals feared death or punishment as a result of failure to consummate the marriage. PRAK Yut, whose evidence KHIEU Samphân highlights as illustration of the conclusion that individuals had to consummate their marriages, explained

[4289] Co-Prosecutors' Response (F54/1), para. 757, referring to Trial Judgment (E465), paras 3684-3685.
[4290] Trial Judgment (E465), para. 3684.
[4291] Trial Judgment (E465), para. 3685.
[4292] T. 10 October 2016 (Peg LEVINE), E1/480.1, p. 83 ("Of course, I'm not wanting to make the implication that the way in which this happened under DK was tasteful, but consummation of marriage, typically in the Western world when we talk about the honeymoon period, is expected.").
[4293] T. 13 September 2016 (NAKAGAWA Kasumi), E1/472.1, p. 54.
[4294] See, *e.g.*, T. 5 September 2016 (NOP Ngim), E1/469.1, p. 52 ("Angkar organized us to get married. Then we had to live together so that we could live together as husband and wife and probably, later on, have children.").

that couples would be re-educated if they failed to consummate their marriages.[4295] This evidence does not undermine the Trial Chamber's position.

b) Serious Mental or Physical Harm or Suffering

1511. KHIEU Samphân challenges a number of the Trial Chamber's findings on individual harm in the sub-sections 14.3.8.2, "Coercive environment",[4296] 14.3.8.3 "Forced sexual intercourse between spouses",[4297] and 14.3.12.2 "Impact of forced sexual intercourse on victims"[4298] of the Trial Judgment. KHIEU Samphân challenges each piece of evidence in these sections separately and on a piecemeal basis, and fails to show how any particular error would impact his overall conviction. Given that his challenges raise certain common themes, this Chamber will consider them in groups as outlined below.

(i) Absence of Express Statements of Harm

1512. KHIEU Samphân alleges an error because various individuals "did not mention" the pain and suffering they experienced as a consequence of forced sexual intercourse.[4299] He submits that OM Yoeurn testified that she had had a "normal" life with her husband.[4300] KHIEU Samphân further contends that CHEA Deap similarly did "not speak of suffering";[4301] and SAY Naroeun also did not "mention" pain from the forced consummation itself, only her distress at losing her virginity.[4302] According to KHIEU Samphân, the Trial Chamber similarly failed to take into account NOP Ngim's statements that she was not forced to consummate the marriage which, he argues, rebuts the conclusion that sexual intercourse was "automatically forced".[4303] KHIEU Samphân argues that PHAN Him made clear that she did not suffer at all.[4304] KHIEU Samphân further alleges that the Trial Chamber ignored the "insufficient level of severity" in CHANG Srey Mom's evidence that she was not coerced into having sexual intercourse, and that "being officially married normalised and legitimised their sexual relations."[4305]

[4295] T. 19 January 2016 (PRAK Yut), E1/378.1, p. 55.
[4296] Trial Judgment (E465), paras 3645-3647.
[4297] Trial Judgment (E465), paras 3648-3661.
[4298] Trial Judgment (E465), paras 3683-3685.
[4299] KHIEU Samphân's Appeal Brief (F54), para. 1307.
[4300] KHIEU Samphân's Appeal Brief (F54), para. 1307.
[4301] KHIEU Samphân's Appeal Brief (F54), para. 1312.
[4302] KHIEU Samphân's Appeal Brief (F54), para. 1326.
[4303] KHIEU Samphân's Appeal Brief (F54), para. 1311. See also KHIEU Samphân's Appeal Brief (F54), para. 1327.
[4304] KHIEU Samphân's Appeal Brief (F54), para. 1327.
[4305] KHIEU Samphân's Appeal Brief (F54), para. 1305.

1513. The Co-Prosecutors submit that KHIEU Samphân wrongly suggests that the only reason civil parties suffered from the policy of population growth was the lack of care and attention for medical women, which ignores the full context in which the Trial Chamber made its findings.[4306]

1514. The Lead Co-Lawyers respond that sexual issues are taboo and that the civil parties may have been reluctant to speak about them.[4307] They also argue that "additional care" is required when evaluating the testimony of those who remain in marriages that they were forced to enter, or who have children from those marriages.[4308]

1515. The Supreme Court Chamber's view is that the fact that civil parties and witnesses did not specifically attest to such harm is irrelevant, particularly when, as observed by the Trial Chamber, sexual issues are taboo in Cambodia, meaning that civil parties may have been reluctant to speak about them.[4309] Accordingly, while CHEA Deap did not expressly state that she "suffered", her unequivocal statement that she did not choose to consummate the marriage was more than sufficient evidence of the harm she experienced.[4310] Further, while NOP Ngim stated that she and her husband did not force one another to have intercourse,[4311] she clearly mentioned that they were abiding by "the organizational disciplines".[4312] The couple was still compelled to consummate their marriage by the regime which is, as outlined above, the conduct which is charged in the present case.

1516. The Supreme Court Chamber has next considered the evidence of CHANG Srey Mom. The Trial Chamber relied on this evidence to find that there was "at least one instance of rape in the context of forced marriage at the Tram Kak Cooperatives".[4313] CHANG Srey Mom testified that her husband did not force her to have sex,[4314] but also stated that she feared for her life if she did not consummate the marriage.[4315] This is consistent with the finding, outlined above, that KHIEU Samphân begins by referring to the Trial Chamber's finding in the case of

[4306] Co-Prosecutors' Response (F54/1), para. 711.
[4307] Lead Co-Lawyers' Response (F54/2), para. 684.
[4308] Lead Co-Lawyers' Response (F54/2), para. 686.
[4309] Trial Judgment (E465), para. 3649.
[4310] T. 30 August 2016 (CHEA Deap), E1/466.1, pp. 73-74.
[4311] T. 5 September 2016 (NOP Ngim), E1/469.1, pp. 78-79.
[4312] T. 5 September 2016 (NOP Ngim), E1/469.1, p. 79.
[4313] Trial Judgment (E465), paras 3673-3674.
[4314] T. 29 January 2015 (CHANG Srey Mom), E1/254.1, p. 29.
[4315] CHANG Srey Mom also stated that she had no choice but to sleep with her husband, because she would otherwise lose her life, see T. 29 January 2015, E1/254.1, pp. 29-30. It was also the Party, rather than her husband, who was the perpetrator of the rape.

Civil Party CHANG Srey Mom that there was "at least one instance of rape in the context of forced marriage at the Tram Kak Cooperatives".[4316] The Supreme Court Chamber finds no error in the Trial Chamber's conclusion that "at least" one rape occurred at the Tram Kak Cooperatives.[4317] This cautious finding appropriately reflects the conclusion the Trial Chamber was able to reach on the evidence before it. This argument is dismissed.

1517. KHIEU Samphân also misrepresents evidence by focusing on isolated extracts and disregarding the full picture conveyed. This is particularly pronounced with regard to the evidence of OM Yoeurn, who stated that she never developed feelings for her husband and feared that he wished to rape her on their wedding night,[4318] and also that she was, in fact, raped by a cadre as punishment for initially failing to consummate her marriage.[4319] The isolated statement that she had lived some degree of "normal life"[4320] has no weight in comparison to the clear and consistent account of the severe suffering endured by this civil party. SAY Naroeun gave explicit evidence on her experience of the consummation of marriage, stating that she found it difficult to breathe, and incredibly painful.[4321] Accordingly, her suffering does not hinge on a more general loss of virginity, contrary to KHIEU Samphân's submission.[4322] All of KHIEU Samphân's submissions with regard to these witnesses are therefore dismissed.

1518. As regards the evidence of PHAN Him, the Trial Chamber found that she was an exception to the conclusion that women were forced to consummate their marriages.[4323] The Trial Chamber did not therefore make any findings on her evidence of suffering, and KHIEU Samphân's submission to the contrary is also rejected.

(ii) "Rapes" as Part of the Coercive Environment

1519. KHIEU Samphân next raises challenges to evidence which he claims showed exceptional instances of harm, asserting that these were erroneously generalised by the Trial Chamber in reaching its broader conclusions about victim harm. KHIEU Samphân argues that the "rapes" experienced by MOM Vun and PEN Sochan were "strictly contrary to the moral

[4316] Trial Judgment (E465), para. 3674.
[4317] Trial Judgment (E465), para. 3674, referring to, para. 3673 (fn. 12256). T. 29 January 2015 (CHANG Srey Mom), E1/254.1, pp. 33-34, referring to submission to sexual intercourse because she felt she had no choice.
[4318] T. 23 August 2016, E1/462.1, p. 5.
[4319] T. 23 August 2016, E1/462.1, p. 6.
[4320] T. 23 August 2016, E1/462.1, p. 53.
[4321] T. 25 October 2016 (SAY Naroeun), E1/489.1, p. 40.
[4322] *Contra* KHIEU Samphân's Appeal Brief (F54), para. 1326.
[4323] Trial Judgment (E465), para. 3659.

principles advocated by the CPK", and so should not have been considered as a part of the more general experience of harm.[4324]

1520. The Co-Prosecutors respond that KHIEU Samphân misrepresents the testimonies of MOM Vun and PEN Sochan, naming them "atypical" and "extraordinary", and ignores the coercive environment that made consent impossible.[4325]

1521. The Lead Co-Lawyers submit that KHIEU Samphân demonstates no evidence to support his argument that the conduct or views of the militiamen were unsual. They argue that the Trial Chamber stated that the CPK policy and moral principles were not always followed, as corroborated by testimonies of Civil Parties MOM Vun and OM Yoeurn.[4326]

1522. The Trial Chamber considered MOM Vun's evidence that she was raped by five men after she initially refused to marry,[4327] as well as PEN Sochan's evidence that after refusing to consummate her marriage, she was "raped" by her husband while five militiamen watched.[4328] As outlined above, these findings formed part of the context of coercion which led individuals to have sexual intercourse in marriage, with the charged conduct being the sexual intercourse which was forced to take place by the State between spouses.

(iii) Credibility Challenges

1523. KHIEU Samphân next argues that the Trial Chamber fails to take account of contradictory testimony from PREAP Sokhoeurn, including that "she stated very late that she was raped",[4329] and also disputes the magnitude of her suffering.[4330]

1524. Contrary to these arguments, the Trial Chamberassessed the timing of PREAP Sokhoeurn's evidence on the occurrence of rape and found there to be no detriment to her credibility.[4331] KHIEU Samphân merely disagrees with the Trial Chamber's assessment without demonstrating error, and his argument is dismissed. As KHIEU Samphân offers no

[4324] KHIEU Samphân's Appeal Brief (F54), para. 1308.
[4325] Co-Prosecutors' Response (F54/1), para. 755.
[4326] Lead Co-Lawyers' Response (F54/2), para. 798.
[4327] Trial Judgment (E465), para. 3650.
[4328] Trial Judgment (E465), para. 3652.
[4329] KHIEU Samphân's Appeal Brief (F54), para. 1314.
[4330] KHIEU Samphân's Appeal Brief (F54), para. 1315. See also KHIEU Samphân's Appeal Brief (F54), para. 1328.
[4331] Trial Judgment (E465), para. 3649.

further support in relation to his submission that the Trial Chamber disregarded exculpatory evidence or contradictory elements of evidence, these arguments are also dismissed.

1525. KHIEU Samphân argues that MOM Vun offered inconsistent evidence about the date of her husband's disappearance, and that PEN Sochan claimed that she was married aged 15, contrary to marriage regulations.[4332] The Supreme Court Chamber has considered, and dismissed, KHIEU Samphân's challenges to MOM Vun's credibility above.[4333] Regarding PEN Sochan, KHIEU Samphân does not explain why the fact that she was married at a young age should impact her credibility. This argument is also dismissed.

(iv) SOU Sotheavy

1526. KHIEU Samphân submits that SOU Sotheavy presents an "atypical case" in that having "the particularity of being a transgender."[4334] Moreover, he submits that "at no moment in [SOU Sotheavy's] testimony did [she] raise the subject of feelings or sentiments of [her] wife."[4335] This being the case, KHIEU Samphân argues, that the Trial Chamber did not have sufficient basis for determining "the impact of the events concerning the wife of SOU Sotheavy and even less for being able to characterise the level of severity."[4336]

1527. The Supreme Court Chamber notes that the Trial Chamber considered SOU Sotheavy's evidence that "he and his" wife only consummated their marriage after being warned that "they would be smashed" if they did not.[4337] To the extent that the Trial Chamber chose to consider the experience of SOU Sotheavy's wife, who did not testify before the court, it was appropriate to consider the implications of SOU Sotheavy's testimony about their mutual fear of being "smashed" if they did not engage in sexual intercourse.

1528. The Supreme Court Chamber recognises that with respect to the issue of forced sexual intercourse, the case of SOU Sotheavy presents distinct considerations owing to her status as a biological male who self-identifies as a transgender female. Indeed, at the time of the forced sexual intercourse to which she was subjected, SOU Sotheavy was required to cut her hair and to dress as a male.[4338] Moreover, in common with other "husbands" subject to forced marriage

[4332] KHIEU Samphân's Appeal Brief (F54), paras 1173, 1308-1309.
[4333] See *supra* Section VII.G.3.c.
[4334] KHIEU Samphân's Appeal Brief (F54), para. 1310.
[4335] KHIEU Samphân's Appeal Brief (F54), para. 1310.
[4336] KHIEU Samphân's Appeal Brief (F54), para. 1310.
[4337] Trial Judgment (E465), para. 3657, referring to T. 23 August 2016 (SOU Sotheavy), E1/462.1, pp. 86-87.
[4338] Written Record of Interview of SOU Sotheavy, 18 December 2009, E3/4609, ERN (EN) 00434879.

and subsequent forced sexual intercourse, SOU Sotheavy was required to engage in penile penetration of a female, an act to which neither party consented but in which both parties participated out of fear of death. In this respect, when assessing the harm caused to male victims of forced sexual intercourse in the context of forced marriage, it is appropriate to consider the harm suffered by SOU Sotheavy.

1529. Unlike most other "husbands", however, SOU Sotheavy suffered the additional harm of being compelled to dress and appear as a man, as well as engage in sexual intercourse involving the penetration of a biological woman, which was contrary to SOU Sotheavy's own identity as a transgender woman. SOU Sotheavy underscored the extremity of her situation by referencing how she knew of other transgendered people who drank poison or committed suicide rather than engage in forced marriages with a woman in which sexual consummation was required.[4339] Furthermore, she described how this single occasion of forced sexual intercourse on her part "was the only time [in my life] that I had sexual intercourse with a woman".[4340] Given the aggravated harm caused by the forced sexual intercourse to SOU Sotheavy as a transgender woman, the Trial Chamber should have further taken her experience into account in its findings on serious mental or physical suffering or injury caused to women.

c) Evidence of Harm not Considered by the Trial Chamber

1530. In addition to his challenges on the evidence which was considered by the Trial Chamber in its findings on forced consummation, KHIEU Samphân also challenges the Trial Chamber's "selective and biased analysis" in failing to consider the evidence of other civil parties and witnesses.[4341] In support, KHIEU Samphân cites numerous female witnesses and civil parties who, he claims, did not give evidence of any suffering, and also alleges errors in the Trial Chamber's findings on the evidence of men testifying about their wives' experience of consummation in the context of forced marriage.[4342]

1531. With regard to the majority of the female witnesses and civil parties pointed to by KHIEU Samphân, the Supreme Court Chamber finds that KHIEU Samphân once again misapprehends the self-evident nature of harm engendered by forced sexual intercourse,

[4339] T. 23 August 2016, (SOU Sotheavy), E1/462.1, p. 96; T. 24 August 2016 (SOU Sotheavy), E1/463.1, p. 32.
[4340] T. 24 August 2016 (SOU Sotheavy), E1/463.1, p. 47. See also T. 23 August 2016 (SOU Sotheavy), E1/462.1, p. 87.
[4341] KHIEU Samphân's Appeal Brief (F54), para. 1324.
[4342] KHIEU Samphân's Appeal Brief (F54), paras 1325-1335.

claiming that inferences should be drawn from the lack of specific statements of harm. Thus, the fact that NGET Chat focused on the fear she and her husband experienced at being overheard by the militiamen on the night of her marriage, rather than expressly articulating the harm caused by the consummation,[4343] is immaterial.[4344] HENG Lai Heang explained how she and her husband did not immediately consummate the marriage, because they did not like one another at the time they were forced to marry.[4345] It is also irrelevant that she "did not speak of any particular impact resulting from sexual intercourse within marriage".[4346] Similarly, CHAO Lang "did not mention being pressured or having suffered",[4347] but stated that she was forced to marry.[4348] IN Yoeurng did not "mention" suffering, but stated that she had to consummate the marriage.[4349] CHANG Srey Mom made clear that she felt compelled by the regime to have sexual intercourse with her husband, even though he did not force her as an individual.[4350] THUCH Sithan stated unequivocally that she had to force herself to marry her husband for fear of a worse alternative.[4351] The fact that SUON Yim's did not experience "specific" physical or mental problems due to intercourse does not detract from the harm that occurred.[4352]

1532. KHIEU Samphân also fails to show how the evidence of the other women, he cites, should be used to refute the conclusion of harm from forced consummation. Evidence that KHIEV Horn remarried after the regime,[4353] and that HORNG Orn liked her husband at some point in the future,[4354] is irrelevant to the inference that forced consummation caused harm. The fact that KHOEUN Choeum and SREY Soeum did not consummate their marriages immediately is similarly immaterial.[4355] Further, evidence that in isolated circumstances showing consummation did not occur at all,[4356] or occurred for reasons other than pressure by

[4343] T. 24 October 2016 (NGET Chat), E1/488.1, pp. 125-126.
[4344] *Cf.* KHIEU Samphân's Appeal Brief (F54), para. 1326.
[4345] T. 19 September 2016 (HENG Lai Heang), E1/476.1, p. 17.
[4346] KHIEU Samphân's Appeal Brief (F54), para. 1328.
[4347] KHIEU Samphân's Appeal Brief (F54), para. 1332.
[4348] T. 1 September 2015 (CHAO Lang), E1/339.1, p. 70.
[4349] T. 3 February 2016 (IN Yoeurng), E1/387.1, pp. 93-94.
[4350] T. 29 January 2015 (CHANG Srey Mom), E1/254.1, pp. 86-87. See also Written Record of Interview of KHET Sakhan, 27 November 2013, E3/9830, ERN (EN) 01077083, p. 14 (The husband of KHET Sakhan asked her to have sexual intercourse but did not force her to do so).
[4351] T. 21 November 2016 (THUCH Sithan), E1/500.1, pp. 72-73.
[4352] Written Record of Interview of SUON Yim, 24 November 2014, E3/9829, ERN (EN) 01054036, p. 10. See also Written Record of Interview of MEAS Saran, 29 December 2014, E3/9736, ERN (EN) 01057632, p. 18.
[4353] Written Record of Interview of KHIEV Horn, 9 September 2009, E3/5559, ERN (EN) 00377369-00377370.
[4354] Written Record of Interview of HORNG Orn, 9 September 2009, E3/5558, ERN (EN) 00381009-00381010.
[4355] Written Record of Interview of KHOEUN Choeum, 6 May 2015, E3/9828, ERN (EN) 01111894; Written Record of Interview of SREY Soeum, 16 December 2014, E3/9826, ERN (EN) 01067749.
[4356] T. 24 June 2015 (CHUM Samoeurn), E1/321.1, pp. 64-65 (CHUM Samoeurn describes her terror on her wedding night but ultimately separated three days. later without consummation); Written Record of Interview of MAO Kroeun, 10 September 2009, E3/5661, ERN (EN) 00384790 (she and her husband separated after marriage);

the DK regime,[4357] does not detract from the swathes of evidence proving the occurrence and the impact and harm of forced consummation. These submissions are therefore dismissed.

1533. The Supreme Court Chamber is similarly unpersuaded by the argument that the Trial Chamber should have treated the evidence of male witnesses regarding the harm suffered by their wives differently. The male victims EM Oeun, KUL Nem, YOS Phal and SENG Soeun, CHEAL Choeun and MEY Savoeun, according to KHIEU Samphân, do not provide evidence about the experiences of their wives,[4358] and these accounts "do not allow for the indication of any possible impact" suffered by the women in question.[4359] To begin, the Supreme Court Chamber recalls that the Trial Chamber did not in fact rely on these male witnesses for evidence regarding their wives' experiences, but instead relied on a range of civil party and witness evidence which primarily focused on the harm directly caused to the party. KHIEU Samphân also fails to acknowledge that forced sexual intercourse implies a sense of gravity. Accordingly, the fact that YOS Phal did not consummate the marriage right away has no bearing on the conclusion that the intercourse was forced.[4360] MEY Savoeun stated that he was compelled to marry against his will,[4361] so the fact that he waited to consummate the marriage does not diminish its status as forced.[4362] Furthermore, the fact that SENG Soeun and CHEAL Choeurn did not give evidence about consummation is irrelevant, given neither stated that it did not occur.

Male Victims: The Co-Prosecutors' Appeal

1534. The Trial Chamber considered "the mental and physical suffering inflicted upon those individuals who were raped as part of the requirement that marriage would be consummated, and that such acts were performed intentionally."[4363] It found that considered holistically, this conduct was of a similar gravity to other enumerated crimes against humanity, and that the *actus reus* of other inhumane acts through conduct characterised as rape in the context of forced

Written Record of Interview of CHECH Sopha, 13 October 2014, E3/9831, ERN (EN) 01050638, p. 21 (did not consummate marriage and lived with husband for 29 days).
[4357] T. 29 July 2015 (KHIN Vat), E1/325.1, p. 91 (consummated marriage after feeling sorry for husband); Written Record of Interview of KEO Theary, 8 December 2014, E3/9662, ERN (EN) 01057763-01057768, 01057769-01057770, 01057774 (they have the same feelings as couples married by consent); Written Record of Interview of VA Limhun, 15 September 2014, E3/9756, ERN (EN) 01046946-01046947 (loved husband and never thought of leaving him).
[4358] KHIEU Samphân's Appeal Brief (F54), paras 1326, 1329, 1334-1335.
[4359] KHIEU Samphân's Appeal Brief (F54), para. 1329.
[4360] T. 25 August 2016 (YOS Phal), E1/464.1, p. 31.
[4361] KHIEU Samphân's Appeal Brief (F54), para. 1334.
[4362] See T. 17 August 2016 (MEY Savoeun), E1/459.1, p. 63.
[4363] Trial Judgment (E465), para. 3698.

marriage was therefore established.[4364] The Trial Chamber held, however, that while men were also unable to refuse to consummate the marriage, there was not "clear evidence concerning the level of seriousness of this kind of conduct and of its impact on males".[4365] Accordingly, "while acknowledging that men were subjected to sexual violence that was contrary to human dignity," the Trial Chamber was unable to reach a finding on the seriousness of the mental and physical suffering suffered by these men.[4366]

1535. The Co-Prosecutors challenge the Trial Chamber's conclusion that forced consummation in the case of male victims did not meet the threshold for the crime of other inhumane acts. They argue that the Trial Chamber made legal and factual errors in its findings with respect to the evidence of mental and physical suffering on the part of men.[4367] They also argue that the Trial Chamber erred in concluding that, while men were subjected to sexual violence that was contrary to human dignity, it was unable to determine the seriousness of their suffering and, consequently, was unable to conclude that men were victims of the crime against humanity of other inhumane acts.[4368] They submit that these legal and factual errors invalidated the decision and resulted in a miscarriage of justice.[4369] The Co-Prosecutors request that the erroneous finding be set aside, and that the conviction for the crime of other inhumane acts be corrected to include sexual violence against male victims.[4370]

1536. KHIEU Samphân responds that the Trial Chamber reasonably found that it was impossible to conclude, as a matter of law or fact, that the suffering experienced by "male victims of domestic sexual violence" was sufficiently serious to amount to the crime of other inhumane acts.[4371] He further submits that the Trial Chamber properly analysed human dignity, and concluded that the attack on human dignity was serious enough to be characterised as other inhumane acts.[4372] Accordingly, he submits that the Co-Prosecutors' appeal should therefore be dismissed in its entirety.[4373]

[4364] Trial Judgment (E465), para. 3698.
[4365] Trial Judgment (E465), para. 3701.
[4366] Trial Judgment (E465), para. 3701.
[4367] Co-Prosecutors' Appeal (F50), paras 25-39.
[4368] Co-Prosecutors' Appeal (F50), paras 18-24.
[4369] Co-Prosecutors' Appeal Brief (F50), para. 2.
[4370] Co-Prosecutors' Appeal Brief (F50), paras 3, 40.
[4371] KHIEU Samphân's Response (F50/1), para. 103.
[4372] KHIEU Samphân's Response (F50/1), paras 7-9. See also KHIEU Samphân's Response (F50/1), paras 10-39.
[4373] KHIEU Samphân's Response (F50/1), para. 105.

1537. The Supreme Court Chamber will first consider whether the Trial Chamber erred in its finding with respect to the seriousness of mental or physical suffering on the part of men. This Chamber will then consider whether the Trial Chamber erred in finding that the evidence was insufficient to conclude that men were victims of the crime against humanity of other inhumane acts.[4374]

a) Whether the Trial Chamber Was Required to Consider Both Serious Mental or Physical Suffering or Injury, and a Serious Attack on Human Dignity

1538. As stated above, the Trial Chamber, in outlining the elements for the crime of other inhumane acts, held that the *actus reus* "requires an act or omission that caused serious mental or physical suffering or injury, or constituted a serious attack on human dignity."[4375] The Supreme Court Chamber in Case 002/01 reached the same conclusion.[4376]

1539. The Co-Prosecutors do not dispute this standard *per se*, but raise what is essentially a point of clarification. They submit that the crime of other inhumane acts demands a finding that an act or omission caused serious mental or physical suffering, *or* an assessment of whether the act or omission constituted a serious attack against human dignity.[4377]

1540. KHIEU Samphân does not respond to this submission, but appears, through his arguments, to accept the Co-Prosecutors' articulation of the "two-pronged" standard.[4378]

1541. The Lead Co-Lawyers agree that the two concepts, serious mental or physical suffering or injury, and a serious attack against human dignity, are disjunctive; meaning that each must be considered in the alternative if a negative finding is made as to one.[4379]

1542. The Supreme Court Chamber agrees that the requirement that an act or omission caused "serious mental or physical suffering or injury, or constituted a serious attack on human

[4374] This Chamber do not address the issue of "unconscious bias" on the part of the Trial Chamber that was first raised by the Co-Prosecutors during oral argument. T. 19 August 2021, F1/12.1, pp. 4-6. The Co-Prosecutors' Appeal Brief, dated and filed on 20 August 2019, contains no reference to "unconscious bias." Although it alludes in one paragraph to gender stereotypes that exist in society, it does not assert that the Trial Chamber entertained such stereotypes or that such stereotypes affected its decision-making. See Co-Prosecutors' Appeal (F50), para. 38. The general standard of appellate review is that parties cannot raise new issues during oral arguments that did not appear in their appellate briefs. Consequently, the issue concerning "unconscious bias" is not properly before this Chamber, and it will not consider that issue.
[4375] Trial Judgment (E465), para. 724.
[4376] Case 002/01 Appeal Judgment (F36), para. 580.
[4377] Co-Prosecutors' Appeal Brief (F50), para. 18.
[4378] See KHIEU Samphân's Response (F50/1), paras 7-9.
[4379] T. 19 August 2021, F1/12.1, p. 15.

dignity" requires a two-fold assessment. The use of the second conjunction "or" in the sentence "serious mental or physical suffering or injury *or* a serious attack against human dignity" suggests that the two assessments are disjunctive. In other words, conduct within the crime of other inhumane acts could be found to establish *either* serious mental or physical suffering or injury, *or* a serious attack against human dignity. This Chamber also agrees that the further logical inference from the way this sentence is constructed is that these assessments of harm arise in the alternative. If one component is not established, then the other should be considered. The Supreme Court Chamber recalls that it is an established principle of interpretation that terms be given their ordinary meaning.[4380]

1543. The formulation as articulated by the Trial Chamber has been used repeatedly by the ICTY and ICTR when defining the *actus reus* standard for other inhumane acts;[4381] with an equivalent standard being adopted when defining the *actus reus* for the crimes of cruel treatment, and inhumane acts.[4382] This Chamber notes, however, that some ICTY and ICTR Chambers have referred only to seriousness of physical or mental harm or suffering or injury in outlining the elements of other inhumane acts.[4383] The Rome Statute, furthermore, does not include the human dignity element in the test for other inhumane acts,[4384] requiring only that the perpetrator "inflicted great suffering, or serious injury to body or to mental or physical

[4380] See Case 001 Appeal Judgment (F28), para. 59; *Tadić* Appeal Judgment (ICTY), para. 282; *Nyiramasuhuko et al.* Appeal Judgment (ICTR), para. 2137.
[4381] *Čelebići* Trial Judgment (ICTY), para. 533; *Vasiljević* Appeal Judgment (ICTY), para. 165; *Prosecutor v. Milošević*, Trial Chamber (ICTY), IT-98-29/1-T, Judgement, 12 December 2007, para. 934; *Prosecutor v. Galić*, Trial Chamber (ICTY), IT-98-29-T, Judgement, 5 December 2003, para. 152; *Prosecutor v. Blagojević and Jokić*, Trial Chamber (ICTY), IT-02-60-T, Judgement, 17 January 2005, para. 626; *Krnojelac* Trial Judgment (ICTY), para. 130; *Stakić* Appeal Judgment (ICTY), para. 366; *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber (ICTR), ICTR-95-1-T, Judgement, 21 May 1999, para. 151.
[4382] Trial Judgment (E465), para. 737, referring to *Čelebići* Trial Judgment (ICTY), para. 533 ("The foregoing discussion with regard to inhuman treatment is also consistent with the concept of 'inhumane acts', in the context of crimes against humanity."). This definition as to the crimes of "inhuman treatment" and "cruel treatment" was cited with approval by the ICTY Appeals Chamber, see *Čelebići* Appeal Judgment (ICTY), para. 426; *Krnojelac* Trial Judgment (ICTY), para. 130 ("[i]t is apparent from the jurisprudence of the Tribunal that cruel treatment, inhuman treatment and inhumane acts basically required proof of the same elements"); *Simić et al.* Trial Judgment (ICTY), para. 74 ("In assessing the content of cruel and inhumane treatment, the Trial Chamber finds that it is assisted by the Tribunal's jurisprudence regarding other inhumane acts […], inhuman treatment […], and cruel treatment […]. The elements of these offences are the same […].").
[4383] *Kordić and Čerkez* Appeal Judgment (ICTY), para. 117 ("Inhumane acts as a crime against humanity is comprised of ac612uerrih fulfill the following conditions […] the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances); *Kajelijeli* Trial Judgment (ICTR), para. 932 ("the Prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to the mental or physical health of the victim"). See also Case 002/01 Appeal Judgment (F36), para. 579 ("in elaborating the meaning of gravity, a number of courts have sought to determine whether alleged conduct produced 'serious mental or physical suffering', although they have not always used uniform language.").
[4384] The concept of "human dignity" does not appear in the Rome Statute or Elements of Crimes.

health."[4385] The standard adopted by the ICC now exactly mirrors the wording of the provisions which establish, as a grave breach of the Geneva Conventions, "[w]ilfully causing great suffering, or serious injury to body or health".[4386] As the Trial Chamber found in the present case, "[t]his grave breaches [...] focuses on the seriousness of the suffering or of the injury and does not include acts where the resultant harm relates solely to an individual's human dignity."[4387]

1544. This Chamber considers that the fact that other courts have sometimes adopted a formulation of the *actus reus* which does not reference to human dignity is, however, irrelevant to the standard adopted in the present case. This Chamber observes that the disputed element is, in essence, a way of assessing the gravity of the conduct: the precise manner in which the Trial Chamber chooses to conduct this assessment is, to some extent, discretionary.[4388] This Chamber also notes that in any event the ICC, while adopting a more restricted definition, has also referred to the ICTY *Čelebići* case, wherein the Trial Chamber, relevantly, found that forced *fellatio* constituted a fundamental attack on victims' human dignity.[4389]

1545. This Chamber finds that in accordance with the standard it outlined, the Trial Chamber should have considered whether the conduct at issue caused either serious or mental physical or suffering or injury, *or* a serious attack on human dignity. Further, in the event that it made a negative finding on either of these, the Trial Chamber should have considered whether an unfront to human dignity was established. This Chamber will consider below whether the Trial Chamber met this standard.

b) Serious Mental or Physical Harm or Suffering

1546. The Trial Chamber held that while men were also unable to refuse to consummate the marriage, there was no "clear evidence concerning the level of seriousness of this kind of

[4385] Rome Statute, Art. 7(1) (k). The ICC Trial Chamber has confirmed the elements of the crime of "other inhumane acts": (1) "[t]he perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act"; and (2) "[s]uch act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute". See *Ongwen* Trial Judgment (ICC), para. 2743, citing ICC Elements of Crimes, Art. 7(1)(k). See also Criminal Code of the Kingdom of Cambodia (30 November 2009) ("Criminal Code of Cambodia"), Art. 188 (11) (referring to "other inhumane acts intentionally causing great suffering, or serious injury to body").
[4386] Rome Statute, Art. 8 (2)(a)(iii).
[4387] See Trial Judgment (E465), para. 761. See also Case 001 Trial Judgment (E188), para. 453, citing *Kordić and Čerkez* Trial Judgment (ICTY), para. 245.
[4388] See also Case 002/01 Appeal Judgment (F36), para. 579.
[4389] *Čelebići* Trial Judgment (ICTY), para. 1066 ("The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act").

conduct and its impact on males."[4390] Accordingly, and while "acknowledging that men were subjected to sexual violence that was contrary to human dignity," the Trial Chamber found itself unable to reach a finding on the seriousness of the mental and physical suffering suffered by these men.[4391]

1547. The Co-Prosecutors argue that the Trial Chamber erred in law in failing to provide a reasoned opinion as to why, on the basis of its own findings, serious suffering was not established, and also erred in fact in reaching this unreasonable conclusion.[4392] The Co-Prosecutors submit that in its analysis, the Trial Chamber neglected direct and circumstantial evidence or gave such evidence an inappropriately limited weight.[4393] The Trial Chamber also applied different standards for women and men, when it failed to accept evidence of forced consummation as demonstrating suffering.[4394] The Co-Prosecutors argue that the Trial Chamber omitted to consider relevant testimony male victim EM Oeun, female victim MOM Vun in relation to her husband and expert witness NAKAGAWA Kasumi;[4395] as well as a number of other relevant evidence on the case-file when assessing the seriousness of male suffering caused by forced consummation.[4396]

1548. KHIEU Samphân responds that the findings pointed to by the Co-Prosecutors do not, in fact, demonstrate that forced consummation caused serious harm to men.[4397] Of the civil parties who testified in the marriage segment, YOS Phal, SOU Sotheavy, SENG Soeun and KUL Nem, the Trial Chamber expressly considered the evidence of YOS Phal and SOU Sotheavy in finding that it was unable to conclude that the gravity of suffering reached the necessary level.[4398] The other two accounts do not show that "conjugal intercourse" established serious harm.[4399] KHIEU Samphân also responds that EM Oeun's evidence was considered by

[4390] Trial Judgment (E465), para. 3701.
[4391] Trial Judgment (E465), para. 3701.
[4392] Co-Prosecutors' Appeal Brief (F50), paras 25-39.
[4393] Co-Prosecutors' Appeal Brief (F50), paras 27-39.
[4394] Co-Prosecutors' Appeal Brief (F50), paras 27-28, 33-34, 37-38.
[4395] Co-Prosecutors' Appeal Brief (F50), paras 29-33, 36; T. 19 August 2021, F1/12.1, pp. 11-13.
[4396] Co-Prosecutors' Appeal Brief (F50), paras 29-37; T.19 August 2021, F1/12.1, pp. 10-13.
[4397] KHIEU Samphân's Response (F50/1), paras 92-102; T. 19 August 2021, F1/12.1, p. 24.
[4398] KHIEU Samphân's Response (F50/1), para. 44. KHIEU Samphân also argues that the Trial Chamber erred in relying in SOU Sotheavy's "atypical evidence" as a transgender woman to support its finding of harm in relation to men. See KHIEU Samphân's Response (F50/1), para. 46. He further submits that men who testified in trial segments other than the marriage section did not testify about any harm. See KHIEU Samphân's Response (F50/1), paras 50-54.
[4399] KHIEU Samphân's Response (F50/1), paras 47-49. KHIEU Samphân again repeats his arguments that harm was not established because, variously, alleged victims chose or were expected to consummate their marriages, developed feelings for one another or got along well after marriage, or failed to expressly refer to suffering. KHIEU Samphân's Response (F50/1), paras 64-79, 81.

the Trial Chamber, and, in any event, lacked credibility and reliability,[4400] while MOM Vun did not give any evidence about the impact that that the events in question had on her husband.[4401] NAKAGAWA Kasumi's evidence was a "personal opinion", not "an extensive research-based finding."[4402]

1549. The Lead Co-Lawyers draw a distinction between evidence of specific suffering and evidence of treatment: they submit that the Supreme Court Chamber, in Case 002/01, relied on evidence of treatment to infer serious suffering.[4403]

1550. The Supreme Court Chamber recalls that it is vital as an element of a fair trial that the Trial Chamber's decisions and judgments are sufficiently reasoned.[4404] The Appeals Chamber of the ICTY has held that the right to a reasoned opinion is an element of the right to a fair trial, and only on the basis of a reasoned decision is proper appellate review possible.[4405] With regards to the evaluation of evidence, the ICTY Appeals Chamber has further explained that a trial chamber does not necessarily need to articulate "every step of the reasoning in reaching a decision on these points", but this will be tempered by the Trial Chamber's duty to provide a reasoned opinion.[4406] The reasoning required to ensure fairness of the proceedings will depend on the specific circumstances of the case.[4407] The ICTY Appeals Chamber has held that, "at a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision".[4408]

[4400] KHIEU Samphâns' Response (F50/1), paras 56-59; T. 19 August 2021, F1/12.1, p. 26.
[4401] KHIEU Samphân's Response (F50/1), para. 80.
[4402] KHIEU Samphân's Response (F50/1), paras 60-62.
[4403] T. 19 August 2021, F1/12.1, pp. 15-16.
[4404] Case 002/01 Appeal Judgment (F36), para. 202.
[4405] Case 002/01 Appeal Judgment (F36), para. 205, referring to *Momir Nikolić* Sentencing Appeal Judgment (ICTY), para. 96 ("[o]nly a reasoned opinion, one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute, allows the Appeals Chamber to carry out its function pursuant to Article 25 of the Statute by understanding and reviewing findings of a Trial Chamber"). See also *Furundžija* Appeal Judgment (ICTY), paras 68-69 ("The right of an accused under Article 23 of the Statute to a reasoned opinion is an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute"); *Kunarac et al.* Appeal Judgment (ICTY), para. 41 ("[p]ursuant to Article 23(2) of the Statute, the Trial Chamber has an obligation to set out a reasoned Inion [...]. This element, *inter alia*, enables a useful exercise of the right of appeal available to the person convicted. Additionally, only a reasoned opinion allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of evidence.").
[4406] Case 002/01 Appeal Judgment (F36), para. 206, quoting *Kupreškić* Appeal Judgment (ICTY), para. 32. The Supreme Court Chamber also cited this passage of the judgment with approval in the Case 001 Appeal Judgment (F28), para. 17.
[4407] Case 002/01 Appeal Judgment (F36), para. 207.
[4408] *Prosecutor v. Milutinović et al.*, Appeals Chamber (ICTY), IT-05-87-AR65.1, Decision on Interlocutory Appeal from Trial Chamber's Decision Granting Nebojša Pavković's Provisional Release, 1 November 2005, para. 11.

1551. The Supreme Court Chamber will now consider the reasoning adopted by the Trial Chamber. The Trial Chamber's findings on the suffering experienced by male victims are outlined in one paragraph of the Trial Judgment. This reads, in the relevant part as follows:

> The Chamber has found that men also could not refuse to consummate marriage. On one occasion, a husband had sexual intercourse with his wife following *Angkar*'s instructions and out of fear for the lives of him and his wife. One Civil Party suffered greatly because he was not able to marry his fiancée. However, in the absence of clear evidence concerning the level of seriousness of this kind of conduct and of its impact on males, the Chamber, while acknowledging that men were subjected to sexual violence that was contrary to human dignity, is unable to reach a finding on the seriousness of the mental and physical suffering suffered by these men.[4409]

1552. This Chamber concludes that the men who experienced forced sexual intercourse were, quite rightly, found by the Trial Chamber to have been "subjected to sexual violence".[4410] In the present case, the Trial Chamber concluded that it was "unable to reach a finding on the seriousness of the mental and physical suffering", due to the "absence of clear evidence."[4411] This Chamber observes that the Trial Chamber appears to misapply the standard for other inhumane acts. The *actus reus* requires an act or omission that caused serious mental *or* physical suffering; it does not require that *both* mental and physical suffering be established.[4412]

1553. The Supreme Court Chamber also finds the Trial Chamber's reference to requiring "clear evidence" to be unclear. First, it is noteworthy that the Trial Chamber relied on identical findings of fact, the occurrence of forced sexual intercourse, to find that female victims had experienced serious mental or physical suffering or injury.[4413] "Newly married couples" were placed in an assigned location to have sexual intercourse after marriage, where they were monitored by armed militia.[4414] It held that "both" men and women felt compelled to have sexual intercourse with their new spouses;[4415] and "couples" who were found not to have had sexual intercourse were re-educated or threatened with being killed or punished.[4416] While the Trial Chamber considered evidence where women had additional coercive experiences, whether through sexual violence committed by their husbands, or by third parties,[4417] the overall finding was that both men and women were coerced into sexual intercourse.

[4409] Trial Judgment (E465) , para. 3701.
[4410] Trial Judgment (E465), para. 3701.
[4411] Trial Judgment (E465), para. 3701.
[4412] See Trial Judgment (E465), para. 724.
[4413] Trial Judgment (E465), para. 3697.
[4414] Trial Judgment (E465), para. 3696.
[4415] Trial Judgment (E465), para. 3696.
[4416] Trial Judgment (E465), para. 3696.
[4417] Trial Judgment (E465), paras 3646, 3650-3653, 3658, 3697.

1554. This Chamber particularly notes, in this regard, that the Trial Chamber did not make findings demonstrating that all female victims had experienced physical harm. Earlier in its legal analysis, the Trial Chamber considered some features of penetrative sex which were distinctive to women. It found that while in-court statements were not always explicit in describing penetration, "circumstances such as the pain, the bleeding for a long time thereafter, or the explicit reference to forced penetration allow the Chamber to conclude that such penetration occurred."[4418] These findings are, however, focused around the occurrence of the act of penetration, and not the harm itself. This Chamber recalls that what is required is physical *or* mental harm, and considers, therefore, that there is no requirement that physical harm must occur for the crime of other inhumane acts to be established for victims of either gender. This Chamber finds it impossible to envisage how non-consensual sexual intercourse would not be, at a minimum, mentally harmful.

1555. The Supreme Court Chamber has next considered the Trial Chamber's findings on two "husbands", YOS Phal and SOU Sotheavy, whose evidence was highlighted to demonstrate the "lack of clear evidence". The Trial Chamber first found, referring to the evidence of YOS Phal, that he had "suffered greatly" because he was not able to marry his fiancée.[4419] While this finding is accurate in its statement of YOS Phal's experience of forced marriage, the Trial Chamber failed to consider that this evidence demonstrates how difficult and painful he found the act of sexual intercourse, because he loved another woman, and considered his wife to be like a sibling.[4420] This was an example of the Trial Chamber failing to consider clearly relevant evidence. The Trial Chamber also relied on SOU Sotheavy's evidence which showed that "a husband had sexual intercourse with his wife following *Angkar*'s instructions and out of fear for the lives of him and his wife."[4421] Even *prima facie*, this finding attests to serious harm, as it evidences that SOU Sotheavy had sexual intercourse out of fear of death.

1556. The Supreme Court Chamber has already described how the harm suffered by SOU Sotheavy as both a biological male and a transgender woman should be considered. In common with other "husbands" subject to forced marriage and subsequent forced sexual intercourse, SOU Sotheavy was required to engage in penile penetration of a female, an act to which neither party consented but in which both parties participated out of fear of death. In this respect, when

[4418] Trial Judgment (E465), para. 3697.
[4419] Trial Judgment (E465), para. 3701.
[4420] T. 25 August 2016 (YOS Phal), E1/464.1, pp. 23-24.
[4421] Trial Judgment (E465), para. 3701.

assessing the harm caused to male victims of forced sexual intercourse in the context of forced marriage, it is appropriate to consider the harm suffered by SOU Sotheavy.

1557. Given the aggravated harm caused to SOU Sotheavy as a transgender woman forced to engage in forced sexual intercourse, the Trial Chamber should have also taken her experience into account in its findings on serious mental or physical suffering or injury on the part of women.

1558. This Chamber therefore concludes that the Trial Chamber failed to address its mind to the extremity of SOU Sotheavy's predicament, as well as the grave suffering that ensued. Furthermore, the Trial Chamber went on to explain its reasoning and reached unreasonable conclusions about male victims. The Supreme Court Chamber will now consider the Co-Prosecutors' contention that the Trial Chamber erred in failing to consider other relevant evidence when reaching its conclusions.

1559. The Co-Prosecutors point to evidence by female victims of forced marriage saying that as a couple, they were subject to threats;[4422] as well as academic texts by NAKAGAWA Kasumi, Rochelle BRAAF and Bridgette TOY-CRONIN which included witness and victim accounts making the same point.[4423] The Co-Prosecutors next argue that the Trial Chamber erred in failing to consider the evidence of civil party EM Oeun, a male victim of forced sexual intercourse, as well as the expert evidence of NAKAGAWA Kasumi, who gave her expert testimony on the harm men experienced through being forced to have sexual intercourse.[4424] The Co-Prosecutors argue that the Trial Chamber erred in disregarding the evidence of MOM Vun, who gave evidence about her husband being physically forced to have sex with her.[4425]

1560. The Supreme Court Chamber recalls that the ICTY Appeals Chamber has held that a Trial Chamber is presumed to have evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of

[4422] See Co-Prosecutors' Appeal (F50), paras 34-35, fn. 102, referring, *inter alia*, to Written Record of Interview of SUM Pet, 4 August 2014, E3/9824, ERN (EN) 01044591; Written Record of Interview of VAT Phat, 23 February 2015, E3/9822, ERN (EN) 01079922-01079923; Written Record of Interview of KEO Theary, 8 December 2014, E3/9662, ERN (EN) 01057767-01057768.
[4423] See Co-Prosecutors' Appeal (F50), para. 35 & fn. 102, referring, *inter alia*, to NAKAGAWA Kasumi, *Gender-based violence during the Khmer Rouge Regime*, December 2008, E3/2959, ERN (EN) 00421895; Rochelle BRAAF, *Sexual Violence Against Ethnic Minorities During the Khmer Rouge Regime*, March 2014, E3/9240, ERN (EN) 00992283; Bridgette TOY-CRONIN, *"I want to tell you": Stories of Sexual Violence During Democratic Kampuchea*, 18 December 2018, E3/3416, ERN (EN) 00449490.
[4424] Co-Prosecutors' Appeal (F50), paras 29-31.
[4425] Co-Prosecutors' Appeal (F50), paras 36-37.

evidence.[4426] There may, however, be an indication of disregard when evidence, which is clearly relevant to the findings, is not addressed in the Trial Chamber's reasoning.[4427] The Supreme Court Chamber recalls that the Trial Chamber already found that marriages were consummated under threat of force, meaning that neither husbands nor wives were able to freely consent to sexual intercourse.[4428] The additional evidence highlighted by the Co-Prosecutors, including testimony by female victims of forced marriage, as well as academic texts by NAKAGAWA Kasumi, Rochelle BRAAF and Bridgette TOY-CRONIN, further affirms the climate of fear and coercion which was already found to have occurred. The Supreme Court Chamber therefore finds no error in the Trial Chamber's decision not to have expressly considered this evidence.

1561. The Co-Prosecutors do consider, however, that EM Oeun, NAKAGAWA Kasumi and MOM Vun all offered directly relevant evidence. The Trial Chamber did not refer to the evidence of any of these individuals in its finding on seriousness of harm.[4429] EM Oeun testified that he and his wife discussed the fear that if they did not consummate the marriage, they would eventually be killed.[4430] He further testified that even with this fear, it took them two weeks to finally consummate the marriage.[4431] He expressly described his experience of forced sexual intercourse as causing "suffering", and stated that "to date I cannot forget it."[4432] NAKAGAWA Kasumi, in evidence which was considered and relied upon by the Trial Chamber in its earlier factual findings, gave evidence that forced sexual intercourse "impacted extremely and disproportionately impacted over the man because men were tasked and forced to rape a wife", which was "[an] inhuman act".[4433] The Supreme Court Chamber finds that the

[4426] *Kvočka et al.* Appeal Judgment (ICTY), para. 23. See also *Nyiramasuhuko et al*. Appeal Judgment (ICTR), para. 1308.
[4427] *Kvočka et al.* Appeal Judgment (ICTY), para. 23. See also *Đorđević* Appeal Judgment (ICTY), para. 864.
[4428] Trial Judgment (E465), para. 3696.
[4429] The Trial Chamber did not refer to the highlighted portion of EM Oeun's evidence anywhere in the Trial Judgment, whereas it did, in a footnote elsewhere in the Trial Judgment, summarise NAKAGAWA Kasumi's evidence. See Trial Judgment (E465), fn. 12092, referring to T. 23 August 2012 (EM Oeun), E1/113.1, p. 104 (indicating that he was working at the hospital when he refused to marry someone he did not love, and that he was transferred to work at the worksite as a punishment instead of working at the hospital), fn. 12274, referring to T. 23 August 2012 (EM Oeun), E1/113.1, pp. 104-105 ("[A]s a youth, I believe that we wanted our freedom to choose our own wife, and if you were forced to get married to someone whom you do not love, that was veIpainful [...] My wife did not love me either, so, whenever we stayed together at night, we cry to each other."). MOM Vun testified as to her own experience in T. 16 September 2016 (MOM Vun), E1/475.1, p. 58 (she and her husband were both forced by militia men with guns and torches to undress, and the militia men grabbed her husband's penis and forced it into her. They were forced to have sex in front of the militia men.).
[4430] T. 23 August 2012 (EM Oeun), E1/113.1, p. 106.
[4431] T. 23 August 2012 (EM Oeun), E1/113.1, p. 106.
[4432] T. 23 August 2012 (EM Oeun), E1/113.1, p. 106.
[4433] T. 13 September 2016 (NAKAGAWA Kasumi), E1/472.1, p. 110. See also T. 13 September 2016 (NAKAGAWA Kasumi), E1/472.1, p. 111-112 (stating that for women "the impact was already huge when she

Trial Chamber erred in failing to consider these portions of evidence which were clearly relevant, relied upon in other sections of the Trial Judgment, and not explicitly discounted in whole or in part.[4434]

1562. MOM Vun testified that militia men forced her husband at gunpoint to have sex with her, during which she described how "[t]hey threatened us again and they used the torch on us and they actually got hold of his penis and to insert it into my thing [sic]. It was so disgusting, but we had no choice."[4435] While MOM Vun gave evidence about her own experience as a female victim of forced marriage, her account also attests to the visible harm to her husband, who was manhandled and forced into sexual activity at gunpoint. The Supreme Court Chamber is satisfied that this evidence was of direct relevance to the Trial Chamber's finding of harm, and should have been considered.

1563. In light of the above, the Supreme Court Chamber finds that no reasonable trier of fact could have concluded that serious physical and mental harm or suffering was not established in the case of male victims of forced sexual intercourse.The Trial Chamber's finding of fact is reversed insofar as it relates to male victims of forced sexual intercourse.

c) Human Dignity

1564. The Co-Prosecutors argue that the Trial Chamber erred by finding only on serious physical suffering or injury, and not on whether the conduct to which men were subjected constituted a serious attack on human dignity.[4436] They further submit that had the question been properly evaluated, the Trial Chamber would have found that the conduct clearly violated human dignity.[4437]

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was forced to marry agaIt her will [...] without her parents' consent. So she was already after the stage that she was deprived of almost all hopes. And those forced married couples, mostly they knew that they have to consummate the marriage because of the instruction at the marriage ceremony or from tIvillage chief [...] this is a huge terror imposed on a woman who may not have been most probably exposed to any sexuality issues and, of course, after the rape it happens, I think, in many ways. Some rape happened inIvery violent way [...] some Ies were not violent [...] but the men [*sic*] were forced to rape their wife and the wife had to be raped by the husband."), referred to in Trial Judgment (E465), para. 3684 & fns 12289-12290. As outlined above, the Supreme Court Chamber does not accept that male victims of forced consummation are properly described as "rapists".

[4434] See *Prosecutor v. Perišić*, Appeals Chamber (ICTY), IT-04-81-A, Judgement, 28 February 2013, para. 95.

[4435] T. 16 September 2016 (MOM Vun), E1/475.1, p. 58.

[4436] Co-Prosecutors' Appeal (F50), para. 18.

[4437] Co-Prosecutors' Appeal (F50), para. 19.

1565. KHIEU Samphân responds that the Trial Chamber did consider whether men had been subjected to acts that were contrary to human dignity, and found that the conduct was not serious enough to be characterised as other inhumane acts.[4438]

1566. As a preliminary matter, the Supreme Court Chamber observes that the questions raised by the Co-Prosecutors have now arguably, become moot. The Supreme Court Chamber has found above that the Trial Chamber correctly articulated the standard for assessing the harm of conduct within the crime of other inhumane acts when it found that the *actus reus* requires an act or omission that caused serious mental or physical suffering or injury, or constituted a serious attack on human dignity.[4439] This Chamber has also found that this standard meant that, in the event that one of the factors was found not to be present, either serious mental or physical suffering or injury, or a serious attack on human dignity, the Trial Chamber was obliged to consider the other. This Chamber did not find, however, that there was an obligation to consider *both* serious mental or physical suffering or injury, *and* human dignity. Accordingly, in light of this Chamber's finding that the Trial Chamber erred in finding that men were not subjected to serious mental or physical suffering or injury, there is no longer technically any obligation to consider whether the conduct in question also amounted to a serious attack on human dignity.

1567. The Supreme Court Chamber has already determined that the Trial Chamber committed an error when it found that there was insufficient evidence of serious physical or mental harm or suffering with regard to male victims. This Chamber also recalls that, in general, the experience of male sexual violence is little considered in international criminal law, and the experience of penetrating male victims even less. This Chamber recalls its finding, in Case 001, that in "exceptional circumstances, the Supreme Court Chamber may raise questions *ex proprio motu* or hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgment but is nevertheless of general significance to the ECCC's jurisprudence."[4440] Accordingly, the Supreme Court Chamber will consider the Parties' submissions regarding the Trial Chamber's approach to assessing human dignity.

1568. In the impugned finding, the Trial Chamber refers to both "human dignity" and also "serious mental or physical suffering or injury". It held "that men were subjected to sexual violence that was contrary to human dignity", but concluded that it was unable to reach a

[4438] KHIEU Samphân's Response (F50/1), paras 7-8; T. 19 August 2021, F1/12.1, p. 24.
[4439] Trial Judgment (E465), para. 724.
[4440] Case 001 Appeal Judgment (F28), para. 15.

finding on the seriousness of the mental and physical suffering suffered by these men.[4441] The Supreme Court Chamber considers that while this finding refers to human dignity, this conclusion is made only in passing and in subordination to the finding on the seriousness of "mental or physical suffering or injury". There is no hierarchy between "mental or physical suffering or injury" and "a serious breach of human dignity", in contrast to the crime of "an intentional act of omission causing great suffering or serious injury to body or health, including mental health", as a grave breach, which excludes acts which relate solely to an individual's human dignity.[4442] This Chamber also observes that the Trial Chamber found that human dignity was "breached", but did not explain why such breach was not serious. The Trial Chamber therefore erred in failing to consider whether the male experience of sexual violence amounted to a serious attack on human dignity.

1569. The Co-Prosecutors submit that the ICTY Trial Judgment in the *Čelebići* case established that the concept of human dignity must be assessed objectively.[4443] They submit that analogous examples from the international criminal courts and tribunals demonstrate that, had the Trial Chamber considered the question objectively, it would have concluded that a serious attack on human dignity had clearly occurred with regard to men who were forced to have sexual intercourse.[4444] The Co-Prosecutors also submit that while a serious attack on human dignity does not require subjective proof of serious suffering, proof of such suffering was before the Trial Chamber.[4445]

[4441] Trial Judgment (E465), para. 3701.
[4442] See Rome Statute, Art. 8 (2)(a)(iii). See Trial Judgment (E465), para. 761. See also Case 001 Trial Judgment (E188), para. 453, citing *Kordić and Čerkez* Trial Judgment (ICTY), para. 245.
[4443] Co-Prosecutors' Appeal (F50), paras 21-22; T. 19 August 2021, F1/12.1, p. 8. The Co-Prosecutors also submit that the Trial Chamber's approach in Case 002/01 supports the analysis that when one alternative is satisfied, the other is unnecessary, as well as the converse, whereby if the first alternative does not satisfy the test, then the other must be considered.
[4444] Co-Prosecutors' Appeal (F50), paras 19, 23, referring to, *inter alia*, *Prosecutor v. Bagosora et al.*, Trial Chamber (ICTR), ICTR-98-41-T, Judgment and Sentence, 18 December 2008, paras 705, 717-718, 2219-2222, 2224; *Prosecutor v. Kunarac et al.*, Trial Chamber (ICTY), IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, paras 766-774, 781, 782; *Katanga & Ngudjolo Chui* Confirmation of Charges Decision (ICC), paras 373-376. The Co-Prosecutors point to illustrative findings on violations of personal dignity made in the ICTR case of *Bagosora* (inserting a bottle into the vagina of the prime minister's naked corpse and stripping women naked before killing them), the ICTY case of *Kunarac* (forcing victims to strip and dance naked on a table while the accused watched and pointed weapons) and the ICC *Katanga & Ngudjolo Chui* Confirmation of Charges Decision (a woman was forced to show combatants a weapons and ammunitions depot while wearing only a blouse and underwear and, later, only a blouse). The Co-Prosecutors also submit that the Trial Chamber failed to consider the fundamental principle of international humanitarian law and human rights law that demands that the human dignity of every person be protected, whatever his or her gender. See Co-Prosecutors' Appeal (F50), para. 24.
[4445] T. 19 August 2021, F1/12.1, pp. 10-14.

1570. KHIEU Samphân responds that the test proposed by the Co-Prosecutors violates the principle of legality, because an "objective" standard for appraising dignity was established only through ICTY cases in the 1990s and did not exist at the time of the alleged criminal conduct.[4446] He claims that the facts charged in Case 002/02 are incomparable to the presumption of gravity alleged by the Co-Prosecutors. In any event, KHIEU Samphân submits that the cases cited by the Co-Prosecutors show that the sexual relations alleged in Case 002/02 were not as grave as the acts dealt with before the *ad hoc* tribunals.[4447]

1571. As a first and general matter, it is the view of this Chamber that an appraisal of human dignity within the overarching crime of other inhumane acts is not a legal assessment, but a factual one. As this Chamber has repeatedly held, there is no requirement to identify independent crimes when conduct is charged under the overarching crime of other inhumane acts. The Trial Chamber is obliged to conduct a case-specific analysis of, in particular, the impact of the conduct on the victims and whether the conduct itself is comparable to the enumerated crimes against humanity.[4448] The case law of other international criminal courts and tribunals may be of relevance to determining whether, as a matter of fact, conduct can be considered to be a breach of human dignity, but this assessment is not, contrary to KHIEU Samphân's submission, a matter of legality. This case law does not offer a standard which must, or must not be considered, but serves as a tool for comparative appraisal. Whether or not there is case law establishing an "objective" or "subjective" standard, this is relevant only to assessing facts.

1572. This Chamber has next considered those cases which, in the parties' submissions, establish an "objective" standard. The *Čelebići* Trial Chamber found that Mr Mirko Kuljanin had been severely beaten in advance of being taken to a prison camp.[4449] When he arrived at the prison camp, he was taken to a site where prisoners were being beaten, and was hit several times before he was taken away.[4450] The Trial Chamber then found that it was unable to make a finding that the beating he received had wilfully caused great suffering or serious injury to

[4446] KHIEU Samphân's Response (F50/1), paras 11-14, referring to *Prosecutor v. Aleksovski*, Trial Chamber (ICTY), IT-95-14/I-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgment (ICTY)"), paras 53-56. KHIEU Samphân argues that the ICTY case of *Čelebići* was "completed" by the ICTY *Aleksovski* Judgment, and that the *Aleksovski* Trial Chamber "stated unequivocally that the assessment of the seriousness of the attack on human dignity had, up to that point, been purely subjective."
[4447] KHIEU Samphân's Response (F50/1), paras 34-38.
[4448] Case 002/01 Appeal Judgment (F36), para. 586.
[4449] *Čelebići* Trial Judgment (ICTY), para. 1024.
[4450] *Čelebići* Trial Judgment (ICTY), para. 1024-1025.

body and health, but concluded that the act of hitting someone who was already so injured was, at a minimum, a serious affront to human dignity.[4451] In this conclusion, in the Supreme Court Chamber's view, the Trial Chamber was not establishing a general standard, it was, rather, making a factual assessment of the evidence before it in that specific case. The Supreme Court Chamber accordingly rejects the submission that *Čelebići* established that there was an "objective standard" to be applied when appraising human dignity.

1573. The Supreme Court Chamber observes, however, that a number of other cases have referred to an "objective standard", but in the context of offences described as against "personal dignity", not "human dignity". The *Aleksovski* Trial Judgment, which, according to KHIEU Samphân, "completed" the objective standard for an assessment of human dignity, held that the "act must cause serious humiliation or degradation to the victim",[4452] and that this required both a "subjective" assessment of the harm caused to the actual individual, as well as a finding that "the humiliation to the victim must be so intense that the reasonable person would be outraged."[4453] The *Kunarac* Appeals Chamber also endorsed an objective standard in regard to outrages upon personal dignity, upholding the Trial Chamber's finding "that the humiliation of the victim must be so intense that any reasonable person would be outraged."[4454]

1574. This Chamber notes that violations of personal dignity can fall within the scope of offences against human dignity. As the *Aleksovski* Trial Chamber held, an "outrage upon personal dignity is an act which is animated by contempt for the human dignity of another person."[4455] Under human rights law, rights to personal, physical and mental integrity and dignity are linked together as corollaries of the right to life.[4456] Offences against the person

[4451] *Čelebići* Trial Judgment (ICTY), para. 1026.
[4452] *Aleksovski* Trial Judgment (ICTY), para. 56.
[4453] *Aleksovski* Trial Judgment (ICTY), para. 56.
[4454] *Kunarac et al.* Appeal Judgment (ICTY), para. 162. The notion of "outrages upon personal dignity" is defined in the Elements of Crimes of the ICC as acts which humiliate, degrade or otherwise violate the dignity of a person to such a degree "as to be generally recognized as an outrage upon personal dignity". The Elements of Crimes further specifies that degrading treatment can apply to dead persons and that the victim need not be personally aware of the humiliation. ICC Elements of Crimes, Definition of outrages upon personal dignity, in particular humiliating and degrading treatment, as a war crime (Rome Statute, Art. 8(2)(b)(xxi) and (c)(ii)).
[4455] *Aleksovski* Trial Judgment (ICTY), para. 56.
[4456] ICCPR, Art. 6. See also *Prosecutor v. Saif Al-Islam Gaddafi,* Appeals Chamber (ICC), ICC-01/11-01/11-695-Anxl, Separate and Concurring Opinion of Judge Luz del Carmed Ibánex Carranza on the Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam GadafIursuant to Article 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April 2019, 21 April 2020', para. 139 ("Amnesties or measures of equivalent effect for international crimes that always constitute grave human rights violations are contrary to well-established international law, principles and standards, as they violate concrete State obligations to investigate, prosecute and punish these crimes. Such obligations stem primarily from international human rights law insofar as they are indispensable to ensure the enjoyment of inalienable human rights which are the corollary of human dignity.").

have been described with reference to human dignity. In the ICTY case of *Vasiljević*, for example, the Trial Chamber found that attempted murder was a serious attack on human dignity.[4457] To the extent that offences of human dignity rest purely upon personal experience, this Chamber considers that there is merit in an objective evaluation. This Chamber also observes, however, that the idea of human dignity is broader than simply personal dignity. The ICTY *Furundžija* Trial Chamber held that "[t]he general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law."[4458] Conceptions of human dignity which span both individual and communal harm have appeared in cases of hate speech,[4459] and forced preparation of military fortifications.[4460] This Chamber considers that the emphasis on an "objective" standard with regard to offences of personal dignity emerged because these offences rest on the essentially personal experience of an individual victim. In cases where a broader concept of human dignity is breached, there is no comparable need to conduct such an appraisal.

1575. Sexual violence offences have commonly been considered as violations of personal dignity. These assessments have not generally involved any objective appraisal, resting instead on assumptions about physical or mental harm, or degradation, caused by a proven act of sexual assault. This Chamber itself held in Case 001, citing the ICTR Trial Chamber in *Akayesu*, that the crime of rape was in general "a violation of personal dignity."[4461] The ICTY *Milutinović* Trial Chamber described how "sexual assault" falls within various provisions safeguarding physical integrity, and could also constitute an "outrage upon personal dignity", which the chamber considered "a violation of a fundamental right".[4462] In the SCSL's *RUF* case, the SCSL concluded that the RUF's conduct "in forcing approximately 20 captive civilians to have

[4457] In the *Vasiljević* case, the ICTY Trial Chamber held that "the attempted murder of VG-32 and VG-14 constitutes a serious attack on their human dignity, and that it caused VG-32 and VG- 14 immeasurable mental suffering, and that the Accused, by his acts, intended to seriously attack the human dignity of VG-32 and VG-14 and to inflict serious physical and mental suffering upon them". *Prosecutor v. Vasiljević*, Trial Chamber II (ICTY), IT-98-32-T, Judgment, 29 November 2002, para. 239.
[4458] *Furundžija* Trial Judgment (ICTY), para. 183.
[4459] The ICTR held hate speech constitutes an affront to human dignity, and as such it might serve as the basis for a conviction for crimes against humanity. The court thus upheld a persecution conviction for Ferdinand Nahimana, the head of Radio Télévision Libre des Mille Collines. See *Nahimana et al.* Appeal Judgment (ICTR).
[4460] See *Blaškić* Appeal Judgment (ICTY), para. 597 ("The Appeals Chamber finds that the use of persons taking no active part in hostilities to prepare military fortifications for use in operations and against the forces with whom those persons identify or sympathise is a serious attack on human dignity and causes serious mental (and depending on the circumstances physical) suffering or injury.").
[4461] Case 001 Appeal Judgment (F28), para. 208.
[4462] *Milutinović et al.* Trial Judgment (ICTY), para. 192.

sexual intercourse with each other and slitting the genitalia of several male and female civilians constituted a severe degradation, harm and violation of the victims' personal dignity" was sufficient to form the basis for a conviction for outrages upon personal dignity."[4463]

1576. A more limited universe has described acts of sexual violence as breaches of human dignity. The ICC's *Bemba* Trial Chamber, following the ICTY's *Furundžija* case, considered that oral penetration can amount to rape and "is a degrading fundamental attack on human dignity which can be as humiliating and traumatic as vaginal or anal penetration."[4464] The ICTY Appeals Chamber in *Đorđević et al*. adopted a similar approach, considering that sexual violence may not require physical contact with the perpetrator where the acts constitute sexual humiliation or degradation.[4465] In *Prosecutor v. Niyitegeka*, the ICTR Trial Chamber concluded that an act of "sexual violence" involving the insertion of an object into a dead woman's vagina was "of seriousness comparable to other [enumerated crimes against humanity], and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole."[4466]

1577. The Supreme Court Chamber will now consider whether human dignity was violated by the conduct before it, namely, situations where male victims were forced to penetrate female victims for fear for their lives. In its oral submissions, the Co-Prosecutors argue that the Trial Chamber should have taken into account three factual circumstances showing that a serious attack on human dignity was established in the case of male penetrating victims.[4467] First, couples were forced to have sex just hours after their forcible marriage: a factor which, the Co-Prosecutors claim, the Trial Chamber raised in its analysis for women, but did not consider for men.[4468] Second, there was a threat of punishment for a failure to follow orders, exerting pressure to complete the sexual act.[4469] The Trial Chamber failed to consider evidence showing

[4463] *Gbao et al.* Trial Judgment (SCSL), para. 1307, pp. 678, 682, 685, 678 (count 9).
[4464] *Bemba* Trial Judgment (ICC), para. 101.
[4465] *Đorđević* Appeal Judgment (ICTY), para. 156 ("The Appeals Chamber notes that the act must also constitute an infringement of the victim's physical or moral integrity. Often the parts of the body commonly associated with sexuality are targeted or involved. Physical contact is, however, not required for an act to be qualified as sexual in nature. Forcing a person to perform or witness certain acts may be sufficient, so long as the acts humiliate and/or degrade the victim in a sexual manner.") (internal citations omitted).
[4466] *Niyitegeka* Trial Judgment (ICTR), paras 316, 465. See also, *e.g.*, *Prosecutor v. Nikolić*, Trial Chamber II (ICTY), IT-94-2-S, Sentencing Judgment, 18 December 2003 ("*Nikolić* Sentencing Trial Judgment (ICTY)"), paras 87-89, 111 (finding that "acts of forcible transfer, sexual violence, subjection to inhumane conditions and atmosphere of terror [rose] without further explanation to a level of gravity that falls within the ambit of [the crime against humanity of persecution]" and noting that sexual violence included not only rape but also verbal threats of sexual abuse).
[4467] T. 19 August 2021, F1/12.1, p. 9.
[4468] T. 19 August 2021, F1/12.1, p. 9.
[4469] T. 19 August 2021, F1/12.1, p. 9.

the widespread implementation of punishments.[4470] Third, the CPK not only violated men's bodily integrity and sexual autonomy, but forced them to inflict serious suffering upon their wives, subjecting them to serious indignity.[4471]

1578. The Supreme Court Chamber concludes that both men and women were, through the policy of forced consummation, subjected to the most egregious humiliation and degradation. Having already been subjected to the misery of forced marriage, usually to a total stranger, couples were forcibly relocated and monitored by armed militia to ensure that sexual intercourse between themselves, usually strangers, took place. If it did not, couples were forced, jointly and severally, to explain themselves and ultimately took the decision to consummate the marriages due to fear of physical punishments including death or beatings. Certain individuals, including female and male victims were subjected to other acts of sexual violence as part of the general coercive environment. For this reason, this Chamber concludes that both men and women experienced serious breaches of human dignity.

1579. This Chamber will now consider submissions which were raised by the Co-Prosecutors about the specific factors which further support a finding that human dignity was breached in relation to male victims. This Chamber first observes that the timing of sexual intercourse was not, contrary to the Co-Prosecutors' submission, considered by the Trial Chamber in its assessment of the harm caused to female victims.[4472] This Chamber also observes that a number of witnesses and civil parties testified that they waited some time to consummate their wedding before feeling compelled to do so.[4473] The fact that individuals were monitored so closely immediately after the wedding does, in the view of this Chamber, exacerbate the humiliation of the experience. This is, however, a factor which applies equally to both men and women.

1580. The Supreme Court Chamber is also not persuaded that the implementation of punishment is an additional factor which needed be considered in assessing human dignity in these circumstances. The threat of death was sufficient to establish the lack of consent founding

[4470] T. 19 August 2021, F1/12.1, pp. 9-10.
[4471] T. 19 August 2021, F1/12.1, p. 10.
[4472] *Cf.* T. 19 August, F1/12.1, p. 9 ("The first circumstance was that couples were forced to have sex mere hours after they had been subjected to the crime of forced marriage. This cumulatively increased the seriousness and impact of both crimes. The Chamber mentioned this factor at paragraph 3697 in its analysis for women, but not for men."), with Trial Judgment (E465), para. 3697.
[4473] See, *e.g.*, Trial Judgment (E465), fn. 12175, referring to T. 23 August 2016 (OM Yoeurn), E1/462.1, pp. 8, 47 ("Madam, can you tell the Chamber at which point that you have sex with your husId? A.It was a month later [...] I was so afraid so I agreed to sleep with him.") (waited a month before consummating), plus examples of sanctions when delays took place.

the acts of sexual violence which are inherently offensive to human dignity. Again, however, this Chamber considers that this factor applies equally to both male and female victims of the policy of forced consummation of marriage. This Chamber also recalls the particularly humiliating circumstances described by MOM Vun in relation to her husband's experience of forced consummation.

1581. This Chamber does, however, agree with the Co-Prosecutors that male victims experienced a distinctive humiliation, in being forced to penetrate their wives. This does not establish them as rapists, as previously outlined, but simultaneously establishes them as both tool and victim of sexual violence. The *Čelebići* Trial Chamber found that when victims are forced to victimise others, it subjects them to serious indignity.[4474] The Supreme Court Chamber finds that these factors further support a conclusion that human dignity was seriously breached in the case of male victims.

1582. The Supreme Court Chamber notes that the Trial Chamber also wholly disregarded the direct evidence of other husbands, EM Oeun and YOS Phal, as well as MOM Vun's evidence regarding her husband's experience. While EM Oeun was questioned by KHIEU Samphân's to a limited extent in Case 002/01 on his forced marriage, it has already has already been determined that this does not mean that the Trial Chamber was prohibited from considering EM Oeun's testimony on the topic in Case 002/02 where that evidence was corroborated by other evidence from Case 002/02.[4475] EM Oeun and YOS Phal both stated explicitly that they had been seriously harmed by the experience of forcibly consummating their marriage, while MOM Vun stated that her husband was forced to penetrate her at gunpoint. It is hard to imagine a clearer illustration of harm in relation to that individual, although this Chamber reiterates that forcible circumstances need not be demonstrated by such visible threats of violence.

1583. Similarly, the Trial Chamber neglected to consider, in its legal findings, the evidence of NAKAGAWA Kasumi that male victims were very seriously harmed by being forced to have sexual intercourse with their wives. This omission is particularly of concern considering that the Trial Chamber had expressly accepted this evidence earlier in its factual findings.

[4474] See *Čelebići* Trial Judgment (ICTY), para. 1070 ("The Trial Chamber finds that, through being forced to administer a mutual beating to one another, Danilo and Miso Kuljanin were subjected to serious pain and indignity.").
[4475] See *supra* Section V.C.3.b.

1584. For all of these reasons, this Chamber concludes that the Trial Chamber's approach demonstrates a degree of error. The Supreme Court Chamber, consequently, overturns the Trial Chamber's finding and enters its own finding that male victims of the policy of forced consummation of marriage, were, at minimum, seriously mentally harmed when they were forced to have sexual intercourse.

1585. This Chamber has also considered whether the human dignity of male victims was seriously breached by the act of forced sexual intercourse. This evaluation was not strictly necessary, because the Trial Chamber was not obliged to conduct analyses of both serious mental or physical harm or suffering, and a serious breach of human dignity. Nonetheless, however, given the extent of the Trial Chamber's errors when it came to assessing serious mental or physical suffering or injury, this Chamber considered it important to also appraise the Trial Chamber's approach to this matter.

1586. The Trial Chamber failed to conduct an independent evaluation of human dignity, as it was required to do when it found that serious mental or physical suffering or injury was not established. Instead, the Trial Chamber appeared to adopt the standard in relation to which a finding of harm to human dignity is deemed insufficient to establish the crime. This was an error. The Supreme Court Chamber has further found, on evaluation of the facts, that the conduct in question very clearly amounted to a serious breach of human dignity. This Chamber observes that this conclusion is generally applicable also to female victims. Both men and women experienced serious humiliation and degradation in being forced to copulate on demand, at risk of immediate physical harm at the hands of armed militia, and/or other acts of physical harm or death. Some women also experienced the specific harm of being sexually violated by their husbands. This Chamber has also considered, however, that male victims experienced a further, specific harm at being forced to penetrate, and thus victimise, another person. Being the tool of sexual violence, as well as the victim of it, is a serious breach of human dignity.

1587. This Chamber has found no error in the Trial Chamber's conclusion that the conduct charged as forced marriage was established, and that it caused serious mental and physical suffering of similar gravity to other crimes against humanity.[4476] All of KHIEU Samphân's submissions on these points are dismissed.

[4476] Trial Judgment (E465), para. 3692.

1588. The Supreme Court Chamber has also considered KHIEU Samphân's challenges to the Trial Chamber's finding that female victims being forced to consummate their marriages amounted to the crime of rape, established serious mental and physical suffering, and was of a similar gravity to other crimes against humanity.[4477] The Supreme Court Chamber has held that the Trial Chamber erred in directing itself to consider whether the "elements" of rape were established. This Chamber has clarified that the findings of fact are essentially gender-neutral, in that both male and female victims were forced to have sexual intercourse, in order to consummate their marriages. While women may have experienced specific coercive threats, including sexual violence by their husbands or other men, these acts did not form part of the charged conduct, but instead, part of the coercive environment. Males and females were both victims of the charged conduct: the fact that one was forced to penetrate, and one was forced to be penetrated, is immaterial.

1589. The Supreme Court Chamber has rejected all of KHIEU Samphân's challenges to the Trial Chamber's findings on the victims identified as female victims. It has found that the Trial Chamber reasonably considered the context of forced marriage, and properly appraised evidence of serious mental or physical harm or suffering. This Chamber has, however, found that the Trial Chamber erred in failing to properly recognise SOU Sotheavy's identity as a transgender woman. The Supreme Court Chamber has summarised SOU Sotheavy's evidence as to the acute harm she experienced, and has made the finding that this civil party should be considered as part of the universe of female victims of the policy of forced consummation.

1590. The Supreme Court Chamber has upheld, in full, the Co-Prosecutors' appeal to the Trial Chamber's finding that there was no sufficient evidence of serious mental or physical harm or suffering on the part of the male victims who were forced to consummate their marriage. The Trial Chamber reached a conclusion no reasonable trier of fact could have reached, and also failed to provide a reasoned opinion. Particularly prominent as an error in its assessment was the different treatment of men and women with regard to identical factual circumstances. The Trial Chamber also made unreasonable findings on the evidence and failed to consider direct relevant evidence. This Chamber has also held that the Trial Chamber erred in failing to consider whether human dignity had been seriously breached in light of its negative finding on physical or mental suffering or injury. This Chamber has, furthermore, found that forcing individuals to have sexual intercourse amounted to a serious breach of human dignity. This

[4477] Trial Judgment (E465), para. 3692.

conclusion applied to both male and female victims, albeit with distinctive elements applicable to each.

1591. The Supreme Court Chamber recalls that, according to Rule 110 (4), in the case of appeal by the Co-Prosecutors, this Chamber has the power to modify the findings of the Trial Chamber's decision if it deems them erroneous, but cannot modify the disposition of the Trial Judgment. This Chamber sets aside the Trial Chamber's finding that the crime of other inhumane acts as a crime against humanity was not established with regard to male victims. The Supreme Court Chamber enters a new finding that male victims who were forced to have sexual intercourse in the context of forced marriage experienced at a minimum serious mental harm, and also a serious attack on human dignity. KHIEU Samphân's conviction for conduct amounting to forced sexual intercourse in the context of forced marriage as an other inhumane act is otherwise upheld.[4478]

H. GENOCIDE

1. Genocide of the Vietnamese

1592. The Trial Chamber found that the crime of genocide, including its *actus reus* and *mens rea*, by killing members of the Vietnamese group was established.[4479]

1593. KHIEU Samphân disputes the Trial Chamber's findings on genocide, challenging its conclusions that both the *actus reus* and *mens rea* had been established.[4480]

a. Whether the *Actus Reus* Was Properly Established

i. Whether Members of a Protected Group Were Targeted

1594. In determining that the *actus reus* for genocide was established, the Trial Chamber found that "the Vietnamese constituted a racial, national and ethnic group at the relevant time and [were] thus a protected group."[4481] The Trial Chamber also concluded that a number of the victims of the crimes against humanity of murder and extermination were targeted because they were Vietnamese.[4482] According to the Trial Chamber "these killings were systematically

[4478] Trial Judgment (E465), paras 4326-4327.
[4479] Trial Judgment (E465), paras3514-3519.
[4480] KHIEU Samphân's Appeal Brief (F54), paras 1052-1097.
[4481] Trial Judgment (E465), para. 3514.
[4482] Trial Judgment (E465), paras 3515-3516, referring to paras 2560-2571, 2959, 2994-2999, 3497, 3501.

organised and directed against the Vietnamese," observing that "in each case, Vietnamese were targeted not as individuals but on the basis of their membership in the group."[4483]

1595. The Trial Chamber stated that Vietnamese "living in Cambodia" were members of the protected group, and noted that "[n]one of the Parties contest the existence of the Vietnamese living in Cambodia as constituting a group, as such".[4484] The Trial Chamber pointed out that those Vietnamese "living in Cambodia" shared certain "distinct features", including the Vietnamese language, cuisine, cultural practices, traditional dress, a common historical heritage, a limited facility with Khmer, close family relations and shared physical traits.[4485]

1596. KHIEU Samphân contends that the Trial Chamber erroneously determined that the Vietnamese killed at Au Kanseng Security Centre and S-21, as well as in Cambodian territorial waters, including at Ou Chheu Teal port, were members of the protected group because the Trial Chamber defined the protected group as "Vietnamese living in Cambodia" whereas the Vietnamese executed at these locations lived in Vietnam.[4486] According to KHIEU Samphân, victims who were residents of Vietnam were not included in the protected group in question, which consists solely of those "Vietnamese living in Cambodia."[4487]

1597. The Supreme Court Chamber considers that the Trial Chamber's statement that Vietnamese "living in Cambodia" were in the protected group, however, did not *ipso facto* limit the scope of the protected group. Indeed, it was implicit in the findings of the Trial Chamber that it considered all Vietnamese *located* in Cambodia, regardless of residency, to be members of the protected group based on their shared racial, national, and ethnic characteristics. CPK rhetoric was often "directed against all ethnic Vietnamese," including those who had entered Cambodia from Vietnam during the armed conflict.[4488] It is the Supreme Court Chamber's view that the fact that the protected group is defined by the shared racial, national, and ethnic characteristics of its members is consequential, because it signifies that the protected group comprises all Vietnamese, including those living outside of Cambodia. The fact that only members of the protected group located in Cambodia were targeted does not limit the scope of the protected group itself, but it may have an impact on whether a perpetrator intended to destroy the group "in whole or in part."[4489]

[4483] Trial Judgment (E465), para. 3516.
[4484] Trial Judgment (E465), para. 3418.
[4485] Trial Judgment (E465), para. 3419.
[4486] KHIEU Samphân's Appeal Brief (F54), paras 1055-1057.
[4487] KHIEU Samphân's Appeal Brief (F54), paras 1055-1057.
[4488] Trial Judgment (E465), para. 3416.
[4489] See Section below on whether the *mens rea* of the crime of genocide by killing was properly established.

1598. In discussing the targeting of the Vietnamese, the Trial Chamber included the killing of, *inter alia*, "Vietnamese fishermen and refugees caught encroaching on DK waters at Ou Chheu Teal port after April or May 1977," "Vietnamese captured by Division 164 on 19 and 20 March 1978," and "780 Vietnamese persons at S-21 and Au Kanseng Security Centres."[4490] This last group included Vietnamese soldiers and civilians captured along the border or at sea and taken to S-21, as well as Vietnamese executed at Au Kanseng who were civilians captured at the Au Ya Dav village battlefield along the border with Vietnam.[4491] Thus, like the Vietnamese who in fact lived in Cambodia, Vietnamese soldiers, fishermen, refugees, and other civilians who were captured in Cambodia or its territorial waters fell within the scope of the protected group and were targeted.

1599. Moreover, as KHIEU Samphân acknowledges, the majority of the evidence relied upon by the Trial Chamber with respect to the targeting of the protected group refers to "the Vietnamese" in general and does not distinguish between those Vietnamese living in Cambodia and those who were otherwise present there.[4492]

1600. The Trial Chamber concluded that it was "satisfied beyond reasonable doubt that the CPK internally as well as publicly targeted Vietnamese as a group […] identifying them as 'poisonous foreigners' from the early stages of the DK regime."[4493] Taking into consideration the evidence before the Trial Chamber, the Supreme Court Chamber discerns no error in the Trial Chamber's determination that members of the protected group of Vietnamese were targeted. Accordingly, the Supreme Court Chamber rejects the argument to the contrary advanced by KHIEU Samphân.

ii. Whether Members of the Protected Group Were Killed

1601. KHIEU Samphân submits that the Trial Chamber erred in finding that six Vietnamese captives were killed at Au Kanseng Security Centre, and that murder and extermination of Vietnamese had been established at S-21, in the provinces of Svay Rieng, Kratie, and Kampong Chhnang, in Cambodian territorial waters, and at Wat Khsach.[4494] Concerning S-21, he contends that the Trial Chamber erred in concluding that murder and extermination had been established in relation to the Vietnamese because it made no specific mention of Vietnamese

[4490] Trial Judgment (E465), para. 4002.
[4491] Concerning the Vietnamese at S-21, see Trial Judgment (E465), paras 2460-2484. Concerning the Vietnamese killed at Au Kanseng, see Trial Judgment (E465), para. 2926 and fn. 10025.
[4492] See KHIEU Samphân's Appeal Brief (F54), para. 1067.
[4493] Trial Judgment (E465), para. 3416.
[4494] KHIEU Samphân's Appeal Brief (F54), paras 1052-1053.

in its legal finding of murder and because the Trial Chamber conflated wilful killing as a grave breach of the Geneva Conventions with the crime against humanity of murder.[4495] He argues that the *actus reus* of genocide was not properly established due to errors in determining that the killings at the above-mentioned locations occurred.[4496]

1602. According to the Co-Prosecutors, KHIEU Samphân merely repeats his erroneous claims that the killings were not properly established. They submit that the Trial Chamber made factual findings regarding the killing of Vietnamese detainees at S-21 and legally characterised the deaths without distinguishing between the types of victims.[4497]

1603. The Lead Co-Lawyers submit that the Trial Chamber relied on previous legal findings that the crimes against humanity of murder and extermination were established in determining that killings were sufficiently proven, and that additional civil party evidence supports this finding.[4498] They submit that the conclusion that Vietnamese individuals were killed at S-21 was sufficient to establish the *actus reus* of genocide by killing, irrespective of its legal characterisation.[4499]

1604. The Supreme Court Chamber has upheld the Trial Chamber's findings in relation to the killing of Vietnamese in Svay Rieng, in DK waters, in Kampong Chhnang province, at Wat Khsach, and in Kratie, as well as the existence of a contemporaneous centrally devised policy targeting the Vietnamese for adverse treatment.[4500] Thus, this Chamber will not revisit KHIEU Samphân's submissions concerning these findings in the context of genocide because they are without merit.

1605. Concerning KHIEU Samphân's alleged errors with respect to S-21, the Supreme Court Chamber recalls that the S-21 records clearly show that prisoners of Vietnamese origin were admitted, tortured, and killed, and the Trial Chamber made several factual findings to that effect.[4501] The Supreme Court Chamber concludes that the Trial Chamber did not err in determining that the evidence was sufficient to support its finding that the members of the Vietnamese protected group were killed in the context of the genocide charge.

[4495] KHIEU Samphân's Appeal Brief (F54), para. 1052.
[4496] KHIEU Samphân's Appeal Brief (F54), para. 1054.
[4497] Co-Prosecutors' Response (F54/1), para. 652.
[4498] Lead Co-Lawyers' Response (F54/2), paras 713-714.
[4499] Lead Co-Lawyers' Response (F54/2), para. 715.
[4500] See *supra* Section VII.B.2; *infra* Section VIII.B.5.a.
[4501] Trial Judgment (E465), paras 2460-2484. See also Trial Judgment (E465), para. 3457, referring to, *inter alia*, T. 16 December 2015 (PAK Sok), E1/369.1, pp. 21-22.

1606. Based on the foregoing, the evidence presented before the Trial Chamber supported its conclusion that Vietnamese located in Cambodia were targeted as members of a protected group and that members of the group were killed. The Supreme Court Chamber thus discerns no error in the Trial Chamber's determination that, as a result, "the *actus reus* of the crime of genocide by killing is established".[4502]

b. Whether the *Mens Rea* Was Properly Established

1607. As stated by the Trial Chamber, "[g]enocide requires not only proof of the intent to commit the underlying act, but also proof of the specific intent to destroy the group, in whole or in part."[4503] This is consistent with the Genocide Convention's definition of the crime, which relates that a perpetrator must have the intent to destroy a protected group "as such," emphasising that "the victim of [the] crime of genocide is not merely the person but the group itself."[4504]

1608. KHIEU Samphân contends, however, that the Trial Chamber erred in determining that the Vietnamese group was targeted as such,[4505] and failed to clarify whether the evidence established the existence of an intent to destroy the Vietnamese group "in whole or in part".[4506] He submits that if the intent was to destroy the group in part, the evidence before the Trial Chamber failed to prove that the part of the group intended for destruction was sufficiently "substantial" to demonstrate genocidal intent.[4507]

i. Whether the Intent Was to Destroy the Protected Group as Such

1609. Although genocide can be defined as the intent to destroy a protected group either in whole or in part, the common element is that the destructive intent must be directed toward the group "as such." In reviewing the evidence before it with respect to the material elements of genocide, the Trial Chamber concluded that killings "were systematically organised and directed against the Vietnamese" and that "in each case, Vietnamese were targeted not as individuals but on the basis of their membership in the group."[4508]

[4502] Trial Judgment (E465), para. 3516.
[4503] Trial Judgment (E465), para. 797, which further states: "This has been referred to as genocidal intent, *dolus specialis*, special intent or specific intent."
[4504] Trial Judgment (E465), para. 798 and fns 2375 and 2377.
[4505] KHIEU Samphân's Appeal Brief (F54), paras 1065-1067.
[4506] KHIEU Samphân's Appeal Brief (F54), para. 1059.
[4507] KHIEU Samphân's Appeal Brief (F54), paras 1059-1064.
[4508] Trial Judgment (E465), para. 3516.

1610. In its consideration of the intentional element of the crime, the Trial Chamber cites the Genocide Convention for the proposition that the *mens rea* of genocide is the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[4509] In determining that the "CPK internally and publicly targeted the Vietnamese as a group," the Trial Chamber observed that it did so through extensively circulated instructions, political training sessions, statements, speeches, the creation of lists, and by following a policy designed to "dig up the roots" of the Vietnamese.[4510] Accordingly, the Trial Chamber concluded that the individuals who physically committed the killings demonstrated "the specific intent to destroy the Vietnamese group, as such."[4511]

1611. According to KHIEU Samphân, the Trial Chamber primarily relied on its finding that there was a CPK policy to remove Vietnamese from Cambodia and then destroy them, which was based on POL Pot's "one against 30" speech, speeches by KHIEU Samphân, a declaration by NUON Chea and an analysis of certain political training sessions.[4512] He argues that because the charge of genocide was levelled against "Vietnamese living in Cambodia", the Trial Chamber was required to determine whether the intent was to target this group, and thus the Trial Chamber should have clearly distinguished this group from other Vietnamese, especially given the armed conflict between Cambodia and Vietnam, but it did not.[4513]

1612. He also argues that the Trial Chamber committed several errors in its analysis of the evidence, leading it to erroneously conclude that there was intent to destroy the group as such:

a. The Trial Chamber erred in its interpretation of the 1973 Paris Peace Accords, which concerned the diplomatic relations between two states rather than any policy toward the Vietnamese in Cambodia.[4514]

b. The Trial Chamber misinterpreted the April 1976 *Revolutionary Flag*, assuming that the reference to foreigners meant Vietnamese when it should have meant Americans and Europeans living in Phnom Penh.[4515]

[4509] Trial Judgment (E465), para. 797, referring to Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277 ("Genocide Convention"), Art. 2.
[4510] Trial Judgment (E465), para. 3518.
[4511] Trial Judgment (E465), paras 3517-3518 referring to paras 2167-2168, 2174-2175, 3377-3381, 3385, 3390-3391, 3396, 3416, 3425, 3428, 3497, 3501, fn. 11436, IENG Sary Speech, 3 September 1978, E3/199, p. 4.
[4512] KHIEU Samphân's Appeal Brief (F54), para. 1065.
[4513] KHIEU Samphân's Appeal Brief (F54), paras 1066-1067.
[4514] KHIEU Samphân's Appeal Brief (F54), paras 1068-1069.
[4515] KHIEU Samphân's Appeal Brief (F54), paras 1070-1072.

c. The Trial Chamber erred in interpreting CPK leaders' references to the Vietnamese as enemies when the target was Vietnam as a country, and any anti-Vietnamese rhetoric should have been interpreted in the context of the armed conflict.[4516] As a result, he believes that the Trial Chamber should not have relied on EK Hen's testimony concerning comments made by KHIEU Samphân in a meeting because her testimony lacks credibility and reliability, and it is open to multiple interpretations.[4517]

d. The Trial Chamber erred in relying on and analysing two FBIS documents because they have low probative value, the remarks contained in them cannot be attributed to the CPK, and they appeared after Vietnam launched a large-scale offensive against Cambodia.[4518]

e. The Trial Chamber erred in concluding that two speeches by KHIEU Samphân demonstrated that all Vietnamese had been targeted because the two documents relied on were different transcriptions and translations of the same speech, and in the speech, KHIEU Samphân called for the killing of the Vietnamese enemy, which referred to the Vietnamese State's army, not civilian Vietnamese or ethnic Vietnamese in Cambodia.[4519]

f. The Trial Chamber erred in assuming that POL Pot's "one against thirty" speech was aimed at the entire ethnic Vietnamese population, when it was intended to galvanise DK troops facing vastly superior enemy numbers.[4520] KHIEU Samphân contends that the Trial Chamber should have considered how the speech was interpreted by the people, citing the Supreme Court Chamber's criticism of the Trial Chamber in Case 002/01 for failing to explain why it interpreted the term "enemy" in a different speech to mean more than a military target.[4521]

[4516] KHIEU Samphân's Appeal Brief (F54), paras 1073-1074, 1078.
[4517] KHIEU Samphân's Appeal Brief (F54), para. 1075.
[4518] KHIEU Samphân's Appeal Brief (F54), para. 1079.
[4519] KHIEU Samphân's Appeal Brief (F54), paras 1080-1081.
[4520] KHIEU Samphân's Appeal Brief (F54), paras 1083-1084.
[4521] KHIEU Samphân's Appeal Brief (F54), para. 1085.

g. The Trial Chamber erred in failing to read the *Revolutionary Flag* Issues of May-June 1978 and July 1978 in context, as their references to Vietnamese in those issues did not refer to ethnic Vietnamese living in Cambodia.[4522]

h. The Trial Chamber erred by taking telegrams and other contemporaneous evidence out of context, as they referred to border clashes with Vietnam rather than the executions of civilian Vietnamese.[4523]

i. The Trial Chamber erred in assuming that the DK Government declaration protesting Vietnamese aggression on 2 January 1979 was directed at all Vietnamese "without distinction".[4524]

j. The Trial Chamber erred in relying on the testimony of Civil Party HENG Lai Heang, who was the only person to expressly state that there was a policy to eliminate ethnic Vietnamese, because the probative value of her testimony is questionable since HENG Lai Heang lost members of her family and therefore lacked objectivity.[4525] KHIEU Samphân contends that HENG Lai Heang did not witness any executions and that because she stated that there were no Vietnamese in her commune, she had no idea what was going on with the Vietnamese.[4526] Moreover, her testimony was contradicted by former DK soldier MEAS Voeun, who testified that there was never any policy to execute Vietnamese civilians.[4527]

k. Finally, the Trial Chamber erred in concluding that a policy of attacking the civilian Vietnamese population existed based on the establishment of lists, because the Vietnamese were not the only ones subjected to a census under DK, but this was done for everyone as part of cooperatives rationing and supply plans.[4528] He also argues that the matrilineal status of the ethnic group was not established.[4529]

[4522] KHIEU Samphân's Appeal Brief (F54), para. 1086.
[4523] KHIEU Samphân's Appeal Brief (F54), paras 1090-1093.
[4524] KHIEU Samphân's Appeal Brief (F54), para. 1094.
[4525] KHIEU Samphân's Appeal Brief (F54), para. 1095.
[4526] KHIEU Samphân's Appeal Brief (F54), para. 1095, fn. 2048.
[4527] KHIEU Samphân's Appeal Brief (F54), para. 1095, fn. 2048.
[4528] KHIEU Samphân's Appeal Brief (F54), para. 1096.
[4529] KHIEU Samphân's Appeal Brief (F54), para. 1096.

1613. In conclusion, KHIEU Samphân contends that no reasonable trier of fact could have found that the *mens rea* of genocide by killing was established through a State policy to destroy ethnic Vietnamese, and that he should thus be acquitted.[4530]

1614. The Co-Prosecutors refute KHIEU Samphân's claim that the Trial Chamber erred in finding that the intent to destroy the group as such was established and distorted the evidence as a result.[4531]

1615. The Lead Co-Lawyers concur with the Co-Prosecutors, objecting only to KHIEU Samphân's portrayal of the testimony of Civil Party HENG Lai Heang, which they claim was objective, clear, honest, and direct.[4532]

1616. The Supreme Court Chamber rejects KHIEU Samphân's argument that the Trial Chamber should have determined whether there was an intent to specifically target Vietnamese living in Cambodia, whom he distinguishes from other Vietnamese, especially given the ongoing armed conflict between Cambodia and Vietnam at the time. This claim of error is premised on his submission that the protected group was limited to the "ethnic Vietnamese living in Cambodia."[4533] As set out above, it is this Chamber's view that the protected group includes all Vietnamese regardless of residency.[4534]

1617. To the extent that KHIEU Samphân supports his claim in this regard with a recitation of the alleged Trial Chamber's "numerous errors both in fact and in law",[4535] the Supreme Court Chamber discerns no legal error on the part of the Trial Chamber.

1618. Specifically, the Supreme Court Chamber finds no error in the Trial Chamber's conclusions concerning the consequences of the Paris Peace Accords, which the Trial Chamber was aware dealt with the diplomatic relations between States:

> The CPK rhetoric against the Vietnamese was grounded in their perception of a long-standing animosity between the Khmers and Vietnamese, which the CPK dated back to the second century. […] The deterioration of the relationship between the CPK and North Vietnamese authorities (following the signing of the January 1973 Paris Peace Accords between the governments of Vietnam and the US) must be considered against this background of animosity, which explains

[4530] KHIEU Samphân's Appeal Brief (F54), para. 1097.
[4531] Co-Prosecutors' Response (F54/1), paras 656 (1973 Paris Peace Accords), 657 (April 1976 edition of *Revolutionary Flag*), 658-660 (documentary evidence and oral testimonies), 661 (FBIS and SWB documents and speeches), 662 (issues of the *Revolutionary Flag* and *Revolutionary Youth* magazines), 663 (telegrams), 664 (oral testimonies of HENG Lai Heang, MEAS Voeun, and PAK Sok).
[4532] Lead Co-Lawyers' Response (F54/2), paras 722-726.
[4533] KHIEU Samphân's Appeal Brief (F54), para. 1066.
[4534] See *supra* Section VII.H.1.a.i.
[4535] KHIEU Samphân's Appeal Brief (F54), para. 1066.

> in part the CPK's identification of ethnic Vietnamese living in Cambodia as a group deserving distinct attention.[4536]

1619. In addition, the Supreme Court Chamber finds that the Trial Chamber did not misinterpret the April 1976 *Revolutionary Flag's* reference to "foreigners".

1620. In response to KHIEU Samphân's contention that the Trial Chamber erred by relying on EK Hen's testimony, the Supreme Court Chamber recalls that EK Hen was one of several witnesses heard by the Trial Chamber who helped to establish that from 1976 through 1978, senior CPK leaders lectured at, or attended training sessions where Vietnamese or Vietnamese "agents" were labelled as enemies.[4537] KHIEU Samphân's claim that EK Hen's testimony lacked credibility and reliability is unsubstantiated, as he merely refers to certain paragraphs of a request he made to admit the Case 003 and 004 Written Records of Interviews of EK Hen into Case 002/02.[4538] He considers her testimony as unreliable because she was unsure of the date of the meeting at which she heard KHIEU Samphân speak, but the Trial Chamber noted that the training occurred after Pang was denounced and arrested around April 1978.[4539] KHIEU Samphân has failed to demonstrate that this finding was unreasonable or that it calls her testimony into question. Similarly, claiming that EK Hen's testimony could be interpreted in a variety of ways does not suffice to demonstrate that the Trial Chamber's interpretation was unreasonable.

1621. In terms of the Trial Chamber's reliance on the two FBIS documents, the Supreme Court Chamber concludes that the Trial Chamber did not overweigh their probative value. The Trial Chamber stated unequivocally that the broadcasts in question were made by "an unidentified Phnom Penh broadcaster" and that they were used only as corroborative evidence:

> The Chamber finds that the form and substance of the broadcast text mirrors other CPK rhetoric and concludes that it was in fact issued by the Party Centre. Read in context and considering the Vietnamese armed forces withdrawal at the time, the Chamber finds that these calls targeted both Vietnamese soldiers and Vietnamese civilians.[4540]

Accordingly, KHIEU Samphân fails to show that the Trial Chamber erred in finding that the broadcasts were attributable to the CPK.

[4536] Trial Judgment (E465), para. 3382.
[4537] Trial Judgment (E465), para. 3390, referring to T. 3 May 2012 (PEAN Khean), E1/72.1, p. 25; T. 17 May 2012 (PEAN Khean), E1/73.1, pp. 20-22, 24; T. 20 June 2012 (YUN Kim), E1/89.1, p. 78; T. 27 August 2012 (EM Oeun), E1/115.1, pp. 26-28, 44-45; T. 16 September 2016 (MOM Vun), E1/475.1, pp. 63, 71; T. 10 November 2016 (OU Dav), E1/498.1, pp. 93-94; T. 28 November 2016 (BEIT Boeurn *alias* BIT Na), E1/502.1, pp. 22-23, 25, 28; T. 3 July 2013 (EK Hen), E1/217.1, pp. 45, 47.
[4538] KHIEU Samphân's Appeal Brief (F54), para. 1075, fn. 1995.
[4539] Trial Judgment (E465), fn. 11437.
[4540] Trial Judgment (E465), para. 3398.

1622. Whether or not the Trial Chamber erred in determining that two different transcriptions were two separate speeches rather than a single speech, KHIEU Samphân merely interprets the evidence differently by claiming that the speech(es) referred to the Vietnamese army rather than to civilians but has not demonstrated that the Trial Chamber's conclusion was unreasonable. The Trial Chamber reasoned that those references to preserving the "Cambodian race" and inciting "national hatred" demonstrated that the targeted group included all Vietnamese, not just the Vietnamese armed forces.[4541]

1623. The Trial Chamber "accept[ed] that POL Pot's April 1978 speech stating the CPK's 'One against 30' policy primarily relates to soldiers and served to 'stir up the fighting spirits of cadres and combatants to be ready in battlefields'."[4542] After reviewing this speech and other evidence, the Trial Chamber concluded that the call was directed against the ethnic Vietnamese population as a whole, not just the Vietnamese military forces, and provided its reasoning.[4543] In contrast, in Case 002/01, the Trial Chamber failed to explain why it believed the term "enemy" did not only refer to a military target. Thus, KHIEU Samphân has failed to demonstrate that the Trial Chamber's interpretation of this evidence was erroneous.

1624. Similarly, the Supreme Court Chamber rejects KHIEU Samphân's arguments concerning the Trial Chamber's alleged failure to read the *Revolutionary Flag* Issues of May-June and July 1978 in context, because he has failed to demonstrate that the Trial Chamber's interpretation is unreasonable. Furthermore, as previously discussed, the protected group at issue is all Vietnamese, with the CPK's intent to destroy those in Cambodia, hence the Trial Chamber's finding that these issues specifically referred to the Vietnamese living in Cambodia rather than just the Vietnamese in general was superfluous.

1625. KHIEU Samphân's claim that the contemporaneous telegrams and other evidence were taken out of context because they referred to border clashes rather than the execution of civilian Vietnamese is incorrect, because non-civilians can be victims of genocide.[4544]

1626. In response to KHIEU Samphân's contention that the Trial Chamber erred in interpreting the DK Government's declaration of 2 January 1979 protesting Vietnamese

[4541] Trial Judgment (E465), paras 3399-3400.
[4542] Trial Judgment (E465), para. 3402.
[4543] Trial Judgment (E465), para. 3402.
[4544] See, *e.g.*, *Prosecutor v. Krstić,* Appeals Chamber (ICTY), IT-98-33-A, Judgment, 19 April 2004, para. 226 ("*Krstić* Appeal Judgment (ICTY)") ("[T]he intent requirement of genocide is not limited to instances where the perpetrator seeks to destroy only civilians. […] [T]here is nothing in the definition of genocide prohibiting, for example, a conviction where the perpetrator killed detained military personnel belonging to a protected group because of their membership in that group.").

aggression as aimed at all Vietnamese without distinction, the Supreme Court Chamber notes that the Trial Chamber explicitly considered the military offensives, but concluded that the explicit reference to the whole Kampuchea people and the "hereditary enemy" demonstrated that the statement was aimed at, and targeted, all Vietnamese indiscriminately.[4545] The Trial Chamber noted that multiple witnesses testified that during the DK era, the CPK and its senior leaders promoted Vietnam as the "hereditary enemy" of the Cambodian people.[4546] Accordingly, KHIEU Samphân fails to demonstrate that the Trial Chamber's interpretation was unreasonable.

1627. Civil Party HENG Lai Heang provided a detailed account of how the CPK policy in relation to Vietnamese individuals was disseminated from the sector to the village levels, via the district and the commune.[4547] The fact that she had not witnessed any killings was not germane to the Trial Chamber's finding, as the Trial Chamber relied on her testimony to confirm the existence of a policy rather than actions taken in its implementation. It is hardly persuasive to argue that because there were no Vietnamese in her commune, she had no idea what was going on with the Vietnamese when she was a CPK member who served on a commune committee in Kratie until 1977 and was aware of the CPK's policy toward the Vietnamese.[4548] The fact that the Trial Chamber preferred HENG Lai Heang's testimony concerning a policy toward Vietnamese over that of MEAS Voeun, who, according to KHIEU Samphân, affirmed that there was never a policy aimed at executing Vietnamese civilians, does not indicate any error on the part of the Trial Chamber, which is entrusted with evaluating the evidence at trial and drawing conclusions afterwards.

1628. The Supreme Court Chamber rejects KHIEU Samphân's argument that because everyone was subjected to a census, creating lists of Vietnamese does not prove they were targeted. While anyone could be subjected to a census, this does not invalidate the Trial Chamber's conclusion that Vietnamese were screened through the creation of lists. The Trial Chamber relied on testimony from multiple witnesses concerning the screening of Vietnamese based on the creation of lists.[4549] KHIEU Samphân refers to his arguments about the finding of racial persecution of the Vietnamese in Prey Veng and Svay Rieng, in relation to the Trial

[4545] Trial Judgment (E465), para. 3412.
[4546] Trial Judgment (E465), para. 3412.
[4547] T. 19 September 2016 (HENG Lai Heang), E1/476.1, pp. 67-68.
[4548] Trial Judgment (E465), paras 3414-3415.
[4549] Trial Judgment (E465), paras 3420-3422.

Chamber's findings on a policy of matrilineal ethnicity. The Supreme Court Chamber has rejected these.[4550]

1629. The Supreme Court Chamber thus concludes that the evidence before the Trial Chamber was sufficient, both factually and as a matter of law, to support its finding of a "specific intent to destroy the Vietnamese group, as such."[4551]

ii. Whether the Intent Was to Destroy the Protected Group in Whole or in Part

1630. According to KHIEU Samphân, the Trial Chamber failed to clarify whether the intent was to destroy the group in whole or in part, and that if the intent was to destroy the group in part, the Trial Chamber was required to establish that the part of the group intended for destruction was "substantial", which necessitates determining the numerical size of the targeted part of the group.[4552] He submits that the evidence does not support the claim that a substantial part of the group was targeted because the number of people killed, if properly established, would be too low, and no demographic data was used to create statistics on the number of Vietnamese in Cambodia or to establish the number of deaths in comparison with the total population of the group.[4553]

1631. In fact, the Trial Chamber did not specify whether it considered the intent to destroy the Vietnamese group to be "in whole" or "in part" when it concluded that "the *mens rea* of the crime of genocide by killing is established."[4554] However, no evidence of an intent to destroy the racial, national or ethnic Vietnamese group "in whole" was presented to the Trial Chamber, and no finding was made in that regard.[4555]

1632. Consequently, this Chamber concludes that the Trial Chamber's conclusion that "the *mens rea* of the crime of genocide by killing is established" is based on its assessment that the evidence was sufficient to demonstrate an intent to destroy the Vietnamese group "in part." The Supreme Court Chamber therefore proceeds to examine whether the evidence presented to the Trial Chamber supported that conclusion.

[4550] See *supra* Section VII.F.4.d.i.
[4551] Trial Judgment (E465), paras 3517-3518.
[4552] KHIEU Samphân's Appeal Brief (F54), paras 1059-1064.
[4553] KHIEU Samphân's Appeal Brief (F54), paras 1062-1064.
[4554] Trial Judgment (E465), paras 3517-3518.
[4555] Although the evidence does not establish that there was an intent to destroy the entire Vietnamese group outside of Cambodia, it can nonetheless be inferred that any Vietnamese who crossed into Cambodia or entered its territorial waters would be targeted along with those Vietnamese already located in Cambodia.

1633. Although legal commentators have proposed several analytical approaches to the meaning of the term "in part,"[4556] in setting out the applicable law the Trial Chamber made specific reference to the *Krstić* case. In that case, the ICTY Appeals Chamber determined that the intent to destroy a part of a group in a geographical area smaller than a State could be considered an intent to destroy a group "in part."[4557] The International Court of Justice has similarly stated that "it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area."[4558]

1634. The *Krstić* Appeals Chamber observed that the intent to destroy geographically delimited parts of larger groups can be considered an intent to destroy the group "in part," noting that "[t]he intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him." *Krstić* also concluded that if the intent is to destroy a group "in part," the part intended for destruction must nevertheless be "substantial."[4559] In such cases, genocide perpetrators, according to *Krstić*, "must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such."[4560]

1635. The evidence presented to the Trial Chamber amply demonstrated that all Vietnamese located in Cambodia were specifically targeted for destruction, thus constituting a "distinct entity which must be eliminated as such." Their intended destruction would, if successful, have resulted in the annihilation of all Vietnamese from Cambodia. Given the size of the Vietnamese community in Cambodia, its total elimination would amount to a destruction "in part" of the larger Vietnamese group, one that can be considered "substantial."

1636. The Supreme Court Chamber is thus not persuaded by the contention of KHIEU Samphân that the total number of Vietnamese killed in Cambodia is insufficient to establish that "a substantial part of the group of ethnic Vietnamese was targeted."[4561] When considering the *mens rea* for genocide, the reference to the destruction of a group "in whole or in part" relates to the intent of the perpetrator rather than the result that is actually achieved.[4562] Thus,

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[4556] See, *e.g.*, William A. Schabas, *Genocide in Internat[io]nal Law: The Crime of Crimes* (2nd ed. 2009) ("Schabas, Genocide in International Law"), pp. 277-286.
[4557] In *Krstić*, the Trial Chamber identified the protected group as the national group of Bosnian Muslims and analysed whether the targeting of the Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia amounted to genocide. See *Krstić* Appeal Judgment (ICTY), para. 15.
[4558] Schabas, Genocide in International Law, p. 286, citing *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment, 26 February 2007, para. 199.
[4559] *Krstić* Appeal Judgment (ICTY), paras 12-13.
[4560] *Krstić* Trial Judgment (ICTY), para. 590.
[4561] KHIEU Samphân's Appeal Brief (F54), para. 1063.
[4562] Schabas, Genocide in International Law, p. 277.

the destruction of a group is not required for an offense to qualify as genocide. A large number of victims can indeed serve to demonstrate the requisite intent, although there is no numerical threshold that must be met. In light of these conclusions, KHIEU Samphân's submission is rejected in this regard.

1637. For the foregoing reasons, the evidence presented to the Trial Chamber supported its conclusion of a specific intent to destroy "the Vietnamese group, as such." Similarly, the evidence supports the conclusion that the intent involved was to destroy the group "in whole or in part." The Supreme Court Chamber thus discerns no error in the Trial Chamber's determination that "the *mens rea* of the crime of genocide by killing is established."[4563]

1638. Having discerned no error in the Trial Chamber's findings and rulings with respect to both the *actus reus* and the *mens rea* of the crime of genocide, the Supreme Court Chamber affirms the Trial Chamber's determination that "the crime of genocide by killing members of the Vietnamese group is established."[4564]

VIII. ALLEGED ERRORS RELATING TO INDIVIDUAL CRIMINAL RESPONSIBILITY

A. KHIEU SAMPHÂN'S ROLES AND FUNCTIONS

1. Deputy Prime Minister, Minister of National Defence and Cambodian People's National Liberation Armed Forces Commander-in-Chief

a. April 1975 Special National Congress and December 1975 Third National Congress

1639. The Trial Chamber relied on a number of international and domestic media reports of statements made by KHIEU Samphân at a "Special National Congress" ostensibly held in April 1975 and a Third National Congress of December 1975[4565] in its findings about the evolution of the common plan,[4566] its policies,[4567] and KHIEU Samphân's contribution by way of promoting the common plan.[4568] Owing to the scarcity of other evidence, it was not clear to the Trial Chamber whether the April and December 1975 congresses genuinely took place.[4569] Nonetheless, it held that "the attribution of such events to KHIEU Samphân as GRUNK Deputy

[4563] Trial Judgment (E465), para. 3518.
[4564] Trial Judgment (E465), para. 3519.
[4565] Trial Judgment (E465), para. 593.
[4566] Trial Judgment (E465), para. 3735.
[4567] Trial Judgment (E465), para. 3897.
[4568] Trial Judgment (E465), para. 4262, fn. 13908.
[4569] Trial Judgment (E465), para. 593.

Prime Minister and National United Front of Kampuchea ("FUNK") representative, among others, served effectively to legitimise the CPK's agenda internationally."[4570]

1640. KHIEU Samphân submits that the Trial Chamber erred in fact by relying on these media reports, arguing that in the absence of evidence that these congresses actually took place, the Trial Chamber could not logically conclude that he had conferred legitimacy to the CPK's agenda internationally.[4571] Moreover, because the congresses may not have taken place, the Trial Chamber could not conclude that the reports about them "reflected the political line advocated by the CPK at the time".[4572]

1641. The Co-Prosecutors respond that the Trial Chamber's uncertainty regarding whether the congresses took place did not prevent it from finding (1) the content of the congresses' communiques and reportedly adopted resolutions reflected the CPK's political line at the time; (2) the communiques and resolutions were officially broadcast on the radio; and (3) "the attribution of such events (and the communiqués and speeches discussing them) by the regime to [KHIEU Samphân] contributed [by] […] giving credit to and legitimising the CPK political line".[4573]

1642. The Supreme Court Chamber notes that both the April and December 1975 congresses' domestic radio broadcasts reported that KHIEU Samphân read the press communiques.[4574] The radio broadcast of the April 1975 "Special National Congress" was thereafter picked up and reported by international media outlets.[4575] Whether the congresses actually took place is immaterial to the question of whether KHIEU Samphân publicly promoted the Party line and thereby contributed to the common purpose.[4576] In this regard, he does not deny having read the communiques for radio broadcast.

[4570] Trial Judgment (E465), para. 593.
[4571] KHIEU Samphân's Appeal Brief (F54), para. 1690.
[4572] KHIEU Samphân's Appeal Brief (F54), para. 1690.
[4573] Co-Prosecutors' Response (F54/1), para. 918 (internal citations omitted).
[4574] '*Special National Congress' Retains Sihanouk, Penn Nouth* (in FBIS collection), 28 April 1975, E3/118, ERN (EN) 00167012 (noting that text is "read by KHIEU Samphan—live or recorded"); *National Congress Held*; *New Constitution Adopted* (in FBIS collection), 15 December 1975, E3/1356, ERN (EN) 00167574 (reporting that "Comrade Deputy Prime Minister Khieu Samphan has come to personally read this communique. The respected and beloved compatriots are urged to listen to the speech by Comrade Deputy Prime Minister Khieu Samphan: [begin second male speaker, presumably Khieu Samphan]").
[4575] *Long March from Phnom Penh* (Time), 19 May 1975, E3/4430, ERN (EN) 00445392, p. 3; *Cambodia Holds Special Congress* (The Guardian), 21 May 1975, E3/3722, ERN (EN) S00003467; *National Congress Held*; *New Constitution Adopted* (in FBIS collection), 15 December 1975, E3/1356, ERN (EN) 00167574-00167575.
[4576] See Trial Judgment (E465), para. 4262, fn. 13908.

1643. Moreover, in the Supreme Court Chamber's view, the dissemination of the "Party line" by local radio broadcast to local and international listeners was an important tool in the DK's propaganda chest. It is not possible to determine with certainty whether the congresses actually took place or were staged. What is important is that KHIEU Samphân reported for the DK that they occurred and what was decided for the very purpose of disseminating the CPK's message.[4577] As the Co-Prosecutors rightly point out, that their content reflects the CPK political line is also confirmed by both POL Pot and KHIEU Samphân's later references to the congresses.[4578] In addition, the new DK Constitution, apparently decided during the December 1975 congress, was actually promulgated in January 1976.[4579] Again, whether the congresses took place is immaterial to the point that their broadcasts regarding their occurrence and decisions taken were aimed at promoting the Party line.

1644. For these reasons, the Supreme Court Chamber is not persuaded that the Trial Chamber erred by relying on the radio broadcasts of the press communiques of the April and December 1975 national congresses. Thus, KHIEU Samphân's argument is dismissed.

b. Meetings of Military Personnel in Phnom Penh

1645. The Trial Chamber found that military personnel occasionally participated in large meetings or rallies in Phnom Penh, some of which were attended by DK and CPK senior leaders, including KHIEU Samphân.[4580] During oral arguments, KHIEU Samphân emphasised that the Trial Chamber recognised that he was never part of the military branch.[4581] He submits that the Trial Chamber erred in finding that he would have participated in important meetings or gatherings with military personnel in Phnom Penh.[4582] Therefore, he submits, the Trial

[4577] In this regard, see the Trial Chamber's findings on the CPK's use of radio broadcasts to propagate the party line, Trial Judgment (E465), Section 6.1.4 'Communication Structures: Methods of Communication: Radio Broadcasts'.
[4578] *Pol Pot Interview by Yugoslavian Journalists*, 20 March 1978, E3/5713, ERN (EN) 00750098 (following "a special national congress in late April 1975" the CPK determined "to build a prosperous and happy Cambodian society […] free from all class or individual forms of exploitation in which everyone strives to increase production and to defend the country"); *Khieu Samphan Report* (in FBIS Collection), 5 January 1976, E3/273, ERN (EN) 00167810-0016817 (KHIEU Samphân referred to the three 1975 national or FUNK congresses held in February, April and December 1975 and their content showed his knowledge of the Constitution's content and proclaimed the commitment to the construction of a classless society free from exploitation striving to build and defend the country which perfectly reflects the CPK's political line at the time).
[4579] See Trial Judgment (E465), para. 412; DK Constitution, E3/259; *Radio Editorial Hails Promulgation of New Constitution* (in FBIS collection), 8 January 1976, E3/273, ERN (EN) 00167822.
[4580] Trial Judgment (E465), para. 510.
[4581] T. 18 August 2021, F1/11.1, p. 23.
[4582] KHIEU Samphân's Appeal Brief (F54), para. 1691.

Chamber should not have relied on this finding for its conclusion that he "promoted, confirmed and endorsed the common purpose".[4583]

1646. This Chamber recalls that the onus is on an appellant to demonstrate how an error of fact occasioned a miscarriage of justice; that is, that it was critical to his conviction and its correction creates reasonable doubt as to his guilt.[4584] In the present instance, and in an apparent reversal of his earlier submission, KHIEU Samphân concedes that the Trial Chamber did not err in fact, in finding that "an impartial review of the evidence […] shows that the Appellant was present […] at the 1975 rallies".[4585] Thus, it seems his presence at military rallies is not disputed. In any event, as the Co-Prosecutors point out, the Trial Chamber did not rely on this finding in holding that he promoted, confirmed and endorsed the common purpose.[4586] This Chamber's review of the facts shows that the Trial Chamber did not rely on this finding in any part of its reasoning regarding KHIEU Samphân's contribution to the common purpose.

1647. As such, the Supreme Court Chamber dismisses this challenge. KHIEU Samphân's outstanding arguments regarding this point[4587] are moot.

2. President of the State Presidium

a. Appointment

1648. KHIEU Samphân submits that the Trial Chamber erred in its conclusion that the Central Committee "would have" appointed him to the position of President of the State Presidium as, in his view, "the appointment decision was rather taken by the Standing Committee".[4588] As KHIEU Samphân alleges other factual errors pertaining to the 30 March 1976 decision appointing him, these are considered below.[4589]

b. Roles and Responsibilities

1649. The Trial Chamber held that KHIEU Samphân's role as Chairman or President of the State Presidium entailed two main tasks: performing diplomatic and ceremonial functions,[4590]

[4583] KHIEU Samphân's Appeal Brief (F54), para. 1691.
[4584] See Case 001 Appeal Judgment (F28), paras 18-19; Case 002/01 Appeal Judgment (F36), para. 91.
[4585] KHIEU Samphân's Appeal Brief (F54), para. 1691.
[4586] Co-Prosecutors' Response (F54/1), para. 919.
[4587] KHIEU Samphân's Appeal Brief (F54), para. 1691.
[4588] KHIEU Samphân's Appeal Brief (F54), para. 1693.
[4589] See *infra* Section VIII.A.3.
[4590] Trial Judgment (E465), para. 597 (internal citations omitted).

and making speeches.[4591] The Trial Chamber concluded that "[i]n accordance with the largely symbolic nature of the role […] KHIEU Samphan's responsibilities as part of this role were mostly confined to diplomatic duties within DK and the general promotion of the CPK line."[4592] KHIEU Samphân alleges several errors pertaining to these findings.

1650. First, he submits that since his position as President of the State Presidium was "only 'largely symbolic'", the Trial Chamber erred in relying on it "as a charge against him".[4593] The Co-Prosecutors submit that KHIEU Samphân fails to demonstrate an error.[4594] The Supreme Court Chamber notes that KHIEU Samphân misapprehends the Trial Chamber's description of his position as President of the State Presidium as "symbolic". The Trial Chamber held that the role of President of the State Presidium held symbolic significance as, while he did not exercise executive or decision-making authority in this role, he nevertheless acted as the "public face of the DK".[4595] It did not, as he implies, hold that the position existed only on paper. As President, he received diplomatic missions, represented the DK abroad and, on his own evidence to the Co Investigating Judges, attended meetings of the Standing Committee "to be informed to be able to talk […] to diplomats".[4596] The Supreme Court Chamber does not accept that the Trial Chamber's description of his role as being "symbolic" either precluded or detracted from it properly relying upon his conduct in this role as an aspect of his contribution to the common purpose[4597] and an aggravating factor in sentencing.[4598]

1651. Second, KHIEU Samphân avers that the Trial Chamber ignored evidence showing that the CPK mistrusted him.[4599] In his submission, this mistrust is evidenced, first, by the appointment of SAO Phim and RUOS Nhim, whom he describes as "of a higher rank than him", as Vice-Presidents in the Presidency[4600] and, second, by the fact that his promotion as a full member of the Central Committee only occurred in 1976, "when he [had] been appointed as an alternative member five years earlier".[4601] The Co-Prosecutors respond that KHIEU

[4591] Trial Judgment (E465), para. 598 (internal citations omitted).
[4592] Trial Judgment (E465), para. 599.
[4593] KHIEU Samphân's Appeal Brief (F54), para. 1694.
[4594] Co-Prosecutors' Response (F54/1), para. 923.
[4595] Trial Judgment (E465), para. 624. See generally Trial Judgment (E465), Section 8.3.2: Roles and Functions – KHIEU Samphan: Roles During the DK Period: President of the State Presidium.
[4596] KHIEU Samphan Written Record of Adversarial Hearing, 19 November 2007, E3/557, ERN (EN) 00153270, p. 5.
[4597] See, *e.g.*, Trial Judgment (E465), paras 4257, 4265.
[4598] See Trial Judgment (E465), para. 4389.
[4599] KHIEU Samphân's Appeal Brief (F54), para. 1694.
[4600] KHIEU Samphân contrasts this with the appointment of NORODOM Sihanouk as Head of State, appearing to suggest that the latter was more trusted because he did not have "vice" heads of state.
[4601] KHIEU Samphân's Appeal Brief (F54), para. 1694.

Samphân's submissions omit that the DK Constitution mandated two Vice Presidents; "the nominal 'Vice Presidents' […] never acted as such during the DK period, and were ultimately purged".[4602] The Co-Prosecutors submit that members of the Central Committee could only be appointed by a Party Congress and that between 1971 and 1976, there was no Party Congress which might have promoted KHIEU Samphân to full membership.[4603]

1652. This Chamber notes that KHIEU Samphân raised these same arguments at trial. They were explicitly considered by the Trial Chamber, including specifically the mistrust apparently evidenced by his delayed promotion in the Central Committee.[4604] The Co-Prosecutors correctly submit that KHIEU Samphân merely disagrees with the Trial Chamber's interpretation of the evidence as demonstrating "that he had a close and trusting relationship with the other CPK leaders".[4605] As KHIEU Samphân does not show how this interpretation was unreasonable, this argument is dismissed.

1653. Third, KHIEU Samphân argues that the Trial Chamber erred by finding that he contributed to the common purpose by exercising diplomatic duties and generally promoting the CPK line in his speeches, because "the CPK line […] in the general sense [was] not criminal in and of itself".[4606] The Co-Prosecutors respond that KHIEU Samphân ignores the Trial Chamber's findings on the objective of the common purpose, its intrinsically linked criminal policies, and "discipline promoted" by the CPK Statute and by the Party Centre, including by KHIEU Samphân in his speeches and lectures.[4607]

1654. The Supreme Court Chamber has given ample consideration both to KHIEU Samphân's submissions on the criminality of the common plan and to his relentless and entirely baseless refrain that he supported only entirely innocuous and benevolent policies and endeavors of the CPK.[4608] This Chamber concludes that KHIEU Samphân mischaracterises the Trial Chamber's findings: the Trial Chamber found that he promoted the CPK line, in its various facets, rather than any "general" or non-criminal CPK line. In fact, the Trial Chamber found that KHIEU Samphân's speeches promoted its criminal policies, which included deporting and eliminating

[4602] Co-Prosecutors' Response (F54/1), para. 923.
[4603] Co-Prosecutors' Response (F54/1), para. 923.
[4604] Trial Judgment (E465), paras 226 (fn. 533), 576, 4202.
[4605] Co-Prosecutors' Response (F54/1), para. 923. The Co-Prosecutors submit that this is demonstrated by the numerous other functions in the DK held by KHIEU Samphân.
[4606] KHIEU Samphân's Appeal Brief (F54), paras 1695-1696.
[4607] Co-Prosecutors' Response (F54/1), para. 923.
[4608] See *infra* Section VIII.B.2. See also Case 002/01 Appeal Judgment (F36), paras 811-817, 978-985.

Vietnamese,[4609] establishing and operating cooperatives and worksites,[4610] abolishing Buddhist practices,[4611] and arranging marriages.[4612] This argument is without merit and is therefore dismissed.

1655. Finally, KHIEU Samphân contests the Trial Chamber's finding that he received two letters from Amnesty International in his capacity as President of the Presidium.[4613] As he challenges receipt of these letters again in his submissions concerning closeness to Ministry of Foreign Affairs, these are considered together below.[4614]

c. Speeches

1656. KHIEU Samphân submits that the Trial Chamber made several factual errors in relying on speeches, attributed to him as President of the State Presidium, which led to a miscarriage of justice.[4615] In the Co-Prosecutors' submission, none of these alleged errors impacted the Trial Chamber's conclusion on his contribution to the common purpose.[4616]

1657. First, KHIEU Samphân avers that the Trial Chamber misattributed to him a speech delivered at the first sessions of the People's Representative Assembly, held on 11 April 1976, and submits that the corresponding Trial Chamber findings must be reversed.[4617] The Co-

[4609] Trial Judgment (E465), paras 3399-3406, 4260, 4269, referring, *inter a*[li]*a*, to *Phnom Penh Rally Marks 17th April Anniversary* (in SWB/FE/5791/B collection), 16 April 1978, E3/562, ERN (EN) S00010563; *KHIEU Samphan Speech at Anniversary Meeting*, 17 April 1978, E3/169, ERN (EN) 00280396-00280398; *Sihanouk Attends, Khieu Samphan Addresses KCP Banquet* (in FBIS collection), 30 September 1978, E3/294, ERN (EN) 00170170.
[4610] Trial Judgment (E465), paras 4265-4267, referring to *Phnom Penh Reportage on Third National Congress: Khieu Samphan Report* (in FBIS collection), 6 January 1976, E3/273, ERN (EN) 00167810-00167816, 00167817; *Deputy Premier Khieu Samphan Grants Interview to AKI* (in FBIS collection), 13 August 1975, E3/119, ERN (EN) 00167386; *Welcome Rally Marks Sihanouk's Return: Khieu Samphan Speech* (in FBIS collection), 12 September 1975, E3/271, ERN (EN) 00167454; U.S. State Department Telegram, Subject: Khieu Samphan Visit to PRC, August 1975, E3/619, ERN (EN) 00413733; *Khieu Samphan's Speech at Anniversary Meeting* (in SWB/FE/5490/C collection), 15 April 1977, E3/200, ERN (EN) S00004164-S00004170.]
[4611] Trial Judgment (E465), para. 4268, referring, by way of cross-references to other parts of the judgment, to *Phnom Penh Reportage on Third National Congress: KHIEU Samphan Report* (in FBIS collection), 5 January 1976, E3/273, ERN (EN) 00167816; *Khieu Samphan Interviewed on Executions, National Problems* (in FBIS collection), 26 September 1976, E3/608, ERN (EN) 00[41]9843; *Phnom Penh Rally Marks 17th April Anniversary* (in SWB/FE/5791/B/1 collection), 16 April 1978, E3/562, ERN (EN) S00010565.
[4612] Trial Judgment (E465), paras 4248-4268, referring, by way of cross references to other parts of the judgment, to *KHIEU Samphan's Speech at Anniversary Meeting* (in SWB/FE/5908/A3 collection), 15 April 1977, E3/201, ERN (EN) 00419514.
[4613] KHIEU Samphân's Appeal Brief (F54), para. 1697.
[4614] See *infra* Section VIII.A.4.d.
[4615] KHIEU Samphân's Appeal Brief (F54), paras 1698-1703.
[4616] Co-Prosecutors' Response (F54/1), para. 924.
[4617] KHIEU Samphân's Appeal Brief (F54), paras 1699-1700.

Prosecutors do not dispute that the speech was misattributed, but submit that this error does not warrant appellate intervention as it had no impact on the verdict.[4618]

1658. The Supreme Court Chamber has previously ruled that there are insufficient indicators to allow attribution of this speech to KHIEU Samphân,[4619] and this Chamber affirms this assessment.[4620] This Chamber must therefore consider whether the Trial Chamber's error in relying on it occasioned a miscarriage of justice. In this regard, this Chamber observes that the Trial Chamber relied on this speech in support of its findings that KHIEU Samphân supported "the creation of the new DK state and its institutions";[4621] promoted the object of achieving a "great and magnificent leap";[4622] and "endorsed the priority of building and defending an independent and self-reliant country quickly while continuing the class struggle against imperialism, colonialism and other 'oppressor classes'".[4623]

1659. The Supreme Court Chamber finds that evidence shows that KHIEU Samphân supported these aims of the CPK, specifically in a substantial number of speeches he made both as President of the State Presidium and before this appointment.[4624] This conclusion is further supported by his willing acceptance of key roles which he continued to hold throughout the DK period. Thus, the Supreme Court Chamber finds that as the Trial Chamber's error regarding the disputed speech does not subtract from the overall conclusion that KHIEU

[4618] Co-Prosecutors' Response (F54/1), para. 927.
[4619] Case 002/01 Appeal Judgment (F36), para. 1023.
[4620] See *supra* Section V.C.3.
[4621] Trial Judgment (E465), para. 598 (fn. 1877).
[4622] Trial Judgment (E465), para. 3739 (fn. 12469).
[4623] Trial Judgment (E465), para. 3739 (fn. 12469).
[4624] See *Cambodians Urged to Unite in New Year's Offensive* (in FBIS collection), 31 December 1974, E3/30, ERN (EN) 00166659-00166660; *Khieu Samphan 21 Apr Victory Message on Phnom Penh Radio* (in FBIS collection), 21 April 1975, E3/118, ERN (EN) 00166994-00166996; *Deputy Premier Khieu Samphan Grants Interview to AKI* (in FBIS collection), 13 August 1975, E3/119, ERN (EN) 00167385-00167387; *Welcome Rally Marks Sihanouk's Return: Khieu Samphan Speech* (in FBIS collection), 12 September 1975, E3/271, ERN (EN) 00167454; *Reception for Sihanouk: Speeches by Khieu Samphan and Sihanouk* (in SWB/FE/5006/B collection), 11 September 1975, E3/711, ERN (EN) S00003732-S00003733; *National Congress Held; New Constitution Adopted* (in FBIS collection), 15 December 1975, E3/1356, ERN (EN) 00167574-00167575; *Phnom Penh Reportage on Third National Congress: Khieu Samphan Report* (in FBIS collection), 6 January 1976, E3/273, ERN (EN) 00167809-00167817; *Anniversary of 17 Apr Victory Celebrated: Khieu Samphan Address* (in FBIS collection), 16 April 1976, E3/275, ERN (EN) 00167630-00167639; *First People's Representative Assembly Convenes* (in FBIS collection), 16 April 1976, E3/275, ERN (EN) 00167640-00167641; *Speech of the President of the Presidium of the State of the State of Democratic Kampuchea at the Fifth Summit Conference of Non-Aligned Countries*, 16-19 August 1976, E3/549, ERN (EN) 00644931-00644941; *Khieu Samphan's Speech at Anniversary Meeting* (in SWB/FE/5490/C collection), 15 April 1977, E3/200, ERN (EN) S00004164-S00004170; *Radio Reports More on Visit of LPDR's Souphanouvong: Khieu Samphan's Address* (in FBIS collection), 20 December 1977, E3/1497, ERN (EN) 00168379; KHIEU Samphan Speech at Anniversary Meeting, 17 April 1978, E3/169, ERN (EN) 00280389-00280399, p. 12; *Sihanouk Attends, Khieu Samphan Addresses KCP Banquet* (in FBIS collection), 30 September 1978, E3/294, ERN (EN) 00170169-00170170.

Samphân supported the creation of the new DK state and its institutions, no miscarriage of justice was occasioned thereby. KHIEU Samphân's argument is dismissed.

1660. Second, KHIEU Samphân contends[4625] that the Trial Chamber erred by relying on an interview he is reported to have given in September 1976.[4626] He submits that this document is "dubious" and "unsubstantiated" and that one witness considered that it was fake.[4627] With respect to the document's authenticity, the Co-Prosecutors submit that the interview was given in Colombo, Sri Lanka, thus, likely took place during the Fifth Non-Aligned Summit Conference.[4628] In any case, the Co-Prosecutors submit that KHIEU Samphân fails to demonstrate that the Trial Chamber's reliance on this interview had any impact on its conclusions, as other evidence supports the Trial Chamber's conclusion that he knew that crimes were committed against Buddhists during the DK regime.[4629]

1661. The article in question, entitled "Khieu Samphan Interviewed on Executions, National Problems", purportedly contains an interview given by KHIEU Samphân to Paola BRIANTI, published in Italian magazine Famiglia Cristiana on 26 September 1976.[4630] François PONCHAUD recounted to the Trial Chamber that a journalist named Erić LAURENT told him that he had been by Paola BRIANTI's side in Colombo and the latter had never met KHIEU Samphân.[4631] Mr. PONCHAUD considered the interview "a fabrication"[4632] and its author a "liar".[4633] In the view of this Chamber, Mr. PONCHAUD's account, although hearsay, casts doubt on the authenticity of the Famiglia Cristiana interview, which also differs significantly in both tone and content from KHIEU Samphân's other public statements on the evidential record. This Chamber finds that the Trial Chamber erred by failing to explain why it relied on the purported interview notwithstanding the doubts raised by Mr. PONCHAUD.

1662. This Chamber holds the view that the interview was not decisive in establishing that KHIEU Samphân knew that crimes were committed against Buddhists during the DK period.

[4625] KHIEU Samphân's Appeal Brief (F54), para. 1701.
[4626] Trial Judgment (E465), paras 4241 (fn. 13844), 4253 (fn. 13875), referring to *Khieu Samphan Interviewed on Executions, National Problems* (in FBIS collection), 26 September 1976, E3/608, ERN (EN) 00419843.
[4627] KHIEU Samphân's Appeal Brief (F54), para. 1701.
[4628] Co-Prosecutors' Response (F54/1), fn. 3229.
[4629] Co-Prosecutors' Response (F54/1), para. 926.
[4630] *Khieu Samphan Interviewed on Executions, National Problems* (in FBIS collection), 26 September 1976, E3/608.
[4631] T. 10 April 2013 (Franço is PONCHAUD), E1/179.1, pp. 83-84; T. 11 April 2013 (François PONCHAUD), E1/180.1, p. 6.
[4632] T. 11 April 2013 (François PONCHAUD), E1/180.1, p. 6.
[4633] T. 10 April 2013 (François PONCHAUD), E1/179.1, p. 83.

The Trial Chamber's nuanced analysis clearly indicates that the interview was only one of several indices that he knew that Buddhists were targeted. KHIEU Samphân routinely paid homage to the *Sangha* up until the CPK's victory and abruptly stopped thereafter.[4634] The Trial Chamber thus considered that his earlier stated praise and respect evidenced "subterfuge aimed at shoring up the legitimacy of the interim CPK-dominated government".[4635] Following the CPK's victory, KHIEU Samphân "continued publicly supporting the charade of normalcy" by welcoming NORODOM Sihanouk in the presence of Sangha community on his return in September 1975, and lauding the DK's constitution guarantees to religious worship.[4636] However, "[b]ehind the scenes, KHIEU Samphân was fervently instructing the arrangement of marriages in the absence of monks and in a manner fundamentally inconsistent with Buddhist traditions".[4637]

1663. The Supreme Court Chamber takes particular note of the content of KHIEU Samphân's speech setting out the new constitution. In explaining the new clause's freedom of religion except for "reactionary religions", he set out the CPK's view that "foreign imperialists […] use religion to subvert us" or "use a religious cloak to infiltrate our country".[4638] Other evidence establishes that the CPK considered Buddhism to be a "reactionary" religion,[4639] and KAING Guek Eav *alias* Duch told the Co-Investigating Judges that the constitutional guarantee of the right to religious belief "was a lie".[4640] In an interview given after the collapse of the regime, asked what the CPK would do differently, KHIEU Samphân stated that, if it is able to regain control of Cambodia, the Party will allow the people freedom to practice religion.[4641] In the

[4634] Trial Judgment (E465), para. 4242.
[4635] Trial Judgment (E465), para. 4240.
[4636] Trial Judgment (E465), para. 4241.
[4637] Trial Judgment (E465), para. 4242.
[4638] *Phnom Penh Reportage on Third National Congress: KHIEU Samphan Report* (in FBIS collection), 5 January 1976, E3/273, ERN (EN) 00167816.
[4639] T. 10 February 2016 (YSA Osman), E1/389.1, p. 97 ("[T]he DK regime defined a reactionary religion would include any religion, including Buddhism and Islamic. As a result all the monks, all the Buddhist monks, were defrocked and all the Buddhist temples were destroyed"); T. 9 February 2015 (Elizabeth BECKER), E1/259.1, p. 54 (stated that THIOEUNN Prasith described Buddhism as a reactionary faith which the people had given up); MATH Ly DC-Cam Interview, 27 March 2000, E3/7821, ERN (EN) 00441581 ("In 1976, the constitution of the assembly was released and stated that we could practice belief in any religion, except the reactionary ones. But after the liberalization in 1975, all religions were considered reactionary."). See also *A Yugoslav Journalist's Impression of His Visit* (in SWB/FE/5801/B collection), 29 April 1978, E3/2306, ERN (EN) 00010083; Slavko Stanić, "Kampuchea – Socialism Without a Model", *Socialist Thought and Practice*, October 1978, E3/2307, ERN (EN) 00046706, p. 74 (YUN Yat told journalists that Buddhism was incompatible with the revolution because it had been an instrument of exploitation).
[4640] KAING Guek Eav *alias* Duch Response to the Co-Investigating Judges' Questions, 21 October 2008, E3/15, ERN (EN) 00251374, fn. 1.
[4641] *A Plea for International Support* (Time Magazine), 10 March 1980, E3/628, ERN (EN) 00524518 ("Q. If your government regains control of Kampuchea, would you do things differently than you did before? A. If we succeed

view of this Chamber, this allows the clear inference that he was aware that Buddhism was prohibited in the DK and that this had consequences for the followers of Buddhism and for their places of education and worship.

1664. While the Trial Chamber, without further reasoning, should not have relied on the Famiglia Cristiana interview to establish KHIEU Samphân's contemporaneous knowledge that crimes were being committed by the DK,[4642] the Trial Chamber's conclusion that he was aware that Buddhists were a targeted group is supported by a wealth of other evidence.[4643] The error was, thus, not material and it could not overturn the overall conclusion. The rest of the argument is dismissed.[4644]

1665. Third, KHIEU Samphân alleges that the Trial Chamber erred by relying on a speech given by him in January 1976, while he was still Deputy Prime Minister of GRUNK and before he was President of the State Presidium.[4645] While this speech is cited in a section of the Trial Judgment concerning KHIEU Samphân's role as President of the State Presidium,[4646] the paragraph in question explicitly deals with KHIEU Samphân's speeches "[t]hroughout the DK period".[4647] The Supreme Court Chamber does not therefore find any error.

1666. Finally, KHIEU Samphân submits that the Trial Chamber relied on a number of speeches "in a biased and partial way" as these, in his view, do not demonstrate that he "approved or supported any criminal aspect of the common purpose, nor that he was aware of alleged crimes".[4648] The Supreme Court Chamber has addressed KHIEU Samphân's constant and baseless, claims that he supported only a hypothetical non-criminal plan.[4649] His claims are otherwise vague and unsubstantiated and thus dismissed.

3. Member of the Central and Standing Committees

in defeating the Vietnamese, we will use currency, we will permit more freedom of movement by our citizens. People will be free to practice religion.").
[4642] Trial Judgment (E465), Section 18.1.3 'Knowledge Arising After the Commission of the Crimes', para. 4253 (fn. 13875).
[4643] See evidence cited in Trial Judgment (E465), paras 4250-4253.
[4644] KHIEU Samphân's Appeal Brief (F54), para. 1701.
[4645] KHIEU Samphân's Appeal Brief (F54), para. 1702 (fn. 3285), referring to Trial Judgment (E465), para. 598 (fns 1876-1880), referring to *Phnom Penh reportage on third national congress: Report of Khieu Samphan* (in FBIS collection), 5 January 1976, E3/273.
[4646] Trial Judgment (E465), Section 8.3.2 'Roles and Functions – KHIEU Samphan: Roles During the DK Period: President of the State Presidium'.
[4647] Trial Judgment (E465), para. 598.
[4648] KHIEU Samphân's Appeal Brief (F54), para. 1702.
[4649] See *infra* Section VIII.B.2.

a. Membership in the Central Committee

1667. Although KHIEU Samphân concedes that he was "first an alternate member and then a full member" of the Central Committee,[4650] in his view, the Trial Chamber made several errors in assessing the significance of his role. He submits the Trial Chamber erred by (1) extending the powers of the Central Committee; (2) attributing decisions of the Standing Committee to the Central Committee; (3) "conveniently" dating KHIEU Samphân's admission as a full member of the Central Committee in order to implicate him in the Central Committee decision of 30 March 1976; and (4) finding that he participated in Party Congresses.[4651] The Co-Prosecutors respond that there are no errors in the Trial Chamber's findings, and that KHIEU Samphân overlooks the totality of the evidence and misrepresents some of the Trial Chamber's findings.[4652]

i. Membership

1668. The Trial Chamber found that KHIEU Samphân became a candidate member of the CPK Central Committee at the Party's Third Congress in 1971, and a full-rights member at the Fourth Congress in January 1976.[4653]

1669. KHIEU Samphân submits that the Trial Chamber "conveniently" dated his admission as a full-member in order to implicate him in the Central Committee decision of 30 March 1976.[4654] He contends, first, that the Trial Chamber erred in its determination that the Fourth Party Congress took place in January 1976, as the CPK Statute adopted by that Congress is undated and the remaining evidence does not support that conclusion.[4655] In this respect, KAING Guek Eav *alias* Duch, on whose testimony the Trial Chamber relied, only mentioned 1976 after it was posed to him as part of a question and was in any case talking about the CPK Statute and not the Congress.[4656] Further, KHIEU Samphân submits that Craig ETCHESON, who claims that the CPK Statute was adopted at a Party Congress that was held in January 1976, relies on a document that does not mention the Fourth Party Congress, the CPK Statutes, or the date of 1976.[4657]

[4650] KHIEU Samphân's Appeal Brief (F54), para. 1705.
[4651] KHIEU Samphân's Appeal Brief (F54), paras 1706-1729.
[4652] Co-Prosecutors' Response (F54/1), paras 890-897.
[4653] Trial Judgment (E465), paras 226, 355, 574, 600. See also Trial Judgment (E465), para. 343.
[4654] KHIEU Samphân's Appeal Brief (F54), paras 1706, 1720.
[4655] KHIEU Samphân's Appeal Brief (F54), para. 1721.
[4656] KHIEU Samphân's Appeal Brief (F54), fn. 3325.
[4657] KHIEU Samphân's Appeal Brief (F54), fn. 3325.

1670. Moreover, KHIEU Samphân submits that there was insufficient evidence for the Trial Chamber to conclude that he was admitted to full membership in January 1976, rather than later in 1976, and as such he "should have been given the benefit of the doubt".[4658] Further, he says that some of the evidence cited does not support the Trial Chamber's conclusion, as KAING Guek Eav *alias* Duch, SALOTH Ban, and IENG Sary as reported by Stephen HEDER all placed KHIEU Samphân's admission as a full-rights member of the Central Committee in 1976, without specifying the month.[4659] Further, KHIEU Samphân submits that he has "[e]ssentially […] always stated that he became a full member in 1976, but either without specifying the month or referring to the beginning of 1976 or more often […] to June 1976".[4660] Finally, KHIEU Samphân disputes the Trial Chamber's use of the evidence of Stephen HEDER and Philip SHORT. Stephen HEDER testified that he had been told in interviews that the CPK Statute was adopted in January 1976 and linked this to the Fourth Party Congress. However, KHIEU Samphân submits that Stephen HEDER also "mentioned the potential existence of a reference in documents, which he did not give".[4661] On the other hand, the Trial Chamber omitted Philip SHORT's assertion that KHIEU Samphân was promoted to full member at the same time as he was appointed Head of State, which the Trial Chamber found to have happened on 30 March 1976.[4662]

1671. The Co-Prosecutors respond that there was sufficient evidence that KHIEU Samphân became a full-rights member of the Central Committee during the Fourth Party Congress in January 1976.[4663] Specifically, KHIEU Samphân misrepresents the testimony of Stephen HEDER, who testified that KHIEU Samphân was elevated from alternate to full membership of the Central Committee at a Party Congress in January 1976, and KHIEU Samphân himself acknowledged that he became a full member between late 1975 and early 1976.[4664]

1672. The Supreme Court Chamber's review of the evidence, set out in more detail below, suggests that the Fourth Party Congress, the adoption of the CPK Statute and KHIEU Samphân's promotion were interrelated, in light of the fact that the CPK Statute was adopted by the Party Congress and that appointing members of the Central Committee fell to the Party

[4658] KHIEU Samphân's Appeal Brief (F54), paras 1721-1722.
[4659] KHIEU Samphân's Appeal Brief (F54), para. 1721 (fn. 3326).
[4660] KHIEU Samphân's Appeal Brief (F54), para. 1721.
[4661] KHIEU Samphân's Appeal Brief (F54), para. 1721.
[4662] KHIEU Samphân's Appeal Brief (F54), para. 1721, referring to Trial Judgment (E465), para. 596.
[4663] Co-Prosecutors' Response (F54/1), para. 891.
[4664] Co-Prosecutors' Response (F54/1), para. 891, referring to T. 15 July 2013 (Stephen HEDER), E1/223.1, p. 43; T. 29 May 2013 (KHIEU Samphân), E1/198.1, p. 87.

Congress, which convened very rarely and only twice during the DK period.[4665] This Chamber therefore finds no error in the Trial Chamber's approach when it assessed the three events holistically and rejects KHIEU Samphân's attempts to separate them.

1673. Most of the evidence points to January 1976 as the relevant date.[4666] Specifically, Stephen HEDER stated that KHIEU Samphân was elevated from alternative to full member of the Central Committee at a Party Congress in January 1976.[4667] The Trial Chamber was entitled to prefer Stephen HEDER's evidence to that of Philip SHORT, who thought that KHIEU Samphân was elected in March 1976, considering that the Central Committee was not empowered to appoint its own members, and that there is no evidence to support the notion that a Congress took place on 30 March 1976. Similarly, Craig ETCHESON stated that the CPK Statute was adopted at a Party Congress in January 1976.[4668] While KHIEU Samphân has at times publicly asserted that he was promoted to full membership of the Central Committee in mid-1976[4669] or June 1976,[4670] he told ECCC investigators that he was promoted in 1976,[4671] and told the Trial Chamber, albeit not under oath, that he became a full member in "late 1975 or early 1976".[4672] The Supreme Court Chamber concludes that it was not unreasonable for the Trial Chamber to have taken into account KHIEU Samphân's statements to the ECCC investigators.

1674. Furthermore, it was not unreasonable for the Trial Chamber to consider as corroborative of this conclusion other evidence which indicates that KHIEU Samphân was promoted in 1976, even though the month is not specified. Thus, IENG Sary told Stephen HEDER that KHIEU Samphân "became a Central Committee member in 1976, although already in 1975 he was *de*

[4665] See Trial Judgment (E465), paras 343, 345; 1976 CPK Statute, undated, E3/130, ERN (EN) 00184044, p. 23 (Art. 21).
[4666] Additional evidence, not cited by the Trial Chamber in this regard, points to January 1976 as the date of the Fourth Party Congress. See Elizabeth Becker, *When the War was Over: Cambodia and the Khmer Rouge Revolution*, (First Public Affairs Edition, 1998), E3/20, ERN (EN) 00237887, p. 182; *Conclusion of Pol Pot Speech at 27 Sep Phnom Penh Meeting* (in FBIS collection), 2 October 1978, E3/294, ERN (EN) 00170164, 00170166.
[4667] T. 11 July 2013 (Stephen HEDER), E1/222.1, pp. 19, 91; T. 15 July 2013 (Stephen HEDER), E1/223.1, p. 43. See also T. 10 July 2013 (Stephen HEDER), E1/221.1, p. 76. See also Stephen Heder, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* (2004), March 2004, E3/48, ERN (EN) 00393581, p. 93.
[4668] Written Record of Analysis of Craig ETCHESON, 18 July 2007, E3/494, ERN (EN) 00142828, p. 3.
[4669] *Letter from Khieu Samphân: Appealing to All My Compatriots*, 16 August 2001, E3/205, ERN (EN) 00149526.
[4670] Khieu Samphân, *Cambodia's Recent History and the Reasons Behind the Decisions I Made* (2004), E3/18, ERN (EN) 00103793, p. 140.
[4671] Written Record of Interview of KHIEU Samphân, 13 December 2007, E3/27, ERN (EN) 00156751, p. 11.
[4672] T. 29 May 2013 (KHIEU Samphân), E1/198.1, p. 87.

facto involved in Central Committee affairs".[4673] While the year 1976 was put to KAING Guek Eav *alias* Duch in questioning about the CPK Statute, he not only confirmed this as the year it was adopted but also testified that he saw and studied the Statute in 1976 and identified a copy of it in court.[4674]

1675. The Supreme Court Chamber has identified an error in the Trial Chamber's reasoning in that KAING Guek Eav *alias* Duch did not specify when KHIEU Samphân was promoted to full Central Committee membership.[4675] Furthermore, SALOTH Ban stated that "if he was a member", KHIEU Samphân "would" have been a member of the Central Committee rather than the Standing Committee.[4676] It is thus clear that he did not know when KHIEU Samphân was promoted from candidate to full member, and the Trial Chamber erred by relying on him on this point. Nevertheless, these errors do not invalidate the Trial Chamber's overall conclusion as to KHIEU Samphân's January 1976 appointment, and his arguments on this point are dismissed.

ii. Scope of Duties and Powers of the Central Committee

1676. KHIEU Samphân submits, "[a]s a preliminary matter", that the Trial Chamber erred in finding that there were between 20 and 30 Central Committee members, as well as reserve members.[4677] The Co-Prosecutors do not respond to this contention. The Supreme Court Chamber notes, first, that the Trial Chamber's finding does not differ significantly from KHIEU Samphân's own estimation that the Central Committee "consisted of more than 30 members".[4678] Further, this Chamber is unable to ascertain what bearing the number of Central Committee members has on KHIEU Samphân's criminal responsibility and his submissions do not clarify this point. This argument is therefore dismissed.

1677. KHIEU Samphân avers that the Trial Chamber erred in finding that the Central Committee had the power to appoint members of the Standing Committee, as it relied solely on written notes of the 1971 CPK Statute whereas this required corroboration.[4679] The Co-

[4673] T. 15 July 2013 (Stephen HEDER), E1/223.1, p. 4; IENG Sary Interview Notes by Stephen HEDER, 4 January 1999, E3/573, ERN (EN) 00427599.
[4674] T. 21 March 2012 (KAING Guek Eav), E1/52.1, pp. 70-73. KAING Guek Eav *alias* Duch also volunteered the year in testimony in 2009. See T. 8 June 2009 (KAING Guek Eav), E3/5797, p. 68.
[4675] T. 10 April 2012 (KAING Guek Eav), E1/62.1, p. 73.
[4676] T. 26 April 2012 (SALOTH Ban), E1/69.1, pp. 1, 3.
[4677] KHIEU Samphân's Appeal Brief (F54), para. 1707, referring to Trial Judgment (E465), para. 356. See also Trial Judgment (E465), para. 355.
[4678] Written Record of Interview of KHIEU Samphân, 13 December 2007, E3/27, ERN (EN) 00156751.
[4679] KHIEU Samphân's Appeal Brief (F54), para. 1708, referring to Trial Judgment (E465), paras 357, 344.

Prosecutors respond that the Trial Chamber relied on the totality of the evidence, and not only the CPK Statute of 1971, to conclude that the Central Committee had the power of appointment.[4680] They point to evidence of the appointments actually made by the Central Committee in its decision of 30 March 1976, including that of KHIEU Samphân as President of the State Presidium.[4681]

1678. The Supreme Court Chamber has found no error in the Trial Chamber's finding that the Central Committee appointed KHIEU Samphân as President of the State Presidium by its decision of 30 March 1976.[4682] While the 30 March 1976 decision also made a number of other appointments, the Supreme Court Chamber notes that KHIEU Samphân was not held criminally responsible based on his other Central Committee appointments.[4683] The objection has no relevance to the charges at issue and is dismissed as it does not show a miscarriage of justice.

1679. KHIEU Samphân next raises a number of arguments concerning the relationship between the Central and Standing Committees, seeking to demonstrate that the Central Committee "had no effective power and was merely a forum for the dissemination of decisions already taken by the [Standing Committee]".[4684] He submits, first, that the Trial Chamber erred by not explaining why it relied on the CPK Statutes to find that the Central Committee was responsible for monitoring the implementation of Party policies, when it had earlier noted the difference between the theory of the Statutes and reality.[4685] Second, he argues that the Trial Chamber distorted his writings when it found that he "acknowledged" that the Central Committee "issued directives".[4686] KHIEU Samphân submits that the Trial Chamber failed to take account of his statements, supported by other evidence, that the Central Committee was in fact subordinate to the Standing Committee and merely disseminated its decisions.[4687]

1680. The Co-Prosecutors respond that the Trial Chamber relied on the totality of the evidence, and not just the 1971 CPK Statute to conclude that the Central Committee was

[4680] Co-Prosecutors' Response (F54/1), para. 892.
[4681] Co-Prosecutors' Response (F54/1), para. 893, referring to Trial Judgment (E465), paras 414, 596.
[4682] See *infra* Section VIII.A.3.a.iii.
[4683] Ibid.
[4684] KHIEU Samphân's Appeal Brief (F54), para. 1710.
[4685] KHIEU Samphân's Appeal Brief (F54), paras 1709-1710.
[4686] KHIEU Samphân's Appeal Brief (F54), paras 1709-1710.
[4687] KHIEU Samphân's Appeal Brief (F54), para. 1710. For this argument, KHIEU Samphân seeks to incorporate by reference arguments raised in his Case 002/01 Appeal Brief. See Case 002/01 KHIEU Samphân's Appeal Brief (F17).

responsible for monitoring the implementation of Party policies.[4688] They argue that KHIEU Samphân fails to acknowledge the weight of evidence demonstrating that the Central Committee monitored and implemented CPK policies regarding worksites, cooperatives, security centres, purges, and measures against specific groups, through the circulation of instructions and decisions, the dissemination of work plans in the zones and sectors and through training sessions.[4689]

1681. On these points, KHIEU Samphân repeats, and indeed seeks to incorporate by reference,[4690] arguments considered, and dismissed, by the Supreme Court Chamber in Case 002/01.[4691] The Supreme Court Chamber recalls its findings on these arguments, from which it sees no cogent reason to depart:

> [C]ontrary to what [KHIEU Samphân] suggests, the Trial Chamber's findings were not contradictory, but portrayed a nuanced picture of the Central Committee's functions, expressly acknowledging that the ultimate decision-making power lay elsewhere. This, however, does not exclude that some decisions were indeed taken at the level of the Central Committee and KHIEU Samphân has not established that the Trial Chamber's findings in this regard were unreasonable. Notably, the Trial Chamber relied upon excerpts of KHIEU Samphân's book, according to which the Central Committee gave certain 'directives' on a variety of issues. Although a footnote to one of those excerpts indicates that the Central Committee was not an 'executive organization', but it only 'discussed implementation of policies created by the [Standing Committee], this is not incompatible with the Trial Chamber's finding, which, as noted above, specifically accepted that the Standing Committee was the ultimate decision-maker.[4692]

1682. Finally, KHIEU Samphân submits that the Trial Chamber erred in its conclusion that regular telegrams sent by zone secretaries showed that the Central and Standing Committees were monitoring the implementation of the Party's policies in accordance with their role.[4693] Specifically, KHIEU Samphân argues that the Trial Chamber relied upon telegrams addressed to "*Angkar*", "*Angkar* 870" and "Committee 870" and copying members of the Standing Committee;[4694] other documents required weekly reports to be sent to Office 870 or the

[4688] Co-Prosecutors' Response (F54/1), para. 892.
[4689] Co-Prosecutors' Response (F54/1), para. 892.
[4690] KHIEU Samphân's Appeal Brief (F54), para. 1710 (fn. 3300), referring to Case 002/01 KHIEU Samphân's Appeal Brief (F17), paras 122-123.
[4691] Case 002/01 Appeal Judgment (F36), paras 1045-1047.
[4692] Case 002/01 Appeal Judgment (F36), para. 1047. See also Trial Judgment (E465), paras 357 (the Trial Chamber contrasted the provisions of the CPK Statute with the effective role played by the Standing Committee), 600 (the Trial Chamber explicitly considered and discussed KHIEU Samphân's claim that the Central Committee was not an "executive organization").
[4693] KHIEU Samphân's Appeal Brief (F54), para. 1709.
[4694] KHIEU Samphân's Appeal Brief (F54), para. 1711, referring to Trial Judgment (E465), para. 3964 (fns 13189-13193), 3899 (fn. 12999).

Standing Committee, and not the Central Committee;[4695] and that witnesses testified that telegrams were delivered only to POL Pot and NUON Chea.[4696] As such, according to KHIEU Samphân, the Trial Chamber could not infer from his Central Committee membership, that he was well-informed.[4697]

1683. The Trial Chamber considered, generally, that KHIEU Samphân was "placed within a small group of well-informed CPK members as a result of his membership of the Central Committee".[4698] More specifically, the Trial Chamber found that KHIEU Samphân had knowledge of the effects of CPK policies on the ground on the basis of a number of telegrams addressed to or copying *Angkar*, *Angkar* 870, Committee 870, Office 870 or Office, which do not contain an addressee, as well as reports from the sector to the zone level "[i]n light of the systematic vertical reporting regime within the ranks of the CPK".[4699] The Trial Chamber tied these reports to the Central Committee's mandate to monitor the implementation of the Party's policies.[4700]

1684. The Supreme Court Chamber accepts that the Trial Chamber's findings do not straightforwardly support the proposition that all members of the Central Committee would necessarily have received all reports addressed to *Angkar*, although some or all may well have received them. This Chamber notes in particular the Trial Chamber's stated uncertainty as to which persons or organs were encompassed by the term *Angkar* and the various iterations of "870".[4701] The Supreme Court Chamber notes the Trial Chamber's conclusion that day-to-day executive power was delegated to the Standing Committee and that, by contrast, the Central Committee met relatively infrequently,[4702] and that documents requiring updates were to be

[4695] KHIEU Samphân's Appeal Brief (F54), para. 1711, referring to Decision of the Central Committee Regarding a Number of Matters, 30 March 1976, E3/12, ERN (EN) 00182809-00182810; Minutes of Meeting on Base Work, 8 March 1976, E3/232, ERN (EN) 00182633-00182634.
[4696] KHIEU Samphân's Appeal Brief (F54), para. 1711.
[4697] KHIEU Samphân's Appeal Brief (F54), para. 1712.
[4698] Trial Judgment (E465), para. 604. See also Trial Judgment (E465), para. 624.
[4699] Trial Judgment (E465), para. 3913 (fns 13051-13053). See also Trial Judgment (E465), paras 3964 (fns 13189-13193), 3899 (fn. 12999).
[4700] Trial Judgment (E465), paras 3913 ("The Chamber finds that as part of its mandate to monitor the implementation of the Party's policies, the Central Committee (and in particular the Standing Committee) was fully apprised of issues affecting the livelihood of workers and peasants at bases, cooperatives and worksites including food shortages, health issues and the lack of medicine throughout the DK period."); para. 3964 ("The Chamber is satisfied that these telegrams demonstrate the monitoring by the Central and Standing Committees of the implementation of the Party's policies in accordance with their mandates.").
[4701] Trial Judgment (E465), Section 5.1.5: Administrative Structures: Structure of the CPK: Office 870' and Section 5.1.8: 'Administrative Structures: Structure of the CPK: Angkar'.
[4702] Trial Judgment (E465), paras 355, 357.

sent to Office 870 or the Standing Committee.[4703] The Trial Chamber's conclusion that reports were sent to the Central Committee seems to be derived mainly from its theoretical statutory power to monitor the implementation of Party policy rather than concrete evidence that the Central Committee did so.

1685. Nevertheless, most telegrams relied upon by the Trial Chamber in support of KHIEU Samphân's knowledge were addressed or copied to "Office", that is, Office 870, where KHIEU Samphân worked from October 1975 onwards.[4704] The Trial Chamber established that there was a vertical reporting system whereby reports from sector committees to the zone level were forwarded up, usually to Office 870.[4705] Being one of very select members of Office 870, which was moreover at the apex of power given its mandate to oversee the implementation of the Standing Committee decisions, the Supreme Court Chamber finds it absolutely implausible that KHIEU Samphân was ignorant of the information flowing to that office. Further, the Supreme Court Chamber has upheld the Trial Chamber's finding that KHIEU Samphân was kept informed of DK trade and commerce matters by virtue of his position in the Commerce Committee.[4706] The Supreme Court Chamber thus concludes that the basis of KHIEU Samphân's knowledge was clearly established. KHIEU Samphân's submissions are therefore dismissed.

iii. Attributing Standing Committee Decisions to the Central Committee

1686. KHIEU Samphân submits that the Trial Chamber "conveniently and erroneously attributed important decisions made by the Standing Committee to the Central Committee"[4707] with respect to four decisions: (1) the May 1972 decision to close markets, end the use of money, and organise cooperatives in the liberated zones (decision 1);[4708] (2) the mid-1974 decision to close to the door to Party membership in order to prevent spies from infiltrating the

[4703] See, *e.g.*, Decision of the Central Committee Regarding a Number of Matters, 30 March 1976, E3/12, ERN (EN) 00182809-00182810; Minutes of Meeting on Base Work, 8 March 1976, E3/232, ERN (EN) 00182633-00182634.
[4704] See Trial Judgment (E465), para. 364; Trial Judgment (E465), Section 8.3.4.1: 'Roles and Functions – KHIEU Samphân: Roles During the DK Period: Residual Functions: Membership of Office 870'. KHIEU Samphân's challenges to the Trial Chamber's findings of his role in Office 870 are further addressed below at See *infra* Section VIII.A.4.b.
[4705] See Trial Judgment (E465), Section 6.2.2: 'Communication Structures: Lines of Communication: Between the Party Centre and the Zones or Autonomous Sectors', para. 492. See also Trial Judgment (E465), para. 3913 (fn. 13053).
[4706] See *infra* Section VIII.A.4.c.i.
[4707] KHIEU Samphân's Appeal Brief (F54), para. 1713.
[4708] KHIEU Samphân's Appeal Brief (F54), para. 1714, referring to Trial Judgment (E465), paras 239, 3872.

Party (decision 2);[4709] (3) the June 1974 decision to undertake the final assault and evacuation of Phnom Penh in the dry season of 1974-1975 (decision 3);[4710] and (4) the 30 March 1976 'Decision of the Central Committee Regarding a Number of Matters' (decision 4).[4711]

1687. Further, KHIEU Samphân submits that even if the four decisions had been made by the Central Committee, "it was never established either that a meeting took place or that [he] was present."[4712] With respect to decision 2, he states that he was only an "alternate member without the right to vote" and that there was no evidence that he was present.[4713] As for decision 3, KHIEU Samphân points out that the Trial Chamber explicitly found that he did not attend.[4714] As such, the Trial Chamber should have "recognised that not all members necessarily attended the meetings".[4715] As such, the Trial Chamber "could not infer from these decisions and from KHIEU Samphân's membership of the Central Committee any knowledge, intent or contribution to the crimes".[4716]

1688. With respect to decision 4, KHIEU Samphân also argues that the Trial Chamber erred in finding that the Central Committee "would have" appointed him President of the State Presidium.[4717] He submits that the Trial Chamber should have properly considered that all of these decisions were made instead by the Standing Committee.[4718]

1689. The Co-Prosecutors respond that, as under the DK constitution the President was not a member of the government, there is no reason to expect that he would have been appointed by the Standing Committee; the title of the 30 March 1976 decision clearly indicates that it was issued by the Central Committee; and being submitted to the Standing Committee's effective authority does not preclude an initial appointment by the Central Committee.[4719]

1690. The Trial Chamber found that KHIEU Samphân was "placed within a small group of well-informed CPK members as a result of his membership of the Central Committee".[4720] In

[4709] KHIEU Samphân's Appeal Brief (F54), para. 1715, referring to Trial Judgment (E465), paras 402, 3940.
[4710] KHIEU Samphân's Appeal Brief (F54), para. 1716, referring to Trial Judgment (E465), paras 230, 3880.
[4711] KHIEU Samphân's Appeal Brief (F54), para. 1717, referring to Trial Judgment (E465), paras 414, 416, 596, 3739, 3855-3856, 3899, 3955, 4259-4260.
[4712] KHIEU Samphân's Appeal Brief (F54), para. 1718.
[4713] KHIEU Samphân's Appeal Brief (F54), para. 1714 (fn. 3309).
[4714] KHIEU Samphân's Appeal Brief (F54), para. 1718.
[4715] KHIEU Samphân's Appeal Brief (F54), para. 1718.
[4716] KHIEU Samphân's Appeal Brief (F54), para. 1719.
[4717] KHIEU Samphân's Appeal Brief (F54), para. 1693.
[4718] KHIEU Samphân's Appeal Brief (F54), para. 1718.
[4719] Co-Prosecutors' Response (F54/1), para. 922.
[4720] Trial Judgment (E465), paras 604, 624.

its discussion of his awareness of the substantial likelihood that crimes would be committed, the Trial Chamber took account of his knowledge of the CPK's *modus operandi* pre-1975. The Trial Chamber concluded that "[b]etween KHIEU Samphan's induction into the CPK ranks in 1969 and the Party's victory on 17 April 1975, policies were planned, tested and implemented in 'liberated' areas, and patterns of conduct emerged which were evident to KHIEU Samphân as a prominent member of the CPK leadership".[4721] For this finding, the Trial Chamber relied, *inter alia,* on KHIEU Samphân's knowledge of decision 1[4722] and decision 2.[4723]

1691. The Trial Chamber did not refer directly to decision 3 in its discussion of KHIEU Samphân's knowledge or contribution to the crimes. Nevertheless, decision 3 was discussed in the context of the existence of the policy to evacuate cities, this was closely linked to establishing cooperatives and worksites,[4724] of which KHIEU Samphân was found to be aware. As such, the Supreme Court Chamber concludes that KHIEU Samphân's knowledge of decision 3 forms a part of the basis for his individual criminal responsibility.

1692. At the outset, the Supreme Court Chamber notes that KHIEU Samphân's presence at meetings is not dispositive of his knowledge of the decisions taken thereat. The Trial Chamber was not required to establish beyond a reasonable doubt either that a meeting took place or that he was present. The Trial Chamber found that KHIEU Samphân was aware of the June 1974 plan to take Phnom Penh (decision 3) despite concluding on the evidence that he was not present when the decision was formulated.[4725] Further, this Chamber concludes that there is a reasonable inference that KHIEU Samphân was aware of decisions taken by the Central Committee simply by reason of his membership, irrespective of whether these decisions were taken before he was admitted to full membership and accorded voting rights or whether he was always present. KHIEU Samphân's arguments in this vein are therefore dismissed.

[4721] Trial Judgment (E465), para. 4207.
[4722] Trial Judgment (E465), para. 4207 (fn. 13731), referring to Trial Judgment (E465), para. 239. The Trial Chamber noted that KHIEU Samphân was "then part" of the Central Committee to highlight he would have been aware of it.
[4723] Trial Judgment (E465), para. 4207 (fn. 13733), referring to Trial Judgment (E465), paras 3937, 3940. The Trial Chamber also relied on this decision in establishing the existence of the policy against enemies. See Trial Judgment (E465), paras 402, 3940.
[4724] Trial Judgment (E465), paras 230, 3880.
[4725] See Trial Judgment (E465), Section 8.1.3.1 'Roles and Functions – KHIEU Samphan: Background Information and Pre-DK Period: 1970 – 17 April 1975: Attendance at June 1974 Central Committee and April 1975 meeting of CPK leaders', paras 583-588; Trial Judgment (E465), para. 230 (fn. 548). The Trial Chamber also did not find that KHIEU Samphân attended any meeting in May 1972 (decision 1). See Trial Judgment (E465), para. 227.

1693. As KHIEU Samphân was not held liable for his contribution to crimes *via* participating in making decisions 1 to 3, which pre-date the establishment of the DK and the indictment period as a member of the Central Committee, the Supreme Court Chamber is not persuaded that KHIEU Samphân's knowledge of the decisions hinges on whether they were taken by the Central or Standing Committees. Rather, at issue is whether a reasonable Trial Chamber could have concluded that KHIEU Samphân was aware that these decisions were taken. The Supreme Court Chamber takes note of these considerations as it considers KHIEU Samphân's submissions with respect to decisions 1, 2, and 3.

1694. With respect to decision 1, KHIEU Samphân submits that the Trial Chamber should have preferred the evidence of NUON Chea to that of Philip SHORT, to find that the decision was taken by the Standing Committee rather than the Central Committee.[4726] The Co-Prosecutors respond that KHIEU Samphân fails to demonstrate an error, and point to additional evidence that the decision was taken by "the entire Party".[4727] In any case, the Co-Prosecutors submit that KHIEU Samphân fails to demonstrate that it was unreasonable to find that he knew about these "notorious" decisions.[4728]

1695. KHIEU Samphân further submits that the Trial Chamber erred in relying on articles contained in three editions of the *Revolutionary Flag* publication in support of its conclusion that the Central Committee took decision 2, since these referred not to the Central Committee but to the "Party".[4729] As for decision 3, KHIEU Samphân argues that the Trial Chamber failed to explain why it did not accept NUON Chea's testimony that the final assault and evacuation of Phnom Penh was discussed at an extraordinary session of the Standing Committee, but instead relied on a *Revolutionary Flag* issue, which reported a meeting of the Central Committee.[4730]

1696. The Co-Prosecutors respond that the Trial Chamber attributed to the Central Committee a June 1974 meeting at which both decisions 2 and 3 were taken, and KHIEU Samphân failed to show an error in this finding.[4731] The Trial Chamber correctly assessed the evidence *in toto,*

[4726] KHIEU Samphân's Appeal Brief (F54), para. 1714.
[4727] Co-Prosecutors' Response (F54/1), para. 894.
[4728] Co-Prosecutors' Response (F54/1), para. 894.
[4729] KHIEU Samphân's Appeal Brief (F54), para. 1715, referring to Trial Judgment (E465), para. 402 (fn. 1204).
[4730] KHIEU Samphân's Appeal Brief (F54), para. 1716.
[4731] Co-Prosecutors' Response (F54/1), para. 896.

submit the Co-Prosecutors, including NUON Chea's "inconsistent" evidence on whether it was a meeting of the Central Committee, Standing Committee or members of both.[4732]

1697. The Supreme Court Chamber notes that the Trial Chamber explicitly took NUON Chea's evidence into account in its discussions of both decisions 1 and 3, [4733] before choosing not to rely on it in the manner disputed by KHIEU Samphân. Further, with respect to decisions 1, 2, and 3, KHIEU Samphân merely advances a different interpretation of the evidence without demonstrating that the Trial Chamber's conclusion was unreasonable. The Supreme Court Chamber declines to disturb the Trial Chamber's findings on this basis alone.

1698. The Supreme Court Chamber nevertheless wishes to note that ample evidence, aside from his membership of the Central Committee, supports the Trial Chamber's conclusion that KHIEU Samphân was aware of all three decisions. As for decision 1, relevant are KHIEU Samphân's prominent positions in the GRUNK, FUNK and CPK; his role in preparing FUNK propaganda materials, conducting political training sessions and issuing press statements and radio appeals; tours of CPK-"liberated" areas in 1972 and 1973; and his diplomatic role in GRUNK and FUNK.[4734] An awareness of key CPK policy was indispensable for carrying out all of these functions. With respect to decision 3, KHIEU Samphân made radio announcements in December 1974 the day before the attack by the Cambodian People's National Liberation Armed Forces,[4735] which continued throughout the invasion of Phnom Penh,[4736] and met with senior leaders to discuss the evacuation of Phnom Penh in April 1975.[4737] KHIEU Samphân has also publicly offered rationales for the implementation of cooperatives pre-1975 (decision 1),[4738] and the timing of the attack on Phnom Penh (decision 3).[4739] Finally, decisions 1,[4740] 2[4741], and 3[4742] were publicised in *Revolutionary Flag* magazines published in the early period of the DK, the contents of which KHIEU Samphân would have been aware. The Supreme Court Chamber thus concludes that KHIEU Samphân failed to establish that the Trial Chamber erred

[4732] Co-Prosecutors' Response (F54/1), para. 896 (fn. 3098).
[4733] Trial Judgment (E465), paras 239 (fn. 570) (decision 1), 230 (fn. 547) (decision 3).
[4734] See Trial Judgment (E465), paras 576-580.
[4735] See Trial Judgment (E465), para. 231.
[4736] See Trial Judgment (E465), paras 231-232.
[4737] See Trial Judgment (E465), paras 584-585.
[4738] See Trial Judgment (E465), paras 240-241.
[4739] See Trial Judgment (E465), para. 230.
[4740] Revolutionary Flag, December 1975-January 1976, E169/4/1.1.2, ERN (EN) 00865708-00865709; Revolutionary Flag, September-October 1976, E3/10, ERN (EN) 00450510, 00450511. See also Revolutionary Flag, February-March 1976, E3/166, ERN (EN) 00517844, 00517819; *Third Anniversary of the Organisation of Peasant Cooperatives*, 20 May 1976, E3/50, ERN (EN) 00636009.
[4741] Revolutionary Flag, March 1976, E3/166, ERN (EN) 00517844-00517845, pp. 32-33.
[4742] Revolutionary Flag, August 1975, E3/5, ERN (EN) 00401497, p. 22.

in concluding that he knew of all three decisions, irrespective of whether these were taken by the Standing or Central Committee.

1699. Finally, KHIEU Samphân challenges attribution to the Central Committee of the 30 March 1976 "Decision of the Central Committee Regarding a Number of Matters" (decision 4).[4743] The Trial Chamber relied on decision 4 to find that (1) KHIEU Samphân was appointed Chairman of the State Presidium by the CPK Central Committee on 30 March 1976[4744] and (2) as a member of the Central Committee, KHIEU Samphân contributed to the common purpose by assenting to its contents, specifically "the directive to place state power into the hands of the worker-peasants and initiatives encouraging districts to achieve the 'three tonnes of rice per hectare' target";[4745] and delegating the "right to smash" down the ranks of the CPK.[4746]

1700. KHIEU Samphân avers that the Trial Chamber erred in fact in considering that the Central Committee "would have" appointed him.[4747] In his view, the Trial Chamber's findings and the evidence better support the inference that "the appointment decision was rather taken by the Standing Committee."[4748] Further, KHIEU Samphân points out that this document does not mention its participants, no witness claimed to have seen it during the DK, and it is unsupported by additional evidence of a Central Committee meeting.[4749] Finally, KHIEU Samphân submits that the Trial Chamber did not explain why it did not take account of the views of Philip SHORT or Craig ETCHESON attributing decision 4 to the Standing Committee in Cases 002/01 or 002/02, as it did in Case 001.[4750]

1701. The Co-Prosecutors respond that KHIEU Samphân failed to demonstrate an error, as (1) the title of the 30 March 1976 decision indicates it was issued by the Central Committee, and (2) "being submitted to the [Standing Committee's] effective authority after the creation of the State Presidium and government does not exclude an initial appointment by the [Central

[4743] KHIEU Samphân's Appeal Brief (F54), paras 1693, 1717; Decision of the Central Committee Regarding a Number of Matters, 30 March 1976, E3/12, ERN (EN) 00182813.
[4744] Trial Judgment (E465), para. 596 (fn. 1868).
[4745] Trial Judgment (E465), para. 4259. See also Trial Judgment (E465), paras 1126, 3899.
[4746] Trial Judgment (E465), para. 4260. See also Trial Judgment (E465), paras 3771, 3955.
[4747] KHIEU Samphân's Appeal Brief (F54), para. 1693.
[4748] KHIEU Samphân's Appeal Brief (F54), para. 1693, referring to Trial Judgment (E465), para. 416; Minutes of Meeting of the Standing Committee: The Front, 11 March 1976, E3/197, ERN (EN) 00182640-00182641 (POL Pot made decisions following the tendered resignation of NORODOM Sihanouk with the agreement of the Standing Committee); T. 6 May 2013 (Philip Short), E1/189.1, ERN (EN) 00909381-00909382 (Central Committee meeting were very rare and gatherings to absorb decisions that were already being made by the Standing Committee).
[4749] KHIEU Samphân's Appeal Brief (F54), para. 1717.
[4750] KHIEU Samphân's Appeal Brief (F54), para. 1717, referring to Case 001 Trial Judgment (E188), para. 103.

Committee]".[4751] Further, KHIEU Samphân repeats arguments rejected by the Supreme Court Chamber in Case 002/01,[4752] and misrepresents the Trial Chamber's findings in Case 001.[4753]

1702. The Supreme Court Chamber notes that, contrary to KHIEU Samphân's suggestion, the Trial Chamber has consistently attributed decision 4 to the Central Committee.[4754] KHIEU Samphân repeats arguments raised in Case 002/01, including with respect to the evidence of Philip SHORT and Craig ETCHESON,[4755] which were considered and rejected by the Supreme Court Chamber in that appeal judgment.[4756] The Supreme Court Chamber finds no cogent reason to reopen the issue.

1703. Further, KHIEU Samphân has not shown that it was unreasonable for the Trial Chamber to find that he was appointed to the role of President of the State Presidium by decision of the CPK Central Committee. A formal decision on his appointment being issued by the Central Committee precludes neither the decision having in reality been taken by the Standing Committee nor in any way undermines the Trial Chamber's findings that the Standing Committee was the *locus* of executive power. As KHIEU Samphân does not dispute having been appointed to this position, he fails to demonstrate how an error in who appointed him could occasion a miscarriage of justice. His arguments on this point are therefore dismissed.

iv. Presence at Congresses

1704. The Trial Chamber relied on the testimonies of SAO Sarun and CHHAOM Sé,[4757] to find that both the 1976 and 1978 Congresses "were attended by hundreds of people, including […] the CPK Central Committee members", which suggests that KHIEU Samphân attended in this capacity.[4758] These Congresses "adopted policies […] concerning the overall political line in accordance with the principle of democratic centralism".[4759] At the Fourth Party Congress,

[4751] Co-Prosecutors' Response (F54/1), para. 923.
[4752] Co-Prosecutors' Response (F54/1), para. 895, referring to Case 002/01 KHIEU Samphân's Appeal Brief (F17), paras 497-501; Case 002/01 Appeal Judgment (F36), paras 1045-1047.
[4753] Co-Prosecutors' Response (F54/1), para. 895.
[4754] Case 001 Trial Judgment (E188), para. 102 ("One of the most critical and influential directives to full-rights members of the Party from the Central Committee was the 'Decision of the Central Committee Regarding a Number of Matters' dated 30 March 1976"); Case 002/01 Trial Judgment (E313), paras 235, 237, 319, 381, 760, 764.
[4755] Case 002/01 KHIEU Samphân's Appeal Brief (F17), paras 497-498, 500-501.
[4756] Case 002/01 Appeal Judgment (F36), paras 1045-1047.
[4757] Trial Judgment (E465), para. 345 (fn. 958), referring to T. 11 June 2012 (SAO Sarun), E1/84.1, pp. 20-24; T. 11 January 2013 (CHHAOM Sé), E1/159.1, pp. 56, 68-69.
[4758] Trial Judgment (E465), para. 345.
[4759] Trial Judgment(E465), para. 4259.

the "policies" are those contained in the 1976 CPK Statute adopted by it.[4760] The Trial Chamber found that KHIEU Samphân "attended the Fifth Party Congress at which VORN Vet was arrested and thereafter sent to S-21 Security Centre for interrogation and execution".[4761]

1705. KHIEU Samphân disputes these findings and contends that there was no evidence that he was present at either Congress as would enable the Trial Chamber to hold him responsible for his participation.[4762]

1706. The Co-Prosecutors respond that KHIEU Samphân fails to demonstrate that the Trial Chamber's findings that he attended the Fourth and Fifth Party Congresses were unreasonable.[4763]

1707. Taking the Fourth Party Congress in 1976 first: KHIEU Samphân submits that the Trial Chamber did not cite any evidence in support of its conclusion that he attended.[4764] Specifically, CHHAOM Sé "did not talk about the Congress but about a military rally in September 1975".[4765] The Co-Prosecutors do not comment on the evidence of CHHAOM Sé, but submit that it was reasonable to conclude that KHIEU Samphân was present at the Fourth Party Congress, as he was appointed full-rights member of the Central Committee at that Congress.[4766]

1708. CHHAOM Sé testified that he attended a conference at Olympic Stadium in approximately, September 1975, during which Division 801 was created and "in which a pronouncement was made publicly concerning the leadership of the Khmer Rouge and also the […] anniversary of the establishment of the army".[4767] This rally was attended by a large number of senior leaders, including KHIEU Samphân, division commanders, and more than 1,000 members from all military divisions from the company level up.[4768] CHHAOM Sé's description of the event he attended does not, aside from the presence of senior CPK leaders, suggest that it was the Fourth Party Congress, which this witness would hardly have attended. Rather, the Supreme Court Chamber considers it likely that the witness attended the July 1975

[4760] See Trial Judgment (E465), paras 3738, 3765.
[4761] Trial Judgment (E465), para. 4260. See also Trial Judgment (E465), para. 4229.
[4762] KHIEU Samphân's Appeal Brief (F54), para. 1723.
[4763] Co-Prosecutors' Response (F54/1), para. 897.
[4764] KHIEU Samphân's Appeal Brief (F54), para. 1724.
[4765] KHIEU Samphân's Appeal Brief (F54), para. 1724.
[4766] Co-Prosecutors' Response (F54/1), paras 897, 102.
[4767] T. 11 January 2013 (CHHAOM Sé), E1/159.1, pp. 52, 56, 67-68.
[4768] T. 11 January 2013 (CHHAOM Sé), E1/159.1, pp. 68-69.

ceremony establishing the Revolutionary Army Kampuchea,[4769] as the witness himself tacitly accepted,[4770] or indeed the September 1975 rally marking Sihanouk's return.[4771] The Supreme Court Chamber therefore accepts KHIEU Samphân's submission and finds that the Trial Chamber erred by relying on CHHAOM Sé's testimony in this context.

1709. While the Trial Chamber may have been in error in its interpretation of CHHAOM Sé's evidence, the fact remains that there was a Party Congress in early 1976. The Supreme Court Chamber considers the notion that KHIEU Samphân would not have attended the Fourth Party Congress, the first in over five years and where he was promoted to full membership of the Central Committee, to stretch credulity. It was amply reasonable for the Trial Chamber to find that he attended on the basis of his appointment to the Central Committee, the importance of the event, and the climate of fear and suspicion which permeated the CPK.

1710. KHIEU Samphân also raises a number of challenges to the Trial Chamber's finding that he attended the Fifth Party Congress. First, he submits that the evidence underlying the Trial Chamber's conclusion that it took place on 1 and 2 November 1978, does not mention that he attended.[4772] The Co-Prosecutors respond that the Fifth Party Congress meeting minutes corroborate KHIEU Samphân's presence, as these contain his appointment as member of the Economic Committee of the Central Committee.[4773] The Supreme Court Chamber accepts that "Hom" in these handwritten minutes is meant to be a reference to "Hem", as is corroborated by the subject matter of the appointment in economics and the description of the individual in

[4769] Revolutionary Flag, August 1975, E3/5, ERN (EN) 00401488, p. 13 ("On 22 July 1975 on the occasion of the ceremony of the Communist Party of Kampuchea Center to establish the Revolutionary Amy, the comrade chairman of the High-Level Military Committee of the Party convened an important political conference of the Communist Party of Kampuchea Center for approximately 3,000 representatives of every unit of the Revolutionary Army"); Trial Judgment (E465), para. 424 ("On 22 July 1975, POL. Pot announced the formation of a new Revolutionary Army of Kampuchea ('RAK'), bringing a number of zone military divisions under the control of the Central Committee"). See also Case 002/01 Trial Judgment (E313), para. 240 ("On 22 July 1975, POL Pot announced the formation of a new Revolutionary Army of Kampuchea ('RAK'), bringing a number of Zone military brigades under the control of the Central Committee specifically, under the command of the General Staff, headed by SON Sen. The units created under the General Staff ('Centre Divisions') included […] Division 801".)

[4770] T. 11 January 2013 (CHHAOM Sé), E1/159.1, pp. 72-75, ERN (EN) 01406383-01406386 (Asked if the General Assembly he spoke about was a different meeting to that of 22 July 1975, the witness stated: "I just don't remember the exact date because I did not take note of the date and I have not had any documents with me to prove this").

[4771] Held on 12 September 1975 at the Olympic Stadium, this was attended by a large number of senior leaders as well as members of the military. See *Welcome Rally Marks Sihanouk's Return: Hu Nim Opens Rally* (in FBIS collection), 15 September 1975, E3/271, ERN (EN) 00167451; *Welcome Rally Marks Sihanouk's Return: Khieu Samphan Speech* (in FBIS collection), 15 September 1975, E3/271, ERN (EN) 00167452; *Welcome Rally Marks Sihanouk's Return: CPNLAF Representative* (in FBIS collection), 15 September 1975, E3/271, ERN (EN) 00167455.

[4772] KHIEU Samphân's Appeal Brief (F54), para. 1725.

[4773] Co-Prosecutors' Response (F54/1), para. 897.

question "in charge of unit 870". This Chamber agrees with the Co-Prosecutors that this document suggests that KHIEU Samphân was present.

1711. Second, KHIEU Samphân argues that evidence about the Fifth Party Congress suggests that "the main or only function of this unusually brief meeting was to elect a new management team".[4774] Conversely, SAO Sarun, on whose evidence the Trial Chamber relied, testified that he attended a 10 day rally in 1978 to discuss ensuring that the population had enough food and shelter, and reopening markets.[4775] Thus, KHIEU Samphân submits that the Trial Chamber could not establish that SAO Sarun was describing the Fifth Party Congress and should discount his testimony that KHIEU Samphân was present.[4776]

1712. The Co-Prosecutors respond that KHIEU Samphân fails to consider the totality of the evidence on his presence at the Fifth Party Congress.[4777] SAO Sarun, whose testimony "clearly gives rise to the reasonable conclusion that [KHIEU Samphân] was at the 1978 Party Congress",[4778] stated that he saw KHIEU Samphân "among other CPK leaders at a Party Congress reuniting all sectors, divisions, and the [Central Committee], where he was appointed Sector 105 Secretary".[4779] Further, the Co-Prosecutors submit that KAING Guek Eav *alias* Duch confirmed that "the main purpose of the Fifth Congress was to formally appoint new zone (and autonomous sector) secretaries to replace many of them who had been purged".[4780]

1713. The Supreme Court Chamber concludes that several important aspects of SAO Sarun's evidence suggest that he attended the Fifth Party Congress, including his description of the event as "the Great Congress"[4781] and "general assembly"[4782] and recollection that it was attended by a CPK representatives from across DK[4783] and the Central Committee members.[4784]

[4774] KHIEU Samphân's Appeal Brief (F54), para. 1725.
[4775] KHIEU Samphân's Appeal Brief (F54), para. 1725, referring to T. 11 June 2012 (SAO Sarun), E1/84.1, pp. 16-24.
[4776] KHIEU Samphân's Appeal Brief (F54), para. 1725.
[4777] Co-Prosecutors' Response (F54/1), para. 897.
[4778] Co-Prosecutors' Response (F54/1), para. 102, fn. 410.
[4779] Co-Prosecutors' Response (F54/1), para. 897.
[4780] Co-Prosecutors' Response (F54/1), para. 897, referring to T. 21 May 2009 (Kaing Guek Eav), E3/55, p. 13.
[4781] T. 11 June 2012 (SAO Sarun), E1/84.1, p. 24.
[4782] T. 11 June 2012 (SAO Sarun), E1/84.1, p. 17. See also T. 11 June 2012 (SAO Sarun), E1/84.1, p. 18 ("nationwide assembly").
[4783] T. 11 June 2012 (SAO Sarun), E1/84.1, pp. 17 ("representatives of all provinces"), 21 ("representatives from all the provinces across the country"), 22 (representatives "from all sectors and from all the divisions"), 22 ("from all over the country, including soldiers and civilians who held the ranks from battalion chiefs and district com or higher"), 24 ("representatives of all provinces and the representatives of all divisions").
[4784] T. 11 June 2012 (SAO Sarun), E1/84.1, pp. 20 ("Pol Pot, Nuon Chea, Khieu Samphan, Ieng Sary, Ieng Thirith, and Son Sen"), 21 (the members of the Party's Central Committee and the military), 24 ("all members of the Central Committee, namely Pol Pot, Khieu Samphan, Nuon Chea, Ieng Thirith, and Ieng Sary").

Further, SAO Sarun testified that he was appointed as Secretary of Sector 105 at this event.[4785] In this regard, the Supreme Court Chamber notes that the minutes of 2 November 1978 note that "Sa Run" was appointed in charge of Mondulkiri. This is in line with first names of persons being used throughout the minutes and provides further corroboration of SAO Sarun's attendance.[4786] In a similar vein, both Philip SHORT and KAING Guek Eav *alias* Duch gave evidence that the appointment of new zone secretaries was a main purpose of the congress.[4787]

1714. The Supreme Court Chamber accepts that there is a contradiction between the account of the Fifth Party Congress provided by Philip SHORT and the event recalled by SAO Sarun. Philip SHORT described an "unusually brief" meeting held on 1 and 2 November 1978 with the main or only function of electing a new leadership[4788] and this version was adopted by KHIEU Samphân to impugn SAO Sarun's description of an event which lasted 10 days,[4789] discussed a range of topics,[4790] and was held "during the Party's anniversary" in September.[4791] Additional evidence supports the fact that the CPK's anniversary was indeed celebrated in September 1978.[4792] Nevertheless, in light of the minutes recording the presence of both KHIEU Samphân and SAO Sarum, and the latter's appointment as Sector 105 secretary, which coincides with a main purpose of the Congress as identified by both Philip SHORT and KAING Guek Eav *alias* Duch, the Supreme Court Chamber finds that it was not unreasonable for the Trial Chamber to find that the event described by SAO Sarun was the Fifth Party Congress.

1715. Third, KHIEU Samphân submits that the Trial Chamber ignores that he described the 1976 congress as the "final" congress and thus that he had no knowledge of a congress in 1978.[4793] It was within the Trial Chamber's discretion not to rely on KHIEU Samphân's evidence on this point and to prefer that of SAO Sarun, submit the Co-Prosecutors.[4794] In the view of the Supreme Court Chamber, the Trial Chamber's reliance on KHIEU Samphân's

[4785] T. 11 June 2012 (SAO Sarun), E1/84.1, p. 26.
[4786] Document on the 5th Pol Pot-Ieng Sary Congress, 2 November 1978, E3/816, ERN (EN) 00281239-00281241.
[4787] T. 21 May 2009 (Kaing Guek Eav), E3/55, p. 13; Philip Short, *Pol Pot: The History of a Nightmare* (2004), E3/9, ERN (EN) 00396600, p. 392.
[4788] Philip Short, *Pol Pot: The History of a Nightmare* (2004), E3/9, ERN (EN) 00396600, p. 392.
[4789] T. 11 June 2012 (SAO Sarun), E1/84.1, p. 21.
[4790] T. 11 June 2012 (SAO Sarun), E1/84.1, p. 18 ("to foster the leadership over the people […] to make sure they had food to eat and […] houses to stay in"); T. 11 June 2012 (SAO Sarun), E1/84.1, p. 18 ("regarding the currency printing and money circulation[,] allowing the people to return to the cities, the reopening of markets").
[4791] T. 11 June 2012 (SAO Sarun), E1/84.1, pp. 16, 18-19.
[4792] *Conclusion of Pol Pot Speech at 27 Sep Phnom Penh Meeting* (in FBIS collection), 2 October 1978, E3/294, ERN (EN) 001700162; *KCP Central Committee 26 Sep Reception Marks Party Anniversary* (in FBIS collection), 28 September 1978, E3/76, ERN (EN) 00170445.
[4793] KHIEU Samphân's Appeal Brief (F54), para. 1726, referring to Written Record of Interview of KHIEU Samphân, 13 December 2007, E3/27, ERN (EN) 00156750-00156751.
[4794] Co-Prosecutors' Response (F54/1), para. 103.

evidence throughout the Judgment demonstrates that this statement was not "ignored", as claimed by KHIEU Samphân, but rather, in the exercise of its discretion, the Trial Chamber preferred other evidence on this point.

1716. Finally, according to KHIEU Samphân, the terms of the CPK Statute do not support the conclusion that all Central Committee members would necessarily attend Party Congresses.[4795] The Supreme Court Chamber notes that Article 21 of the 1976 CPK Statute tasks the Central Committee with calling a Party Congress "representing the entire country".[4796] Article 22, in turn, allows the Central Committee to designate "[t]he number of full-rights representatives […] representing the entire country."[4797] In the Supreme Court Chamber's view, neither of these provisions suggests that members of the Central Committee would *not* attend a Party Congress; rather, they provide for the inclusion of other CPK officials, representing the entire DK, in Congresses. This Chamber therefore rejects KHIEU Samphân's contention that Article 22 speaks to what proportion of Central Committee members would have attended a Party Congress.

1717. In addition, the Supreme Court Chamber takes account of the fact that KHIEU Samphân demonstrated his knowledge of the rationale for VORN Vet's arrest, which occurred during the Fifth Party Congress, in a 2006 interview;[4798] this Chamber also notes the potential risk to KHIEU Samphân had he been seen as disloyal for failing to attend at the height of the CPK purges and in the context of the congress being tasked with appointing replacement for purged members, and the fact that his presence would have been virtually mandatory by reason of the various offices he held. This Chamber considers that KHIEU Samphân has failed to demonstrate that the Trial Chamber erred in fact when it concluded that he attended the Fifth Party Congress.

1718. For these reasons, KHIEU Samphân's arguments with respect to his attendance at the Fourth and Fifth Party Congresses are dismissed.

b. Attendance and Participation in Meetings of the Standing Committee

[4795] KHIEU Samphân's Appeal Brief (F54), para. 1727, referring to CPK Statute, undated, E3/130, ERN (EN) 00184045 (Art. 22).
[4796] CPK Statute, undated, E3/130, ERN (EN) 00184045 (Art. 21).
[4797] CPK Statute, undated, E3/130, ERN (EN) 00184045 (Art. 22).
[4798] See Trial Judgment (E465), para. 4229; KHIEU Samphan Interview by MENG-TRY Ea and SOPHEAK Loeung, 9-11 June 2006, E3/108, ERN (EN) 00000929.

i. Position of "Unique Standing" within the Party

1719. Relying on 38 documents relating to Standing Committee meetings, the Trial Chamber held that the Standing Committee "[met] regularly throughout the DK period to discuss the implementation of the Party's political line and the administration of the country".[4799] The Trial Chamber noted that of 22 meeting minutes which listed attendees, 16 recorded "Hem" as being present, and surmised that KHIEU Samphân "attended a number of its meetings".[4800] It concluded that KHIEU Samphân was "in a position of unique standing within the Party by virtue of his attendance at numerous Standing Committee meetings, where important matters were discussed and crucial decisions were made".[4801] It went on to attribute broad knowledge of the CPK's doings to KHIEU Samphân based, in part, on this position.[4802]

1720. KHIEU Samphân alleges several factual errors in the Trial Chamber's characterisation of the evidence[4803] and submits that it could not hold him responsible on the basis of his supposed regular attendance at Standing Committee meetings or position of unique standing within the Party.[4804] According to him, the minutes allow only for the deduction that "meeting had taken place on certain dates and dealt with certain subjects".[4805] He highlights that only 16 sets of meeting minutes, dated between 9 October 1975 and 10 June 1976, list him as present.[4806] As such, the Trial Chamber erred by extrapolating that he participated in "numerous

[4799] Trial Judgment (E465), para. 3740. See also Trial Judgment (E465), paras 484, 347. The Standing Committee "met approximately every seven to 10 days, or more frequently if the circumstances so required." (Trial Judgment (E465), para. 357).
[4800] Trial Judgment (E465), para. 357, fn. 1011.
[4801] Trial Judgment (E465), para. 604. See also Trial Judgment (E465), para. 624.
[4802] Trial Judgment (E465), paras 340 (taking account of KHIEU Samphân's "position of unique standing within the Party by virtue of his attendance at numerous Standing Committee meetings" to find that he was aware of the protected status of victims at S-21), 4208 (considering KHIEU Samphân's "[attendance] at Standing Committee meetings where important matters were discussed and crucial decisions were made" as an aspect of "proximity to the Party Centre" and taking this into account to find that he had "ongoing knowledge of the development of plans, their implementation and the substantial likelihood that crimes within the scope of Case 002/02 would occur"), 4224 (taking account of KHIEU Samphân's "unique position of standing within the Party" to conclude that he knew of the arrest and death of formerly high-ranking CPK cadres), 4225 (noting, *inter alia*, KHIEU Samphân's "attendance at and participation in Standing Committee meetings" to find he knew of Doeun's arrest and subsequent execution), 4230 (considering, *inter alia*, KHIEU Samphân's "position of unique standing within the Party" to find he knowingly facilitated the arrest, imprisonment and execution of Phuong), 4236 (taking into account his "unique standing in the Party Centre" to find that he knew of the commission of crimes against Cham). See also Trial Judgment (E465), paras 4277 (recalling that "KHIEU Samphan's position of unique standing within the CPK and regular attendance at Standing Committee meetings gave him insight into the Party's operations."), 4382 (For the purpose of its gravity assessment in sentencing, the Trial Chamber recalled that "[a]s a Central Committee member and an attendee at Standing Committee meetings, KHIEU Samphan was privy to important matters and crucial decisions, and thus enjoyed elevated standing within the party.")
[4803] KHIEU Samphân's Appeal Brief (F54), paras 1731-1734, 1745-1747.
[4804] KHIEU Samphân's Appeal Brief (F54), paras 1735, 1748.
[4805] KHIEU Samphân's Appeal Brief (F54), para. 1733.
[4806] KHIEU Samphân's Appeal Brief (F54), para. 1734.

meetings", about his "regular attendance", and consequently his "position of unique standing".[4807] He stresses that the minutes give no indication of how long attendees had been present at the meetings.[4808]

1721. KHIEU Samphân further submits that his standing was not "unique", since other non-members attended "expanded" Standing Committee meetings.[4809] More than that, he avers that he had no responsibility in the zones or armed forces; was a "late entrant to the Party"; occupied "nominal" positions; and was only appointed to full membership of the Central Committee in order to be eligible for the position of Head of State.[4810] Thus, according to him, the Trial Chamber should have concluded that he held "a position without influence or power".[4811]

1722. The Co-Prosecutors counter that KHIEU Samphân fails to show an error in the Trial Chamber's findings that he regularly attended Standing Committee meetings,[4812] including several where important issues were discussed and crucial decisions taken.[4813] He rather offers an alternative interpretation of evidence already assessed.[4814] With respect to the "uniqueness" of his position, the Co-Prosecutors submit that KHIEU Samphân overlooks evidence which, in addition to participation in Standing Committee meetings, shows that he had important functions within the CPK and GRUNK or DK government, and worked closely with CPK leaders, particularly POL Pot and NUON Chea.[4815]

1723. The Supreme Court Chamber finds no error in the Trial Chamber's finding that KHIEU Samphân attended "numerous"[4816] Standing Committee meetings, or its description of his attendance as "regular".[4817] Minutes in evidence indicate that he was present at 16 meetings. While these took place over only a small part of the indictment period, they show that KHIEU Samphân was a frequent attendee, as the Trial Chamber noted, on the available minutes he was ranked third in the list of attendees with POL Pot and NUON Chea listed above his name.[4818] It was not unreasonable for the Trial Chamber to consider that the minutes provide a snapshot

[4807] KHIEU Samphân's Appeal Brief (F54), paras 1735, 1748.
[4808] KHIEU Samphân's Appeal Brief (F54), paras 1733, 1734.
[4809] KHIEU Samphân's Appeal Brief (F54), para. 1746.
[4810] KHIEU Samphân's Appeal Brief (F54), para. 1746.
[4811] KHIEU Samphân's Appeal Brief (F54), para. 1747.
[4812] Co-Prosecutors' Response (F54/1), para. 899.
[4813] Co-Prosecutors' Response (F54/1), para. 898.
[4814] Co-Prosecutors' Response (F54/1), para. 899.
[4815] Co-Prosecutors' Response (F54/1), para. 898.
[4816] Trial Judgment (E465), para. 604.
[4817] See Trial Judgment (E465), paras 4257, 4258, 4277.
[4818] See Trial Judgment (E465), para. 602.

of his attendance at Standing Committee meetings and to deduce that this pattern was followed regularly throughout the DK nor, in this Chamber's view, is KHIEU Samphân reasonably entitled to any presumption that he did not remain for the entire length of meetings at which his attendance was noted, in the absence of supporting evidence.

1724. The Supreme Court Chamber also holds the view that KHIEU Samphân has not shown unreasonableness in the Trial Chamber's conclusion that the Standing Committee "met to discuss the implementation of the Party's political line and the administration of the country"[4819] or that "important matters" [4820] or "matters central to the common purpose"[4821] were discussed and "crucial decisions" made at these meetings.[4822] These are rather moderate conclusions in light of the breadth of key topics covered in the minutes and the Trial Chamber's finding, explicitly accepted by KHIEU Samphân, that the Standing Committee was the "highest decision-making body of the CPK".[4823]

1725. In light of these findings, the Trial Chamber's conclusion that KHIEU Samphân's frequent attendance at Standing Committee meetings accorded him "a position of unique standing" in the CPK[4824] is also reasonable. In seeking to show that the Trial Chamber should instead have found his role to be "without influence or power", KHIEU Samphân advances an alternative interpretation of the evidence without showing any error. He rehashes arguments raised both before the Trial Chamber in Cases 002/01 and 002/02 and in his Closing Brief, these have been repeatedly considered and have been addressed.

1726. Finally, KHIEU Samphân overlooks that his "position of unique standing" was relied upon by the Trial Chamber in support of its findings that he was aware of crimes by virtue of his proximity to the Party Centre.[4825] Whether this position also entailed "power or influence" is thus immaterial to the knowledge gained through his presence among the upper echelon.[4826] More importantly, as no finding of KHIEU Samphân's awareness rests solely or decisively on

[4819] Trial Judgment (E465), para. 3740.
[4820] Trial Judgment (E465), para. 604. See also Trial Judgment (E465), para. 624.
[4821] Trial Judgment (E465), para. 4258.
[4822] Trial Judgment (E465), paras 604, 624, 4257.
[4823] Trial Judgment (E465), para. 346. See, *e.g.*, KHIEU Samphân's Appeal Brief (F54), para. 1730.
[4824] See Trial Judgment (E465), paras 604, 624.
[4825] See *infra* Section VIII.B.7.
[4826] KHIEU Samphân's contribution to the common purpose via attendance at Standing Committee meetings is considered in the following section.

his attendance at Standing Committee meetings or position of unique standing within the CPK, an error in this regard could not occasion a miscarriage of justice.[4827]

1727. As such, KHIEU Samphân's arguments on these points are dismissed.

ii. Attendance and Participation in Standing Committee Meetings

1728. The Trial Chamber addressed KHIEU Samphân's claims that he did not voice opinions or participate in decision-making in meetings of the Standing Committee that he attended.[4828] Nevertheless, basing its findings on two sets of minutes which attribute statements to KHIEU Samphân, it considered that KHIEU Samphân "contributed on at least two occasions, reporting to the [Standing] Committee on relations with NORODOM Sihanouk and on the [People's Representative Assembly] 'election' of 20 March 1976".[4829] On this basis, the Trial Chamber held that KHIEU Samphân "participated in some Standing Committee meetings".[4830]

1729. KHIEU Samphân takes issue with the Trial Chamber's findings regarding his participation, reiterating his claim that he "never [took] part in the discussion or participated in any decision-making".[4831] He submits that "[t]he mere presentation of a report demonstrates subordination, a hierarchy, and does not mean taking part in a debate or decision" and, further, the topics of KHIEU Samphân's reports are "very specific and unrelated to any crime or criminal purpose".[4832] Rather, KHIEU Samphân submits that the Trial Chamber should have concluded that his participation was "entirely passive" on 14 occasions and "insignificant" on the other two.[4833]

1730. The Co-Prosecutors submit that KHIEU Samphân fails to show an error.[4834] They further submit that his claim that his interventions during the meetings were unrelated to a

[4827] It is for this reason that the Supreme Court Chamber is also unpersuaded by KHIEU Samphân's submissions that his knowledge of crimes committed at the Kampong Chhnang Airfield could not be established by his attendance at relevant Standing Committee meetings. See KHIEU Samphân's Appeal Brief (F54), paras 1740-1743; Co-Prosecutors' Response (F54/1), para. 900.
[4828] Trial Judgment (E465), para. 601.
[4829] Trial Judgment (E465), para. 602, referring to Standing Committee Minutes, 11-13 March 1976, E3/197, ERN (EN) 00182638, pp. 1, 3-4; Standing Committee Minutes regarding base work, 8 March 1976, E3/232, ERN (EN) 00182628, p. 1.
[4830] Trial Judgment (E465), para. 602. See also Trial Judgment (E465), para. 3740 (Noting that non-members of the Standing Committee including, amongst others, KHIEU Samphân "took part in meetings").
[4831] KHIEU Samphân's Appeal Brief (F54), para. 1736.
[4832] KHIEU Samphân's Appeal Brief (F54), para. 1737.
[4833] KHIEU Samphân's Appeal Brief (F54), para. 1738.
[4834] Co-Prosecutors' Response (F54/1), para. 898.

specific crime, is irrelevant, because his participation in the commission of crimes need not be direct; it can also be indirect.[4835]

1731. The Supreme Court Chamber understands KHIEU Samphân's submissions to be premised on the mistaken notion that he was held liable for contributing to the common purpose by actively participating in Standing Committee meetings. However, a review of the Trial Chamber's findings shows that it did not infer from KHIEU Samphân's two reports to the Standing Committee that he participated in its meetings more broadly. It did not hold him responsible for contributing to the common purpose on the basis of his contributions to the meetings and participation in decision-making. Rather, the Trial Chamber considered a plethora of evidence besides evidence of his presence at Standing Committee meetings, which led the Trial Chamber to conclude, and rightly so, that he provided support to its members in pursuing their objectives.

1732. Thus, the Trial Chamber held that "KHIEU Samphan's regular *attendance* at Standing Committee meetings where crucial decisions were made, membership of Office 870 […] and oversight of DK commerce matters […] evidence his support for and continued assistance to the CPK in the realisation of its objectives."[4836] Similarly, in holding that "KHIEU Samphan regularly attended and participated in Standing Committee meetings at which matters central to the common purpose were discussed", the Trial Chamber referred back to its earlier analysis that makes clear that his "participation" was limited to the two occasions in which he reported to the Standing Committee.[4837] Indeed, it went on to set out facets of CPK policy that KHIEU Samphân supported through his presence,[4838] and emphasised that he was "*present* when Standing Committee members regularly furnished reports […] *present* at the Standing Committee meeting at which the construction of a military airfield in Kampong Chhnang was planned […] *present* at later meetings at which SON Sen reported on the construction of Kampong Chhnang Airfield."[4839]

[4835] Co-Prosecutors' Response (F54/1), para. 899.
[4836] Trial Judgment (E465), para. 4257 (emphasis added). The Supreme Court Chamber considers that by his attendance at Standing Committee meetings KHIEU Samphân showed his "support", whereas the word "assistance" pertains to the exercise of his functions in Office 870 and oversight of DK commerce matters. On these, see *infra* Sections VIII.A.4.a & Section VIII.A.4.c.i.
[4837] Trial Judgment (E465), para. 4258 (fn. 13890), referring to Trial Judgment (E465), Section 8.3.3: Roles and Functions – KHIEU Samphan: Membership of the Central and Standing Committees.
[4838] Trial Judgment (E465), para. 4258 (fns 13891-13893).
[4839] Trial Judgment (E465), para. 4258 (emphasis added; internal footnotes omitted).

1733. As such, the Supreme Court Chamber concludes that KHIEU Samphân's arguments, insofar as these go to his active participation in Standing Committee meetings, are misplaced and are thus dismissed.

1734. KHIEU Samphân takes particular issue with the Trial Chamber's finding that he contributed to the common plan by attending Standing Committee meetings discussing Kampong Chhnang Airfield.[4840] Specifically, with respect to the first relevant meeting of 9 October 1975, he submits that as the minutes do not contain a list of attendees, the Trial Chamber erred in finding that he was present.[4841] KHIEU Samphân extracts portions of the minutes of the second and third relevant meetings in an attempt to show that these provide an insufficient basis for the Trial Chamber's description of their contents.[4842] He avers that the Trial Chamber failed to take into account that it was unable to ascertain whether he was present at the April 1976 Standing Committee meeting which decided to build an airfield at Kampong Chhnang.[4843]

1735. The Co-Prosecutors defend the reasonableness of the finding that KHIEU Samphân participated in both the October 1975 and April 1976 Standing Committee meetings, as both appoint him to various responsibilities.[4844]

1736. The Supreme Court Chamber accepts KHIEU Samphân's submission that the Trial Chamber erred in finding that he attended the Standing Committee Meeting of 9 October 1975. The meeting's first agenda item, "[d]elegation of work" made Comrade Hêm "[r]esponsible for the Front and the Royal Government, and Commerce for accounting and pricing".[4845] However, the minutes of this meeting do not list attendees.[4846] Thus, having earlier accepted that KHIEU Samphân attended meetings where the minutes list him as attendee,[4847] in this instance the Trial Chamber relied on minutes that do not do so. Nonetheless, this error does not detract from the Trial Chamber's overall conclusion that KHIEU Samphân contributed to the

[4840] KHIEU Samphân's Appeal Brief (F54), paras 1741, 1743.
[4841] KHIEU Samphân's Appeal Brief (F54), para. 1742; Trial Judgment (E465), para. 1723 (fn. 5834); Standing Committee Minutes, 9 October 1975, E3/182 [replicated in E3/1733, E3/1612, E3/183], ERN (EN) 00183393, 00183407, pp. 1, 15.
[4842] KHIEU Samphân's Appeal Brief (F54), para. 1742.
[4843] See KHIEU Samphân's Appeal Brief (F54), para. 1742.
[4844] Co-Prosecutors' Response (F54/1), para. 900. Although the Co-Prosecutors refer to the "May 1976" meeting "about the airfield organization" (E3/222), it cites the April 1976 meeting (E3/235) and advances argument relevant to its content. See Co-Prosecutors' Response (F54/1), para. 900 (fn. 3121).
[4845] Standing Committee Meeting Minutes, 9 October 1975, E3/182 [replicated in E3/1733, E3/1612 and E3/183], ERN (EN) 00183393, p. 1.
[4846] Standing Committee Meeting Minutes, 9 October 1975, E3/182 [replicated in E3/1733, E3/1612 and E3/183].
[4847] See Trial Judgment (E465), para. 602.

common plan by attending meetings of the Standing Committee where important matters were discussed, which is based on a number of meetings.[4848]

1737. Minutes of a Standing Committee meeting in February 1976, the second relevant meeting, contain a proposal to "examine a new site […] for example in the vicinity of […] Kampong Chhnang".[4849] The Supreme Court Chamber sees no error in the Trial Chamber's findings that the airfield's construction was "planned"[4850] or that the Standing Committee "continued discussing the matter"[4851] at this meeting. SON Sen clearly reported "on the progress of the Airfield the construction"[4852] when he told the Standing Committee that much gravel has to be placed, the buildings need to be roofed so it is not too hot, and "[t]he drilling group has arrived."[4853] KHIEU Samphân's challenges to these findings are without merit and are dismissed.

1738. The Supreme Court Chamber recalls that all that is required to fulfil the *actus reus* element of JCE liability is that KHIEU Samphân significantly contributed to the implementation of the common plan.[4854] A showing that he directly contributed to the commission of any of the underlying crimes is not necessary. This Chamber does not see the relevance of KHIEU Samphân's submission that the Trial Chamber failed to emphasise that it was unable to ascertain whether he was present at the April 1976 Standing Committee meeting which decided to build an airfield at Kampong Chhnang.[4855]

1739. Finally, KHIEU Samphân submits that the Trial Chamber erred in finding that he "regularly participated in" Standing Committee meetings where "agriculture, drought and industry" were discussed, or indeed that such a meeting had taken place, as this was based on a single written statement recounting a discussion between IENG Sary and Stephen HEDER.[4856] The Co-Prosecutors counter that the Trial Chamber assessed IENG Sary's out of

[4848] Contrary to the Co-Prosecutors' submissions, the Trial Chamber did not find that KHIEU Samphân was present at the April 1976 Standing Committee meeting which decided on construction of the airfield, despite him being tasked with certain responsibilities at this meeting.
[4849] Standing Committee Meeting Minutes, 22 February 1976, E3/229, ERN (EN) 00182627, p. 3.
[4850] Trial Judgment (E465), para. 4258 (fn. 13899).
[4851] Trial Judgment (E465), para. 1723 (fn. 5835).
[4852] Trial Judgment (E465), para. 1727 (fn. 5854).
[4853] Standing Committee Meeting Minutes, 15 May 1976, E3/222, ERN (EN) 00182666, p. 2. See also Trial Judgment (E465), para. 1724 (holding that the arrival of the drilling group signaled the beginning of construction).
[4854] See Case 002/01 Appeal Judgment (F36), para. 983.
[4855] See KHIEU Samphân's Appeal Brief (F54), para. 1742.
[4856] KHIEU Samphân's Appeal Brief (F54), para. 1744, referring to Trial Judgment (E465), para. 4258 (fn. 13891), referring to Trial Judgment (E465), para. 3891 (fn. 12977), in turn referring to IENG Sary Interview by Stephen HEDER, 17 December 1996, E3/89, ERN (EN) 00417600-00417603, pp. 2-5.

court statement in light of other corroborating evidence to find that KHIEU Samphân attended this meeting.[4857] They point to two other meetings attended by KHIEU Samphân which fall within the designation of "agriculture, drought and industry".[4858]

1740. The Supreme Court Chamber has found no legal error in the Trial Chamber's approach to assessing out-of-court statements absent the opportunity for confrontation. It recalls that less weight may be accorded to untested out-of-court statements, especially when taken outside the framework of a judicial process, such as those recorded by DC-Cam. Statements of deceased persons may be relied upon to prove the acts and conduct of an accused person; however, this Chamber must be satisfied that the proposed evidence is reliable, and a conviction may not be based solely or decisively thereupon.[4859]

1741. Turning to the finding at hand, the Supreme Court Chamber notes, first, that the Trial Chamber's conclusion that KHIEU Samphân "regularly attended and participated in Standing Committee meetings at which matters central to the common purpose were discussed"[4860] is based on his attendance at a number of such meetings. KHIEU Samphân's conviction for contributing to the common plan by the support he provided in this manner does not rest solely or decisively on his attendance at this specific September 1975 meeting. Second, the Supreme Court Chamber considers that IENG Sary gave a detailed and cogent account of the meeting in question, which, moreover, coincided in substance with matters of concern to the Standing Committee at that time, as evidenced by both the report of its visit to the Northwest Zone and the September 1975 policy document.[4861]

1742. For the reasons discussed above, KHIEU Samphân's arguments pertaining to his participation in Standing Committee meetings and contribution to the common plan by his attendance are dismissed.

c. Democratic Centralism

[4857] Co-Prosecutors' Response (F54/1), para. 901.
[4858] Co-Prosecutors' Response (F54/1), para. 901, referring to Standing Committee Minutes, 30 May 1976, E3/224; Standing Committee Minutes, 10 June 1976, E3/226.
[4859] See *supra* Section V.E.2.c. See also Trial Judgment (E465), paras 69-72.
[4860] Trial Judgment (E465), para. 4258.
[4861] See IENG Sary Interview by Stephen HEDER, 17 December 1996, E3/89, ERN (EN) 00417600-00417603, pp. 2-5; Record of the Standing Committee's visit to the Northwest Zone, E3/216, 20-24 August 1975; DK Publication, Examination of Control and Implementation of the Policy Line, September 1975, E3/781; Trial Judgment (E465), paras 3887-3891.

1743. KHIEU Samphân submits that the Trial Chamber erred in fact when it considered that the principle of democratic centralism "[gave] him the opportunity to intervene" in meetings of the Central and Standing Committee.[4862] He argues, in the first place, that there is insufficient evidence to demonstrate either that relevant meetings of the Central Committee took place or, if they did, that he attended and thus could be said to have assented to the decisions reached.[4863] Specifically at issue in this regard is KHIEU Samphân's responsibility for the CPK Statute adopted at the Fourth Party Congress,[4864] the Central Committee decision of 30 March 1976,[4865] and the mid-1978 memorandum calling for compassion to be accorded to "misled persons" who had served as *Yuon* agents.[4866]

1744. The Supreme Court Chamber has already addressed KHIEU Samphân's claims, repeated here, that he was not present at the Fourth Party Congress and upheld as not unreasonable the Trial Chamber's finding that he was.[4867] Turning to the 30 March 1976 decision and mid-1978 directive, KHIEU Samphân is correct that the Trial Chamber did not find that these were accompanied by any meeting of the Central Committee and, by extension, that he was present. However, the Supreme Court Chamber considers that the Trial Chamber did not rely on the principle of democratic centralism to conclude that he assented to either. Rather, it relied on the fact that he was, respectively, a "fully-fledged member" and a "full-rights voting member" of the Central Committee when these documents were issued.[4868] The Supreme Court Chamber concludes that KHIEU Samphân has not shown unreasonableness in the Trial Chamber's conclusion that he was responsible for decisions of the Central Committee taken when he was a voting member.

1745. KHIEU Samphân additionally argues that the Trial Chamber erred in finding that he participated in meetings of the Standing Committee in accordance with the methods of democratic centralism.[4869] However, he refers, in the first place, to the Trial Chamber's analysis of his responsibility as a superior.[4870] As KHIEU Samphân was not found to be liable through

[4862] KHIEU Samphân's Appeal Brief (F54), para. 1749.
[4863] KHIEU Samphân's Appeal Brief (F54), para. 1750.
[4864] See Trial Judgment (E465), paras 4259, 3738, 3765; Trial Judgment (E465), Section 5.1.1 'Administrative Structures: Structure of the CPK: Party Congress'.
[4865] See Trial Judgment (E465), paras 4259-4260. See also Trial Judgment (E465), paras 1126, 3771, 3899, 3955.
[4866] See Trial Judgment (E465), para. 4260. See also Trial Judgment (E465), paras 3404-3406, 3828.
[4867] See *supra* Section VIII.A.3.a.
[4868] Trial Judgment (E465), para. 4260. Indeed, the Trial Chamber mentions democratic centralism only with respect to the Fourth Party Congress, a meeting of CPK representatives from across the DK and its institutions. See Trial Judgment (E465), para. 4259.
[4869] KHIEU Samphân's Appeal Brief (F54), para. 1749.
[4870] KHIEU Samphân's Appeal Brief (F54), para. 1751 (fn. 3376), referring to Trial Judgment (E465), para. 4322.

this form of liability,[4871] these submissions fail to show a miscarriage of justice and are dismissed. Second, the Supreme Court Chamber has already found that KHIEU Samphân's contribution to the common plan by way of attending meetings of the Standing Committee was not premised on his active participation.[4872] As such, his arguments on whether the principle of "democratic centralism" gave him the right to intervene in these meetings are moot.

1746. KHIEU Samphân further challenges the Trial Chamber's finding that democratic centralism involved a collective decision-making process.[4873] In light of the preceding discussion, this challenge is relevant only to his participation in the adoption of the CPK Statute at the Fourth Party Congress.[4874] KHIEU Samphân repeats, and seeks to incorporate by reference, submissions pertaining to the Trial Chamber's assessment of the evidence which were considered by the Appeals Chamber in Case 002/01.[4875] The Supreme Court Chamber declines to depart from its previous findings on these points.[4876]

1747. KHIEU Samphân argues further that the Trial Chamber failed to explain why it did not prefer his statement to the Co-Investigating Judges that power was effectively concentrated in the Standing Committee, and POL Pot and NUON Chea in particular,[4877] and that minutes of Standing Committee meetings show that decisions were made by POL Pot alone or together with NUON Chea.[4878] Contrary to his submissions, the Trial Chamber accepted KHIEU Samphân's evidence that effective control was concentrated in the Standing Committee.[4879] As discussed previously, the Supreme Court Chamber does not consider this to be incompatible with its findings that important decisions were also taken elsewhere[4880] and by extension, with the principle of democratic centralism. KHIEU Samphân merely advances a different

[4871] Trial Judgment (E465), para. 4325.
[4872] See *supra* Section VIII.A.3.b.
[4873] KHIEU Samphân's Appeal Brief (F54), para. 1751.
[4874] The Trial Chamber held that "KHIEU Samphan attended the Third, Fourth and Fifth Party Congresses which adopted policies from the Standing Committee concerning the overall political line in accordance with the principle of democratic centralism." (Trial Judgment (E465), para. 4259). However, the Trial Chamber does not point to any specific act of either the Third or Fifth Party Congress attributable to KHIEU Samphân. Rather, he was appointed as candidate member of the Central Committee at the Third Party Congress and was implicated in VORN Vet's arrest during the Fifth Party Congress. See further Trial Judgment (E465), paras 274, 4229, 4257, 4260.
[4875] KHIEU Samphân's Appeal Brief (F54), para. 1752, referring to Case 002/01 KHIEU Samphân's Appeal Brief (F17), paras 126-138. See Case 002/01 Appeal Judgment (F36), para. 1048.
[4876] See Case 002/01 Appeal Judgment (F36), para. 1050.
[4877] KHIEU Samphân's Appeal Brief (F54), para. 1752 (fn. 3382).
[4878] KHIEU Samphân's Appeal Brief (F54), para. 1752 (fn. 3383).
[4879] Trial Judgment (E465), para. 357 (fn. 1001).
[4880] See *supra* Section VIII.A.3.a.

interpretation of the evidence regarding the decision-making process as shown by the Standing Committee minutes, which do not attribute speakers consistently enough to be unequivocal.

1748. For these reasons, the Supreme Court Chamber dismisses KHIEU Samphân's arguments with respect to the content and application of the notion of "democratic centralism".

4. Residual Functions

a. Participating in Education Sessions

1749. The Trial Chamber found that:

> KHIEU Samphan attended and lectured at political training sessions held at Borei Keila (K-6) and the Khmer-Soviet Friendship Institute of Technology (K-15), at times alongside NUON Chea and other CPK leaders. Participants ranging from combatants to CPK cadres and returnees from overseas, numbering in the tens to the thousands, were variously instructed on revolutionary principles, cooperatives, agricultural techniques and economic matters, with KHIEU Samphan lecturing on identifying 'enemies' and uncovering 'traitors'.[4881]

1750. KHIEU Samphân takes particular issue, first, with the Trial Chamber's reliance on the testimonies of EM Oeun and EK Hen to find that he lectured on "identifying 'enemies' and uncovering 'traitors'".[4882] He submits that their testimonies were not credible or reliable as they contained "numerous and important contradictions"[4883] and the Trial Chamber erred in fact by relying on them.[4884] As such, submits KHIEU Samphân, the Trial Chamber could not have concluded that he contributed to disseminating the policy with respect to "enemies".[4885] The Co-Prosecutors respond that KHIEU Samphân has not shown any error in the Trial Chamber's assessment of the credibility and reliability of EM Oeun and EK Hen, bearing in mind the deference due to the Trial Chamber in assessing the evidence before it.[4886]

1751. With respect to EM Oeun, KHIEU Samphân submits that "constant" contradictions and inconsistencies in the civil party's testimony undermine his credibility.[4887] Specifically, he submits that EM Oeun was inconsistent about when the training session took place;[4888] contradicted himself by stating that his father told him that KHIEU Samphân was President of the State Presidium, whereas his father disappeared in 1974 before KHIEU Samphân's

[4881] Trial Judgment (E465), para. 607.
[4882] KHIEU Samphân's Appeal Brief (F54), paras 1754-1755.
[4883] KHIEU Samphân's Appeal Brief (F54), para. 1754.
[4884] KHIEU Samphân's Appeal Brief (F54), para. 1756.
[4885] KHIEU Samphân's Appeal Brief (F54), para. 1755.
[4886] Co-Prosecutors' Response (F54/1), para. 1075.
[4887] KHIEU Samphân's Appeal Brief (F54), paras 1757-1758.
[4888] KHIEU Samphân's Appeal Brief (F54), para. 1757, fns 3390-3393.

appointment to that role; gave "many versions" of the circumstances surrounding his mother's death; and provided a "particularly surprising" account of his marriage.[4889]

1752. The Co-Prosecutors respond that the Trial Chamber correctly assessed EM Oeun's testimony to be credible.[4890] They submit that KHIEU Samphân ignores other factors relevant to assessing the evidence of civil parties, focusing only on discrepancies.[4891] The Co-Prosecutors submit that the Trial Chamber's finding that the evidence of EM Oeun was credible was not unreasonable, considering the evidence *in toto*, as he gave consistent and detailed testimony about material facts, including the location and topics discussed by KHIEU Samphân at the political training session he attended, whereas the contradictions raised by KHIEU Samphân were only peripheral.[4892] EM Oeun responded "reasonably and forthrightly" to numerous defence challenges about his inability to recall the dates events occurred.[4893] The Co-Prosecutors submit that KHIEU Samphân selectively refers to EM Oeun's evidence regarding his forced marriage as EM Oeun clearly explained the circumstances surrounding, and forced nature of, his marriage and why he remained married to his first wife.[4894]

1753. The Supreme Court Chamber notes that the Trial Chamber considered that EM Oeun's in-court account of the political training he attended as a trainee physician was consistent with his Civil Party Application and that it was credible.[4895] This Chamber is unpersuaded that this conclusion about his attendance is undermined by the minor inconsistencies in his evidence raised by KHIEU Samphân, especially with respect to EM Oeun's difficulty in recalling the precise date of the training session. Contrary to KHIEU Samphân's submissions, the Supreme Court Chamber holds the view that EM Oeun provided a consistent and frank account of his mother's death. The Supreme Court Chamber has addressed KHIEU Samphân's arguments about EM Oeun's evidence of his forced marriage.[4896] As KHIEU Samphân has not further substantiated what was "surprising" about EM Oeun's testimony, this submission is not considered further.

[4889] KHIEU Samphân's Appeal Brief (F54), para. 1758.
[4890] Co-Prosecutors' Response (F54/1), para. 1076. See also Co-Prosecutors' Response (F54/1), paras 140-143.
[4891] Co-Prosecutors' Response (F54/1), para. 140.
[4892] Co-Prosecutors' Response (F54/1), paras 141, 1076.
[4893] Co-Prosecutors' Response (F54/1), para. 141.
[4894] Co-Prosecutors' Response (F54/1), para. 142.
[4895] Trial Judgment (E465), para. 3942 (fn. 13151), noting that "[t]he Civil Party's evidence about this event was generally consistent with his Civil Party Application" and that "[t]he Chamber accepts his account as credible."
[4896] See *supra* Section VII.G.3.c.ii.g.

1754. KHIEU Samphân further argues that EM Oeun's "purportedly word-for-word recollection of KHIEU Samphan's supposed speech" at the session he attended is "unlikely" given EM Oeun's testimony that the speakers repeated the same things.[4897] According to the Co-Prosecutors, however, KHIEU Samphân mischaracterises EM Oeun's evidence. Rather than testifying that "all speakers repeated the same thing", EM Oeun stated that speakers "linked their speech to one another", and each "picked up a few words" from the previous speaker before making their contribution.[4898]

1755. The Supreme Court Chamber does not accept KHIEU Samphân's characterisation of EM Oeun's evidence regarding the content of the speech. This Chamber determines that the import of EM Oeun's account was not that the different speakers "repeated the same things", as claimed by KHIEU Samphân, but rather, that each briefly summed up what had been said by the previous speaker before continuing.[4899] This practice of supplementing the words of the previous speaker during trainings was corroborated by BEIT Boeurn with respect to the trainings she attended.[4900] Further, KHIEU Samphân does not identify an error, but puts forth a vague and unsubstantiated notion that EM Oeun's recollection of the event seems "unlikely". In this Chamber's view, the civil party's clarity about the different statements attributed to POL Pot, NUON Chea, and KHIEU Samphân serves to enhance, rather than undermine, his credibility.[4901]

1756. Regarding EK Hen's evidence, KHIEU Samphân submits that the Trial Chamber erred by relying on her testimony to determine what he said, as this was confused and lacked detail.[4902] EK Hen was unable to say whether NUON Chea or KHIEU Samphân had addressed

[4897] KHIEU Samphân's Appeal Brief (F54), para. 1757.
[4898] Co-Prosecutors' Response (F54/1), para. 142.
[4899] Speakers, including POL Pot, NUON Chea, KHIEU Samphân and Nu Him, would "[link] their speech to one other" (T. 23 August 2012 (EM Oeun), E1/113.1, p. 82) and "repeat one another before adding further points." (T. 23 August 2012 (EM Oeun), E1/113.1, p. 83. See also T. 27 August 2012 (EM Oeun), E1/115.1, pp. 26-27, 38-39, 45-46.
[4900] T. 28 November 2016 (BEIT Boeurn), E1/502.1, p. 23 (KHIEU Samphân "used to speak [at study sessions]. When the chief made a speech, then the member and the deputy would be allowed also to comment or to supplement the presentation made by the chief.").
[4901] See T. 23 August 2012 (EM Oeun), E1/113.1, p. 83 (POL Pot gave an introductory sessions and said that "as a Communist, we had to understand clearly our roles so that we could be in line with […] the 'great leap forward' [the] Party wanted […] if we couldn't have this 'great leap', then we would be considered as enemies".); T. 23 August 2012 (EM Oeun), E1/113.1, p. 84 (NUON Chea spoke about the need of identifying those who were infiltrating the Party, "referring to people who could have been the soldiers in the previous regimes, including [the] Norodom Sihanouk and Lon Nol regimes", intellectuals and those who graduated abroad.); T. 27 August 2012 (EM Oeun), E1/115.1, pp. 26-28, 44-45 (NUON Chea discussed spy networks including "Yuon agent[s]" or "Aggressive Yuon agent[s]").
[4902] KHIEU Samphân's Appeal Brief (F54), para. 1759.

the meeting on the topic of enemies.[4903] KHIEU Samphân submits that EK Hen's account is further weakened by her later admitted Written Record of Interview from Case Files 003 and 004.[4904] The Co-Prosecutors counter that EK Hen was consistent that she attended two trainings, in 1976 and 1978, one in which NUON Chea talked about traitors in the North Zone and KOY Thuon's treason, and another in which KHIEU Samphân spoke about work quotas and Vietnamese spies and justified Pang's arrest "because he was a traitor collaborating with the 'Yuon'".[4905] The Co-Prosecutors respond further that the Trial Chamber was able to determine that the trainings given by NUON Chea and KHIEU Samphân were respectively held in 1976 and 1978 by referring to the dates of KOY Thuon and Pang's arrests.[4906] They submit that KHIEU Samphân fails to demonstrate that EK Hen's confusion about the year she attended his training makes the Trial Chamber's reliance on her testimony unreasonable.[4907]

1757. The Supreme Court Chamber notes that EK Hen gave consistent evidence about the words she attributed to KHIEU Samphân at a political training at Borei Keila,[4908] including, specifically, that he told participants that Pang was a traitor who had been arrested and taken away, and advised them not to do as Pang did.[4909] While this Chamber accepts that she gave conflicting evidence about whether KHIEU Samphân led the first or second training session she attended and that she initially confirmed her statement to investigators that KHIEU Samphân had led the first training in 1976,[4910] it notes that under vigorous cross-examination EK Hen was adamant that he led the second session in 1978,[4911] and this account coincides with the date of Pang's arrest. This Chamber considers that this confusion about the order of the trainings does not significantly undermine the witness's credibility, in light of her certainty about the order of the training sessions when questioned, which was corroborated by other evidence as to the timing of Pang's arrest.

1758. For these reasons, the Supreme Court Chamber is not persuaded by KHIEU Samphân's submissions that the Trial Chamber erred in fact in relying on the testimonies of EM Oeun and

[4903] KHIEU Samphân's Appeal Brief (F54), para. 1759, referring to T. 3 July 2013 (EK Hen), E1/217.1, pp. 77-99.
[4904] KHIEU Samphân's Appeal Brief (F54), para. 1759.
[4905] Co-Prosecutors' Response (F54/1), para. 1077.
[4906] Co-Prosecutors' Response (F54/1), para. 1077, referring to Trial Judgment (E465), paras 4069, 4139.
[4907] Co-Prosecutors' Response (F54/1), para. 1077.
[4908] See T. 3 July 2013 (EK Hen), E1/217.1, pp. 40-41. 43-45, 78, 88.
[4909] See T. 3 July 2013 (EK Hen), E1/217.1, pp. 40-41, 45-48, 88.
[4910] Written Record of Interview of EK Hen, E3/474, ERN (EN) 00205049 (KHIEU Samphân led the first session in 1976); T. 3 July 2013 (EK Hen), E1/217.1, pp. 40-41, 77 (confirming Written Record of Interview).
[4911] T. 3 July 2013 (EK Hen), E1/217.1, pp. 79-81, 92-93 (stating that KHIEU Samphân led the second session).

EK Hen to find that he spoke about "enemies" during political training sessions. His submissions on this point are therefore dismissed.

1759. KHIEU Samphân's remaining challenges relating to his participation in political training sessions go to whether the Trial Chamber properly found that he thereby significantly contributed to the JCE.[4912] On this point, he argues, first, that the Trial Chamber erred by not relying on the evidence of several witnesses, including CHEA Say, SAO Sarun, SUONG Sikoeun, and ROCHOEM Ton *alias* PHY Phuon, who stated either that KHIEU Samphân "rarely gave instructions at a study session"[4913] or that sessions were mainly led by POL Pot and NUON Chea, even when KHIEU Samphân was present.[4914] The Co-Prosecutors respond that KHIEU Samphân fails to demonstrate an error and instead proposes an alternative interpretation of the evidence on which the Trial Chamber relied.[4915] They submit that the Trial Chamber reasonably found that KHIEU Samphân lectured at, and also attended training sessions where other CPK leaders spoke about enemies and "did not disassociate himself" from these comments.[4916]

1760. Contrary to his submissions, witnesses referenced by KHIEU Samphân in support of the argument that he rarely participated in study sessions, including CHEA Say, ROCHOEM Ton, and Philip SHORT, all testified about training sessions actually led by him.[4917] Although SAO Sarun did not see KHIEU Samphân at the study session he attended, he recalled hearing his name as one of the participants in the training;[4918] similarly, while SUONG Sikoeun was not personally instructed by KHIEU Samphân, he recalled seeing him at Borei Keila.[4919] All of these accounts support the Trial Chamber's finding that KHIEU Samphân was indeed involved in political training. More generally, that POL Pot and NUON Chea may have led political training sessions more often than KHIEU Samphân in no way undermines the Trial Chamber's finding that he led some training sessions and, in this way, significantly contributed to the

[4912] See KHIEU Samphân's Appeal Brief (F54), para. 1760 ("[T]he Trial Chamber erred by using statements attributed to KHIEU Samphan […] as attesting to his contribution to the JCE.")
[4913] KHIEU Samphân's Appeal Brief (F54), para. 1761, referring to T. 20 September 2012 (CHEA Say), E1/124.1, p. 71.
[4914] KHIEU Samphân's Appeal Brief (F54), para. 1761.
[4915] Co-Prosecutors' Response (F54/1), para. 1080.
[4916] Co-Prosecutors' Response (F54/1), para. 1080, referring to Trial Judgment (E465), paras 4038, 3517, 4054.
[4917] T. 20 September 2012 (CHEA Say), E1/124.1, pp. 30-37, 71; T. 25 July 2012 (ROCHOEM Ton), E1/96.1, pp. 77-79; T. 6 May 2013 (Philip SHORT), E1/189.1, pp. 74-75.
[4918] T. 6 June 2012 (SAO Sarun), E1/82.1, pp. 16-18.
[4919] T. 6 August 2012 (SUONG Sikoeun), p. 74.

common purpose. As such, the Supreme Court Chamber concludes that KHIEU Samphân merely advances an alternative interpretation of the evidence without demonstrating an error.

1761. Lastly, KHIEU Samphân argues that the Trial Chamber erred in finding that statements attributed to him "relating to the CPK's general economic project" constituted a significant contribution to the JCE.[4920] Aside from EM Oeun and EK Hen, he argues, Prosecution witnesses, including CHEA Say, PEAN Khean, ONG Thong Hoeung, and Philip SHORT attributed innocuous statements to KHIEU Samphân.[4921] He submits that these "showed no evidence of criminal intent" on his part.[4922]

1762. The Co-Prosecutors respond that KHIEU Samphân's piecemeal analysis fails to consider the totality of the evidence, the weight of which supports the Trial Chamber's conclusion that his lectures pertained to identifying "enemies" and uncovering "traitors".[4923] Aside from EM Oeun and EK Hen, KHIEU Samphân ignores ROCHOEM Ton *alias* PHY Phuon's testimony that he attended a K-15 training session led by KHIEU Samphân where the internal and external political situation and "common enemy" were discussed, as well as that of BEIT Boeurn, who stated that KHIEU Samphân participated actively with POL Pot and NUON Chea in the political sessions and instructed commerce cadres to search for internal enemies.[4924] According to the Co-Prosecutors, KHIEU Samphân also misrepresents the testimony of PEAN Khean, who stated that the presentation of KHIEU Samphân and other CPK leaders comprised instructions to identify infiltrated enemies, including CIA and KGB agents and Vietnamese, in order to defend the country against a Vietnamese invasion or the return of American imperialists.[4925]

1763. The Supreme Court Chamber recalls that it has found no error in the Trial Chamber's reliance on the evidence of EM Oeun and EK Hen, who testified to KHIEU Samphân's statements about "enemies" of the DK at political training sessions.[4926] The Supreme Court

[4920] KHIEU Samphân's Appeal Brief (F54), para. 1760. See also KHIEU Samphân's Appeal Brief (F54), para. 1762.
[4921] KHIEU Samphân's Appeal Brief (F54), para. 1762.
[4922] KHIEU Samphân's Appeal Brief (F54), para. 1762. See also KHIEU Samphân's Appeal Brief (F54), para. 1760 ("the topics covered in the training sessions, as described by the witnesses cited […], do not serve to substantiate any criminal intent on the part of the Appellant.")
[4923] Co-Prosecutors' Response (F54/1), para. 1079, referring to Trial Judgment (E465), para. 607 (fn. 1904).
[4924] Co-Prosecutors' Response (F54/1), para. 1079, referring to T. 25 July 2012 (ROCHOEM Ton), E1/96.1, pp. 77-79; T. 1 August 2012 (ROCHOEM Ton), E1/100.1, pp. 94-96; T. 28 November 2016 (BEIT Boeurn), E1/502.1, pp. 22-23, 25, 28.
[4925] Co-Prosecutors' Response (F54/1), para. 1079, referring to T. 17 May 2012 (PEAN Khean), E1/73.1, pp. 20-24.
[4926] See *supra* Section V.D.7.

Chamber further accepts that both ROCHOEM Ton *alias* PHY Phuon, and BEIT Boeurn, also testified to KHIEU Samphân's support for the CPK's policy against enemies during political training sessions.

1764. The Supreme Court Chamber notes that, aside from finding that KHIEU Samphân instructed on the implementation of the policy against enemies,[4927] the Trial Chamber held that KHIEU Samphân contributed to the common plan by delivering political trainings "aimed at strengthening socialist consciousness, forging worker-peasant identity and engendering support for CPK policies",[4928] including, by meeting economic and production targets.[4929] These findings are supported by the testimony of a number of witnesses, including PEAN Khean,[4930] EM Oeun,[4931] EK Hen,[4932] CHEA Say,[4933] ROCHOEM Ton *alias* PHY Phuon,[4934] ONG Thong Hoeung[4935] and Philip SHORT.[4936] The Supreme Court Chamber thus rejects KHIEU Samphân's assertion that the trainings he delivered concerned "the CPK's general economic projects" as opposed to any criminal policy. Finally, the Supreme Court Chamber considers KHIEU Samphân's submissions to be misconceived insofar as he suggests, that a

[4927] See Trial Judgment (E465), paras 4271, 3390 (attending and lecturing at training sessions where Vietnamese and their "agents" were denounced as enemies and stressing the need for their deportation), 4272, 3942-3943, 3967, 4226 (instructing cadres on how to identify enemies and how to avoid being branded an enemy).
[4928] Trial Judgment (E465), para. 4262.
[4929] Trial Judgment (E465), paras 4273, 3916, 3942.
[4930] T. 17 May 2012 (PEAN Khean), E1/73.1, pp. 19-20, 22 (confirming that KHIEU Samphân "gave high-level political education"), 21 ("the meeting was meant to alert people on how, together, they could develop the country, how to establish cooperatives […] the political line and prospects for building a prosperous country in the future."), 23 (clarifying that "the first political line was to rebuild the country […] thirdly, to establish the cooperatives and create the collective regime, and encourage the people and the popular masses to build canals and dams to ensure that the country can prosper quickly.")
[4931] T. 27 August 2012 (EM Oeun), E1/115.1, p. 47 (urging cadres to accomplish *Angkar's* directions "at all costs").
[4932] T. 3 July 2013 (EK Hen), E1/217.1. pp. 42-44 (study session "started with [KHIEU Samphân] explaining and instructing the workers to strive harder in our work in order to assist our country. […] He did not want us to argue [with] each other, but rather to consolidate and strive to work hard to build the country, as the war had just ended."); T. 3 July 2013 (EK Hen), E1/217.1, pp. 40-48, 63, 78-82, 87-88, 90-98 (KHIEU Samphân lectured about work quotas, including the production of three tonnes of rice per hectare).
[4933] T. 20 September 2012 (CHEA Say), E1/124.1, pp. 29-34, 71 (NUON Chea and KHIEU Samphân lectured on "the economization and on strengthening and working hard", including "working hard to build the country").
[4934] T. 25 July 2012 (ROCHOEM Ton), E1/96.1, pp. 76-78 (KHIEU Samphân and NUON Chea were among the presenters who taught "how to follow the principle of national democratic revolution and the organizational position, or stance."); T. 1 August 2012 (ROCHOEM Ton *alias* PHY Phuon), E1/100.1, pp. 95-96 (KHIEU Samphân lectured on "the situation inside and outside the country and the situation after the liberation. And besides that, he talked about the socialist revolution [and the] revolutionary life view").
[4935] T. 7 August 2012 (ONG Thong Hoeung), E1/103.1, p. 99 (witness was told by his wife that, at K-15, KHIEU Samphân lectured that "Cambodia is being developed and it needs the resources, and also that we had to build ourselves").
[4936] T. 7 May 2013 (Philip SHORT), E1/190.1, pp. 17-19, citing Philip Short, *Pol Pot: The History of a Nightmare*, (2004), E3/9, ERN (EN) 00396524-00396525, pp. 316-317 (KHIEU Samphân gave month-long education sessions to returning intellectuals.)

showing that his words *prima facie* evidenced criminal intent, was necessary to find that he significantly contributed to the common plan.

1765. For these reasons, KHIEU Samphân's remaining arguments, with respect to his significant contribution to the common plan by way of leading political training sessions, are rejected.

b. Member of Office 870

1766. The Trial Chamber found that Office 870 oversaw the implementation of Standing Committee decisions and initially comprised at least two members: SUA Vasi *alias* Doeun, appointed as chairman of the Office in October 1975, and KHIEU Samphân, "who joined at around the same time".[4937] KHIEU Samphân continued to perform certain functions in Office 870 after Doeun's arrest in early 1977. However, following extensive review of the evidence, the Trial Chamber considered that "[t]he precise contours of KHIEU Samphân's responsibilities within Office 870, as distinct from those of his predecessor or those appertaining to his other appointments, remain unclear."[4938] The Trial Chamber thus held that "[a]s a result of the paucity of evidence relating to his functions within Office 870, the Chamber is unable to conclude that KHIEU Samphân served as the chairman of Office 870 or was in fact a 'leading cadre' thereof, as alleged by the Closing Order".[4939]

1767. KHIEU Samphân alleges, first, that the Trial Chamber erred in finding that he joined Office 870 in October 1975 and failing to note that his "involvement exclusively concerned matters relating to trade and commerce".[4940] Moreover, he says the Trial Chamber erred by describing Doeun as his "predecessor". According to KHIEU Samphân, had the Trial Chamber properly recognised that he was not a senior leader and did not replace Doeun, it could not have extrapolated his knowledge or significant contribution to the JCE.[4941]

1768. Regarding the date of his admission and his role in Office 870, KHIEU Samphân says that the Trial Chamber erred by relying on minutes of the Standing Committee meeting of 9 October 1975 as these do not assign him, as they do others, to Office 870, but instead make

[4937] Trial Judgment (E465), para. 608. See also Trial Judgment (E465), para. 364.
[4938] Trial Judgment (E465), para. 616. See also Trial Judgment (E465), para. 4225.
[4939] Trial Judgment (E465), para. 616. See also Trial Judgment (E465), para. 609; Co-Prosecutors' Closing Brief (E457/6/1), paras 417-419; Case 002 Closing Order (D427), paras 1139-1141.
[4940] KHIEU Samphân's Appeal Brief (F54), para. 1764. See also KHIEU Samphân's Appeal Brief (F54), para. 1763.
[4941] KHIEU Samphân's Appeal Brief (F54), para. 1769.

him "[r]esponsible for the Front and the Royal Government and Commerce for accounting and pricing".[4942] Moreover, he submits that the Trial Chamber should not have relied on his "somewhat confused memories" as he has always referred to the totality of his duties with respect to price tables, the distribution of goods in the zones, and exports.[4943] Thus, although he mentioned October 1975, the Trial Chamber should have "corrected his estimate" with reference to the Standing Committee meeting minutes of 13 March 1976, which created the Commerce Committee.[4944] KHIEU Samphân points to the Summary of Decisions of the Standing Committee in the Meeting of 19, 20 and 21 April 1976,[4945] which nominated him as "technical staff assistant". This should have led the Trial Chamber to find that his involvement in Office 870 was limited to commerce.[4946]

1769. The Co-Prosecutors contend that ample evidence establishes that KHIEU Samphân joined Office 870 around[4947] October 1975.[4948] Specifically, they point out that KHIEU Samphân's own evidence that he joined Office 870 in October 1975 and was responsible for preparing price lists and distribution of goods within the country coincides with evidence on the tasks assigned to him by the Standing Committee around October 1975, that is, making him responsible "for Commerce for accounting and pricing".[4949]

1770. Regarding his date of joining Office 870, KHIEU Samphân repeats submissions fully addressed by the Supreme Court Chamber in Case 002/01.[4950] KHIEU Samphân has raised no argument that would justify a departure from this Chamber's earlier reasoning on this point. Moreover, the Supreme Court Chamber notes that no finding of KHIEU Samphân's responsibility rests on whether he joined Office 870 in October 1975 rather than March 1976, which KHIEU Samphân suggests is the correct date and, as such, no miscarriage of justice

[4942] KHIEU Samphân's Appeal Brief (F54), para. 1764, referring to Standing Committee Meeting Minutes, 9 October 1975, E3/182, ERN (EN) 00183393-00183394, pp. 1-2.
[4943] KHIEU Samphân's Appeal Brief (F54), para. 1765.
[4944] KHIEU Samphân's Appeal Brief (F54), para. 1766, referring to Standing Committee Meeting Minutes, 13 March 1976, E3/234, ERN (EN) 00182649, p. 1.
[4945] KHIEU Samphân's Appeal Brief (F54), paras 1766-1767, referring to Summary of the Decisions of the Standing Committee in the Meeting of 19-20-21 April 1976, 21 April 1976, E3/236, ERN (EN) 00183416, 00183419-00183420, pp. 4-5.
[4946] KHIEU Samphân's Appeal Brief (F54), para. 1767.
[4947] The Co-Prosecutors point out that KHIEU Samphân misrepresents the Trial Chamber's finding insofar as it did not find that he joined "in" October 1975, but "around the same time" as Doeun. Co-Prosecutors' Response (F54/1), para. 907 (fn. 3144); Trial Judgment (E465), paras 364, 608.
[4948] Co-Prosecutors' Response (F54/1), para. 907.
[4949] Co-Prosecutors' Response (F54/1), para. 907 (fn. 3145), referring to Standing Committee Meeting Minutes, 9 October 1975, E3/182, ERN (EN) 00183393; Khieu Samphân, *Cambodia's Recent History and the Reasons Behind the Decision I Made*, (2004), E3/18, ERN (EN) 00103755-00103756, pp. 65-66.
[4950] Case 002/01 Appeal Judgment (F36), para. 1017.

could be occasioned by this finding. His arguments as to the dates when he joined Office 870, are dismissed.

1771. The Supreme Court Chamber is also unpersuaded that the Trial Chamber failed to take account of KHIEU Samphân's limited functions within Office 870 which, he says, "exclusively concerned matters relating to trade and commerce".[4951] To the contrary, being unable to establish that he served as chairman or was a leading cadre of that office, the Trial Chamber was particularly circumspect in relying on his role therein as a basis of his criminal responsibility. Specifically, with respect to his *mens rea*, the Trial Chamber took account of "the fact that he remained as one of the few members in Office 870 after Doeun's disappearance for about two years before the fall of the DK" as one of several factors to find that he was aware only of Doeun's arrest and execution.[4952] As to his contribution to the common purpose, the Trial Chamber considered his membership as one of a large number of factors evidencing his continued support for and assistance to the CPK in the realisation of its objectives.[4953] Further, the Trial Chamber held that "[a]s a member of Office 870 and overseer of DK trade and commerce, KHIEU Samphân personally enabled the smooth functioning of the DK administration to the detriment of its population".[4954] The Trial Chamber then went on to particularise his specific established activities in trade and commerce, evidently basing itself primarily on these functions. None of these findings rely on the Trial Chamber having expanded KHIEU Samphân's role in Office 870 beyond that supported by the evidence, and his arguments in this regard are rejected.

1772. Finally, KHIEU Samphân submits that the Trial Chamber's reference to him as Doeun's "predecessor" when it was unable to determine the precise role he played within Office 870 is "blatantly contradictory" as it is "equivalent to saying that KHIEU Samphan in fact replaced Doeun, a finding that the Chamber […] rejected."[4955] Further, KHIEU Samphân suggests that this error led the Trial Chamber to conclude that he was the intended recipient of a number of telegrams sent to "M-870" in 1977 and 1978.[4956]

[4951] KHIEU Samphân's Appeal Brief (F54), para. 1764. See also KHIEU Samphân's Appeal Brief (F54), para. 1763.
[4952] Trial Judgment (E465), para. 4225.
[4953] Trial Judgment (E465), para. 4257.
[4954] Trial Judgment (E465), para. 4276.
[4955] KHIEU Samphân's Appeal Brief (F54), para. 1768.
[4956] KHIEU Samphân's Appeal Brief (F54), para. 1768 (fn. 3423).

1773. The Co-Prosecutors respond that, in light of the Trial Chamber's findings about KHIEU Samphân's role in Office 870, its "use of the term 'predecessor' in the impugned paragraph can […] logically be interpreted as a typographical error, or confusion caused by the fact that Doeun was indeed [the] Appellant's predecessor in the Commerce Committee".[4957] Further, submit the Co-Prosecutors, KHIEU Samphân failed to show that this error was critical to the verdict and therefore that it occasioned a miscarriage of justice.[4958]

1774. The Supreme Court Chamber accepts that the Trial Chamber's reference to Doeun as KHIEU Samphân's "predecessor" in its findings on his role in Office 870[4959] is an error, as it is at variance to its finding that this was not established on the evidence, which was equivocal. Nonetheless, this error did not occasion a miscarriage of justice. The Trial Chamber did not rely on a finding that he succeeded Doeun to hold that KHIEU Samphân was aware of the content of reports sent to "M-870".[4960] Rather, it considered the fact that telegrams continued to be addressed to "M-870" in 1977 and 1978 as evidence that the Office itself "continued to operate after Doeun's arrest".[4961]

1775. This Chamber notes that the Trial Chamber referred to Doeun as KHIEU Samphân's "predecessor" a second time in its discussion of KHIEU Samphân's *mens rea*. This Chamber will therefore consider whether this second reference constitutes an error warranting intervention. In coming to the conclusion that KHIEU Samphân was aware of Doeun's arrest and execution, the Trial Chamber took several factors into account: among these is "that he remained as one of the few members in Office 870 after Doeun's disappearance for about two years before the fall of DK" and that KHIEU Samphân's assumption of Doeun's oversight responsibilities in the Commerce Committee coincided with the removal of cadres from the Ministry of Commerce.[4962] The Trial Chamber went on to reason that "[b]y assuming Doeun's roles during a period of internal turmoil, KHIEU Samphan not only knew that Doeun had been purged but personally ensured that his predecessor's responsibilities remained fulfilled after his removal."[4963] This Chamber considers that this context makes clear that the word

[4957] Co-Prosecutors' Response (F54/1), para. 908, referring to Trial Judgment (E465), paras 616, 4225.
[4958] Co-Prosecutors' Response (F54/1), para. 908.
[4959] Trial Judgment (E465), para. 616.
[4960] See KHIEU Samphân's Appeal Brief (F54), para. 1768 (fn. 3423), referring to Trial Judgment (E465), para. 615. The Supreme Court Chamber notes that this reference is in error and considers that KHIEU Samphân meant to refer to paragraph 610 of the Trial Judgment.
[4961] Trial Judgment (E465), para. 610.
[4962] Trial Judgment (E465), para. 4225.
[4963] Trial Judgment (E465), para. 4225.

"predecessor" was used in reference to KHIEU Samphân's "assumption" of Doeun's responsibilities in the Commerce Committee, and not to his title as chairman of Office 870. While the Trial Chamber might have expressed itself more precisely, the Supreme Court Chamber does not consider that its use of the word "predecessor" in this context either erroneous or prejudicial to KHIEU Samphân.

1776. For the reasons stated above, KHIEU Samphân's arguments, pertaining to his roles in Office 870, are dismissed.

c. Role with Respect to Trade and Commerce

i. Oversight of the Commerce Committee

1777. KHIEU Samphân raises a large number of appeal points against the Trial Chamber's findings with respect to his role in DK trade and commerce.[4964] At the outset, the Supreme Court Chamber notes that he repeats a number of "[claims] that his role in the DK economy had been limited" that were advanced before the Supreme Court Chamber in Case 002/01.[4965] The Supreme Court Chamber thus previously considered a number of arguments to the effect "that the documents upon which the Trial Chamber relied to find that he had oversight of the Commerce Committee actually attest to only a limited function of KHIEU Samphân".[4966]

1778. In Case 002/01, this Chamber's analysis showed that the Trial Chamber's conclusion that KHIEU Samphân supervised the Commerce Committee did not rest exclusively on the cherry-picked contested pieces of evidence, but upon all of its findings in relation to his role in the Committee; and further that KHIEU Samphân merely proposed an alternative interpretation of the evidence, without demonstrating that the Trial Chamber's interpretation was unreasonable.[4967] The Supreme Court Chamber stands by its previous assessment, with respect to a number of arguments that KHIEU Samphân merely repeats in his Case 002/02 Appeal Brief.[4968]

[4964] KHIEU Samphân's Appeal Brief (F54), paras 1770-1798.
[4965] Case 002/01 Appeal Judgment (F36), para. 1018, referring to Case 002/01 KHIEU Samphân's Appeal Brief (F17), paras 554-559.
[4966] Case 002/01 Appeal Judgment (F36), para. 1018, referring to Case 002/01 KHIEU Samphân's Appeal Brief (F17), paras 554-559.
[4967] Case 002/01 Appeal Judgment (F36), para. 1018.
[4968] Arguments repeated by KHIEU Samphân include that the Trial Chamber erred by failing to consider that (1) Standing Committee minutes of 9 October 1975 and 13 March 1976 suggested a limited role of KHIEU Samphân in the Commerce Committee and apportioned greater responsibilities to others (KHIEU Samphân's Appeal Brief (F54), para. 1772; Case 002/01 KHIEU Samphân's Appeal Brief (F17), para. 555); (2) in April 1976 the Standing Committee put VORN Vet in charge of the Commerce Committee, appointed its members, and appointed KHIEU

1779. Identical reasoning applies to a number of additional arguments raised by KHIEU Samphân in his Case 002/02 Appeal Brief, which again advance an alternative reading of the evidence that seeks to present him as having played a minor, and purely technical, role in the Commerce Committee. KHIEU Samphân drew this Chamber's attention to, in his submission, the Trial Chamber's failure to consider that Doeun was still chairman of the Commerce Committee and in that capacity in February 1977 spoke at a banquet pertaining to negotiations with Yugoslavia honouring VORN Vet, who led negotiations;[4969] that IENG Sary, assisted by VAN Rith, led negotiations with China in December 1978;[4970] Commerce Committee reports that sought KHIEU Samphân's "opinion" or "recommendations" related only to his tasks with respect to distribution to the zones of materials to be imported from Yugoslavia and China, whereas VAN Rith was actually in charge of negotiations;[4971] that there is an absence of documents showing that KHIEU Samphân issued instructions with respect to trade and commerce other than distribution of goods in the Zones;[4972] witnesses[4973] and reports[4974] attesting to the limited, technical nature of his tasks; and that there was a lack of banking activity under the DK regime, rendering one of KHIEU Samphân's official tasks moot.[4975] Moreover, it appears that KHIEU Samphân explicitly seeks to demonstrate that the Trial Chamber "misinterpreted the evidence"[4976] and that there is "another reasonable finding",[4977] rather than that the Trial Chamber's findings were unreasonable. The Supreme Court Chamber is not convinced that these arguments, alone or cumulatively, demonstrate unreasonableness on the part of the Trial Chamber.

Samphân "technical staff [assistant]" with respect to a commercial delegation to Korea (KHIEU Samphân's Appeal Brief (F54), para. 1773; Case 002/01 KHIEU Samphân's Appeal Brief (F17), para. 555); (3) the Standing Committee designated Doeun to set up a foreign trade team in May 1976 (KHIEU Samphân's Appeal Brief (F54), para. 1774; Case 002/01 KHIEU Samphân's Appeal Brief (F17), para. 555); (4) decisions were actually made by the Standing Committee (KHIEU Samphân's Appeal Brief (F54), para. 1775; Case 002/01 KHIEU Samphân's Appeal Brief (F17), para. 558 (fn. 1212)); (5) Commerce Committee reports addressed or copied to KHIEU Samphân attest to his limited functions (KHIEU Samphân's Appeal Brief (F54), paras 1785-1790; Case 002/01 KHIEU Samphân's Appeal Brief (F17), para. 555); (6) his visits to state warehouses did not evidence power within the Commerce Committee (KHIEU Samphân's Appeal Brief (F54), paras 1791-1793; Case 002/01 KHIEU Samphân's Appeal Brief (F17), para. 558).

[4969] KHIEU Samphân's Appeal Brief (F54), paras 1774, 1788.
[4970] KHIEU Samphân's Appeal Brief (F54), para. 1775.
[4971] KHIEU Samphân's Appeal Brief (F54), paras 1776-1778.
[4972] KHIEU Samphân's Appeal Brief (F54), paras 1779, 1784.
[4973] KHIEU Samphân's Appeal Brief (F54), para. 1784.
[4974] KHIEU Samphân's Appeal Brief (F54), para. 1787.
[4975] KHIEU Samphân's Appeal Brief (F54), para. 1783.
[4976] KHIEU Samphân's Appeal Brief (F54), para. 1170.
[4977] KHIEU Samphân's Appeal Brief (F54), para. 1780.

1780. KHIEU Samphân has also previously challenged the Trial Chamber's reliance on SAR Kimlomouth. In both appeal briefs for Cases 002/01 and 002/02, he argues that this witness was speculating on documents unknown to him before they were shown to him by investigators. Further, he had not worked with KHIEU Samphân and did not know of his exact role in relation to trade or commerce.[4978] The Supreme Court Chamber previously noted that the Trial Chamber cited this witness's testimony as an additional source and primarily relied on six Commerce Committee reports and letters.[4979] The Trial Chamber proceeded in the same way in Case 002/02.[4980] Further, KHIEU Samphân avers that the Trial Chamber erred in finding, on the basis of SAR Kimlomouth's testimony, that "VAN Rith could not make certain decisions and had to defer to VORN Vet, and KHIEU Samphan".[4981] The Supreme Court Chamber notes that this is merely the Trial Chamber's summary of the witness's testimony, rather than a finding of fact.[4982]

1781. KHIEU Samphân argues further that the Trial Chamber erred in relying on YEN Kuch's written statement to establish that he visited state warehouses, which he says "should have been dismissed".[4983] The Supreme Court Chamber has assessed KHIEU Samphân's challenges to the legal framework set out by the Trial Chamber for assessing the use to which written statements and the weight that can be permissibly accorded to them, and has found no legal error.[4984] In the present case, the Trial Chamber relied primarily on the oral evidence of RUOS Suy and SIM Hao, and referred to YEN Kuch as an additional and corroborative source.[4985] In the view of the Supreme Court Chamber, this accords with the limited weight to be accorded to the evidence of witnesses absent the opportunity for confrontation.

1782. More broadly, the Supreme Court Chamber concludes that KHIEU Samphân's arguments are misplaced insofar as he seeks to show that he did not have exclusive or primary

[4978] KHIEU Samphân's Appeal Brief (F54), paras 1782-1783; Case 002/01 KHIEU Samphân's Appeal Brief (F17), paras 556-557.
[4979] Case 002/01 Appeal Judgment (F36), para. 1018.
[4980] Trial Judgment (E465), para. 619 (fn. 1954).
[4981] KHIEU Samphân's Appeal Brief (F54), para. 1782. See also Case 002/01 KHIEU Samphân's Appeal Brief (F17), para. 556.
[4982] See Trial Judgment (E465), para. 619 (fn. 1954).
[4983] KHIEU Samphân's Appeal Brief (F54), para. 1793; Trial Judgment (E465), para. 620 (fn. 1964).
[4984] See *supra* Section V.D.3.c.
[4985] Trial Judgment (E465), para. 620 (fn. 1964).

decision-making authority in the Commerce Committee,[4986] that this lay elsewhere,[4987] and relatedly that his functions were purely "technical".[4988] That other CPK figures, such as IENG Sary, VORN Vet, and VAN Rith, exercised distinct but related functions, has little bearing on the work done by KHIEU Samphân. Similarly, this Chamber concludes that while KHIEU Samphân's appointment to deal with the matter of banks was hollow in substance due to the lack of banking activity in the DK, it does not detract from the functions he did carry out.

1783. Close scrutiny of the Trial Chamber's findings shows that it was careful not to overstate what was established relating to KHIEU Samphân's exact functions in the Commerce Ministry. His oversight of the Commerce Committee was considered, first, to demonstrate his knowledge of commercial affairs. Thus, that he exercised "considerable oversight" meant that KHIEU Samphân was "thoroughly appraised of DK trade and commerce matters, both domestic and international, between October 1976 and early 1979".[4989] This considerable oversight was taken into account, together with other factors, to find that he was aware of food shortages,[4990] forced marriages as implemented in the Ministry of Commerce,[4991] and Doeun's arrest and execution.[4992] In this regard, KHIEU Samphân accepts that "he was kept informed"[4993] at least of the contents of Commerce Committee reports addressed or copied to him.

[4986] See KHIEU Samphân's Appeal Brief (F54), paras 1774 ("the Chamber could not find that KHIEU Samphan held any decision-making authority or hierarchical status"), 1775 ("KHIEU Samphan was […] neither a negotiator nor a decision-maker"), 1779 ("supervisory authority"), 1782 ("inconsistent with the contention that he held considerable power within the Commerce Committee"), 1788 ("he was not part of the decision-making chain").
[4987] See KHIEU Samphân's Appeal Brief (F54), paras 1772 ("the document mentions 'Comrade Thuch', *alias* KOY Thuon, as responsible for 'Domestic and International Commerce'"), 1773 ("VORN Vet was in charge of the Commerce Committee"), 1774 ("it was Doeun and not KHIEU Samphan who was designated in May 1976 to set up a foreign trade team"; "it was in fact Doeun who, in his capacity as Chairman [of the Commerce Committee], gave a speech […] in February 1977"), 1775 ("it was IENG Sary, assisted by VAN Rith, who led negotiations"; "decision-making was done at the Standing Committee level"), 1778 ("in all of the reports, VAN Rith appears to be the lead negotiator and had full authority to set out the DK's official position), 1786 ("decisions made by VORN Vet or more generally, […] *Angkar*"), fn. 3461 ("VORN Vet was the decision-maker, not KHIEU Samphân"), 1788 ("negotiations with the delegation from Yugoslavia were led by VORN Vet").
[4988] See KHIEU Samphân's Appeal Brief (F54), paras 1772 ("the Appellant's responsibilities with respect to trade and commerce were narrowly restricted"), 1773 ("the Appellant's technical role in Trade and Commerce"), 1777 ("the technical missions he had been assigned"), 1780 ("he was supposed to provide technical assistance"), 1784 ("Those witnesses who mention [distribution of equipment and products to the zones] as one of KHIEU Samphan's tasks have described his work as being primarily technical and administrative in nature"), 1785 ("careful scrutiny of these reports and documents confirms the limited scope of the technical assistance KHIEU Samphan was assigned to provide"), 1787 ("letters [copied to KHIEU Samphân] […] pertain to highly technical exchanges").
[4989] Trial Judgment (E465), para. 621.
[4990] Trial Judgment (E465), para. 3913.
[4991] Trial Judgment (E465), para. 4247.
[4992] Trial Judgment (E465), para. 4225.
[4993] KHIEU Samphân's Appeal Brief (F54), para. 1788. See also KHIEU Samphân's Appeal Brief (F54), para. 1789 (referring to "the practice of sending documents for purposes of information").

1784. Further, the Trial Chamber summed up KHIEU Samphân's contribution to the common purpose in the realm of trade and commerce in broad terms, noting that he "personally enabled the smooth functioning of the DK administration to the detriment of the population" because "[f]or two years after SUA Vasi *alias* Doeun's removal from Office 870 and as supervisor of commerce-related matters, KHIEU Samphan personally ensured that Doeun's responsibilities remained fulfilled".[4994] The Trial Chamber went on to particularise these functions by which he significantly contributed, as follows:

> KHIEU Samphan ensured that cooperatives handed over communally harvested rice for export. He received requests from zones for the delivery of goods, and responded to them with delivery orders. He received reports detailing the quantities of rice sent to state warehouses by the zones and the quantities of rice exported, ensuring that the maximums quantity was exported in accordance with CPK economic plans. He visited state warehouses where he inspected products destined for export, while personally supervising the import and export of goods in and out of DK.[4995]

Thus, the Trial Chamber based itself on the concrete, "technical" tasks performed by KHIEU Samphân, which he has not disputed,[4996] rather than any abstract decision-making authority.

1785. For these reasons, KHIEU Samphân's submissions with respect to his role in the Commerce Committee, are dismissed in their entirety.

ii. Education Sessions for Commerce Cadres

1786. The Trial Chamber relied on the testimony of BEIT Boeurn, to find that KHIEU Samphân "conducted meetings with workers and commerce cadres, instructing them on leadership, discipline and morality, and denouncing as enemies of the Party 'those who were lazy to work'",[4997] and in this way contributed to the common purpose.[4998]

1787. KHIEU Samphân submits that the Trial Chamber erred in fact in relying on BEIT Boeurn's uncorroborated testimony because she was unaware of KHIEU Samphân's official positions or what the Standing Committee was; initially, she claimed that the Commerce Office was headed by a woman, but later said it was VAN Rith; and suspected that VORN Vet and

[4994] Trial Judgment (E465), para. 4276. See also Trial Judgment (E465), para. 4257 ("oversight of DK commerce matters from October 1976 until January 1979 further evidence his support for and continued assistance to the CPK in the realisation of its objectives").
[4995] Trial Judgment (E465), para. 4276 (internal citations omitted).
[4996] See, *e.g.*, KHIEU Samphân's Appeal Brief (F54), paras 1772, 1780, 1784-1790.
[4997] Trial Judgment (E465), para. 620 (fn. 1965).
[4998] Trial Judgment (E465), para. 4272. See also Trial Judgment (E465), para. 4262 ("personally perpetuated the Party line by leading indoctrination sessions at mass rallies and re-education seminars for, among others, […] Ministry of Commerce cadres, which were aimed at strengthening socialist consciousness, forging worker-peasant identity and engendering support for CPK policies.").

SON Sen could have been the same person.[4999] Further, KHIEU Samphân submits that BEIT Boeurn did not mention KHIEU Samphân as among those delivering training sessions in her first DC-Cam interview, and in the second interview only mentioned him in response to a leading question.[5000]

1788. The Co-Prosecutors counter that KHIEU Samphân merely disagrees with the Trial Chamber's assessment of the evidence and fails to acknowledge its broad discretion to assess its reliability and credibility.[5001] Further, contrary to KHIEU Samphân's submission, BEIT Boeurn's testimony was corroborated by RUOS Suy and SIM Hao, who both mentioned participating in sessions for economic cadres chaired by KHIEU Samphân.[5002]

1789. The Supreme Court Chamber is not persuaded that the issues identified by KHIEU Samphân cast doubt on the witness's credibility or reliability. That she lacked knowledge of the upper echelon, specifically KHIEU Samphân's precise positions within the CPK, the Standing Committee and the identities of VORN Vet and SON Sen, is in keeping with her own lower rank, in light of the principle of secrecy within the CPK. BEIT Boeurn's failure to mention KHIEU Samphân in her first DC-Cam interview does not override the Trial Chamber's discretion to accept her live testimony.

1790. KHIEU Samphân submits that the Trial Chamber erred by misrepresenting BEIT Boeurn's evidence, in two ways. First, he submits that the witness stated that it was NUON Chea who discussed the issue of enemies and not KHIEU Samphân.[5003] Second, the witness stated that the enemy was "inside our self, and it was the ideological enemy which made us to become lazy", rather than that those who were too lazy to work, were denounced as enemies, as found by the Trial Chamber.[5004] The Co-Prosecutors respond that there is no contradiction in BEIT Boeurn's previous statements that KHIEU Samphân denounced the attitude of laziness during his meetings.[5005]

[4999] KHIEU Samphân's Appeal Brief (F54), paras 1794-1795.
[5000] KHIEU Samphân's Appeal Brief (F54), para. 1795.
[5001] Co-Prosecutors' Response (F54/1), para. 935.
[5002] Co-Prosecutors' Response (F54/1), para. 935, referring to T. 25 April 2013 (RUOS Suy), E1/184.1, pp. 37, 41, 46-48, 51; RUOS Suy DC-Cam Statement, E3/4594, ERN (EN) 00710554; T. 13 June 2013 (SIM Hao), E1/207.2, pp. 16, 20; SIM Hao DC-Cam Statement, E3/4263, ERN (EN) 00679721-00679722.
[5003] KHIEU Samphân's Appeal Brief (F54), para. 1795.
[5004] KHIEU Samphân's Appeal Brief (F54), para. 1796.
[5005] Co-Prosecutors' Response (F54/1), para. 935.

1791. Having reviewed BEIT Boeurn's evidence, this Chamber finds that the witness testified that she attended two three-day study sessions at Borei Keila and approximately four meetings with commerce cadres, and KHIEU Samphân spoke at all of these events.[5006] At the Borei Keila study sessions, the witness explicitly attributed talk about enemies only to POL Pot and NUON Chea.[5007] This is consistent with her first DC-Cam statement, as identified by KHIEU Samphân.[5008] However, the witness testified that she and a small group of her commerce supervisors additionally attended meetings with KHIEU Samphân, either monthly or every two or three months,[5009] but probably a total of four times.[5010] These meetings were about work leadership, adhering to discipline and morality and also discussed "the psychological enemy", being "those who were lazy to work".[5011] BEIT Boeurn specifically denied hearing KHIEU Samphân speak about CIA agents, Vietnamese or enemies within the CPK.[5012] This Chamber is thus not persuaded that the Trial Chamber mischaracterised the witness's evidence.

1792. For these reasons, the Supreme Court Chamber dismisses KHIEU Samphân's arguments pertaining to the evidence of BEIT Boeurn with respect to study sessions with commerce cadres.

d. Responsibility for the Ministry of Foreign Affairs

1793. The Trial Chamber accepted that KHIEU Samphân knew about the commission of crimes within the scope of Case 002/02, *inter alia*, on the basis of two letters sent to him by Amnesty International, the second joined by the UN Commission on Human Rights, in 1977 and 1978.[5013] The Trial Chamber reasoned that he would have been aware of their contents; he "could not ignore such reports, considering his strong connection to, in particular IENG Sary and the Ministry of Foreign Affairs".[5014] This "strong connection" was apparently based in part on its finding that KHIEU Samphân provided "periodic and limited temporary assistance" to the Ministry of Foreign Affairs ("MFA").[5015] Elsewhere in the Trial Judgment, the Trial

[5006] T. 28 November 2016 (BEIT Boeurn), E1/502.1, pp. 22, 31-32, 53.
[5007] T. 28 November 2016 (BEIT Boeurn), E1/502.1, pp. 23-25.
[5008] BEIT Boeurn DC-Cam Interview, 20 October 2004, E3/5647; KHIEU Samphân's Appeal Brief (F54), para. 1795.
[5009] T. 28 November 2016 (BEIT Boeurn), E1/502.1, pp. 31-32
[5010] T. 28 November 2016 (BEIT Boeurn), E1/502.1, pp. 33, 66.
[5011] T. 28 November 2016 (BEIT Boeurn), E1/502.1, p. 32.
[5012] T. 28 November 2016 (BEIT Boeurn), E1/502.1, p. 32.
[5013] Trial Judgment (E465), para. 4250. See also Trial Judgment (E465), para. 4253.
[5014] Trial Judgment (E465), para. 4250.
[5015] Trial Judgment (E465), para. 623.

Chamber noted that KHIEU Samphân was "forwarded" the letters in his capacity as nominal head of state.[5016]

1794. KHIEU Samphân submits that there was no evidence before the Trial Chamber demonstrating that the letters reached him.[5017] First, he submits that the Trial Chamber erred in finding that "simply by virtue of his position as President of the Presidium, KHIEU Samphan 'received' letters from *Amnesty International* while in the same paragraph it acknowledged that he held only a symbolic position".[5018] Second, he submits that since the Trial Chamber only "noted the 'possibility' that KHIEU Samphan may have provided periodic and limited temporary assistance" to the MFA,[5019] it erred in finding that he had a "strong connection" to IENG Sary and the MFA, and in using this as a basis to conclude that he would have known the letters' contents.[5020] In any case, no reasonable trier of fact could have found that he assisted the MFA, he argues, as the witnesses relied upon do not support that conclusion.[5021]

1795. The Co-Prosecutors respond that KHIEU Samphân does not demonstrate an error in the Trial Chamber's finding that he assisted the MFA, but only disagrees with its interpretation of the evidence.[5022] Further, the Co-Prosecutors submit that the Trial Chamber properly found, based on the totality of the evidence, that KHIEU Samphân knew of the contents of Amnesty International's letters.[5023] In particular, it was reasonable to conclude that Amnesty's consecutive letters addressed to him were received in the normal course of business, in the normal manner of correspondence.[5024] Moreover, Amnesty International's reports elicited a response from IENG Sary, on behalf of the CPK.[5025] As head of state who would have had to receive any international delegation and respond to any concerns raised by international

[5016] Trial Judgment (E465), para. 4048.
[5017] KHIEU Samphân's Appeal Brief (F54), paras 1697 ("no evidence that he would have received these letters"), 1800 ("without any evidence that the letters in question had ever reached him"), 1801 ("do not constitute evidence that he in fact ever received the letters in question").
[5018] KHIEU Samphân's Appeal Brief (F54), paras 1697, 1800 (fn. 3492) ("[t]he mere fact that he was President of the Presidium does not constitute evidence that he received letters addressed to him").
[5019] KHIEU Samphân's Appeal Brief (F54), paras 1799-1800.
[5020] KHIEU Samphân's Appeal Brief (F54), paras 1801-1803.
[5021] KHIEU Samphân's Appeal Brief (F54), para. 1802.
[5022] Co-Prosecutors' Response (F54/1), para. 938.
[5023] Co-Prosecutors' Response (F54/1), paras 939-940.
[5024] Co-Prosecutors' Response (F54/1), para. 940, referring to Trial Judgment (E465), para. 597.
[5025] Co-Prosecutors' Response (F54/1), para. 940, referring to Trial Judgment (E465), paras 3825 (fn. 12784), 3834 (fn. 12816); *Ieng Sary Statement, Letter to the U.N. Secretary General*, 22 April 1978, E3/1385, ERN (EN) 00235721-00235728; DK Telegram, 16 September 1978, E3/4605, ERN (EN) 00095649; Los Angeles Times, *U.N. Chief invited to Cambodia to check on rights*, 10 October 1978, E3/627, ERN (EN) 00004325-00004329; International Herald Tribune, *Cambodia Invites Westerners for Visit to Counter Criticisms*, E3/654, ERN (EN) 00013708.

delegates, it is unlikely that KHIEU Samphân would have been unaware of Amnesty International's letters and reports.

1796. The Supreme Court Chamber notes, first, that the Trial Chamber did not find that it was "possible" that KHIEU Samphân provided occasional assistance to the MFA, but that he did so, and on this point he misrepresents the Trial Chamber's findings. In addition, the Supreme Court Chamber concludes that it was not unreasonable for the Trial Chamber to find that KHIEU Samphân provided "periodic and temporary assistance" to the MFA on the basis of the evidence of three witnesses. LONG Norin who testified to seeing KHIEU Samphân at the MFA welcoming visitors, in IENG Sary's absence, SALOTH Ban testified to seeing KHIEU Samphân holding meetings at MFA, and SUONG Sikoeun testified to seeing KHIEU Samphân discussing a possible publication.[5026]

1797. Second, as discussed above,[5027] KHIEU Samphân deliberately misapprehends the import of the Trial Chamber's finding that his position as President of the State Presidium held "symbolic" significance, rather than executive authority, in his effort to minimise his position as the face and voice of DK. The Supreme Court Chamber rejects his argument that the symbolic significance of his role was in anyway a bar to either receiving the letters or being made aware of their contents.

1798. Further, the Trial Chamber did not find that KHIEU Samphân "received" the letters, as KHIEU Samphân claims, but that they were "forwarded", *i.e.*, sent, to him by Amnesty International in his capacity as nominal head of state and that, "in particular", his connection to IENG Sary and the MFA meant that he would have been made aware of their contents. In this regard, the Supreme Court Chamber is also unpersuaded by KHIEU Samphân's contention that the Trial Chamber should have required direct proof that he personally received the letters. At issue, is rather, whether it was reasonable for the Trial Chamber to conclude that he was, in some manner, made aware of their contents. The Supreme Court Chamber's view is that it was: indeed, this Chamber considers it highly unlikely, given his responsibilities in the role of President of the State Presidium, that KHIEU Samphân would have remained unaware that IENG Sary denied the truth of reports of extrajudicial killings and poor living conditions to the UN Committee on Human Rights.

[5026] Trial Judgment (E465), paras 622-623; KHIEU Samphân's Appeal Brief (F54), para. 1802; Co-Prosecutors' Response (F54/1), para. 938.
[5027] See *supra* Section VIII.A.2.b.

1799. Finally, KHIEU Samphân does not demonstrate that any error, if such had been shown, occasioned a miscarriage of justice. The Trial Chamber's finding that he knew that crimes had been committed does not rest solely or decisively on the letters sent by Amnesty International.

B. JOINT CRIMINAL ENTERPRISE

1800. The Trial Chamber found that, by 17 April 1975, and continuing until at least 6 January 1979, several senior CPK leaders, including KHIEU Samphân, shared the criminal common purpose of rapidly implementing socialist revolution in Cambodia through a "great leap forward" designed to build the country, defend it from enemies, and radically transform the population into an atheistic and homogenous Khmer society of worker-peasants.[5028] According to the Trial Chamber, the common purpose was criminal because it was intrinsically linked to policies that involved the commission of crimes,[5029] namely: (1) the establishment and operation of cooperatives and worksites;[5030] (2) the establishment and operation of security centres and execution sites;[5031] (3) the targeting of specific groups;[5032] and (4) the regulation of marriage.[5033]

1801. The Trial Chamber further found that, in sharing in the common purpose, KHIEU Samphân as a senior leader and the public face of DK, actively promoted the policies domestically and on the international stage and encouraged, incited, and legitimised its implementation through criminal policies, including by instructing CPK cadres on their implementation while enabling and controlling the same.[5034] The Trial Chamber thus determined that KHIEU Samphân made a significant contribution to the commission of crimes perpetrated by CPK cadres within the scope of Case 002/02,[5035] and that he shared the intent of other senior leaders in a joint criminal enterprise to participate in, and commit the crimes encompassed by, the common purpose.[5036] The Trial Chamber accordingly found KHIEU Samphân guilty of committing, through the joint criminal enterprise, genocide, crimes against

[5028] Trial Judgment (E465), paras 3733-3743, 4068, 4069, 4074.
[5029] Trial Judgment (E465), paras 3928, 3987, 3998, 4012, 4022, 4061, 4067, 4068.
[5030] Trial Judgment (E465), paras 3866-3929.
[5031] Trial Judgment (E465), paras 3930-3987.
[5032] Trial Judgment (E465), paras 3988-4061.
[5033] Trial Judgment (E465), paras 4062-4067.
[5034] Trial Judgment (E465), paras 4070, 4073, 4074, 4257-4278, 4306.
[5035] Trial Judgment (E465), para. 4306.
[5036] Trial Judgment (E465), paras 4279-4307. This finding excludes KHIEU Samphân's alleged genocidal intent regarding the Cham, which the Trial Chamber was unable to infer. See Trial Judgment (E465), paras 4290, 4308.

humanity, and grave breaches of the Geneva Conventions, and sentenced him to life imprisonment.[5037]

1802. KHIEU Samphân disputes every part of these key findings and submits that first, the Trial Chamber made several errors of law and fact in defining the common purpose of the senior leaders of DK as criminal. He disputes the criminal appellation to each of the CPK's policies.[5038] He further contends that the Trial Chamber was in error when it found that he shared the criminal aspect of the common purpose and that he significantly contributed to it, as well as in finding that he intended to participate in the common purpose and in the crimes underlying it.[5039] He argues that these errors invalidate the judgment and accordingly requests the Supreme Court Chamber overturn his convictions.[5040] This chapter will approach the Trial Chamber's findings in the context of KHIEU Samphân's premises that: (1) the common plan was not criminal; (2) the policies included in the common plan were not criminal; (3) he was in any event not a participant in the common plan; and (4) all findings that he was a significant contributor to the common plan are factually wrong and legally unsound.

1803. The Co-Prosecutors respond that KHIEU Samphân fails to demonstrate any error in the Trial Chamber's findings regarding the common criminal purpose or his participation in the joint criminal enterprise and accordingly request the Supreme Court Chamber to dismiss his arguments in their entirety.[5041]

1. Applicable Law

1804. The Trial Chamber stated the law applicable to JCE, in relevant part, as follows:

> All categories of JCE have three objective elements. First, there must be a plurality of persons. […] Second, there must be a common purpose of a criminal character which amounts to or involves the commission of a crime. Third, an accused must participate in the common purpose, making a significant, but not necessarily indispensable, contribution to the commission of the crime.[5042]
>
> The common purpose must either have as (one of) its primary objective(s) the commission of (a) crime(s) (*i.e.* 'amounts to') or must contemplate the commission of a (a) crime(s) as a means to achieve an objective that is not necessarily criminal (*i.e.* 'involves'). […] [T]he common purpose, plan or design of a JCE can be fluid and change over time to include additional crimes. […] In

[5037] Trial Judgment (E465), paras 4306, 4307.
[5038] KHIEU Samphân's Appeal Brief (F54), paras 1399-1600.
[5039] KHIEU Samphân's Appeal Brief (F54), paras 1600-1603, 1938-2118. See also T. 18 August 2021, F1/11.1, pp. 8-37; T. 19 August 2021, F1/12.1, pp. 63-69.
[5040] KHIEU Samphân's Appeal Brief (F54), paras 2031-2113.
[5041] Co-Prosecutors' Response (F54/1), paras 953-1105. See also T. 18 August 2021, F1/11.1, pp. 38-61; T. 19 August 2021, F1/12.1, pp. 49-56.
[5042] Trial Judgment (E465), para. 3708 (internal citations omitted).

> such case, liability arises when JCE members, while knowing that new types of crime are included in the common plan, have taken no effective measures to prevent the recurrence of such new types of crime and have subsequently persisted in the implementation of the common purpose.[5043]
>
> Participation in a common purpose may be by positive act or culpable omission. […] An accused's participation in a common purpose need not involve commission of a specific crime […], but may take the form of assistance in, or contribution to, the execution of the common purpose. Such a contribution need not be an indispensable condition, without which the crimes could or would not have been committed. However, a JCE member's involvement in the crime must form a link in the chain of causation.[5044]
>
> Participants in a JCE can incur liability for crimes committed by direct perpetrators who were not JCE members, provided that it has been established that the crimes can be imputed to at least one JCE participant and that this participant, when using a direct perpetrator, acted to further the common purpose.[5045]
>
> With respect to the *mens rea* […], an accused must intend to participate in the common purpose and this intent must be shared with the other JCE participants. JCE participants must also be shown to share with the other JCE participants the required intent regarding the underlying crimes […]. Thus, JCE intent must cover both the common purpose and the crimes it encompassed.[5046]

1805. KHIEU Samphân submits that the Trial Chamber's examination was too brief and does not establish an appropriate legal framework to clarify the specific and central questions on the joint criminal enterprise in the present case.[5047] He argues that the Trial Chamber thus risked violating cardinal principles of law such as *nulla poena sine culpa* and that guilt must be personal or individual (rather than by association), as well as in failing to apply correct evidentiary standards when finding criminal liability.[5048] When challenging the Trial Chamber's assessment of his alleged significant contribution, KHIEU Samphân submits that culpable omission is not sufficient to establish participation in a common purpose,[5049] and that the requisite link must be between a JCE member and *all* direct perpetrators of a crime (not just one).[5050] He contends that the Trial Chamber's presentation of the law shows that it did not consider that a contribution to a crime was necessary in contributing to the common purpose.[5051] He further contends that Trial Chamber erred in stating the law on *mens rea*.[5052]

[5043] Trial Judgment (E465), para. 3709.
[5044] Trial Judgment (E465), para. 3710.
[5045] Trial Judgment (E465), para. 3711.
[5046] Trial Judgment (E465), para. 3712.
[5047] KHIEU Samphân's Appeal Brief (F54), para. 1942.
[5048] KHIEU Samphân's Appeal Brief (F54), paras 1940-1951, 1954-1956.
[5049] KHIEU Samphân's Appeal Brief (F54), paras 1957-1959.
[5050] KHIEU Samphân's Appeal Brief (F54), paras 1952, 1953.
[5051] KHIEU Samphân's Appeal Brief (F54), paras 1960-1962.
[5052] KHIEU Samphân's Appeal Brief (F54), paras 1963-1965, and references cited therein.

1806. The Co-Prosecutors defend the Trial Chamber's articulation of the law on common purpose, significant contribution, and *mens rea*, and argue that KHIEU Samphân misrepresents and misapplies much of the relevant law.[5053]

1807. The Supreme Court Chamber recalls that an appellant must demonstrate not only that the Trial Chamber made a legal error, but also how that error invalidated the judgment.[5054] KHIEU Samphân's submissions regarding the Trial Chamber's allegedly incomplete statement of the law on the common purpose of a joint criminal enterprise are vague and abstract, failing to demonstrate how the Trial Chamber was actually in error rather than potentially in error, in its assessment of what constitutes a joint criminal enterprise, which he concedes is generally correct.[5055] Further, he provides no reason to doubt that the Trial Chamber applied all of the appropriate elements of the relevant description to the facts of the present case and cites no findings that suggest otherwise.

1808. Similarly, his challenges to the Trial Chamber's findings regarding significant contribution alleged, on a general basis, that the Trial Chamber erred in holding that participation in a JCE could take the form of a culpable omission.[5056] The Trial Chamber did this, he argues, without providing any solid legal foundation for this general assertion.[5057] The Supreme Court Chamber notes that, to the contrary, the Trial Chamber pronounced the law applicable to individual criminal responsibility by recalling the settled law of this Court and of the *ad hoc* tribunals that "a crime may be committed by culpable omission where there is a duty to act",[5058] and that participation in a JCE may be by way of positive act or culpable omission.[5059] The Supreme Court Chamber agrees with the Trial Chamber's determination that JCE liability may result from an accused's positive act or culpable omission,[5060] and accordingly dismisses KHIEU Samphân's challenge in this regard.

1809. Likewise, in support of his assertion that "the link [with a JCE member] must be established with each of the principal perpetrators if the crime is committed by several principal

[5053] Co-Prosecutors' Response (F54/1), paras 956, 960, 1040, 1041, 1098, 1099.
[5054] See *supra* Section II.
[5055] KHIEU Samphân's Appeal Brief (F54), paras 1939-1942.
[5056] KHIEU Samphân's Appeal Brief (F54), para. 1957.
[5057] KHIEU Samphân's Appeal Brief (F54), paras 1958, 1959.
[5058] Trial Judgment (E465), para. 3703, referring to Case 002/01 Trial Judgment (E313), para. 693, fn. 2159. See also Trial Judgment (E465), paras 627, 708, fn. 2296.
[5059] Case 002/01 Trial Judgment (E313), para. 693, fn. 2159, and references cited therein.
[5060] See also *Kvočka et al.* Appeal Judgment (ICTY), paras 187, 421 ("[I]t is sufficient for the accused [charged with participation in a JCE] to have committed an act or an omission which contributes to the common criminal purpose"), 556.

perpetrators",[5061] KHIEU Samphân contests the Trial Chamber's finding, on the basis of ICTY jurisprudence, that "the crimes can be imputed to at least one JCE participant and that this participant, *when using a direct perpetrator*, acted to further the common purpose".[5062] He argues that "the Brđanin Judgement echoed by the Krajišnik Judgement requires that one of the participants in the enterprise [has] used *all the principal perpetrators* of the alleged crimes".[5063]

1810. This Chamber notes that the *Krajišnik* Appeal Judgment, which was one of the cases relied on by the Trial Chamber, states that "members of a JCE can incur liability for crimes committed by principal perpetrators who were non-JCE members, provided that it has been established that the crimes can be imputed to at least one member of the JCE and that this member – *when using the principal perpetrators* – acted in accordance with the common objective".[5064] The *Krajišnik* Appeal Judgment relied on the *Brđanin* Appeal Judgment, which held that "the crime can be imputed to one member of the joint criminal enterprise, and that this member – *when using a principal perpetrator* – acted in accordance with the common plan".[5065] This statement is nearly identical to the Trial Chamber's enunciation and is not, in concept or quotation, the same thing as the alternative interpretation advocated by KHIEU Samphân. This Chamber understands the applicable law to be that imputing crimes to a JCE member occurrs when the JCE member uses *one or more direct or principal perpetrators* of the crimes to act in accordance with or furtherance of the common purpose.[5066] KHIEU Samphân does not show that the Trial Chamber considered or applied otherwise.

[5061] KHIEU Samphân's Appeal Brief (F54), para. 1953.
[5062] Trial Judgment (E465), para. 3711 (emphasis added), referring to *Prosecutor v. Krajišnik*, Appeals Chamber (ICTY), IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgment (ICTY)"), para. 225; *Brđanin* Appeal Judgment (ICTY), para. 413.
[5063] KHIEU Samphân's Appeal Brief (F54), para. 1953 (emphasis added).
[5064] *Krajišnik* Appeal Judgment (ICTY), para. 225 (emphasis added).
[5065] *Brđanin* Appeal Judgment (ICTY), para. 413 (emphasis added). See also *Brđanin* Appeal Judgment (ICTY), para. 430.
[5066] In this respect, see also *Martić* Appeal Judgment (ICTY), para. 168 ("In *Brđanin*, the Appeals Chamber held that the decisive issue under the basic form of JCE was not whether a given crime had been committed by a member of the JCE, but whether this crime fell within the common criminal purpose of the JCE. For the extended form of JCE, the accused may be found responsible provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by *one or more of the persons used by him* (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk. The Appeals Chamber thus held that members of a JCE could be held liable for crimes committed by principal perpetrators who were not members of the JCE provided that it had been shown that the crimes could be imputed to at least one member of the JCE and that this member, *when using a principal perpetrator*, acted in accordance with the common plan." (emphasis added).

1811. KHIEU Samphân's remaining submissions dispute the criminality of the common purpose. This important issue is addressed in the sections that follow in which this Chamber outlines the factors and evidence relied on by the Trial Chamber in support of the criminal purpose of the leadership of the CPK and upholds the reasonableness of that assessment. This Chamber nonetheless rejects outright KHIEU Samphân's proposition that the Trial Chamber's pronouncement of the law indicates disregard for the requirement of a contribution to the commission of a crime in furtherance of the common purpose. This Chamber is satisfied that the Trial Chamber explicitly set out that "an accused must participate in the common purpose, making a significant, but not necessarily indispensable, contribution *to the commission of the crime*",[5067] and that "a JCE member's *involvement in the crime* must form a link in the chain of causation."[5068] KHIEU Samphân's formulation of the requisite *mens rea*, that "[i]n reality, the law requires that the accused must […] have had both the intention of participating in the execution of the criminal aspect of the common purpose and that of committing the crime",[5069] is similarly rejected as it hinges on minor differences in phrasing without showing how it differs in substantive meaning from the Trial Chamber's statement that "JCE intent must cover both the common purpose and the crimes it encompassed",[5070] which this Chamber has previously established as correct in Case 002/01.[5071]

1812. KHIEU Samphân's submissions of error in the Trial Chamber's statement of the law applicable to JCE are accordingly dismissed.

2. Criminality of the Common Purpose

1813. KHIEU Samphân objects to the Trial Chamber's conclusion that the CPK's socialist revolution project was criminal in nature.[5072] He contends that "[t]he only common purpose that existed was that of establishing a socialist revolution in Cambodia in the context of a society centred on the collective management of a modernised farming system",[5073] and that the Trial Chamber misconstrued the meaning of a "great leap forward" as well as the CPK's communication structures and the extent to which it could disseminate information.[5074] He describes the Trial Chamber as having exceeded its *saisine* and engaged in a biased

[5067] Trial Judgment (E465), para. 3708 (emphasis added).
[5068] Trial Judgment (E465), para. 3710 (emphasis added).
[5069] KHIEU Samphân's Appeal Brief (F54), para. 1963.
[5070] Trial Judgment (E465), para. 3712.
[5071] Case 002/01 Appeal Judgment (F36), para. 1053.
[5072] KHIEU Samphân's Appeal Brief (F54), paras 1400-1447. See also T. 18 August 2021, F1/11.1, pp. 8-12.
[5073] KHIEU Samphân's Appeal Brief (F54), para. 1594.
[5074] KHIEU Samphân's Appeal Brief (F54), paras 1420-1437.

examination of the evidence in order to distort a non-criminal common purpose into a criminal one.[5075] He argues that just because crimes may have been committed does not mean that they were committed as part of criminal "policies".[5076] This, he argues, is a concept that was artificially introduced to dilute the JCE requirement that a common purpose be criminal.[5077] He accordingly requests that the Supreme Court Chamber overturn the Trial Chamber's findings based on such a "misguided approach".[5078]

1814. The Co-Prosecutors respond that the Trial Chamber correctly defined the common purpose after objectively analysing the extensive evidentiary record to find that the CPK's socialist revolution was, at its core, criminal, as it was designed to be achieved through certain policies involving the commission of crimes.[5079] They respond that KHIEU Samphân's "fixation on an alleged benevolent non-criminal common purpose, and that any crimes were 'deviations' from the common purpose is abstract, irrelevant and ignores reality."[5080]

1815. The Supreme Court Chamber recalls that, in order to give rise to criminal liability, the common purpose being the object of the planned action between several persons has to be of a criminal character, in the sense that it either amounted to or involved the commission of a crime.[5081] In the context of the detailed and thorough assessment of the evidence made by the Trial Chamber, including specific facts of this period of just over three years between 1975 and 1979, and in the years prior to the takeover of Cambodia following the CPK's victory in the civil war, the suggestion that the CPK's common purpose did not involve the commission of any crimes is quite extraordinary. While it is not inconceivable for revolutions to benefit society without resulting in bloodshed or criminal activity, this was not one of them.

1816. KHIEU Samphân's repeated insistence that the common purpose of rapidly implementing socialist revolution in Cambodia was not criminal but rather purely political utterly ignores the reality that crimes were committed on a massive scale throughout the implementation process. The Trial Chamber also duly recognised that the common purpose of achieving a revolutionary Cambodian society through a "great leap forward" was not *per se*

[5075] KHIEU Samphân's Appeal Brief (F54), paras 1399-1408, 1415-1419, 1438-1447, 1593-1600, 1966-1986, 2004-2007.
[5076] KHIEU Samphân's Appeal Brief (F54), paras 1406, 1444, 1600, 1999.
[5077] KHIEU Samphân's Appeal Brief (F54), paras 1974-2000.
[5078] KHIEU Samphân's Appeal Brief (F54), paras 1401, 1407.
[5079] Co-Prosecutors' Response (F54/1), paras 954-984.
[5080] Co-Prosecutors' Response (F54/1), para. 961.
[5081] Case 002/01 Appeal Judgment (F36), paras 789, 814.

criminal, but – considering the evidence called – determined that its successful implementation "was contingent upon the execution of harmful policies and the elimination of all counter-revolutionary elements perceived to be inhibiting the Party or the progress of the socialist revolution."[5082] In any event, the fact that a common purpose may be political at its core does not necessarily preclude its implementation by criminal means.

1817. The Trial Chamber then went on to determine "whether these policies existed, whether they encompassed the commission of crimes and whether they were intrinsically linked to the common purpose" before holding that the enterprise was criminal in character.[5083] It found these facts to have occurred within the limits of the scope of Case 002/02. KHIEU Samphân's submission that the Trial Chamber demonstrated bias by examining the crimes allegedly committed in furtherance of the common purpose rather than focusing solely on its political objective is untenable. This Chamber considers that by no stretch of the imagination could it be seriously stated that the CPK revolution was implemented in a benevolent or altruistic manner. Moreover, even if, *arguendo*, his submissions were accepted that the Trial Chamber misunderstood the CPK's ideological basis, its communication structures and the extent of information dissemination, the Trial Chamber could still reasonably have found that crimes were committed as a matter of policy in order to ensure that the CPK's project, however he may conceive it, would be rapidly achieved. This Chamber also recalls that a party seeking to displace a judge's presumption of impartiality has a high burden in seeking to dislodge that presumption.[5084] Adverse findings achieved by an examination of evidence are not *per se* indicative of bias.

1818. KHIEU Samphân's allegations that the Trial Chamber improperly exceeded its *saisine* including by judging facts relating to the movement of the population in violation of the principle of *res judicata*,[5085] as well as crimes beyond those charged at the cooperatives and worksites within the scope of Case 002/02,[5086] are similarly without merit for the reasons already discussed above.[5087] With respect to evidence of "rape" outside the context of marriage, the Trial Chamber expressly stated for reasons given that evidence of "rape" outside of this particular charge would "not be considered in support of the *elements* of any criminal charge

[5082] Trial Judgment (E465), para. 3743.
[5083] Trial Judgment (E465), para. 3864.
[5084] See Case 002/01 Appeal Judgment (F36), para. 112 and references cited therein.
[5085] KHIEU Samphân's Appeal Brief (F54), para. 1401, fn. 2644, referring to paras 544-546.
[5086] KHIEU Samphân's Appeal Brief (F54), para. 1402, fn. 2649, referring to paras 469, 470, 474, 480, 481, 483, 486, 489, 492-494, 499, 504, 510, 513, 516.
[5087] See *supra* Section VI.D.2.

in this case".[5088] Where the Trial Chamber did consider such evidence, it did so solely as "relevant to the *context* in which crimes within the scope of the trial occurred, because they explain a *context* of fear and of violence in which they took place."[5089] A review of the Trial Judgment shows that, far from "analysing the evidence by seeking confirmation of an initial postulate [of the common purpose's criminality]",[5090] the Trial Chamber engaged in a thorough and extensive examination of a wide body of testimonial and documentary evidence *before* reaching its conclusion that the common purpose was criminal in character.[5091]

1819. KHIEU Samphân's allegations of error in the Trial Chamber's approach to determining the criminality of the common purpose are accordingly dismissed.

3. Policy of Establishing and Operating Security Centres and Execution Sites

1820. The Trial Chamber found that, during the DK period, there existed a policy to establish and operate security centres and execution sites to identify, arrest, isolate, and "smash" those considered to be the most serious types of enemies and re-educate "bad elements".[5092] It determined that the concept of the "enemy" encompassed those who were perceived as opposing the communist revolution,[5093] that the level of focus on different categories of enemies fluctuated depending on who posed the biggest threat at a given time,[5094] and that "[t]heir identification for elimination as a fundamental tenet of the communist movement in Cambodia traces back to the self-proclaimed foundations of the CPK".[5095] The Trial Chamber concluded that this policy of establishing security centres and execution sites for "smashing" enemies was intrinsically linked to the common purpose and, as implemented at the S-21, Kraing Ta Chan, Au Kanseng, and Phnom Kraol Security Centres, involved committing the crimes against humanity of murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, and other inhumane acts through attacks against human dignity and conduct characterised as enforced disappearances.[5096]

1821. Notwithstanding these extensive findings based on, *inter alia*, the evidence of multiple witnesses who were victims, former cadres, and academic writers, KHIEU Samphân submits

[5088] Trial Judgment (E465), para. 188 (emphasis added).
[5089] Trial Judgment (E465), para. 3658 (emphasis added). See also *supra* Section VII.G.3.a.ii.
[5090] KHIEU Samphân's Appeal Brief (F54), para. 1406.
[5091] Trial Judgment (E465), paras 3866-4068.
[5092] Trial Judgment (E465), paras 3930-3972. See also Trial Judgment (E465), paras 3857-3859.
[5093] Trial Judgment (E465), paras 3744, 3835-3863.
[5094] Trial Judgment (E465), paras 3839-3855.
[5095] Trial Judgment (E465), para. 3934. See also Trial Judgment (E465), paras 3744-3838, 3856-3863.
[5096] Trial Judgment (E465), paras 3973-3987.

that the Trial Chamber misconceived the CPK's notion of enemies and wrongly established the existence of a policy to eliminate them at security centres and execution sites.[5097] In particular, he contends that the Trial Chamber erred in relying on events that took place prior to April 1975 to establish that there was a policy against enemies during the DK period,[5098] and that it relied on evidence of low probative value to shape a chronological overview of the CPK's notion of the enemy from 1975 through 1978.[5099] He argues that the Trial Chamber distorted official CPK documents and its leaders' speeches and confused or amalgamated ideological and military terms without putting them in proper context in order to create different categories of enemies and deduce that there was a criminal policy against them.[5100] He further submits that the Trial Chamber erred in concluding that there were at least 200 security centres,[5101] that this and several other findings of crimes at security centres exceeded its *saisine*,[5102] and mischaracterised the existence of crimes in the security centres as a policy when they were merely deviations from otherwise purely political and revolutionary goals.[5103] KHIEU Samphân argues that the Trial Chamber's errors precluded the conclusion that crimes against humanity were committed at the S-21, Kraing Ta Chan, Au Kanseng, and Phnom Kraol Security Centres.[5104]

1822. The Co-Prosecutors dispute the validity of these challenges and remind this Chamber that KHIEU Samphân fails to establish that the Trial Chamber erred in law and fact when it found that the CPK policy was characterised by the fight against "enemies", a concept that evolved over time.[5105] They further contend that he fails to demonstrate any error in the Trial Chamber's finding that the CPK had a policy to identify, arrest, isolate, and "smash" the most dangerous enemies at security centres and execution sites throughout the country and re-educate "bad elements".[5106]

1823. The Supreme Court Chamber recalls its ruling in Case 002/01 on similar objections to reliance on events pre-dating April 1975 that a trial chamber is not precluded from considering

[5097] KHIEU Samphân's Appeal Brief (F54), paras 1448-1488, 1523-1550.
[5098] KHIEU Samphân's Appeal Brief (F54), paras 1524, 1525, referring to Trial Judgment (E465), paras 3934-3941.
[5099] KHIEU Samphân's Appeal Brief (F54), paras 1451-1472.
[5100] KHIEU Samphân's Appeal Brief (F54), paras 1473-1488, 1526-1540.
[5101] KHIEU Samphân's Appeal Brief (F54), para. 1525.
[5102] KHIEU Samphân's Appeal Brief (F54), paras 1543-1545, 1549, referring to paras 397-419, 495-516.
[5103] KHIEU Samphân's Appeal Brief (F54), para. 1547.
[5104] KHIEU Samphân's Appeal Brief (F54), para. 1546.
[5105] Co-Prosecutors' Response (F54/1), paras 985-1002.
[5106] Co-Prosecutors' Response (F54/1), paras 1003-1020.

evidence of previous relevant and potentially probative acts or conduct to establish whether any pattern relevant to the allegations at trial was discernible and, more importantly, whether it was followed during the temporal period of 17 April 1975 onwards in the context of the implementation of a common purpose.[5107] The Trial Chamber's examination established a continuum of the pattern of CPK policies pre-April 1975 and is of relevance to an understanding and appreciation of the nature of the common purpose and policies of the joint criminal enterprise. In his Case 002/02 Closing Brief, KHIEU Samphân expressed discontent with the Supreme Court Chamber's analysis in Case 002/01,[5108] pointing to the judgment of the ICTR Appeals Chamber in the *Nahimana et al*. case, which provides that evidence of any acts or omissions establishing responsibility for a crime must have occurred within the court's temporal jurisdiction.[5109] However, the *Nahimana et al*. Appeal Judgment also provides for the exception that a trial chamber may validly admit evidence of acts preceding its temporal jurisdiction and rely on it where such evidence is aimed at: (1) clarifying a given context; (2) establishing by inference the elements (in particular, criminal intent) of criminal acts occurring within its temporal jurisdiction; and/or (3) demonstrating a deliberate pattern of conduct.[5110]

1824. Evidence on the events pre-dating 17 April 1975, which KHIEU Samphân objects, stems primarily from the testimonies of NUON Chea and KAING Guek Eav *alias* Duch, and from content published in the *Revolutionary Flag*, and showed that the CPK's concept of, and policy against, enemies was founded as early as 1960 and evolved over time into the DK period. This Chamber notes that, for the same reasons just given above, such evidence pertaining to events falling outside the temporal jurisdiction of the ECCC provides important contextual background and insight into the CPK's aims, ambitions, and formation of the common purpose, as well as contributions to the implementation of the common purpose which continued after April 1975. Indeed, it would have been remiss of the Trial Chamber not to see the subsequent actions of the DK leadership in some kind of context. No crimes were charged and no convictions were entered for any crimes that may have been committed before 17 April 1975.

1825. KHIEU Samphân next challenges the probative value of certain individual pieces of evidence, arguing that no findings should have been deduced therefrom. He selectively points to the following evidence: what he describes as an undated document by an unknown

[5107] Case 002/01 Appeal Judgment (F36), paras 211-221.
[5108] KHIEU Samphân's Closing Brief (E457/6/4/1), paras 38-55.
[5109] *Nahimana et al*. Appeal Judgment (ICTR), paras 309-314.
[5110] *Nahimana et al*. Appeal Judgment (ICTR), para. 315.

author;[5111] a June 1975 execution order;[5112] excerpts from Ben KIERNAN's work and IENG Sary's notebooks;[5113] minutes by Christopher GOSCHA;[5114] a "Combined S-21 notebook";[5115] Civil Party PREAP Chhon's testimony;[5116] KAING Guek Eav *alias* Duch's testimony that three categories of enemies had been delineated in 1960;[5117] and KAING Guek Eav *alias* Duch's declaration that a 1978 Central Committee directive pardoning "enemies" for pre-1975 activity was a ruse to appease the population.[5118] However, such an individualised and itemised approach fails to displace the value of such evidence when viewed as a whole and in the context of other documents and testimony and simply ignores the copious other evidence relied upon by the Trial Chamber to identify the CPK's evolving notion of enemies and their policy against those enemies, including: content published in the *Revolutionary Flag* and *Revolutionary Youth*;[5119] official CPK documents and communications;[5120] testimonies of former cadres including NUON Chea;[5121] and speeches by POL Pot, NUON Chea, and KHIEU Samphân.[5122]

1826. KHIEU Samphân repeatedly argues that the Trial Chamber failed to view this evidence in its proper context, namely that of armed hostilities against the LON Nol regime and then subsequently Vietnam.[5123] An appeal is not a rehearing and, within the confines of this understanding, this Chamber has extensively reviewed the evidence in relation to the Trial Chamber's approach to real and perceived enemies of the CPK and concludes that the arguments are without foundation. The Trial Chamber explicitly considered much other evidence in its factual analysis of the CPK's references to enemies.[5124] The repeated attempts to distinguish political/ideological enemies from military enemies in arguing that the Trial

[5111] KHIEU Samphân's Appeal Brief (F54), paras 1451, 1453, referring to Trial Judgment (E465), paras 3750, 3751.
[5112] KHIEU Samphân's Appeal Brief (F54), para. 1454, referring to Trial Judgment (E465), para. 3752.
[5113] KHIEU Samphân's Appeal Brief (F54), paras 1458, 1464, referring to Trial Judgment (E465), paras 3746, 3778, 3791, 3803.
[5114] KHIEU Samphân's Appeal Brief (F54), para. 1463, referring to Trial Judgment (E465), paras 3805, 3814.
[5115] KHIEU Samphân's Appeal Brief (F54), para. 1464, referring to Trial Judgment (E465), para. 3822.
[5116] KHIEU Samphân's Appeal Brief (F54), paras 1534, 1535, referring to Trial Judgment (E465), para. 3961.
[5117] KHIEU Samphân's Appeal Brief (F54), para. 1524, referring to Trial Judgment (E465), para. 3934. See also Trial Judgment (E465), para. 3793.
[5118] KHIEU Samphân's Appeal Brief (F54), para. 1531, referring to Trial Judgment (E465), para. 3971.
[5119] Trial Judgment (E465), paras 3753, 3755, 3758, 3759, 3762, 3777, 3780, 3792, 3802, 3806, 3808, 3810, 3813, 3819, 3820, 3824, 3827-3829, 3833, 3938, 3940, 3941, 3958, 3959, 3966, 3968.
[5120] Trial Judgment (E465), paras 3754, 3756, 3757, 3760, 3764-3766, 3768-3772, 3775, 3779, 3871-3790, 3793-3795, 3797, 3799, 3800, 3804, 3805, 3809, 3811, 3817, 3825, 3826, 3828, 3831, 3834, 3955, 3962-3964.
[5121] Trial Judgment (E465), paras 3761, 3767, 3769, 3801, 3810, 3828, 3935-3937, 3940, 3945, 3969.
[5122] Trial Judgment (E465), paras 3773, 3774, 3807, 3812, 3815, 3816, 3818, 3823, 3830, 3934, 3939, 3960, 3970.
[5123] KHIEU Samphân's Appeal Brief (F54), paras 1450-1452, 1454, 1456, 1457, 1459-1462, 1465-1488, 1525, 1542.
[5124] Trial Judgment (E465), para. 3863.

Chamber confused the two, and thereby mischaracterised them,[5125] are in any event without demonstrable consequence to its overall finding that persons either perceived as enemies or who were in fact enemies, be they political/ideological, military, or other, were targeted for elimination or re-education at security centres and execution sites.

1827. The Supreme Court Chamber similarly dismisses KHIEU Samphân's summary allegation that the Trial Chamber erred in finding that there were at least 200 security centres throughout DK as he does not offer any suggestion as to how annulling this finding could impact or invalidate the Trial Judgment. As the scope of Case 002/02 was confined to four security centres as representative of the whole of DK, the Trial Chamber duly limited its conclusions on the crimes committed as a matter of policy to the S-21, Kraing Ta Chan, Au Kanseng, and Phnom Kraol Security Centres.[5126] This Chamber has already rejected the arguments that such action exceeded the Trial Chamber's *saisine*.[5127] His further allegations that the Trial Chamber distorted official CPK documents, such as the DK Constitution and a Central Committee decision of 20 March 1976,[5128] to misconstrue the meaning of "smashing" of enemies, merely offers his alternative interpretation of the facts without showing why the Trial Chamber's conclusions were unreasonable. The applicable standard in reviewing an impugned finding of fact is that of reasonableness.[5129]

1828. This Chamber further recalls that arguments limited to disagreeing with the Trial Chamber's findings and submissions based on unsubstantiated alternative interpretations of the same evidence are simply not sufficient to overturn the factual findings of a trier of fact.[5130] This Chamber notes that KHIEU Samphân's alternative postulate, that crimes committed at the security centres were not part of a criminal policy but were committed by perpetrators engaging in errant deviations from the legitimate political purpose of establishing socialist revolution, is based solely on arguments previously presented at trial which were unsuccessful. He provides no substantiation as to why the Trial Chamber's conclusion, derived from witness testimony of scores of former deportees, villagers, prisoners, and survivors who lost family members, was unreasonable. His submissions that the Trial Chamber could not have found crimes against humanity were committed at the security centres are similarly unconvincing, with the exception

[5125] KHIEU Samphân's Appeal Brief (F54), paras 1454, 1473-1479, 1532, 1533, 1536-1541.
[5126] Trial Judgment (E465), paras 3973-3986.
[5127] See *supra* Section VI.C.2.a.
[5128] KHIEU Samphân's Appeal Brief (F54), paras 1455, 1527-1530.
[5129] See *supra* Section II.
[5130] See *supra* Section II.

of its finding of murder as a crime against humanity at Phnom Kraol Security Centre, which the Supreme Court Chamber has overturned for the reasons explained above.[5131]

1829. KHIEU Samphân's allegations of error in the Trial Chamber's findings regarding the existence and criminality of a policy to establish and operate security centres and execution sites during the DK era are accordingly dismissed.

4. Policy of Establishing and Operating Cooperatives and Worksites

1830. The Trial Chamber found that, during the DK period, there was a policy to establish and operate cooperatives and worksites that were the primary instrument for waging class struggle and intended to create a labour and production force of strictly controlled people, as a means of furthering the common purpose of rapidly implementing socialist revolution through a "great leap forward".[5132] The Trial Chamber recalled that the Closing Order alleges that "the objectives of population movements included fulfilling the labour requirements of cooperatives and worksites, providing food supplies to the people, protecting the population from security threats and depriving city dwellers (*i.e.* New People) and former Khmer Republic civil servants of their economic and political status by transforming them into peasants"[5133] and deemed it "apposite to consider the movement of populations and establishment of cooperatives and worksites collectively in light of their overlapping political and ideological objectives."[5134] The Trial Chamber concluded that this policy was intrinsically linked to the common purpose and, as implemented at the Tram Kak Cooperatives, the Trapeang Thma Dam Worksite, the 1st January Dam Worksite, and the Kampong Chhnang Airfield Construction Site, involved committing the crimes of murder, enslavement, persecution on political grounds and other inhumane acts through attacks against human dignity and conduct characterised as enforced disappearances, all of which reached the threshold of crimes against humanity.[5135]

1831. KHIEU Samphân disputes the validity of these findings and submits that the Trial Chamber erred in finding that there was a policy to move populations and to establish and operate cooperatives and worksites through the commission of crimes.[5136] In particular, he

[5131] See *supra* Section VII.A.5.e.
[5132] Trial Judgment (E465), paras 3866-3918.
[5133] Trial Judgment (E465), para. 3866.
[5134] Trial Judgment (E465), paras 3866-3867. The Trial Chamber specified that, as the movement of populations had only been charged with respect to the treatment of the Cham, the implementation of the movement of populations policy would only be discussed insofar as it concerns the Cham.
[5135] Trial Judgment (E465), paras 3919-3929.
[5136] KHIEU Samphân's Appeal Brief (F54), paras 1489-1510, 1518-1522.

contends that, since population movements "were not included in the scope of Case 002/02 in their entirety", the Trial Chamber exceeded its *saisine* in finding the existence of a recurrent operation to move populations after the fall of Phnom Penh in order to invent a plan to "control' and 'capture the people'".[5137] He states that this "reveals a willingly distorted presentation of the objective of the cooperatives in order to conclude that they were criminal",[5138] and submits that the Trial Chamber also "erred in […] us[ing] the work by Ben KIERNAN, which is of no probative value"[5139] as well as "in making findings about a group of cooperatives beyond [the Trial Chamber's *saisine*]".[5140]

1832. He further argues that the Trial Chamber mischaracterised the CPK's political orientation regarding the cooperatives by selectively viewing official CPK documents through an incriminating angle of "enmity" and ignoring exculpatory evidence demonstrating that there was a constant concern for the population.[5141] He again contends that most of the crimes the Trial Chamber determined to have been committed at the cooperatives were either outside its *saisine* or not established, and that the existence of some crimes at the cooperatives does not amount to the existence of a criminal policy.[5142]

1833. The Co-Prosecutors respond that KHIEU Samphân fails to establish that the Trial Chamber erroneously used out-of-scope evidence in order to characterise the policy of creating and operating the cooperatives and worksites as criminal,[5143] and further that he fails to establish that the Trial Chamber, through its holistic assessment of the evidence, erred in law

[5137] KHIEU Samphân's Appeal Brief (F54), para. 1489. KHIEU Samphân adds that the Trial Chamber "also relied on written statements with low probative value in order to make findings on [population movements]". See KHIEU Samphân's Appeal Brief (F54), para. 1498, referring to Trial Judgment (E465), para. 3915. As KHIEU Samphân provides no substantiation for this assertion, the Supreme Court Chamber will not discuss it any further.
[5138] KHIEU Samphân's Appeal Brief (F54), para. 1491. KHIEU Samphân adds that this approach contradicts the Trial Chamber's finding that the Cham were specifically dispersed in order to break up their communities given that they were indiscriminately included in the movements of large sections of the population to distribute people around the country into the different cooperatives for economic reasons. See KHIEU Samphân's Appeal Brief (F54), paras 1492, 1493. This submission is dismissed as the Supreme Court Chamber has already determined above that the Trial Chamber did not err in concluding that the forced movement of the Cham was discriminatory. See *supra* Section VII.F.2.a.
[5139] KHIEU Samphân's Appeal Brief (F54), para. 1498, referring to Trial Judgment (E465), para. 3885, fn. 12995.
[5140] KHIEU Samphân's Appeal Brief (F54), para. 1498, referring to Trial Judgment (E465), para. 3917.
[5141] KHIEU Samphân's Appeal Brief (F54), paras 1494-1506, 1510, 1521. KHIEU Samphân adds that the Trial Chamber willingly ignored exculpatory evidence, such as, for instance, false reports of rice surplus, showing that KHIEU Samphân and other CPK leaders lacked knowledge of actual conditions in the cooperatives. See KHIEU Samphân's Appeal Brief (F54), paras 1507-1509. The Supreme Court Chamber has determined below that, even if his submission that some managers concealed food shortages were to be accepted, this would not negate the Trial Chamber's finding, based on the evidence as a whole, that he was aware of the brutal conditions at the cooperatives. See *infra* para. 1906.
[5142] KHIEU Samphân's Appeal Brief (F54), paras 1518-1522.
[5143] Co-Prosecutors' Response (F54/1), paras 1021-1025.

or fact in finding that the policy to establish and operate the cooperatives and worksites involved the commission of crimes which were encompassed by the common purpose.[5144]

1834. This Chamber considers that these submissions on factual findings and on *saisine* are without merit. The Supreme Court Chamber earlier held that "the severance of [Case 002] did not curtail the Trial Chamber's competence to consider events predating or postdating the charges that may be relevant to establish the facts underlying the charges".[5145] Further, this Chamber has already accepted that evidence outside the Trial Chamber's temporal jurisdiction may be admitted and relied upon to clarify context, infer elements of crimes, such as intent, that occurred within the temporal jurisdiction, and demonstrate a deliberate pattern of conduct.[5146]

1835. The allegations of exceeding *saisine* must be viewed from the reality of the scope of the present trial. It is quite clear that the Trial Chamber in this second part of Case 002 limited its pronouncements on the movement of populations in relation to cooperatives and worksites to clarifying the context and analysing the means by which the policy to establish and operate cooperatives and worksites was achieved. It did not enter any convictions nor did it impute any criminal *actus rei* with respect to the implementation of those previous population movements for the purpose of establishing or operating cooperatives and worksites.[5147] This is seen in the Trial Chamber's contrasting assessment and determination of population movements for the purpose of targeting the Cham people, a charge specifically excluded from Case 002/01 and included in Case 002/02,[5148] where the Trial Chamber found that crimes against humanity of persecution and forced transfer had occurred.[5149] This Chamber therefore considers that there is no substance or merit in this series of grounds as the Trial Chamber limited its consideration of population movements to the policy to establish and operate cooperatives and worksites for legitimate and relevant purposes. KHIEU Samphân's argument in this respect is accordingly dismissed.

1836. This Chamber also dismisses KHIEU Samphân's objection to the Trial Chamber's use of Ben KIERNAN's work. Contrary to his submission, this Chamber notes that the Trial

[5144] Co-Prosecutors' Response (F54/1), paras 1026-1039.
[5145] Case 002/01 Appeal Judgment (F36), para. 236.
[5146] See *supra* paras 665-666, referring to *Nahimana et al.* Appeal Judgment (ICTR), para. 315.
[5147] See Trial Judgment (E465), paras 3919-3928.
[5148] Trial Judgment (E465), paras 3728, 3867, 3990, 3991.
[5149] Trial Judgment (E465), paras 3995-3997.

Chamber primarily relied on a series of excerpts from contemporaneous *Revolutionary Flag* publications and only additionally on what Ben KIERNAN wrote about the intensification of the identification of enemies within the cooperatives in 1976.[5150] KHIEU Samphân's submission regarding Ben KIERNAN's work is thus inaccurately presented and accordingly rejected. The submission that the Trial Chamber erred in finding the existence of more cooperatives and worksites throughout the country is also rejected. Even if, which is not apparent, *contra* evidence existed, this finding could not impact or invalidate the Trial Judgment.[5151] This Chamber is satisfied that the Trial Chamber limited its findings on the commission of crimes to the Tram Kak Cooperatives, the Trapeang Thma Dam Worksite, the 1st January Dam Worksite, and the Kampong Chhnang Airfield Construction Site, as charged in the Closing Order.[5152]

1837. The allegations of error regarding the Trial Chamber's characterisation of the policy on cooperatives and worksites as criminal are also rejected in light of the overwhelming evidence supporting this finding. KHIEU Samphân concedes that the creation and operation of cooperatives was included in the common purpose as a means of running the rural economy in Cambodia at the time of the events.[5153] However, he argues that a policy of socialism and shared ownership with the objective of achieving food self-sufficiency is not itself criminal, and that the fact that this policy failed due to a lack of means, incompetence, or bad management does not make the common purpose criminal.[5154]

1838. The common purpose of rapidly implementing socialist revolution cannot be divorced from the means by which such purpose was implemented. As such, the purpose or objective of establishing cooperatives to achieve socialism, shared ownership, and self-sufficiency cannot be viewed independently of the means by which such objective was ultimately implemented, including by deprivation of a voice or choice in every aspect of daily life, whether it was the choice of shelter, food, their work, or whom they married, by abject conditions of virtual slavery, and by threats of being taken for "re-education" and never being seen again. If the objective was to create a happy peasant society, the totality of the evidence from each selected representative work site demonstrated that it was implemented through criminal means, including terror and deprivation, rendering the object criminal in character. KHIEU Samphân's

[5150] Trial Judgment (E465), para. 3898, fn. 12995.
[5151] KHIEU Samphân's Appeal Brief (F54), para. 1498.
[5152] Trial Judgment (E465), paras 3919-3927.
[5153] KHIEU Samphân's Appeal Brief (F54), para. 1490.
[5154] KHIEU Samphân's Appeal Brief (F54), paras 1520-1522.

explanation as to why the policy failed therefore does not vitiate the Trial Chamber's conclusion that the common purpose was criminal in character. This challenge fails.

1839. In support of his contention that the Trial Chamber wilfully ignored, hid, or distorted exculpatory evidence, KHIEU Samphân points to certain CPK materials,[5155] his doctoral thesis,[5156] and some issues of the *Revolutionary Flag* and *Revolutionary Youth* purportedly demonstrating concern for the welfare of the people.[5157] While it is not necessary to refer to every piece of evidence on the trial record,[5158] this Chamber notes that the Trial Chamber did in fact refer to most of the documents to which KHIEU Samphân points. The fact that the Trial Chamber may not have specifically discussed the portions of the documents that he highlights does not imply that the Trial Chamber ignored or hid them, nor do his alternative interpretations of the contents of those documents suffice to overturn the Trial Chamber's.

1840. This deconstruction of findings and the piecemeal highlighting of possible minor errors or differences in interpretation of selected extracts from documents does not alter the direction and weight of the other evidence that the Trial Chamber analysed and relied upon before determining that crimes against humanity were committed at the Tram Kak Cooperatives,[5159] the Trapeang Thma Dam Worksite,[5160] the 1st January Dam Worksite,[5161] and the Kampong Chhnang Airfield Construction Site.[5162] Nor does it detract from the Trial Chamber's detailed findings, supported by reliable and credible evidence, that the crimes were committed in order to achieve economic plans and production targets, build the country, defend it against enemies, and radically transform the population into a homogeneous society of worker-peasants.[5163] His allegations that the Trial Chamber could not have found most of the crimes to have been established at cooperatives and worksites are similarly not persuasive, with the exception of its finding of persecution on political grounds as a crime against humanity of New People at the

[5155] KHIEU Samphân's Appeal Brief (F54), paras 1497, 1500, 1504, referring to Trial Judgment (E465), paras 3877, 3878, 3894. See also KHIEU Samphân's Appeal Brief (F54), paras 1503 (fn. 2835), 1506 (fn. 2845).
[5156] KHIEU Samphân's Appeal Brief (F54), para. 1499, referring to Trial Judgment (E465), para. 3884. See also KHIEU Samphân's Appeal Brief (F54), para. 1503 (fn. 2834).
[5157] KHIEU Samphân's Appeal Brief (F54), paras 1496, 1497, 1501, 1502, referring to Trial Judgment (E465), paras 3885, 3889-3891, 3893, 3898 (fn. 12995), 3900, 3910, 3911. See also KHIEU Samphân's Appeal Brief (F54), paras 1503 (fns 2835-2838), 1505 (fns 2841-2843), 1506 (fn. 2846), 1507 (fn. 2847).
[5158] See, *e.g.*, *Prosecutor v. Hadžihasanović and Kubura*, Appeals Chamber (ICTY), IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović & Kubura* Appeal Judgment (ICTY)"), para. 13, and references cited in fn. 38.
[5159] Trial Judgment (E465), paras 817-1204.
[5160] Trial Judgment (E465), paras 1208-1429.
[5161] Trial Judgment (E465), paras 1438-1712.
[5162] Trial Judgment (E465), paras 1717-1846.
[5163] Trial Judgment (E465), paras 3872-3929.

1st January Dam Worksite, which the Supreme Court Chamber has overturned for the reasons explained above.[5164]

1841. KHIEU Samphân's allegations of error in the Trial Chamber's findings regarding the existence and criminality of a policy to establish and operate cooperatives and worksites during the DK era are accordingly dismissed.

5. Policy of Targeting Specific Groups

1842. The Trial Chamber found that, during the DK period, there existed a policy to target specific groups in order to achieve the aim of an atheistic and homogeneous society without class divisions. This was to be achieved by abolishing all ethnic, national, religious, racial, class, and cultural differences: the Cham, Vietnamese, Buddhist, and former Khmer Republic officials, ncluding civil servants and military personnel, and their families comprised these groups.[5165] The Trial Chamber concluded that this policy was intrinsically linked to the common purpose and involved committing the following crimes: (1) with respect to the Cham: the crime of genocide by killing and the crimes against humanity of murder, extermination, imprisonment, torture, persecution on political and religious grounds, and other inhumane acts through conduct characterised as forced transfer;[5166] (2) with respect to the Vietnamese: genocide by killing and the crimes against humanity of murder, extermination, deportation, and persecution on racial grounds, as well as grave breaches of the Geneva Conventions through wilful killings, torture, inhumane treatment, wilful infliction of great suffering or serious bodily injury to body and health, wilful deprivation of the rights of a fair and regular trial, and unlawful confinement of civilians;[5167] (3) with respect to Buddhists: the crime against humanity of persecution on religious grounds;[5168] and (4) with respect to former Khmer Republic officials: the crimes against humanity of murder (from 20 April 1975 to late May 1975, and from October 1975 to 6 January 1979) and persecution on political grounds throughout the DK period.[5169]

[5164] See *supra* Section VII.F.2.b.iv., paras 961-966.
[5165] Trial Judgment (E465), paras 3988-3990 (Cham), 3999-4000 (Vietnamese), 4013-4017 (Buddhists), 4023-4049 (former Khmer Republic officials).
[5166] Trial Judgment (E465), paras 3991-3998; the Trial Chamber did not find KHIEU Samphân liable for genocide of the Cham.
[5167] Trial Judgment (E465), paras 4001-4012.
[5168] Trial Judgment (E465), paras 4018-4022.
[5169] Trial Judgment (E465), paras 4050-4061.

1843. KHIEU Samphân submits that the Trial Chamber erred in concluding that there were policies targeting the Vietnamese people,[5170] the Cham,[5171] former Khmer Republic officials and soldiers,[5172] and Buddhists.[5173]

1844. The Supreme Court Chamber will address KHIEU Samphân's arguments and the Co-Prosecutors' responses regarding each of these four groups in turn.

a. The Vietnamese

1845. The Trial Chamber was satisfied that there existed "a centrally-devised policy targeting the Vietnamese for adverse treatment […] in DK throughout the indictment period".[5174] The Trial Chamber based this finding on a range of sources, including contemporaneous documentary evidence and speeches, oral testimony, and the academic writings and in-court testimony of experts.[5175] KHIEU Samphân submits that the Trial Chamber distorted this evidence, particularly regarding the armed conflict between DK and Vietnam.[5176] He specifically challenges the Trial Chamber's assessment of the word "*Yuon*" and alleges conflation between the terms "Vietnamese agents" and "Vietnamese".[5177] He also submits that the Trial Chamber erred in using its analysis of the CPK's hostile political relations with Vietnam as a basis for establishing a policy targeting the Vietnamese people in general.[5178]

1846. The Co-Prosecutors submit that KHIEU Samphân neglects to take into account the totality of the evidence showing that there existed a hostile policy towards Vietnamese individuals at the relevant time, arguing that he merely offers alternative interpretations thereof.[5179]

1847. This Chamber is not persuaded by KHIEU Samphân's submissions. The evidence, from senior cadres, telegrams, and *Revolutionary Flag* publications, among other authorities, reveals that the CPK indiscriminately targeted all Vietnamese, combatants and civilians, through its rhetoric, both oral and written. Before turning to consider this evidence, the Trial Chamber

[5170] KHIEU Samphân's Appeal Brief (F54), paras 1551-1560.
[5171] KHIEU Samphân's Appeal Brief (F54), paras 1561-1577.
[5172] KHIEU Samphân's Appeal Brief (F54), paras 1578-1585.
[5173] KHIEU Samphân's Appeal Brief (F54), paras 1586-1591.
[5174] Trial Judgment (E465), para. 3417.
[5175] Trial Judgment (E465), paras 3382-3415.
[5176] KHIEU Samphân's Appeal Brief (F54), paras 1551-1560. See also KHIEU Samphân's Appeal Brief (F54), paras 1068-1097.
[5177] KHIEU Samphân's Appeal Brief (F54), paras 1480-1487.
[5178] KHIEU Samphân's Appeal Brief (F54), paras 1409-1414, 1553-1558.
[5179] Co-Prosecutors' Response (F54/1), paras 549-559.

carefully articulated the reasons underlying its interpretation of the word "*Yuon*", finding that it was employed, both by the CPK in contemporaneous documents and by witnesses during their in-court testimony, "to refer to Vietnam or Vietnamese in general terms" and not exclusively to combatants.[5180] The Trial Chamber then conducted a similarly detailed assessment of its reading of references to the "*Yuon*" and Vietnam as "the 'hereditary enemy' of the Cambodian people and of the Party",[5181] referring to several examples of senior CPK leaders employing this term in an indiscriminate fashion.[5182] This Chamber finds no error in the Trial Chamber's understanding of the two terms. Nor did the Trial Chamber err in the reasoning provided in support thereof; instead, it explicitly explained that it would consider each term and any accompanying derogatory intent, "on a case-by-case basis and by taking into account the totality of the evidence and the circumstances in which" it was used.[5183] Any other errors alleged regarding the impugned policy must therefore considered in view of these properly established findings.

1848. The Trial Chamber considered the totality of the evidence with due caution, discounting SAO Sarun's testimony, in finding that a speech published in the April 1976 edition of *Revolutionary Flag* evinced the CPK's hostility towards "ethnic Vietnamese who were living in Cambodia".[5184] A careful reading of the passage, considered in the context of the preceding and ensuing paragraphs of the extract and the testimony of expert Alexander HINTON,[5185] leaves no room for doubt as to the identity of the "one type of foreigner that was [alleged to be] very strongly poisonous and dangerous" to the Cambodian people.[5186] Other foreigners, labelled American, French, and British "imperialists", were targeted in the preceding paragraphs, with the focus of the speech then shifting to a different "result of national revolution".[5187] The second group targeted in the speech, "foreigners", caused the loss of

[5180] Trial Judgment (E465), para. 3379, referring to T. 7 December 2015 (CHOEUNG Yaing Chaet), E1/363.1, pp. 12, 13, 80; T. 1 March 2016 (KHOUY Muoy), E1/394.1, p. 52; T. 11 December 2015 (UNG Sam Ean), E1/366.1, p. 40; T. 2 December 2015 (SAO Sak), E1/362.1, p. 92; DK Telegram, 4 August 1978, E3/1094, p. 7; T. 16 December 2015 (PAK Sok), E1/369.1, p. 49; S-21 List of Prisoners, undated, E3/8463, pp. 43, 52, 55, 58, 59, 61, 62, 63, 70, 72-74, 94, 314.
[5181] Trial Judgment (E465), para. 3381.
[5182] Trial Judgment (E465), para. 3381, referring to DK Government Statement, 2 January 1979, E3/8404, pp. 10-11; T. 28 April 2016 (PRAK Khorn), E1/424.1, pp. 6-7; T. 3 February 2016 (MEAS Voeun), E1/387.1, p. 24; T. 16 December 2015 (PAK Sok), E1/369.1, p. 33; Written Record of Interview of PAK Sok, 18 October 2013, E3/9674, p. 10; Revolutionary Flag, July 1978, E3/746, p. 1.
[5183] Trial Judgment (E465), paras 3379, 3381.
[5184] Trial Judgment (E465), para. 3388.
[5185] Trial Judgment (E465), para. 3388, referring to T. 15 March 2016 (Alexander HINTON), E1/402.1, pp. 13-14.
[5186] Revolutionary Flag, April 1976, E3/759, p. 5.
[5187] Revolutionary Flag, April 1976, E3/759, p. 4. *Cf.* KHIEU Samphân's Appeal Brief (F54), paras 1070-1072.

"much territory" and "sold land to [other] foreigners".[5188] The only reasonable reading of the extract of the first anniversary speech quoted by the Trial Chamber is that the objects of the vitriol were Vietnamese individuals in Cambodia.

1849. The Trial Chamber also acknowledged the impact of hostilities between Cambodia and Vietnam and distinguished between references to Vietnamese civilians and combatants.[5189] KHIEU Samphân's submission that Vietnamese civilians were not among the objects of CPK vitriol is therefore unsustainable. This Chamber cannot fail to observe the Trial Chamber's explicit assessment of how the CPK contemporaneously employed the term "*Yuon*" also to describe how ethnic Vietnamese children, who could not reasonably be considered as combatants, were "[s]mashed".[5190] Nor can the Trial Chamber's evaluation of how other words and phrases utilised when referring to Vietnamese people – in CPK publications, speeches and training sessions delivered by senior leaders, including KHIEU Samphân, and other contemporaneous documents be regarded as anything other than cautiously reasoned, not least when considering that it found corroboration for these sources in the in-court testimony of

[5188] Revolutionary Flag, April 1976, E3/759, p. 5. See *supra* paras 842-846.

[5189] See, *e.g.*, Trial Judgment (E465), paras 3389 (recalling "that hostilities with Vietnam commenced in, and continued after, 1975"), 3394 (considering references made to "all categories of enemies" in a speech "[i]n view of the escalating military conflict with Vietnam, the Party's intensified resolve to defend the revolution and country against perceived revisionist enemies including the Vietnamese, and the CPK's developing stance on Vietnam as 'aggressors', 'expansionists' and 'annexationists'" and finding that this "would continue throughout the DK period"), 3396 (noting that a "notable change occurred in the CPK rhetoric against the Vietnamese when […] in December 1977, the Vietnamese army made important incursions into Cambodian territory" and finding that, "from that date, references to the '*Yuon*' as the enemy of DK were made very openly, in particular in statements aimed to reach a large public"), 3397 (reading instructions concerning conventional and guerilla warfare tactics "in context with the ongoing armed conflict" and finding that they "refer[rred] primarily to Vietnamese armed forces"), 3398 (reading a broadcast "in context and considering the Vietnamese armed forces withdrawal at the time" and finding that the evidence "targeted both Vietnamese soldiers and Vietnamese civilians"), 3411 (noting that a statement "was made during an important military offensive of the Vietnamese army […] [and] therefore find[ing] that these instructions refer primarily to Vietnamese armed forces"), 3412 (noting in relation to a DK government statement, "[d]espite the contemporaneous military offensives […] the explicit reference to the 'the whole Kampuchea's people' and the 'hereditary enemy', and therefore find[ing] that this statement targeted all Vietnamese people indiscriminately"), 3413 (finding that, "[a]s Vietnamese forces swept through Cambodia in the final days of the DK period in early January 1979, […] directives instructing cadre to 'destroy' the '*Yuon* enemy' militarily, politically, psychologically and economically […] [refer] primarily to Vietnamese forces.") See also Trial Judgment (E465), para. 3416 ("The Chamber has taken into account the state of armed conflict and the contemporaneous military offensives in assessing the evidence, and specified […] when the CPK rhetoric was primarily directed against Vietnamese soldiers. The Chamber notes the remarkable continuity in the thrust of the statements or speeches emanating from the CPK cadre analysed above, and specifically notes a mere variation in the tone, as it was increasingly violent with the escalation of the conflict. Finally, while some statements may have primarily targeted the Vietnamese armed forces, the reference to the '*Yuon*' or to the Vietnamese enemy was often made indiscriminately and was directed against all ethnic Vietnamese, being military or civilian.")

[5190] Trial Judgment (E465), para. 3379, citing DK Telegram, 4 August 1978, E3/1094, p. 7 ("Smashed 100 ethnic Yuons included [*sic*] small and big adults and children"). See also Trial Judgment, paras 3410, 3470 (contrasting the way in which these victims were labelled with "three Vietnamese combatants" discussed in the same document, leading the Trial Chamber to reasonably conclude "that the 100 Vietnamese 'smashed' were civilians").

witnesses whose reliability it had the occasion to assess first-hand. For instance, the Trial Chamber identifies references made during both political training sessions and addresses by CPK leaders to Khmer being "free of Vietnamese or *Yuon*",[5191] the "preservation of the 'Cambodian race'",[5192] "national hatred",[5193] and the "[s]mash[ing] of 50,000,000 *Yuon*"[5194] as examples of language employed indiscriminately in relation to Vietnamese combatants and civilians. The Trial Chamber also found that the references derive from, and find corroboration in, a range of sources: EK Hen's oral testimony was considered in the context of the evidence of other witnesses;[5195] KHIEU Samphân's speeches were evaluated in light of their context and that afforded by two books;[5196] and POL Pot's 17 April 1978 "one against thirty" speech was examined both in light of PRUM Sarat's in-court testimony[5197] and other contemporaneous documentary evidence.[5198]

1850. Turning to the terminology used in CPK publications, including *Revolutionary Flag* and *Revolutionary Youth* magazines, and telegrams, the interpretation of which by the Trial Chamber KHIEU Samphân disputes, this Chamber is not convinced by KHIEU Samphân's alternative readings of these, and other, individual pieces of evidence. Though some of the derogatory rhetoric might also target the Vietnamese armed forces, other references are far less sweeping. The reference to the "Yuon stink[ing] to high heaven and [being] degradingly despised as nothing" forms part of a wider comparison between the ways of life espoused by Cambodian and Vietnamese "people",[5199] while other references made to discussions of

[5191] Trial Judgment (E465), para. 3390, referring to T. 3 July 2013 (EK Hen), E1/217.1, pp. 40, 42, 47. This Chamber notes that the quotation provides, in relevant part, as follows: "Khmer had to be united and Khmer shall be free of Vietnamese, or the 'Yuon'". T. 3 July 2013 (EK Hen), E1/217.1, p. 47.
[5192] Trial Judgment (E465), para. 3399, quoting *Phnom Penh Rally Marks 17th April Anniversary* (in SWB/FE/5791/B collection), 16 April 1978 E3/562.
[5193] Trial Judgment (E465), para. 3400, quoting KHIEU Samphân Speech at Anniversary Meeting, 17 April 1978, E3/169, p. 8.
[5194] Trial Judgment (E465), para. 3402, quoting Revolutionary Flag, April 1978, E3/4604, p. 6.
[5195] Trial Judgment (E465), para. 3390, referring to T. 3 May 2012 (PEAN Khean), E1/72.1, p. 25; T. 17 May 2012 (PEAN Khean), E1/73.1, pp. 20-22, 24; T. 20 June 2012 (YUN Kim), E1/89.1, p. 78; T. 27 August 2012 (EM Oeun), E1/115.1, pp. 26-28, 44-45; T. 16 September 2016 (MOM Vun), E1/475.1, pp. 63, 71; T. 10 November 2016 (OU Dav), E1/498.1, pp. 93-94; T. 28 November 2016 (BEIT Boeurn), E1/502.1, pp. 22-23, 25, 28.
[5196] Trial Judgment (E465), para. 3401, referring to Sihanouk NORODOM, *War and Hope*, E3/1819; N. Chanda, *Brother Enemy*, E3/2376, p. 298.
[5197] Trial Judgment (E465), para. 3402, referring to T. 26 January 2016 (PRUM Sarat), E1/382.1, p. 70.
[5198] Trial Judgment (E465), para. 3405, referring to S-21 Notebook of MAM Nai, June 1975 to October 1978, E3/833; Combined S-21 Notebook, April 1978-December 1978, E3/834, p. 15 (entry dated 3 June 1978); Combined S-21 Notebook, April 1978-December 1978, E3/834, pp. 15, 22-23, 40.
[5199] Revolutionary Flag, July 1978, E3/746, p. 1 ("Our country has a people stronger than the Yuon because our people has a standard of living that is collective and has units of organization set up with staunch discipline. The Yuon live as private individuals oppressing and exploiting one another without organizational discipline. Thus they are weak. Our country, our people have honour and a well-known name because we have striven to build up the country by self-support and by mastery/independence. The Yuon stink to high heaven and are degradingly

"grasp[ing]" and, if thus instructed, to "tak[ing] […] out" or "round[ing] […] up" "Yuons with Khmer spouses" are just as indiscriminate.[5200] The same conclusion applies to the reference to "screen[ing]" and "sweep[ing] clean" of "Yuon aliens".[5201] KHIEU Samphân's submission that nothing in the evidence can be said to demonstrate that the references include Vietnamese living in Cambodia is therefore unpersuasive.

1851. Accordingly, although no single piece of evidence on which the Trial Chamber relied was sufficient *in isolation* to establish the existence of "a centrally-devised policy targeting the Vietnamese for adverse treatment",[5202] the sum of the evidence was adequate to do so. KHIEU Samphân's arguments are consequently dismissed.

b. The Cham

1852. In examining the "Targeting of the Cham", the Trial Chamber considered contemporaneous documents available on the Case File[5203] and in-court testimony.[5204] It found that Telegram 15 was a key document that establishes that the CPK specifically targeted the East Zone Cham population after the September 1975 Koh Phal and October 1975 Svay Kleang rebellions[5205] when groups of Cham objected violently to restrictions placed by *Angkar*, as the CPK was then known, on their Muslim practices and customs. In Telegram 15, East Zone Secretary SAO Phim reported to POL Pot about the transfer of people and emphasised that the reason for the transfer was to separate Cham from the banks of the Mekong "to ease tensions".[5206] He stated that "transfer is in principle designed to disperse the Cham as per our previous discussion."[5207] The Trial Chamber also considered several other documents including a different telegram in which "the Cham" in Chamkar Leu district were implicated in enemy activity; minutes of a meeting in September 1976 of the General Staff of the secretaries of the Centre divisions and independent regiments in which the alleged preparation

despised as nothing because the Yuon think only of carrying around a begging bucket and walking around with a cane to beg for charity in every nook and cranny.")

[5200] DK Telegram, 17 May 1978, E3/863, p. 2. This Chamber observes that the discussions concerning "how to decide on […] Yuons with Khmer spouses" also extended to "the half breed [Khmer Yuon]".

[5201] DK Telegram, 4 August 1978, E3/1094, p. 1.

[5202] Trial Judgment (E465), para. 3417.

[5203] Trial Judgment (E465), section 13.2.5.1.

[5204] Trial Judgment (E465), section 13.2.5.2.

[5205] Trial Judgment (E465), para. 3212.

[5206] Trial Judgment (E465), para. 3210, quoting DK Telegram, 30 November 1975, E3/1680.

[5207] Trial Judgment (E465), para. 3210, quoting DK Telegram, 30 November 1975, E3/1680. The Trial Chamber noted KHIEU Samphân's argument that the transfer of population discussed in the telegram is part of a broader distribution of the population and that the transfer of people living near the border was due to conflict with Vietnam rather than Cham rebellions. Trial Judgment (E465), paras 3211-3212. However, it considered the reference to "eas[ing] tensions" to refer to the recent Cham rebellions. Trial Judgment (E465), para. 3212.

of a Cham rebellion in Kampot Sector was discussed; and a 21 May 1977 report addressed to the Northwest Zone from the Sector 5 Committee indicating special measures being implemented to track down the head of a group of "17 April elements from Phnom Penh who were Cham nationals".[5208] The Trial Chamber noted that the DK Constitution referred to reactionary religions that were detrimental to DK and the Kampuchean people and recalled witness testimony stating that all religions were considered reactionary, there was no freedom of religion, and Islam was considered reactionary and was absolutely forbidden.[5209] It considered contemporaneous CPK publications that referred to the Khmer race and the need to defend and preserve it.[5210]

1853. The Trial Chamber found that in-court evidence demonstrates that the CPK specifically targeted the Cham "in a program expected to fully assimilate them into a single Khmer nation and identity."[5211] It considered testimony from two civil parties and one witness referring to Cham no longer being considered Cham but being considered the same as Khmer or being converted to Khmer, noting also in a footnote some material by expert witnesses.[5212] It referred to witness and civil party testimony that other races were considered as enemies and that the goal was to require Cham to be the same as Khmer, which effectively prevented the Cham from preserving their religious and cultural identity.[5213] The Trial Chamber outlined that witness PRAK Yut testified that she received an order to purge the Cham and passed this order on to her subordinates.[5214] The Trial Chamber also referred to four other witnesses who testified to hearing of plans to exterminate the Cham.[5215] It stated that two non-ECCC interviews and certain experts also referred to CPK targeting of the Cham.[5216]

1854. The Trial Chamber considered arguments that security measures against certain Cham were taken because of their actions rather than their Cham identity, that Cham were in some cases arrested in the aftermath of rebellions or in the context of armed conflict, and that Cham were living under the same conditions as Khmer people, the prohibition on religion affected

[5208] Trial Judgment (E465), para. 3214, citing DK Telegram, 2 April 1976, E3/511; Minutes of Meeting Secretaries and Deputy Secretaries of Divisions and Regiments, 16 September 1976, E3/800; Weekly Report of Sector 5 Committee, 21 May 1977, E3/178.
[5209] Trial Judgment (E465), para. 3215.
[5210] Trial Judgment (E465), para. 3216.
[5211] Trial Judgment (E465), para. 3217.
[5212] Trial Judgment (E465), para. 3217.
[5213] Trial Judgment (E465), para. 3218.
[5214] Trial Judgment (E465), para. 3219.
[5215] Trial Judgment (E465), para. 3219.
[5216] Trial Judgment (E465), para. 3219.

Khmer, Chinese, Buddhists, and Catholics.[5217] It explained why it did not find these arguments persuasive.[5218]

1855. The Trial Chamber then found:

> that the public calls of friendship made immediately after the "liberation" of Phnom Penh, as well as the adoption of Article 20 of the Constitution were disingenuous means of shoring up national and/or popular support for the revolution in the same fashion as was done with the Buddhists at the time, and therefore do not bear any probative value.
>
> The Chamber finds that the CPK, in the effort to establish an atheistic and homogenous society without class divisions, targeted the Cham as an ethnic and religious distinct group throughout the DK period. This policy evolved over time and was characterised by an escalation of the means used to implement such policy. In the early years of the DK period, the CPK, in an initial attempt to assimilate them, specifically targeted the Cham by restricting their cultural and religious practices. When the Cham resisted abandoning their ethnic and religious identity, "rebellions" were brutally suppressed, leaders of the rebellions were executed and Cham communities dispersed. A final shift occurred between 1977 and 1978, when purges of all Cham were ordered. This coincided with the escalation of the conflict with Vietnam when the need to preserve the Khmer race and to protect Cambodian population from all enemies was considered as a top priority.[5219]

1856. KHIEU Samphân submits that the Trial Chamber erred in concluding that there was a CPK policy to target Cham as a result of their group identity, as no official CPK document makes it possible to establish that there was a policy against the Cham and lack of such a policy was confirmed by numerous witnesses.[5220] He argues that the purpose of the Khmer Rouge was to create a secular society where religion took second place in relation to the revolutionary goal of rebuilding the country and that the identity of Cham as members of a group was not a problem for the CPK, as demonstrated by various documents.[5221] He points out that the CPK's public messages concerning the Cham were all positive, which was notable because it did not shy away from denouncing its enemies.[5222] He argues that the Trial Chamber used the occurrence of crimes and distorted evidence to justify its theory concerning a criminal policy targeting the Cham.[5223] KHIEU Samphân also contends that the Trial Chamber's timeline concerning the policy was contradictory:[5224] phase one, the early years of the DK period, would

[5217] Trial Judgment (E465), Section 13.2.5.3.
[5218] Trial Judgment (E465), paras 3221, 3223-3226.
[5219] Trial Judgment (E465), paras 3227-3228.
[5220] KHIEU Samphân's Appeal Brief (F54), paras 1565-1574.
[5221] KHIEU Samphân's Appeal Brief (F54), paras 1566-1567.
[5222] KHIEU Samphân's Appeal Brief (F54), para. 1568.
[5223] KHIEU Samphân's Appeal Brief (F54), para. 1569.
[5224] KHIEU Samphân's Appeal Brief (F54), paras 936-937.

have lasted for a few years from 17 April 1975; then phase two followed the rebellions, yet the rebellions took place in September and October 1975, the early months of the DK regime.[5225]

1857. The Co-Prosecutors respond that KHIEU Samphân has not shown that the absence of official CPK documents regarding a policy and positive messages toward the Cham mean that the only reasonable finding was that there was no policy targeting the Cham.[5226] They point to Telegram 15 and other contemporaneous documents, including publications that did not mention the Cham specifically but stigmatised them by stressing that religion was detrimental and there was a need to preserve the Kampuchean race,[5227] asserting that the totality of the evidence demonstrates a context in which it was inevitable that Cham would be targeted.[5228] They respond that the Trial Chamber did not ignore or conceal the testimony of several experts, but specifically noted KHIEU Samphân's interpretation of their evidence and that some of these experts did give evidence that Cham were targeted.[5229] They respond that if the Trial Chamber's use of the phrase "the early years" is contradictory, this does not give rise to a miscarriage of justice; rather, it is clear that the Trial Chamber used this phrase to highlight the escalation of the CPK's policy toward the Cham over time.[5230]

1858. The Supreme Court Chamber does not consider that the absence of an official CPK document stating that there was a policy concerning the Cham indicates that no such policy existed. This Court has operated from the beginning on the premise that few documents were left behind by the retreating Khmer Rouge when the Vietnamese invasion commenced, the exceptions being at S-21 and Tram Kak District. The Trial Chamber found that such a policy existed based largely on Telegram 15's reference to discussions about dispersing the Cham and from the organised actions in purging Cham in 1977-1978. The Trial Chamber was unimpressed by the public documents referring to friendship towards all religions, finding they were a disingenuous means of shoring up public support. As dissembling was a large part of the *modus operandi* of the DK regime, the finding that there was a policy to target the Cham is not a conclusion that no reasonable finder of fact could have reached.

[5225] KHIEU Samphân's Appeal Brief (F54), para. 937.
[5226] Co-Prosecutors' Response (F54/1), para. 448.
[5227] Co-Prosecutors' Response (F54/1), paras 449-450.
[5228] Co-Prosecutors' Response (F54/1), para. 451.
[5229] Co-Prosecutors' Response (F54/1), paras 456-457.
[5230] Co-Prosecutors' Response (F54/1), para. 478.

1859. The Trial Chamber did not ignore contrary witness testimony, as alleged by KHIEU Samphân.[5231] It explained that KAING Guek Eav *alias* Duch's lack of knowledge of a policy targeting Cham is consistent with evidence showing that he never attended Standing or Central Committee meetings and never received instructions from the Standing Committee or NUON Chea directly.[5232] The Trial Chamber noted KHIEU Samphân's assertion that Witness MAT Ly and certain experts stated there was no policy targeting the Cham.[5233] While the Trial Chamber did not explicitly state why it disagreed with their evidence, it is clear that it considered their evidence and preferred the evidence of other experts such as François PONCHAUD and Stephen HEDER whose evidence was that the CPK targeted the Cham.[5234] The Supreme Court Chamber does not find this to be an error.

1860. Finally, although KHIEU Samphân argues that there was not a policy of specific measures targeting the Cham but rather the application of equal measures to the entire population,[5235] this ignores the Trial Chamber's finding that the policy evolved over time and eventually became one of "purg[ing]" the Cham.[5236] The Supreme Court Chamber finds that KHIEU Samphân has failed to demonstrate that the Trial Chamber erred in finding that the CPK specifically targeted the Cham group.[5237] This argument is therefore dismissed.

c. Former Khmer Republic Soldiers and Officials

1861. The Trial Chamber found that a policy broadly targeting former Khmer Republic soldiers and officials for adverse treatment existed throughout the DK period; that this policy was intrinsically linked to the common purpose of the joint criminal enterprise; and that the policy involved the commission of murder from 20 April 1975 to late May 1975, and from October 1975 to 6 January 1979 and persecution on political grounds throughout the DK period.[5238] To make these findings, the Trial Chamber relied on numerous contemporary documents, including a victory speech made by KHIEU Samphân, as well as witness, civil party, and expert evidence.[5239]

[5231] KHIEU Samphân's Appeal Brief (F54), paras 1572-1574.
[5232] Trial Judgment (E465), para. 3223.
[5233] Trial Judgment (E465), para. 3222.
[5234] Trial Judgment (E465), para. 3226.
[5235] KHIEU Samphân's Appeal Brief (F54), para. 1574.
[5236] Trial Judgment (E465), para. 3228.
[5237] See also *supra* Section VII.F.2.a and Section VII.F.3.a.
[5238] Trial Judgment (E465), paras 4049, 4061.
[5239] Trial Judgment (E465), Section 16.4.3.4.

1862. KHIEU Samphân submits that the Trial Chamber selectively analysed his victory speech: the enemy he referred to was actually American imperialism and America's allies at the head of the Khmer Republic regime, not all former Khmer Republic soldiers and officials.[5240] He argues that the Trial Chamber erred by relying on events at Tuol Po Chrey, although he was acquitted concerning these events because the Supreme Court Chamber found that a policy of taking specific measures against the former Khmer Republic soldiers there had not been established.[5241] He argues that it was not possible on the evidence to find that former Khmer Republic soldiers and officials were treated differently at Tram Kak Cooperatives, the 1st January Dam Worksite, S-21 Security Centre, or Kraing Ta Chan Security Centre because everyone lived under the same conditions and suffered the same fate.[5242]

1863. The Co-Prosecutors respond that KHIEU Samphân's assertions concerning his victory speech are misleading: the adjectives used in KHIEU Samphân's victory speech, which were chosen by him, demonstrate vitriol towards the former regime and explain why all former Khmer Republic soldiers and officials were targeted.[5243] They respond that the Trial Chamber did not err in relying on the events at Tuol Po Chrey as support for its conclusion that there was a policy of discrimination against former Khmer Republic soldiers and officials from 17 April 1975 to late 1975: the Supreme Court Chamber did not acquit KHIEU Samphân of the facts concerning Tuol Po Chrey, but stated it was unreasonable to find that a policy contemplating the execution of Khmer Republic soldiers and officials existed *at the time* of the events at Tuol Po Chrey.[5244] They respond that KHIEU Samphân ignores the fact that the Trial Chamber relied on numerous other speeches, as well as directives, meetings, witness testimony, and Written Records of Interview in finding that a policy targeting former Khmer Republic soldiers and officials existed.[5245]

1864. The Supreme Court Chamber considers that KHIEU Samphân has not demonstrated that the Trial Chamber erred in finding that a policy broadly targeting former Khmer Republic soldiers and officials for adverse treatment existed throughout the DK period that was intrinsically linked to the common purpose of the joint criminal enterprise and involved the commission of persecution on political grounds. The Trial Chamber relied on a range of

[5240] KHIEU Samphân's Appeal Brief (F54), para. 1581.
[5241] KHIEU Samphân's Appeal Brief (F54), para. 1582.
[5242] KHIEU Samphân's Appeal Brief (F54), para. 1583.
[5243] Co-Prosecutors' Response (F54/1), para. 419.
[5244] Co-Prosecutors' Response (F54/1), para. 418.
[5245] Co-Prosecutors' Response (F54/1), paras 420-428.

contemporary documents, as well as witness, civil party, and expert evidence to make this finding, with KHIEU Samphân challenging only: (1) the reliance on his victory speech; (2) the events at Tuol Po Chrey; and (3) the findings that discrimination occurred against former Khmer Republic soldiers and officials at Tram Kak Cooperatives, the 1st January Dam Worksite, S-21 Security Centre, and Kraing Ta Chan Security Centre.

1865. Concerning the victory speech, the Trial Chamber found that "KHIEU Samphan praised the destruction of the former regime following liberation, heralding the fact that 'the enemy [had] died in agony'."[5246] KHIEU Samphân clearly refers to "U.S. imperialism" as an enemy in this speech, but many other references to "the enemy" are ambiguous as to the intended nature. The Supreme Court Chamber considers the interpretation that "the enemy" also referred to the Khmer Republic regime and generally to Khmer Republic soldiers is reasonable, considering that KHIEU Samphân referred to the Khmer Republic regime as a "traitorous, fascist and corrupt regime"[5247] and also stated that the Khmer Rouge "successively attack[ed] the enemy everywhere – in the mountains and plains".[5248]

1866. Concerning the events at Tuol Po Chrey, the Trial Chamber relied on these events as part of its chronological analysis of the treatment of former Khmer Republic soldiers and officials to determine whether there was a policy regarding them during the DK period. The fact that in Case 002/01 the Supreme Court Chamber did not find that such a policy had been established by the time of these events[5249] does not mean that they are not relevant to the Trial Chamber's analysis. The Supreme Court Chamber does not consider that the Trial Chamber erred by considering this evidence.

1867. Concerning KHIEU Samphân's argument that it was not possible to find on the evidence that former Khmer Republic soldiers and officials were treated differently because everyone lived under the same conditions and suffered the same fate, the Supreme Court Chamber recalls its earlier conclusion that persecution can be found even where there has been undifferentiated treatment,[5250] and its further findings that the former Khmer Republic soldiers

[5246] Trial Judgment (E465), para. 4037.
[5247] *KHIEU Samphân 21 Apr Victory Message on Phnom Penh Radio* (in FBIS collection), 21 April 1975, E3/118, ERN (EN) 00166994.
[5248] *KHIEU Samphân 21 Apr Victory Message on Phnom Penh Radio* (in FBIS collection), 21 April 1975, E3/118, ERN (EN) 00166994.
[5249] Case 002/01 Appeal Judgment (F36), para. 1100.
[5250] See *supra* Section VII.F.1.b.

and officials did in fact suffer discrimination at Tram Kak Cooperatives, the 1st January Dam Worksite, and the S-21 Security Centre.[5251]

1868. As KHIEU Samphân has failed to demonstrate that the Trial Chamber erred in relying on (1) his victory speech; (2) the events at Tuol Po Chrey; and (3) the findings that discrimination occurred against former Khmer Republic soldiers and officials at the above-mentioned sites, this argument is dismissed.

d. Buddhists

1869. KHIEU Samphân submits that it was not possible for the Trial Chamber to find on the existence of a criminal policy consisting of taking hostile measures against the Buddhists and even less so that it was part of the common purpose.[5252] In support, he relies on arguments made elsewhere in his brief,[5253] which the Supreme Court Chamber has dismissed above.[5254]

6. Policy of Regulating Marriage

1870. In continuing its examination of the criminal nature of the common purpose, the Trial Chamber found that, during the DK period, there existed a nationwide policy to regulate family-building and marriage from as early as 1974.[5255] It determined that the CPK designed this policy by replacing the role of parents in the selection of a suitable spouse; minimising the role of family in the care and upbringing of children, and coercing couples to marry and forcing the production of children for the purpose of increasing the country's population within 10 to 15 years.[5256] The Trial Chamber concluded that this policy was intrinsically linked to the common purpose and involved the commission of the crime against humanity of other inhumane acts through conduct characterised as forced marriage and rape in the context of forced marriage.[5257]

1871. KHIEU Samphân submits that it was not possible to find the existence of a criminal policy regarding the organisation of forced marriage and the commission of rape in this

[5251] See *supra* Sections VII.F.2.b.ii-v. KHIEU Samphân also asserted that no discrimination occurred at Kraing Ta Chan, but this argument was not substantiated. In the section of his appeal related to Kraing Ta Chan he only raised arguments concerning the Trial Chamber's *saisine*.
[5252] KHIEU Samphân's Appeal Brief (F54), paras 1586-1591.
[5253] KHIEU Samphân's Appeal Brief (F54), paras 426-434, 641-656, 743-747, 954-956.
[5254] See *supra* Section VII.F.3.b.
[5255] Trial Judgment (E465), paras 3670, 4063, 4064, 4067.
[5256] Trial Judgment (E465), paras 3539-3563.
[5257] Trial Judgment (E465), paras 3695-3701, 4064-4067.

context.[5258] In support, he relies on arguments made elsewhere in his brief,[5259] which the Supreme Court Chamber has dismissed above.[5260]

1872. KHIEU Samphân's allegations of error in the Trial Chamber's findings regarding the existence and criminality of a policy to regulate marriage during the DK era are accordingly dismissed.

7. KHIEU Samphân's Contribution

1873. Moving to the issue of whether and, if so, to what extent KHIEU Samphân contributed to the JCE's common purpose, the Trial Chamber found that KHIEU Samphân not only participated in and shared support for the common purpose, but that: he publicly supported it throughout the DK period;[5261] as a senior leader, he actively, vocally, and publicly promoted, confirmed, and endorsed it domestically and on the international stage;[5262] he encouraged and incited its implementation through the CPK's policies while using his senior position to legitimise the same;[5263] he actively instructed on its implementation through the various policies;[5264] and he personally enabled and controlled its implementation through the various policies.[5265] Accordingly, the Trial Chamber found that KHIEU Samphân made a significant contribution to the commission of crimes perpetrated by CPK cadres within the scope of Case 002/02.[5266]

1874. KHIEU Samphân submits that the Trial Chamber erred in finding that he significantly contributed to a common criminal purpose.[5267] In particular, he contends that the Trial Chamber wrongly found that his support for, participation in, and/or contribution to the political aspects of the non-criminal common purpose of implementing socialist revolution in Cambodia were sufficient to establish his significant contribution to the commission of any crimes such purpose may have involved.[5268] He argues that "[i]n a JCE having an aim that is not criminal in itself, the significant contribution should not be made to the achievement of the (non-criminal)

[5258] KHIEU Samphân's Appeal Brief (F54), para. 1592.
[5259] KHIEU Samphân's Appeal Brief (F54), paras 1243-1280, 1341-1398.
[5260] See *supra* Section VII.G.3.b.
[5261] Trial Judgment (E465), paras 4257-4261.
[5262] Trial Judgment (E465), paras 4262-4264.
[5263] Trial Judgment (E465), paras 4265-4270.
[5264] Trial Judgment (E465), paras 4271-4274.
[5265] Trial Judgment (E465), paras 4275-4278.
[5266] Trial Judgment (E465), para. 4306.
[5267] KHIEU Samphân's Appeal Brief (F54), paras 2001-2003, 2008-2011, 2013.
[5268] KHIEU Samphân's Appeal Brief (F54), paras 2002, 2003, 2009-2011, 2013, 2015, 2017.

common purpose but to the commission of the crime",[5269] and that "[f]ailing to be able to determine a specific action of [his] characterising his contribution to criminal aspects of the common purpose, the Chamber had recourse to ruses to include [him] in collective responsibility contrary to the need to determine his individual responsibility."[5270] KHIEU Samphân further challenges the Trial Chamber's conclusions that he supported and promoted the common criminal purpose, and encouraged, incited, legitimised, instructed, facilitated, and controlled its implementation, as well as several specific findings or pieces of evidence underlying the Trial Chamber's conclusions in this respect.[5271]

1875. The Co-Prosecutors respond that KHIEU Samphân fails to show that the Trial Chamber erred in law or in fact in finding that his significant contribution to the common purpose, as a necessary element of the *actus reus* of the JCE, was established.[5272] They contend that he also fails to establish that the Trial Chamber erred by concluding that he publicly supported and actively, vocally, and publicly promoted, confirmed, and endorsed the common purpose, as well as that he encouraged and incited, actively instructed on, and personally enabled and controlled the implementation of the common purpose.[5273] The Co-Prosecutors further submit that KHIEU Samphân fails to demonstrate any errors warranting appellate intervention in the Trial Chamber's specific findings or reliance on any evidence underlying its conclusions in this respect.[5274]

1876. Before criminal liability attaches under JCE, an accused's contribution to the common criminal purpose must be significant although not indispensable to its success. The nature and significance of the role played is to be determined on a case-by-case basis, taking into account a variety of factors including the position of the accused, the level and efficiency of the participation or any efforts taken to prevent crimes.[5275] Such contribution may take many forms,[5276] and as previously determined by this Chamber, "even activities that are on their face unrelated to the commission of crimes may be taken into account when determining whether the accused made a significant contribution thereto."[5277] The Supreme Court Chamber

[5269] KHIEU Samphân's Appeal Brief (F54), para. 2011.
[5270] KHIEU Samphân's Appeal Brief (F54), para. 2008. See also KHIEU Samphân's Appeal Brief (F54), para. 2017; T. 18 August 2021, F1/11.1, p. 17.
[5271] KHIEU Samphân's Appeal Brief (F54), paras 2011-2030.
[5272] Co-Prosecutors' Response (F54/1), paras 1040-1048.
[5273] Co-Prosecutors' Response (F54/1), paras 1049-1056.
[5274] Co-Prosecutors' Response (F54/1), paras 1057-1095.
[5275] Case 002/01 Appeal Judgment (F36), para. 980.
[5276] Case 002/01 Appeal Judgment (F36), paras 981-983.
[5277] Case 002/01 Appeal Judgment (F36), para. 984.

accordingly rejects KHIEU Samphân's general argument that the Trial Chamber could not take into account activities that were, on their face, directed at implementing a socialist revolution (as opposed to the commission of specific crimes) when determining that he made a significant contribution to furthering the JCE's common criminal purpose.

1877. The Supreme Court Chamber similarly rejects his submission that the Trial Chamber essentially imposed on him a "collective responsibility" or guilt by association,[5278] as a review of the Trial Judgment shows that it clearly based its conclusions about KHIEU Samphân's significant contribution to the JCE on his own acts or conduct as opposed to those of others, including, *inter alia*: his continued occupation of positions within the CPK and DK throughout the indictment period;[5279] his regular attendance and participation at Standing Committee meetings and Central Committee Party Congresses where crucial decisions were made and matters were discussed;[5280] his membership in Office 870 from October 1975, and oversight of DK commerce matters from October 1976 until January 1979;[5281] his participation in meetings, discussions, and mass rallies concerning the identification and purge of enemies;[5282] his leading indoctrination sessions at mass rallies and re-education seminars;[5283] his continued calls on the masses to work collectively in fields and factories despite his knowledge of appalling conditions, gruelling work regimes and inadequate food;[5284] his calls on the population to divest themselves of personal sentiment towards their parents in favour of *Angkar*, as well as his openly promoting the Party's policy to rapidly increase the population, actively encouraging the arrangement of marriages contrary to Buddhist traditions and instructing the same so that couples could produce children in order to augment forces to defend the country, and supporting the abolition of Buddhism in DK;[5285] and his active propagation of the CPK's rhetoric calling for the discrimination against the Vietnamese in the midst of heightened tensions and growing hostility towards them, as well as his vocal support for the CPK's policies to deport them.[5286]

[5278] KHIEU Samphân's Appeal Brief (F54), para. 2008.
[5279] Trial Judgment (E465), para. 4257.
[5280] Trial Judgment (E465), paras 4257-4260, 4262, 4277.
[5281] Trial Judgment (E465), paras 4257, 4276.
[5282] Trial Judgment (E465), paras 4258, 4272, 4277.
[5283] Trial Judgment (E465), para. 4262.
[5284] Trial Judgment (E465), paras 4265-4267, 4273, 4276.
[5285] Trial Judgment (E465), paras 4268, 4273.
[5286] Trial Judgment (E465), paras 4269, 4271.

1878. Further, the Trial Chamber considered his position, role and functions as a member of the CPK to place his contribution to the JCE in context.[5287] This included: (1) his continued occupation of positions of influence within the CPK and DK throughout the relevant period;[5288] (2) his regular attendance and participation at Standing Committee meetings and Central Committee Party Congresses where crucial decisions affecting the policies were made and discussed, *e.g.* on the "smashing" of enemies, agriculture, drought, and industry;[5289] and (3) his membership in Office 870 from October 1975 and of oversight of DK commerce matters from October 1976 until January 1979.[5290]

1879. As to KHIEU Samphân's challenges to the Trial Chamber's underlying factual findings and/or reliance on individual pieces of evidence, the vast majority of them refer to submissions made elsewhere in his appeal brief,[5291] which the Supreme Court Chamber has already addressed in the relevant sections of the present judgment. Even where certain factual errors may have been identified, they do not suffice to displace the Trial Chamber's overall conclusion on the significance of KHIEU Samphân's contribution to the JCE,[5292] which was based on the totality of an overwhelming amount of evidence about his activities rather than his suggested method of assessing his particular contributions in isolation, which would not be the correct approach.[5293]

1880. Thus, for instance, KHIEU Samphân argues that the Trial Chamber findings that "[a]s a member of Office 870 and overseer of DK trade and commerce, [he] personally enabled the smooth functioning of the DK administration to the detriment of its population […] [and]

[5287] See *supra* Section VIII.A.
[5288] Trial Judgment (E465), para. 4257.
[5289] Trial Judgment (E465), paras 4257-4260, 4262, 4277.
[5290] Trial Judgment (E465), paras 4257, 4276.
[5291] KHIEU Samphân's Appeal Brief (F54), paras 2012 (referring to 1660-1664, 1704-1753), 2014 (referring to 1690-1803, 1816-1848, 1867, 1868), 2015 (referring to 1489-1522), 2016 (referring to 828-835, 1704-1753, 1851-1853, 1869-1871), 2018 (referring to 1690, 1691), 2019 (referring to 1490-1522, 1754-1803), 2020 (referring to 1408-1437, 1490-1522, 1754-1803), 2021 (referring to 293-305, 1399-1603, 1816-1840), 2022 (referring to 1098-1398, 1408-1447, 1489-1522), 2023 (referring to 1058-1097, 1551-1560, 1886-1927, 2075-2090, 2094, 2099-2113), 2025 (referring to 1080-1082, 1894, 1898-1902), 2026 (referring to 1075, 1759, 1892-1894), 2027 (referring to 1534, 1535, 1757, 1758, 1794-1797, 1864), 2028 (referring to 1233-1242, 1815, 1898-1902, 1929, 1936, 2028, 2117), 2029 (referring to 1490-1522, 1763-1798), 2030 (referring to 1804-1937).
[5292] The Supreme Court Chamber recalls, for instance, the error in the Trial Chamber's reliance on and assessment of the evidence of KAING Guek Eav *alias* Duch and SALOTH Ban to conclude when KHIEU Samphân was promoted from candidate to full member of the Central Committee, but considers such error does not suffice to displace the Trial Chamber's overall conclusion. See *supra* para. 1675.
[5293] See Case 002/01 Appeal Judgment (F36), para. 980.

personally ensured that Doeun's responsibilities remained fulfilled"[5294] are incorrect.[5295] As discussed above regarding KHIEU Samphân's roles and functions, the Supreme Court Chamber has deciphered no error warranting appellate intervention in the Trial Chamber's findings regarding his membership in or functions within Office 870, which KHIEU Samphân himself acknowledged,[5296] or that he exercised significant oversight of DK's commercial affairs, which the evidence amply shows.[5297] The Trial Chamber's characterisation of Doeun as his "predecessor" is also inconsequential in light of its conclusion that it was "unable to conclude that KHIEU Samphan served as chairman of Office 870 or was in fact a 'leading cadre' thereof".[5298] KHIEU Samphân's efforts to exaggerate the Trial Chamber's findings and minimise his role as that of lending mere "technical" and "administrative" assistance,[5299] even if accepted, would not, in any event, succeed in displacing its determination that he helped enable the smooth functioning of DK's administration.

1881. KHIEU Samphân also contends that the Trial Chamber erred in finding that his "support of the CPK and its policies traces back to at least 1967",[5300] arguing that, "at this time, he had only just joined the *maquis*", "only became an alternate member of the [Central Committee] in 1971", and "had no power in this institution which itself did not have any power of decision".[5301] As further discussed above regarding KHIEU Samphân's roles and functions,[5302] the Supreme Court Chamber identifies no error warranting appellate intervention in the Trial Chamber's findings regarding the timing of his membership in the CPK or the role he played in winning support for the revolutionary movement between 1970 to 1975, much of which is based on KHIEU Samphân's own writings, interviews, and/or testimony.[5303] The Supreme Court Chamber considers, in any event, that KHIEU Samphân's assertions are not incongruent with the Trial Chamber's findings, particularly as no power is required in order to lend or rally support for a party or revolution.

[5294] Trial Judgment (E465), para. 4276.
[5295] KHIEU Samphân's Appeal Brief (F54), para. 2029, referring to paras 1763-1798. See also KHIEU Samphân's Appeal Brief (F54), paras 1637-1639; T. 18 August 2021, F1/11.1, p. 24.
[5296] See Trial Judgment (E465), paras 609, 610, 619 and references cited therein.
[5297] Trial Judgment (E465), paras 617-621.
[5298] Trial Judgment (E465), para. 616.
[5299] KHIEU Samphân's Appeal Brief (F54), paras 1784-1798.
[5300] Trial Judgment (E465), para. 4257.
[5301] KHIEU Samphân's Appeal Brief (F54), para. 2012, referring to paras 1660-1664, 1704-1753. See also KHIEU Samphân's Appeal Brief (F54), paras 1665-1668.
[5302] See *supra* Section VIII.A.3.
[5303] See Trial Judgment (E465), paras 573-582, and references cited therein. See also Trial Judgment (E465), paras 211-235.

1882. KHIEU Samphân further objects to the Trial Chamber's reliance on the evidence of EM Oeun and PREAP Chhon, both civil parties, as well as the evidence of witness BEIT Boeurn,[5304] to conclude that he lectured and instructed on the search for enemies.[5305] Once again, KHIEU Samphân adopts a piecemeal approach that does not take into account all the other evidence on which the Trial Chamber relied to find that part of his roles and functions included providing lectures at political training sessions on identifying "enemies" and uncovering "traitors" between 17 April 1975 and 1978.[5306] KHIEU Samphân raises separate objections to this finding elsewhere in his appeal brief,[5307] arguing that the Trial Chamber could not rely on the testimonies of EM Oeun and EK Hen attributing statements concerning "enemies" to him,[5308] and that the remaining evidence showed that "he spoke very little" and did not say "anything bad" during political training sessions.[5309] Recalling that civil party evidence is not *per se* unreliable and may be received together with the evidence of witnesses and experts as means for establishing the truth in respect of the allegations against the accused,[5310] this Chamber considers that KHIEU Samphân merely proposes alternative interpretations of the evidence without showing that the Trial Chamber's was unreasonable. KHIEU Samphân thus fails to show how reliance on these particular pieces of evidence invalidates the Trial Chamber's conclusion that he contributed to the common criminal purpose by instructing on its implementation.

1883. With respect to the Trial Chamber's finding that he publicly promoted the fulfilment of economic goals in cooperatives despite his knowledge of the appalling conditions there, KHIEU Samphân reiterates that the evidence was distorted and in no way showed that it was a revolution that was criminal in nature.[5311] As discussed below, the Supreme Court Chamber identifies no error warranting appellate intervention in the Trial Chamber's findings regarding

[5304] KHIEU Samphân's Appeal Brief (F54), para. 2027, referring to paras 1534, 1535, 1757, 1758, 1794-1797, 1864.
[5305] Trial Judgment (E465), para. 4272. KHIEU Samphân also challenges the Trial Chamber's statement in the same paragraph that, "[a]s late as 1977, he was personally advising the masses that the object of the revolution was to 'eliminate the Lon Nol regime […] eliminate the capitalist, feudalist [and] the intellectuals'", a finding for which he points out the Trial Chamber failed to provide a source. See KHIEU Samphân's Appeal Brief (F54), para. 2026. A review of the Trial Judgment, however, shows that the source of the statement was Civil Party PREAP Chhon. See Trial Judgment (E465), para. 3961.
[5306] See, *e.g.*, Trial Judgment (E465), para. 607 and references cited therein.
[5307] KHIEU Samphân's Appeal Brief (F54), paras 1754-1762.
[5308] KHIEU Samphân's Appeal Brief (F54), paras 1754-1759. See also T. 18 August 2021, F1/11.1, p. 25.
[5309] KHIEU Samphân's Appeal Brief (F54), paras 1760-1762.
[5310] Case 002/01 Appeal Judgment (F36), paras 312-314.
[5311] KHIEU Samphân's Appeal Brief (F54), paras 2019, 2020, referring to paras 1408-1437, 1490-1522, 1754-1803.

his knowledge of crimes at the cooperatives and worksites.[5312] Based on the evidence before it, the Trial Chamber reasonably concluded that he ensured that the maximum quantity of rice, according to the CPK economic and production plans, was exported while knowing the population was starving and dying because of, among other things, lack of food and appalling conditions in worksites and cooperatives.[5313] Such knowledge, combined with verbatim extracts from his own several speeches of his vocal encouragement to the masses that they continue to work "day and night […] without rest, and by making countless sacrifices" to meet economic and production targets,[5314] as corroborated by other witnesses,[5315] constitutes ample grounds for the Trial Chamber to have reasonably concluded that KHIEU Samphân contributed to the common criminal purpose by promoting, confirming, and endorsing it.

1884. As to the finding that he called on the population to replace their personal sentiment towards their parents in favour of *Angkar* and increase the population,[5316] KHIEU Samphân similarly argues without sufficient substantiation that the Trial Chamber misinterpreted the evidence.[5317] These arguments are considered and dismissed elsewhere. Once again, his submissions in this respect merely offer an alternative interpretation that does not show any unreasonableness in the Trial Chamber's conclusion that he gave instructions regarding marriages as part of a policy to increase the population at a meeting in Wat Ounalom and that he personally promoted this policy in his speeches, which was based on the testimony of CHEA Deap as corroborated by RUOS Suy and NORODOM Sihanouk.[5318]

1885. KHIEU Samphân's allegations of error in the Trial Chamber's findings regarding his significant contribution to the JCE's common criminal purpose are accordingly dismissed.

8. KHIEU Samphân's Knowledge and Intent

1886. Following on from the finding that KHIEU Samphân was a member of a joint criminal enterprise whose common purpose or objective was to transform Cambodia into an agrarian and self-sufficient economy that involved employing criminal methods, and that he significantly contributed to it by personally enabling and controlling its implementation

[5312] See *infra* Section VIII.B.8.c.
[5313] Trial Judgment (E465), para. 4276. See also Trial Judgment (E465), para. 3916, fns 13067, 13072.
[5314] See Trial Judgment (E465), para. 3916, fn. 13067.
[5315] See Trial Judgment (E465), para. 3916, fn. 13072.
[5316] Trial Judgment (E465), para. 4268.
[5317] KHIEU Samphân's Appeal Brief (F54), para. 2022, referring to paras 1098-1398. See also KHIEU Samphân's Appeal Brief (F54), paras 1928-1931; T. 18 August 2021, F1/11.1, pp. 26-29.
[5318] Trial Judgment (E465), paras 3569-3571, 4247, 4248. *Supra* Section VII.G.3.b.iv.b.d.

through the various policies, the Trial Chamber found that KHIEU Samphân intended to participate in the common purpose and that this was an intent he shared with other JCE members.[5319] The Trial Chamber further held that his contribution, which was aimed at furthering the common purpose by "supporting and promoting the common purpose; encouraging, inciting and legitimising the underlying policies; and enabling, controlling, and instructing on the common purpose's implementation through underlying policies", was also proof of his intent to participate in the common purpose.[5320] The Trial Chamber also found that he shared the *mens rea*, including, where requisite, the discriminatory and specific intent, of other JCE members to commit the crimes underlying and encompassed by the common purpose.[5321] The Trial Chamber referred to KHIEU Samphân's knowledge of these crimes,[5322] among other factors, to establish that the *mens rea* requirement for the JCE had been met.

1887. KHIEU Samphân disputes these findings that he intended to support and participate in a common purpose that was criminal in nature,[5323] and continues his *leitmotif* that the common purpose was not criminal and so there could not be a joint *criminal* enterprise. He contends that the Trial Chamber erred in "considering that sharing and contributing to the non-criminal common purpose allowed it to find on the contribution to the alleged criminal policies when it needed to establish the intent to participate in the criminal aspect of the common purpose and, in the case at hand, to the criminal aspect of the alleged policies."[5324] He further contends that the Trial Chamber applied an incorrect reasoning to deduce criminal intent, namely by considering that the commission of crimes by principal perpetrators was sufficient to deduce his own criminal intent to commit those crimes.[5325] He argues that any conclusions about his intent to commit crimes should rather have been based on his own specific conduct or participation in the criminal aspect of the common purpose rather than on that of any other alleged JCE participants.[5326] He further contends that his alleged intent should have been assessed in relation to specific crimes rather than on "crimes" in general,[5327] and that the Trial Chamber erred in concluding that he knew of and intended the commission of any crimes at

[5319] Trial Judgment (E465), paras 4278-4279.
[5320] Trial Judgment (E465), para. 4279.
[5321] Trial Judgment (E465), paras 4279-4307. This finding excludes KHIEU Samphân's alleged specific genocidal intent to destroy the Cham ethnic and religious group, as such, which the Trial Chamber found the evidence did not establish. See Trial Judgment (E465), paras 4290, 4308.
[5322] Trial Judgment (E465), paras 4204-4254.
[5323] KHIEU Samphân's Appeal Brief (F54), paras 2031, 2041-2043.
[5324] KHIEU Samphân's Appeal Brief (F54), para. 2032.
[5325] KHIEU Samphân's Appeal Brief (F54), paras 2033-2037. See also T. 18 August 2021, F1/11.1, p. 16.
[5326] KHIEU Samphân's Appeal Brief (F54), paras 2035, 2036.
[5327] KHIEU Samphân's Appeal Brief (F54), para. 2038.

cooperatives and worksites,[5328] at security centres and execution sites as well as during purges,[5329] against any particular groups,[5330] or by regulating marriages.[5331] Moreover, he argues that the Trial Chamber erred in stating that the requisite level of knowledge varies at different times, and in relying on evidence of his knowledge of crimes subsequent to their occurrence to establish his *mens rea* under JCE.[5332]

1888. The Co-Prosecutors respond that KHIEU Samphân fails to demonstrate that the Trial Chamber erred in finding that he intended to support a common purpose that was criminal in nature,[5333] and that he fails to establish that the Trial Chamber applied an incorrect reasoning to deduce his criminal intent under JCE.[5334] They further respond that he fails to show error in the Trial Chamber's conclusions on his knowledge as indicative of his intent,[5335] or with respect to his intent to commit crimes against targeted groups,[5336] during internal purges and at security centres and execution sites,[5337] at cooperatives and worksites,[5338] and in relation to forced marriage including rape in the context of forced marriage.[5339]

1889. The Supreme Court Chamber recognises that intent is an essential part of any finding of criminal responsibility on KHIEU Samphân's part. Against the factual findings that the accused with others engaged in a joint criminal enterprise, it must nevertheless be established beyond reasonable doubt that before an accused can be guilty of a crime based on that liability that his *mens rea* or guilty mind must cover both the ingredients of the crime and the mode of liability.[5340] The accused and the other members of a joint criminal enterprise must share the "intent to effect the common purpose", bearing in mind both the crimes at issue and the circumstances of the case.[5341] In other words, they must be working, even if in disparate ways, on the same aim or objective.

[5328] KHIEU Samphân's Appeal Brief (F54), paras 1816-1848, 2039-2052.
[5329] KHIEU Samphân's Appeal Brief (F54), paras 1849-1878, 2053-2061.
[5330] KHIEU Samphân's Appeal Brief (F54), paras 1879-1927, 2062-2113.
[5331] KHIEU Samphân's Appeal Brief (F54), paras 1928-1931, 2114-2118.
[5332] KHIEU Samphân's Appeal Brief (F54), paras 1804-1807, 1932-1937.
[5333] Co-Prosecutors' Response (F54/1), paras 1100-1102.
[5334] Co-Prosecutors' Response (F54/1), paras 1103-1105.
[5335] Co-Prosecutors' Response (F54/1), paras 1106-1130.
[5336] Co-Prosecutors' Response (F54/1), paras 1131-1183.
[5337] Co-Prosecutors' Response (F54/1), paras 1184-1198.
[5338] Co-Prosecutors' Response (F54/1), paras 1199-1240.
[5339] Co-Prosecutors' Response (F54/1), paras 1241-124
[5340] Case 002/01 Appeal Judgment (F36), para. 1053.
[5341] Case 002/01 Appeal Judgment (F36), para. 1054, referring to *Kvočka et al.* Appeal Judgment (ICTY), para. 82.

1890. As recorded above, KHIEU Samphân does not deny that he and the other members of the enterprise shared a common intent of transforming Cambodia into a self-sufficient classless agricultural society through the socialist revolution, but he persists that they never intended to commit crimes individually or as a group, and that their common purpose was benign and for the benefit of the population of Cambodia. He argues that any crimes that may have occurred in the process of implementing the common purpose were extraneous thereto and happened without his knowledge or participation.

1891. The Trial Chamber found, based on a holistic assessment of the evidence before it, that he could not but know what was happening on the ground at worksites, cooperatives, and security centres. This included information not only on the dire working and living conditions in the cooperatives and worksites, but also the executions and internal purges that took place at security and execution centres, and the effects of the policies of targeting of specific groups and the regulation of marriage on the general population.[5342] This conclusion of the Trial Chamber was partly based on evidence showing that, by reason of his senior position in the CPK, his role as President of the State Presidium from 1977 onward, his position in Office 870, the nerve centre of the CPK, and by his very frequent attendance at the at least twice weekly meetings of the Standing Committee which was at the apex of authority in DK, he received reports regularly. Furthermore, the Trial Chamber, based on a thorough review of extensive evidence, reasoned that by his actions and with this imputed knowledge, the supportive speeches he gave throughout that period, the cadre training he provided, and the knowledge he must have had of events, the only reasonable inference was that he intended to participate in and to give effect to the common purpose which was achieved by, *inter alia*, terror, deprivation and extreme coercion on an industrial basis. This Chamber notes that another factor which no doubt was considered is the fact that KHIEU Samphân continued to enjoy high office when he must have been aware of massive hunger and deprivation without voicing dissent or advocating change and, of note, he was aware that all around him close colleagues, who had shared a history as supporters of the revolution and the common plan, disappeared as they were considered traitors or enemies. While these findings are individually and collectively disputed, KHIEU Samphân's allegations go little further than reiterating his objection to the

[5342] Trial Judgment (E465), paras 4278-4279, 4282, 4287, 4290, 4295, 4298, 4302, 4305-4306.

characterisation of the common purpose as criminal and repeating arguments made throughout his appeal brief, and which the Supreme Court Chamber has already addressed above.[5343]

a. Alleged "Vicarious" Intent

1892. KHIEU Samphân argues that the Trial Chamber failed to establish his intent to participate in the "criminal aspect" of the common purpose, and that a "vicarious criminal liability" was imposed on him for the crimes of others. A review of the Trial Judgment shows that the Trial Chamber fully examined and applied the *mens rea* requirement of the joint criminal enterprise for each of the crimes alleged.[5344] The specific crimes for which the Trial Chamber duly examined whether KHIEU Samphân possessed the requisite *mens rea* were: the crimes against humanity of murder, enslavement, persecution on political grounds, and the other inhumane acts of attacks against human dignity and conduct characterised as enforced disappearances at the Tram Kak Cooperatives, Trapeang Thma Dam Worksite, 1st January Dam Worksite, and Kampong Chhnang Airfield Construction Site;[5345] the crimes against humanity of murder, extermination, enslavement, imprisonment, torture, persecution on political grounds and the other inhumane acts of attacks on human dignity and conduct characterised as enforced disappearances at the S-21, Kraing Ta Chan, Au Kanseng, and Phnom Kraol Security Centres;[5346] the crime of genocide against the Cham, for which the Trial Chamber was unable to infer specific intent, and against the Vietnamese for which, by contrast, the Trial Chamber did infer specific intent;[5347] the crimes against humanity of murder, extermination, imprisonment, torture, deportation, persecution on political, religious, and/or racial grounds, and/or the other inhumane acts of forced transfer against the Cham, Vietnamese, and/or former Khmer Republic officials;[5348] grave breaches of the Geneva Conventions against the Vietnamese prisoners at S-21 Security Centre, including through wilful killing, torture, inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving prisoners of war or civilians of the rights of a fair a regular trial, and unlawful confinement;[5349] and the crime against humanity of other inhumane acts through conduct characterised as forced marriage and rape in the context of forced marriage.[5350] The Supreme

[5343] See *supra* Section VIII.B.2.
[5344] Trial Judgment (E465), paras 4279-4308, and references cited therein.
[5345] Trial Judgment (E465), paras 4281-4282.
[5346] Trial Judgment (E465), paras 4284-4287.
[5347] Trial Judgment (E465), paras 4290, 4294.
[5348] Trial Judgment (E465), paras 4289, 4292, 4293, 4297, 4298, 4300-4302.
[5349] Trial Judgment (E465), para. 4295.
[5350] Trial Judgment (E465), paras 4304, 4305.

Court Chamber notes that this important and necessary exercise was conducted in relation to KHIEU Samphân's imputed knowledge as a senior leader and active participant at the heart of the CPK, and his close relationship with those at the absolute top of that leadership. It was more than merely establishing that crimes alleged were committed by direct perpetrators; it also required a rigorous legal assessment of whether those crimes could also be attributed to him.

1893. This Chamber agrees with the ICTR Appeals Chamber that, because explicit manifestations of criminal intent are often rare in the context of criminal trials, the requisite intent may normally be inferred from relevant facts and circumstances,[5351] and that knowledge of crimes combined with continued participation in a joint criminal enterprise can be conclusive as to a person's intent.[5352] In this respect, contrary to KHIEU Samphân's assertion that the Trial Chamber deduced his criminal intent vicariously through that of others, the Trial Chamber inferred his intent from his own acts and conduct, reciting, *inter alia*: his "enthusiasm for the implementation of the CPK's plans […] [despite] his knowledge of the appalling working and living conditions which were intentionally imposed at cooperatives and worksites throughout the country" as well as "encourag[ing] cadres to assign more work to New People and to deprive them of adequate food while supporting the unequal treatment of class enemies perceived to be impeding the CPK's progress";[5353] his "contribut[ion] to nationwide purges"[5354] and "urg[ing] cadres to identify enemies obstructing the work of the Party, urg[ing] seething anger and 'vigilance' against them, and warn[ing] that traitors would be killed";[5355] his being "personally informed about arbitrary detentions and conditions of imprisonment in Preah Vihear and "exercis[ing] his authority to extricate his relatives therefrom" (members of his wife's family);[5356] his "statements about the Vietnamese" and "his calls to remove Vietnamese populations from Cambodia back to Vietnam in the early days of DK";[5357] his "words and actions during the DK period evinc[ing] his contempt for the Vietnamese and direct intent to kill, on a large scale, the Vietnamese in Cambodia from April 1977 through 6 January 1979";[5358] his "support[ing] the charade of normalcy [aimed at shoring up the legitimacy of the interim CPK-dominated government which, behind the scenes, was defrocking monks in large

[5351] *Kayishema and Ruzindana* Appeal Judgment (ICTR), paras 159, 198.
[5352] *Prosecutor v. Karemera & Ngirumpatse*, Appeals Chamber (ICTR), ICTR-98-44-A, Judgement, 29 September 2014 ("*Karemera & Ngirumpatse* Appeal Judgment (ICTR)"), para. 632.
[5353] Trial Judgment (E465), para. 4281.
[5354] Trial Judgment (E465), para. 4284.
[5355] Trial Judgment (E465), para. 4285.
[5356] Trial Judgment (E465), para. 4285.
[5357] Trial Judgment (E465), para. 4292.
[5358] Trial Judgment (E465), para. 4293.

numbers,] […] before discontinuing any mention of the monkhood while at the same time urging the arrangement of marriages in a fashion fundamentally inconsistent with the Buddhist traditions";[5359] his "call[s] for the execution of Khmer Republic leadership and [being] a staunch supporter of the Party's discriminatory policies throughout the DK period";[5360] and, his "personal instruct[ions] that all ministries were to arrange marriages so that couples could produce children for the ultimate defence of the country".[5361] All of these acts/conduct on KHIEU Samphân's part, which individually may not have been sufficiently compelling, collectively were able to impel the Trial Chamber to draw the only reasonable inference that KHIEU Samphân intended the crimes encompassed by the common purpose.

b. Knowledge Indicative of Intent

1894. The Supreme Court Chamber also agrees with the ICTR Appeals Chamber that a high-ranking position, coupled with the open and notorious manner in which criminal acts unfold, can constitute a sufficient basis for inferring knowledge of the crimes.[5362] In this respect, KHIEU Samphân argues that the Trial Chamber erred in relying on evidence of his retrospective or *ex post facto* knowledge of previous crimes to establish his *mens rea* under JCE.[5363] The Trial Chamber found, for instance, that, considering his strong connection to, in particular, IENG Sary and the MFA, he could not ignore letters from Amnesty International and the UN Commission on Human Rights expressing concern about reports of summary executions and mistreatment of civilians.[5364] KHIEU Samphân rejects this finding as "pure speculation", arguing that "there was nothing to suggest that he had obtained these [reports]" and "[h]is 'strong connection' to IENG Sary does not constitute proof of this knowledge".[5365] He also rejects the Trial Chamber reliance on his post-DK statements, interviews, and awareness of senior officials' speeches as speculative, "generalities" or "generalising", as they do not establish what specific crimes he consequently became aware of,[5366] as well as in considering *Revolutionary Flag/Youth* content as there was "no evidence to indicate that he had access to these publications and especially that he had read each individual issue".[5367]

[5359] Trial Judgment (E465), para. 4297.
[5360] Trial Judgment (E465), para. 4300. See also Trial Judgment (E465), para. 4302.
[5361] Trial Judgment (E465), para. 4304.
[5362] *Karemera & Ngirumpatse* Appeal Judgment (ICTR), para. 630.
[5363] KHIEU Samphân's Appeal Brief (F54), para. 1805, referring to paras 2031-2038. See also KHIEU Samphân's Appeal Brief (F54), paras 1932-1937.
[5364] Trial Judgment (E465), para. 4250.
[5365] KHIEU Samphân's Appeal Brief (F54), para. 1932.
[5366] KHIEU Samphân's Appeal Brief (F54), paras 1933-1937.
[5367] KHIEU Samphân's Appeal Brief (F54), paras 1934, 1937, referring to paras 1641-1643.

1895. In the Supreme Court Chamber's view, KHIEU Samphân confuses speculation with the process of drawing inferences, which the Trial Chamber is free to undertake as long as such inferences are reasonable and based on relevant facts. While KHIEU Samphân's burden to overturn the Trial Chamber's verdict on appeal is a high one, so too is the Co-Prosecutors' burden to prove every element of their case beyond a reasonable doubt, and it is the Trial Chamber's duty to ensure that it does not cross the line from permissible inference to impermissible speculation. However, KHIEU Samphân places that line at an unachievable level by demanding, for instance, proof that he physically received and read not one, but two, letters personally addressed to him from two of the world's most important international human rights organisations. KHIEU Samphân, as Head of State and the regime's public face in charge of receiving international delegations, was required to be informed of and respond to concerns or accusations made by foreign delegates and organisations. These circumstances alone would have sufficed for the Trial Chamber to reasonably infer that he at least was made aware of the reports and letters addressed to him, without the added invocation of his relationship to IENG Sary or the MFA.[5368]

1896. In the same vein, his allegations regarding a lack of proof that he had access to or read the *Revolutionary Flag/Youth* publications are unconvincing. The Trial Chamber duly noted that not every CPK member received their own copy of the magazines, as copies were expected to be shared among members.[5369] Nevertheless, the Trial Chamber could reasonably infer KHIEU Samphân's awareness of the magazines' content based on their wide dissemination,[5370] the importance of his role, and evidence that the CPK considered it important that its members read *Revolutionary Flag*, which was frequently used for educational purposes at CPK political study and training sessions,[5371] some of which he personally led.[5372]

1897. KHIEU Samphân similarly takes issue with the Trial Chamber's reliance on prospective or *ex ante* evidence of his awareness of likely future crimes, including his doctoral thesis and pre-DK associations and activities.[5373] To protest the Trial Chamber's finding that his thesis "demonstrates his positive disposition towards the CPK's policies of collectivism, including through the population's subjugation to state production initiatives",[5374] he argues that his

[5368] See *supra* para. 1798.
[5369] See Trial Judgment (E465), para. 475.
[5370] See Trial Judgment (E465), para. 479.
[5371] See Trial Judgment (E465), para. 477.
[5372] See Trial Judgment (E465), paras 4271-4273.
[5373] KHIEU Samphân's Appeal Brief (F54), paras 1652-1659.
[5374] KHIEU Samphân's Appeal Brief (F54), para. 1653, referring to Trial Judgment (E465), para. 4206.

thesis was "never about coercing anyone, quite the contrary",[5375] and that the Trial Chamber ignored exculpatory evidence of his desire "to serve his nation and reform gently and from above".[5376] He further submits that the Trial Chamber erred in "associat[ing] [him] with the future leaders of the CPK and their convictions as soon as he joined the 'Marxist Circle' a few months after his arrival in Paris"[5377] to conclude that he had supported the CPK and its policies even before he joined the Party,[5378] as there was "no indication that upon his return to Cambodia [he] met with these future CPK leaders".[5379]

1898. The Supreme Court Chamber recalls that, in Case 002/01, KHIEU Samphân raised similar allegations of factual errors in the Trial Chamber's failure to consider his desire to reform gradually, as well as in the Trial Chamber's findings on his contact with senior CPK leaders before joining the Party, and that the Supreme Court Chamber dismissed these allegations.[5380] KHIEU Samphân therefore repeats previously unsuccessful arguments and merely offers alternative interpretations of the evidence without demonstrating any unreasonableness in the Trial Chamber's conclusions, which were more nuanced than he construes. His arguments about the principle of secrecy, which he submits the Trial Chamber wrongly and speculatively held did not apply to him,[5381] suffer the similar defect of having been raised in Case 002/01 and dismissed on appeal.[5382] Once again, KHIEU Samphân merely re-argues that based on the principle of secrecy, the Trial Chamber should have reached a different conclusion, which is clearly insufficient to establish an appealable error.

1899. In any event, this Chamber's review of the relevant sections of the Trial Judgment reveals no instance in which the Trial Chamber relied solely on evidence of his knowledge of crimes before or after their commission to establish his intent to participate in the common purpose or the crimes it encompassed.[5383] The Trial Chamber in fact stated that KHIEU Samphân "*also* knew of the crimes after their commission."[5384] The Trial Chamber also did not state, as KHIEU Samphân puts it, that "the requisite level of knowledge varies at different

[5375] KHIEU Samphân's Appeal Brief (F54), para. 1653.
[5376] KHIEU Samphân's Appeal Brief (F54), para. 1658.
[5377] KHIEU Samphân's Appeal Brief (F54), para. 1655, referring to Trial Judgment (E465), paras 565, 566.
[5378] KHIEU Samphân's Appeal Brief (F54), para. 1654, referring to Trial Judgment (E465), paras 573, 4257.
[5379] KHIEU Samphân's Appeal Brief (F54), para. 1656.
[5380] See Case 002/01 Appeal Judgment (F36), paras 1002, 1005.
[5381] KHIEU Samphân's Appeal Brief (F54), paras 1650, 1651.
[5382] See Case 002/01 Appeal Judgment (F36), para. 1071.
[5383] See Trial Judgment (E465), paras 4279-4307.
[5384] Trial Judgment (E465), para. 4254 (emphasis added).

times",[5385] but rather that "the requisite level of knowledge varies depending on whether the criminal liability of the Accused materialises before, concurrent with or after the commission of the crimes".[5386] Although the rather cryptic sentence raises a measure of ambiguity leading to some exacerbation in the process of translation, the Supreme Court Chamber notes that, when read in context, KHIEU Samphân appears to have correctly understood that the Trial Chamber meant to say that the requisite level of knowledge varies according to the alleged mode of liability.[5387]

1900. The process of determining an accused's *mens rea* under JCE will therefore be better informed by evidence of his or her knowledge concurrent with the commission of crimes, which in the present case formed the bulk of the Trial Chamber's findings on KHIEU Samphân's knowledge of the policies, patterns of conduct and specific crimes.[5388] However, knowledge of crimes before or after their commission can also be relevant in establishing *mens rea* under JCE, particularly if the accused was aware that a crime would be committed and did nothing to stop it (or even acted in favour of it), or continued to participate in the JCE after having become aware of crimes perpetrated in furtherance thereof. The extent to which a trial chamber may, in relation to the *mens rea* for JCE, rely on the accused's knowledge of the commission of past or future crimes, as circumstantial evidence among other things, will necessarily depend on the circumstances of the particular case.[5389]

1901. It is clear that the Trial Chamber looked to KHIEU Samphân's past and his doctoral thesis for indicators of predisposition to apply coercive measures to effect communist societal changes.[5390] The Trial Chamber looked to the policies that were planned, tested, and implemented in "liberated" areas and approved by the Central Committee, of which KHIEU Samphân was a candidate member, and outlined the same pattern of conduct that was followed faithfully when victory over LON Nol government forces was achieved. The Trial Chamber deduced that the *modus operandi* was similar to what happened after 17 April 1975 and was evidence of the agreed common plan of the JCE which continued after 17 April 1975. The Trial Chamber also reviewed his knowledge of those crimes at each of the enumerated crime sites in the context of his claim that he was unaware that conditions at cooperatives and worksites had

[5385] KHIEU Samphân's Appeal Brief (F54), p. 627.
[5386] Trial Judgment (E465), para. 4204.
[5387] KHIEU Samphân's Appeal Brief (F54), para. 1807.
[5388] Trial Judgment (E465), paras 4209-4249.
[5389] See *Šainović et al.* Appeal Judgment (ICTY), para. 1016.
[5390] Trial Judgment (E465), paras 4206-4208.

entailed such losses. It indicated the evidence of his knowledge and awareness from his utterances after the fall of the Khmer Rouge by outlining evidence of his admissions in interviews and books, including that imposed collectivism where people were not free might have been a mistake and that the CPK had run too fast in its quest to acquire a 30-year lead on the revolutions of China, Vietnam, and Korea. In this manner the Trial Chamber examined knowledge that KHIEU Samphân had before 17 April 1975, during the almost four-year reign of DK and then his knowledge after the event, by the qualified admissions of his awareness of its failings during its rule.

1902. The Supreme Court Chamber observes that, in concluding that KHIEU Samphân had the requisite *mens rea* under JCE, the Trial Chamber clearly considered that he had direct contemporaneous knowledge of the commission of crimes and shared the intent for their commission with other JCE members. For instance, with respect to his intent for crimes committed at cooperatives and worksites, the Trial Chamber considered, *inter alia*, that he "knew that the population was being converted into a society of worker-peasants which was being forced to work continually",[5391] and that "[h]is enthusiasm for the implementation of the CPK's plans was not dampened by his knowledge of the appalling working and living conditions which were intentionally imposed at cooperatives and worksites throughout the country".[5392] Similarly, with respect to security centres, execution sites, and internal purges, the Trial Chamber considered that KHIEU Samphân "demonstrated acute knowledge of the circumstances of his fellow leaders' arrests",[5393] that he "supported the principle of secrecy, knew about the widespread arrests of people at bases on the basis of their real or perceived affiliation with enemies, was personally informed about arbitrary detentions and conditions of imprisonment in Preah Vihear and exercised his authority to extricate his relatives therefrom".[5394] The Trial Chamber also found that KHIEU Samphân had contemporaneous knowledge of the crimes committed during the DK period against the Cham,[5395] Vietnamese,[5396] Buddhists,[5397] and former Khmer Republic officials,[5398] as well as of the crimes committed in the course of the CPK's nationwide policy to regulate marriage.[5399] It also

[5391] Trial Judgment (E465), para. 4281, referring to para. 4210.
[5392] Trial Judgment (E465), para. 4281, referring to paras 4215, 4231-4234.
[5393] Trial Judgment (E465), para. 4284, referring to paras 4222, 4225-4229, 4234, 4258, 4272.
[5394] Trial Judgment (E465), para. 4285, referring to paras 4231-4234.
[5395] Trial Judgment (E465), para. 4236.
[5396] Trial Judgment (E465), paras 4237-4239.
[5397] Trial Judgment (E465), paras 4240-4243.
[5398] Trial Judgment (E465), paras 4244-4246, referring to paras 4299-4302.
[5399] Trial Judgment (E465), paras 4247-4249.

found that he acquired knowledge of current affairs by his attendance at meetings of the Standing Committee and because he lived and worked in close proximity to POL Pot, NUON Chea, SON Sen, IENG Sary, and the numerous other members of the Standing and Central Committees.[5400]

1903. The Supreme Court Chamber now turns to address his allegations of error in respect of the Trial Chamber's findings of his contemporaneous knowledge and shared intent to commit the crimes underlying each of the CPK's policies.

c. Cooperatives and Worksites

1904. KHIEU Samphân submits that the Trial Chamber erred in finding that he knew that abject working conditions were intentionally imposed at cooperatives and worksites throughout the country during the DK period.[5401] He argues that this finding was based on the Trial Chamber's deliberate distortion of his statements in an interview with HENG Reaksmey, as well as two others "with an unknown interviewer at an unknown date", which he contends contain exculpatory portions showing that his statements were based on information obtained *after* the DK period, but that the Trial Chamber ignored.[5402] He adds that the Trial Chamber ignored exculpatory evidence on the concealment of food shortages by managers of cooperatives and worksites.[5403]

1905. The Supreme Court Chamber reiterates that KHIEU Samphân again is proposing an alternative interpretation of the evidence. It does note, however, that it would have been preferable that the Trial Chamber actually spelled out that some cooperative committees and their secretaries did seem to exaggerate their rice yields and or understated their food needs but accepts that a trial chamber cannot be presumed to have ignored a particular piece of evidence simply because it did not mention it in its judgment.[5404] Rather, it is to be presumed that a trial chamber evaluated all the evidence presented to it, as long as there is no indication that it completely disregarded any particular piece of evidence.[5405] Such disregard is shown where

[5400] Trial Judgment (E465), paras 4208, 4213-4214, 4216, 4281.
[5401] KHIEU Samphân's Appeal Brief (F54), paras 1816, 2045, referring to Trial Judgment (E465), paras 4216, 4281.
[5402] KHIEU Samphân's Appeal Brief (F54), paras 1816-1828, referring to KHIEU Samphân Interview with HENG Reaksmey, undated, E3/587; KHIEU Samphân Interview, undated, E3/4050; KHIEU Samphân Interview, undated, E3/4043.
[5403] KHIEU Samphân's Appeal Brief (F54), paras 1507-1509, 2044.
[5404] *Stanišić & Župljanin* Appeal Judgment (ICTY), para. 537, and references cited therein.
[5405] See *Kvočka et al.* Appeal Judgment (ICTY), para. 23, and references cited therein.

evidence that is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning.[5406]

1906. In the present case, the specific portions of the interviews which KHIEU Samphân purports to be exculpatory do not suggest that the Trial Chamber ignored them, given that the interviews were discussed to begin with; the Trial Chamber did not need to discuss every portion of every piece of evidence in reaching its conclusions. Moreover, the Trial Chamber explicitly discussed KHIEU Samphân's evidence that he was unaware that the construction of the country entailed "such a great loss" during the DK period.[5407] The Trial Chamber therefore did not ignore or disregard evidence suggesting his lack of awareness, but simply did not believe it, and reasonably determined his contradictory statements to be consistent with an attempt to distance himself from the crimes.[5408] In any event, even if his submission that some managers concealed food shortages were to be accepted, this would not negate the Trial Chamber's finding based on the evidence as a whole, which includes several other statements of his,[5409] proof that he was well aware of the brutal conditions at cooperatives and worksites, his having continuously called for meeting unrealistic economic targets and quotas "at any cost", and his oversight of the exportation of rice knowing that tens of thousands of people were forced to work and harvest that rice without rest and while sick, starving and lacking medicine, with ensuing massive deaths.[5410]

[5406] See *Prosecutor v. Nchamihigo*, Appeals Chamber (ICTR), Case No. ICTR-01-63-A, Judgement, 18 March 2010, para. 166, and references cited therein.
[5407] Trial Judgment (E465), para. 4210
[5408] Trial Judgment (E465), para. 4212.
[5409] See, *inter alia*, KHIEU Samphân Interview, undated, E3/4049, ERN (EN) 00789058, p. 1 ("[T]o be able to build our country quickly, first, food issues would be resolved speedily. [...] But, in order to reach that goal, there had to be coercion for a while, coercion to join cooperatives, because nobody would voluntarily take part in cooperatives. Even poor peasants would not accept these high-level cooperatives, because there was no private harvest for themselves: they would still be getting issued rice from others. Therefore, there had to be coercion first. It was this coercion that would impact some innocent peasants"); Khieu Samphân, *Cambodia's Recent History and the Reasons Behind the Decisions I Made* (2004), E3/18, p. 61 ("I was greatly surprised to learn, during my talks with C.P.K. executives after April 1975, that the superior level cooperatives had been used in the liberated regions since 1973. For sure, they had to be imposed on the population because peasants in any country would never agree to give all the fruits of their labour to any organization"); KHIEU Samphân's Speech at Anniversary Meeting, 19 April 1977, E3/200, ERN (EN) 00004165 ("Each construction site of a reservoir, canal or dam is manned by as many as 10,000, 20,000 or even 30,000 workers. For this reason, the work progresses quickly"); KHIEU Samphân's Speech at Anniversary Meeting, 19 April 1977, E3/201, ERN (EN) 00419517 (noting that each project is manned by as many as 10,000, 20,000 or 30,000 people without the assistance of machines and urging that "[t]he production corps, which are already progressive, should struggle even harder to overfulfil the [rice planting] plan to their fullest capacity"); KHIEU Samphân 21 Apr Victory Message on Phnom Penh Radio, E3/118 (referring to "all people" building dykes, digging canals and water reservoirs, increasing production, cultivating two rice harvests annually, "working day and night […] without rest"); T. 27 May 2013 (KHIEU Samphân), E1/197.1, p. 83 (acknowledging that food was generally "not abundant" during the DK period).
[5410] See Trial Judgment (E465), paras 4210-4215, and references cited therein.

1907. KHIEU Samphân moreover argues that the Trial Chamber's finding that he knew of the discriminatory treatment meted out to New People at cooperatives and worksites at the time of the events was based exclusively on a distortion of the contents of his book, in which he offered his analysis of DK period events *after* reading the works of several experts.[5411] However, the Supreme Court Chamber notes that the Trial Chamber's finding about his knowledge and intent to discriminate against New People at cooperatives and worksites was not solely based on KHIEU Samphân's book, but also on his contemporaneous knowledge of this policy as evidenced by the corroborative testimony of Civil Party EM Oeun that he stressed at mass rallies during the DK period that New People were to be assigned much harder labour and less food.[5412]

1908. KHIEU Samphân further contends that the Trial Chamber distorted the evidence in finding him to have "contemporaneous knowledge about living conditions in cooperatives in Preah Vihear",[5413] explaining that he learned about the arrests and conditions at Preah Vihear "accidentally" and "thought these arrests were isolated incidents".[5414] This Chamber notes that his explanation confirms rather than negates his contemporaneous knowledge of arrests and conditions at Preah Vihear in 1978, which included his wife telling him "in tears" that "[h]er siblings and relatives, along with many other people, were shackled on both their hands and legs for over a year, causing nasty bruises on their bodies".[5415] Relatedly, KHIEU Samphân submits that the events at Preah Vihear were not within the scope of the trial, and that the Trial Chamber thereby wrongly deduced therefrom that he had general knowledge of conditions at all cooperatives and worksites during the DK period.[5416] Though KHIEU Samphân was not charged with any crimes committed at Preah Vihear cooperatives and therefore cannot be (nor was he) convicted of them, evidence of his knowledge of crimes and conditions there is certainly circumstantial in providing elements from which his knowledge of similar crimes and conditions at other cooperatives could reasonably be inferred. The Trial Chamber was therefore well within its discretion to consider that his knowledge about living conditions in cooperatives

[5411] KHIEU Samphân's Appeal Brief (F54), paras 1836-1838, 2046, 2047, referring to Trial Judgment (E465), paras 4217, 4281.
[5412] See Trial Judgment (E465), para. 3967.
[5413] Trial Judgment (E465), para. 4216, referring to paras 4232-4234.
[5414] KHIEU Samphân's Appeal Brief (F54), paras 1831, 1832.
[5415] KHIEU Samphân's Appeal Brief (F54), para. 1832.
[5416] KHIEU Samphân's Appeal Brief (F54), paras 1829-1835.

at Preah Vihear was consistent[5417] with its conclusion that he knew of the abject working conditions at other cooperatives and worksites during the DK period.

1909. With respect to the four cooperatives and worksites which fell within the scope of Case 002/02, KHIEU Samphân contends that the Trial Chamber failed to point to a single piece of evidence establishing that he was aware of or intended any of the crimes committed at the Tram Kak Cooperatives, Trapeang Thma Dam, 1st January Dam, or Kampong Chhnang Airfield.[5418] In this respect, the Co-Prosecutors submit that KHIEU Samphân provides no authority to support his contention that the Trial Chamber's reasoning should have followed a site-by-site structure or that it was required to refer to specific sites.[5419] The Supreme Court Chamber disagrees. The Trial Judgment must enable the Supreme Court Chamber to discharge its task based on a sufficient determination of what evidence has been accepted as proof of all elements of the crimes as charged.[5420] KHIEU Samphân was not charged in Case 002/02 with committing through a JCE, crimes against humanity at *all* cooperatives and worksites throughout the country during the DK period, but rather at only four specific sites, namely the Tram Kak Cooperatives, the Trapeang Thma Dam, the 1st January Dam, and the Kampong Chhnang Airfield Construction Site. It was therefore incumbent on the Trial Chamber to provide a duly reasoned opinion in finding that all essential elements in relation to the crimes committed at each site were met.

1910. The Supreme Court Chamber agrees with KHIEU Samphân that the sections of the Trial Judgment relevant to KHIEU Samphân's knowledge and intent reveal a dearth of reasoning in respect of crimes committed at the Tram Kak Cooperatives, Trapeang Thma Dam, 1st January Dam, and Kampong Chhnang Airfield Construction Site. In light of the fundamental importance of the element of intent in establishing criminal liability, and the highly inferential nature of the exercise in establishing intent, the Trial Chamber should have explained its conclusions here with more diligence and specificity to each crime site as charged. However, the Trial Chamber did indicate elsewhere in its Judgment that, "for the purposes of assessing any knowledge relevant to the crimes charged on the part of the Accused, it will assess all of the information before it, including the visits of CPK leaders to specific crime

[5417] Trial Judgment (E465), para. 4216.
[5418] KHIEU Samphân's Appeal Brief (F54), paras 1839-1848, 2051, 2052.
[5419] Co-Prosecutors' Response (F54/1), paras 1097, 1207, 1221, 1231, 1234.
[5420] See, *e.g.*, *Prosecutor v. Kordić and Čerkez*, Appeals Chamber (ICTY), IT. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić & Čerkez* Appeal Judgment (ICTY)"), para. 385.

sites."[5421] Moreover, a holistic view of the Trial Judgment shows findings throughout that are relevant to KHIEU Samphân's knowledge of and link to crimes at each specific site, from which his intent to commit them can reasonably be inferred.

1911. The Tram Kak Cooperatives, for instance, were led by Southwest Zone Secretary *Ta* Mok, who was a native of the Tram Kak District and a long-standing prominent member of the CPK's Central and Standing Committees.[5422] *Ta* Mok, who personally inducted KHIEU Samphân into the CPK, visited the Tram Kak Cooperatives regularly and was well aware of the conditions there.[5423] Described as "Brother Number 4" and "the only person who could interrupt POL Pot",[5424] it would have been entirely reasonable for the Trial Chamber to infer that *Ta* Mok would keep his fellow chief comrades, including KHIEU Samphân, candidly and diligently informed of all events and developments at the Tram Kak Cooperatives, among others under his responsibility. This is not only by virtue of the reporting requirements from Zones to the Party Centre, but also due to regular lateral communications within the Party Centre, of which both *Ta* Mok and KHIEU Samphân formed part.[5425] Tram Kak was also designated as a "model district", winning an award in 1976 from the CPK's Central Committee for being one of the most productive districts at two yields per year despite being poor and having soil of low quality.[5426] There was one particular model cooperative in Leay Bour commune of the Tram Kak District which was exhibited to visiting foreigners and was primarily for Base People and known as K-1, whereas another cooperative known as K-3, not shown to foreigners, was for New People.[5427] The Trial Chamber could reasonably infer from these findings as well as KHIEU Samphân's role and functions as Central Committee member, Head of State, and the public face of the regime in charge of receiving international delegations, that he knew of, and coupled with his acquiescence and continued participation, intended the gruelling conditions which led to such unusually high productivity in Tram Kak District, and that New People in particular were most adversely affected.

1912. With respect to the 1st January Dam, the Trial Chamber similarly found that a number of foreign delegations visited the Dam accompanied by senior DK leaders, and that these visits

[5421] Trial Judgment (E465), para. 1261.
[5422] Trial Judgment (E465), para. 904.
[5423] Trial Judgment (E465), paras 904, 905. *Ta* Mok's daughter, PREAK Khom *alias Yeay* Khom, was Tram Kak District Secretary for approximately one year after 17 April 1975. See Trial Judgment (E465), para. 920.
[5424] Trial Judgment (E465), para. 905.
[5425] See Trial Judgment (E465), paras 482-493.
[5426] See Trial Judgment (E465), paras 1126, 1127.
[5427] Trial Judgment (E465), paras 1128, 1129.

also served to apprise the CPK leadership of the living and working conditions at the worksite.[5428] In April 1977, for instance, a Laotian women's delegation visited the 1st January Dam along with IENG Thirith.[5429] KHIEU Samphân received the Laotian delegation in Phnom Penh on 27 April 1977, along with IENG Thirith and IENG Sary.[5430] The Trial Chamber determined that "IENG Thirith reported to the CPK Standing Committee about the conditions at work sites and cooperatives throughout the country. Although it is likely that IENG Thirith also noted the conditions faced at the 1st January Dam, there is no direct proof that IENG Thirith notified the Standing Committee of the adverse working conditions at the 1st January Dam specifically. Other visits by NUON Chea nonetheless provided such notice to the CPK Standing Committee."[5431] The Trial Chamber further considered that the pressure to complete the 1st January Dam as scheduled was illustrated by a speech given by KHIEU Samphân in 1977, during which he noted that each project is manned by 10,000-30,000 people without the assistance of machines and urged that the people should struggle even harder to overfulfil production plans.[5432] This led to the imposition of longer working hours and harsher conditions in order to meet the envisaged deadline.[5433] The Trial Chamber could thus reasonably infer his knowledge and intent from these facts.

1913. As to the Trapeang Thma Dam, the Trial Chamber made specific reference to KHIEU Samphân's "excited" observation of the construction of the Dam in 1976 by a work force of between 10,000 and 20,000 workers in concluding that he had knowledge concurrent with the commission of crimes.[5434] The Trial Chamber found that he visited the Northwest Zone and Trapeang Thma Dam in particular during the DK period.[5435] On appeal, KHIEU Samphân submits that the Trial Chamber "confused awareness of the existence of the site and knowledge of the crimes committed there".[5436] However, the Trial Chamber also found that the Standing Committee visited the Northwest Zone from 20 to 24 August 1975 and reported that the "new people are experiencing [] shortages of food supplies as well as […] medications".[5437] The Trial Chamber acknowledged that KHIEU Samphân likely did not participate in this particular visit

[5428] Trial Judgment (E465), paras 1491-1497.
[5429] Trial Judgment (E465), para. 1492.
[5430] Trial Judgment (E465), para. 1495.
[5431] Trial Judgment (E465), para. 1495.
[5432] Trial Judgment (E465), para. 1517, referring to KHIEU Samphân's Anniversary Speech, 19 April 1977, E3/201.
[5433] Trial Judgment (E465), paras 1517-1519.
[5434] Trial Judgment (E465), para. 4213.
[5435] Trial Judgment (E465), paras 1254, 1259, 1261.
[5436] KHIEU Samphân's Appeal Brief (F54), para. 1842.
[5437] Trial Judgment (E465), para. 1256.

as he was travelling to China, Vietnam, and North Korea at the time, but was satisfied that, by virtue of his senior position within the Party, he was aware of the report and participated in the development of plans and policies reflected therein.[5438] The Trial Chamber further concluded that a number of foreign delegations visited the Trapeang Thma Dam, and that KHIEU Samphân visited it as part of these delegations.[5439] It noted that, with respect to these visits, "attempts were made by local authorities to hide certain aspects of the real situation faced by workers on the ground, as explained by several witnesses who testified that only the healthy-looking workers were allowed to stand in line close to the guests."[5440] In this regard, KHIEU Samphân argues that "[t]he logical finding that the Chamber should have made is that […] if a person hides from the visiting dignitaries and from KHIEU Samphan the reality of the workers' situation at the [Trapeang Thma Dam], it is because they were all unaware of the reality of the living and working conditions at the site".[5441] However, while such a deduction may be evident in respect of visiting dignitaries, it does not readily extend to KHIEU Samphân, who could reasonably be deemed to have participated in the charade, especially in light of the Trial Chamber's other findings that KHIEU Samphân publicly supported a façade of normalcy to the international community.[5442] KHIEU Samphân thus merely disagrees with the Trial Chamber's conclusion without demonstrating that it was unreasonable.

1914. Finally, regarding the Kampong Chhnang Airfield Construction Site, KHIEU Samphân argues that the particularity of the site as, above all, a military site, made it impossible to find that he had knowledge of any crimes committed there since he had no power involving military matters or any effective control over military matters.[5443] The Supreme Court Chamber recalls, however, that for joint criminal enterprise liability to arise, the plurality of persons with whom the accused acts in furtherance of the common criminal purpose need not be organised in a military, political, or administrative structure.[5444] Moreover, although the Trial Chamber determined that the Airfield was initially intended as a military project, the construction of which was assigned to Division 502 (air force) and began in early 1976, it also found that once the purges of the North and East Zones started in 1977 and 1978, the worksite was filled with people considered enemies who were deprived of their status and sent to labour to be "tempered

[5438] Trial Judgment (E465), fn. 4289.
[5439] Trial Judgment (E465), paras 1258, 1259.
[5440] Trial Judgment (E465), para. 1260.
[5441] KHIEU Samphân's Appeal Brief (F54), para. 1844.
[5442] See, *e.g.*, Trial Judgment (E465), paras 4208, 4241, 4268, 4297.
[5443] KHIEU Samphân's Appeal Brief (F54), paras 1847, 1848.
[5444] See, *e.g.*, *Ntakirutimana & Ntakirutimana* Appeal Judgment (ICTR), para. 466, referring to *Tadić* Appeal Judgment (ICTY), para. 227 and references cited therein.

and refashioned".[5445] Kampong Chhnang Airfield was overseen by Division 502 Commander SOU Met, who was located in Phnom Penh and regularly visited the site.[5446] SOU Met regularly attended meetings during which he received instructions from and reported to SON Sen, the Chief of the General Staff, on a number of matters including the enemy situation, cultivation, health conditions, and food supply in his areas of responsibility.[5447] SON Sen, in turn, attended meetings of the Standing Committee to report on military affairs and matters of national defence, and also forwarded written messages and reports received from military commanders to other CPK leaders with handwritten annotations and requests for instructions.[5448] According to the Trial Chamber, KHIEU Samphân was present at the Standing Committee meeting during which the construction of a military airfield in Kampong Chhnang was planned in October 1975,[5449] and was present at later meetings at which SON Sen reported on the progress of the Airfield's construction.[5450] Reports on the situation in the West Zone, which also concerned the Kampong Chhnang Airfield, were also sent to the upper levels of *Angkar* by the Committee of the West Zone.[5451] In addition, the Trial Chamber was "satisfied that a number of delegations of senior leaders visited the worksite".[5452] In the Supreme Court Chamber's view, these factors combined with, among others, KHIEU Samphân's senior role within the CPK and participation in Standing Committee meetings, as well as his public support for the identification and purge of enemies, provide a sufficient basis from which his knowledge and intent for the commission of crimes at the Kampong Chhnang Airfield could reasonably be inferred.

1915. KHIEU Samphân's allegations of error regarding his knowledge of and intent to commit crimes in relation to cooperatives and worksites and are accordingly dismissed.

d. Security Centres, Execution Sites, and Purges

1916. KHIEU Samphân submits that the Trial Chamber failed to establish that he knew of and intended the commission of crimes at each of the specific security centres subject to the proceedings in the Case 002/02.[5453] He argues that the Trial Chamber "never mentioned" that he had knowledge that crimes against humanity were being committed at either the S-21,

[5445] Trial Judgment (E465), paras 1735, 3923.
[5446] Trial Judgment (E465), paras 380, 1726.
[5447] Trial Judgment (E465), para. 1726.
[5448] Trial Judgment (E465), para. 508.
[5449] Trial Judgment (E465), paras 1723, 4258, fn. 5854.
[5450] Trial Judgment (E465), paras 1727, 4258.
[5451] Trial Judgment (E465), para. 1727.
[5452] Trial Judgment (E465), para. 1788. The Trial Chamber specified, however, that it was not in a position to determine precisely who was part of these delegations.
[5453] KHIEU Samphân's Appeal Brief (F54), paras 1849-1856, 2054-2057.

Kraing Ta Chan, Au Kanseng, or Phnom Kraol Security Centres, and that "[c]onsequently, it could not establish any direct intent to commit the above-mentioned crimes".[5454] He adds that "considering that the purges are 'inextricably intertwined with the policy to establish and operate security centres and execution sites' did not absolve the Chamber from establishing KHIEU Samphan's intent to commit the crimes for which he was convicted in each of the security centres".[5455] In addition, he argues that the Trial Chamber erred in inferring his intent to commit crimes from his participation in the common purpose and policy on enemies, as participation and intent are distinct components of JCE liability.[5456] In response, the Co-Prosecutors reiterate that KHIEU Samphân misunderstands the *mens rea* required for JCE liability, which, they contend, does not require knowledge of *specific* criminal incidents.[5457]

1917. The Supreme Court Chamber recalls that intent for JCE liability can be inferred from the accused's knowledge of the enterprise's crimes and his/her continued participation in the enterprise.[5458] Thus, while neither knowledge nor participation are requisite constituent components of the element of criminal intent, in the absence of direct evidence, such intent may be deduced from such circumstantial factors as knowledge of crimes underlying the common purpose combined with continued participation in the common purpose. KHIEU Samphân is therefore wrong in arguing that the Trial Chamber could not rely on his participation in the common purpose to infer his intent for the commission of crimes underlying it. He nevertheless correctly acknowledges that "knowledge of the crimes is not an element constitutive of [responsibility under JCE]".[5459]

1918. KHIEU Samphân also points out that the Trial Chamber did not provide explicit reasons for finding that he intended the commission of crimes through a JCE at each of the four specific security centres within the scope of Case 002/02. In this respect, this Chamber notes that the jurisprudence that the Co-Prosecutors invoke to argue that such specificity is not required shows that they conflate the specificity of the form in which an alleged crime was committed with the specificity required of the place. In the *Prlić* case, for instance, the ICTY Appeals Chamber, "recall[ing] the Trial Chamber's conclusions that Praljak 'had to have known' and that 'he was at least aware' that the detention conditions in Gabela Prison and Dretelj Prison

[5454] KHIEU Samphân's Appeal Brief (F54), paras 1852, 1854-1856.
[5455] KHIEU Samphân's Appeal Brief (F54), para. 2054.
[5456] KHIEU Samphân's Appeal Brief (F54), para. 2060.
[5457] Co-Prosecutors' Response (F54/1), paras 1097, 1195, and references cited therein.
[5458] See *supra* para. 1893, referring to *Karemera & Ngirumpatse* Appeal Judgment (ICTR), para. 632.
[5459] KHIEU Samphân's Appeal Brief (F54), para. 1852.

were problematic, bad, and poor", concluded that "[w]hile the Trial Chamber could have been more explicit regarding the specific crimes in its analysis, this does not show an error".[5460] The *Prlić* Appeal Judgment refers to the *Stanišić & Župljanin* case, on which the Co-Prosecutors also rely, and in which the ICTY Appeals Chamber determined that "it is not required that members of the JCE agreed upon a particular form through which the forcible displacement of non-Serbs was to be effectuated or that Župljanin intended specific acts of coercion causing the displacement of individuals, so long as it is established that Župljanin intended to forcibly displace the victims."[5461] The jurisprudence is clearly limited to discussing that a JCE member need only intend the crimes, as charged, encompassed by a common criminal purpose to trigger JCE liability, and not necessarily the specific acts or conduct underlying those crimes. Nothing in the jurisprudence suggests that an accused's shared intent to participate in a common criminal purpose and the crimes it encompassed also need not be specific to the crime *sites* as charged.

1919. As with cooperatives and worksites, KHIEU Samphân was not charged in Case 002/02 with committing through a JCE, crimes against humanity at *all* security centres and execution sites throughout the country during the DK period, but rather at only four specific sites, namely at S-21, Kraing Ta Chan, Au Kanseng, and Phnom Kraol. It was therefore incumbent on the Trial Chamber to provide a duly reasoned opinion in finding that all essential elements in relation to the crimes committed at each site were met. A review of the sections of the Trial Judgment relevant to KHIEU Samphân's knowledge and intent reveal similar a dearth of reasoning in respect of crimes committed at the S-21, Kraing Ta Chan, Au Kanseng, and Phnom Kraol Security Centres. Reiterating the importance of the element of criminal intent and the highly inferential nature of such determination, and noting that the Trial Chamber considered KHIEU Samphân's role to be limited to the oversight of security centres within the scope of Case 002/02,[5462] the Supreme Court Chamber deems that it was especially incumbent on the Trial Chamber to explain its conclusions about his *mens rea* under JCE with more detail and specificity to each crime site as charged. Nevertheless, a holistic view of the Trial Judgment shows findings from which KHIEU Samphân's intent to commit crimes against humanity at S-21, Kraing Ta Chan, Au Kanseng, and Phnom Kraol could reasonably be inferred.

[5460] *Prlić et al.* Appeal Judgment (ICTY), para. 2074.
[5461] *Stanišić & Župljanin* Appeal Judgment (ICTY), para. 917.
[5462] Trial Judgment (E465), paras 340, 4219.

1920. Kraing Ta Chan was located in Tram Kak District,[5463] and thus fell under the oversight and control of Southwest Zone Secretary *Ta* Mok,[5464] a native of the district as well as a long-standing prominent member of the CPK's Central and Standing Committees, who personally inducted KHIEU Samphân into the CPK in 1969.[5465] The Trial Chamber found that *Ta* Mok visited Kraing Ta Chan "on at least a few occasions" and was kept apprised of its operation.[5466] Thus, as with the Tram Kak Cooperatives discussed above,[5467] including Zone to Party Centre reporting requirements and lateral communications within the Party Centre, the Trial Chamber could reasonably infer that *Ta* Mok kept his fellow chief comrades and JCE co-members, including KHIEU Samphân, candidly and diligently informed of events and developments such as the arrests, brutal interrogations, and "smashing" or executions of those perceived as enemies at the Kraing Ta Chan Security Centre.

1921. Au Kanseng was located in the Northeast Zone and operated by Centre Military Division 801.[5468] The Trial Chamber found that, throughout the duration of the Au Kanseng Security Centre's operation, reports concerning prisoner interrogations and confessions were sent directly to Division 801 commander SAO Saroeun, who in turn reported to SON Sen at the General Staff headquarters in Phnom Penh who forwarded the report to the CPK Standing Committee.[5469] The Trial Chamber was satisfied that SON Sen was kept apprised of the situation inside Division 801, including prisoner interrogations inside the Au Kanseng Security Centre, and that, as the Chairman of the General Staff, SON Sen had overall authority over Au Kanseng and regularly relayed information to *Angkar* before furnishing instructions to lower echelons, including the Au Kanseng Security Centre.[5470] The Trial Chamber was also satisfied that the Northeast Zone Committee reported the progress of internal purges across the Zone and inside Division 801 directly to the Party Centre.[5471] Thus, as with the Kampong Chhnang Airfield Construction Site discussed above, the Trial Chamber could reasonably infer his knowledge and intent for the crimes committed at the Au Kanseng Security Centre based on

[5463] Trial Judgment (E465), para. 2683.
[5464] Trial Judgment (E465), para. 2709.
[5465] Trial Judgment (E465), para. 904.
[5466] Trial Judgment (E465), paras 2708, 2709.
[5467] See *supra* paras 583-588.
[5468] Trial Judgment (E465), paras 383, 2866, 2867.
[5469] Trial Judgment (E465), paras 383, 2869-2875.
[5470] Trial Judgment (E465), para. 2875.
[5471] Trial Judgment (E465), para. 2884.

inter alia KHIEU Samphân's senior role and participation in Standing Committee meetings, as well as his public support for the identification and purge of enemies.

1922. Phnom Kraol was located in Sector 105 Mondulkiri province, initially under the administrative framework of the Northeast Zone and, by late 1976, as an autonomous sector.[5472] The Sector 105 Secretary reported directly to the Party Centre at Office 870, on the operational requirements of the sector, agricultural conditions, rice production and the enemy situation, and further requested supplies and guidance on the treatment of captured Vietnamese combatants, and then received instructions back from the Party Centre, including from POL Pot and NUON Chea.[5473] The Sector 105 Secretary also forwarded reports to KHIEU Samphân on non-security related matters including social affairs, equipment and healthcare, and responses were in turn received at Sector 105 from KHIEU Samphân.[5474] In addition to maintaining a written line of communication with the Party Centre, the Sector 105 Secretary also travelled to Phnom Penh to report in person and attend meetings and other major Party assemblies, and then convened meetings with sector and division officials on return to Phnom Kraol to conduct training sessions and disseminate instructions from the Party Centre on the enemy situation.[5475] The Trial Chamber was satisfied that the arrests and detentions of individuals associated with perceived enemies within Sector 105, particularly at the Phnom Kraol Security Centre, were conducted pursuant to a systematic process with the objective of preventing collaboration with the Vietnamese.[5476] It was further satisfied that orders to arrest, detain, and execute Sector 105 personnel were furnished under the authority and oversight of the CPK Standing Committee,[5477] orders which the Sector 105 Secretary was then required to implement,[5478] and that disappearances at the Phnom Kraol Security Centre were carried out by DK authorities or with the authorisation, support, or acquiescence of the CPK.[5479] These factors combined, *inter alia*, with KHIEU Samphân's prominent role within the Party, Central and Standing Committees, and Office 870, as well as his trainings and speeches urging vigilance against the Vietnamese enemy, provide a sufficient basis for the Trial Chamber to

[5472] Trial Judgment (E465), paras 3025, 3034.
[5473] Trial Judgment (E465), paras 3035, 3036, 3040.
[5474] Trial Judgment (E465), paras 3037, 3040.
[5475] Trial Judgment (E465), paras 3038, 3040.
[5476] Trial Judgment (E465), para. 3065.
[5477] Trial Judgment (E465), para. 3080.
[5478] Trial Judgment (E465), para. 3108.
[5479] Trial Judgment (E465), para. 3162.

reasonably infer that he knew of and intended the crimes committed at the Phnom Kraol Security Centre.

1923. As to S-21, the Trial Chamber determined that it was used as an "absolute instrument" of the CPK and the Party Centre, as well as the Standing Committee, with the core mandate of detaining, interrogating, obtaining confessions from, and "smashing" prisoners suspected of being enemies and arrested from across Cambodia.[5480] The Trial Chamber found that S-21 was logistically supported by the General Staff but was directly linked to and controlled by the Standing Committee and CPK leaders, usually through orders and reports from General Staff Chairman SON Sen and NUON Chea.[5481] SON Sen was the direct superior of S-21 Chairman KAING Guek Eav *alias* Duch until 15 August 1977, when NUON Chea took over as KAING Guek Eav *alias* Duch's direct superior.[5482] KAING Guek Eav *alias* Duch testified that the Central Committee made the decision to arrest,[5483] and that the general policy was that when the head of the family was considered a traitor, the spouse and the children were also killed,[5484] due to the Party's fear that the children would take revenge.[5485] Some prisoners begged KAING Guek Eav *alias* Duch to ask the Party to pardon them, such as HUOT Sambath, who wrote to KHIEU Samphân on 10 September 1976 and confessed his mistakes, expressed his regret, and requested the "Organization to forgive me and spare my life" or requested that his wife and children be taken care of if he could not be forgiven.[5486] The Trial Chamber found that this evidence, among others, "establishe[d] the central role which the CPK had in disseminating policies and insisting on a common ideology to guide the work of cadres at S-21 […] which was tasked with interrogating those identified as enemies and obtaining confessions for the Party".[5487] Torture was used to extract confessions, which were then submitted to the upper echelon for its decision and action.[5488] Confessions, photographs, and a movie of Vietnamese prisoners of war, the largest group of foreign detainees at S-21 were also amply used for propagandistic and educational purposes, which the Trial Chamber determined could not have possibly escaped the attention of a senior CPK leader such as KHIEU Samphân, who was

[5480] Trial Judgment (E465), paras 2183, 2184, 2236, 2237, 2350, 2372.
[5481] Trial Judgment (E465), paras 340, 2191.
[5482] Trial Judgment (E465), para. 2193.
[5483] Trial Judgment (E465), para. 2183.
[5484] Trial Judgment (E465), para. 2331.
[5485] Trial Judgment (E465), para. 2330.
[5486] Trial Judgment (E465), para. 2179. The Trial Chamber specified, however, it could not determine whether this letter was ever delivered to or received by KHIEU Samphân.
[5487] Trial Judgment (E465), para. 2180.
[5488] Trial Judgment (E465), paras 2372-2431.

present at many political study sessions and personally held speeches on vigilance against the Vietnamese enemy.[5489] These factors combined, *inter alia*, with KHIEU Samphân's prominent role within the Party and unique position within a small group of well-informed CPK members, as well as his regular participation and attendance at Standing Committee meetings,[5490] provide abundant reliable bases for the Trial Chamber to reasonably infer that he was well aware of and intended the crimes committed at the S-21 Security Centre.

1924. The Trial Chamber found that the flow of prisoners in and out of S-21 mirrored the various internal purges of the CPK, and that these purges triggered several large waves of incoming prisoners and further arrest of cadres during the DK period.[5491] The Trial Chamber was satisfied that KHIEU Samphân was aware of the arrests and deaths of formerly high-ranking CPK cadres – including, among others, SUA Vasi ("Doeun"), CHAN Chakrei, SUOS Neou ("Chhouk"), KOY Thuon, KEO Meas, HU Nim, CHOU Chet ("Sy"), VORN Vet, SAO Phim, and VEUNG Chhaem ("Phuong") – as well as of the widespread lower-level purges and executions of the country's population during the DK period.[5492] In this respect, KHIEU Samphân again contends that the Trial Chamber committed several errors including relying on his post-DK statements to establish that he knew of the arrests and deaths of high-ranking cadres,[5493] as well as on evidence of events at Preah Vihear to deduce his knowledge of purges of lower-level cadres throughout the country.[5494]

1925. The Supreme Court Chamber recalls that the Trial Chamber may take into account knowledge after the fact when determining whether an accused had the requisite intent at the time of a crime's commission.[5495] In the present case, the Trial Chamber took into account the evidence KHIEU Samphân presents on appeal as to his assertions of ignorance of arrests at the time of the events, but found it to be unconvincing.[5496] He claims, for instance, that the Trial Chamber distorted a statement he made in 2007 in which he "observed that some members of the Central Committee *disappeared* one by one"[5497] to find that he acknowledged

[5489] Trial Judgment (E465), paras 338, 340, 2462, 2472-2477, 2556, 2607, 3390, 3393, 3394, 3399-3401, 3406.
[5490] Trial Judgment (E465), para. 340.
[5491] Trial Judgment (E465), para. 2255.
[5492] Trial Judgment (E465), paras 4220-4235.
[5493] KHIEU Samphân's Appeal Brief (F54), paras 1857-1873, 2053, 2055-2057.
[5494] KHIEU Samphân's Appeal Brief (F54), paras 1874-1878, 2058, 2059.
[5495] Case 002/01 Appeal Judgment (F36), para. 1082.
[5496] Trial Judgment (E465), para. 4220.
[5497] KHIEU Samphân's Appeal Brief (F54), para. 1858, referring to Written Record of Interview of KHIEU Samphân, 14 December 2007, E3/210, ERN (EN) 00156948-00156950 (emphasis in original).

"witnessing"[5498] their arrests, and argues that "there is a clear difference between no longer seeing certain persons and witnessing their arrest".[5499] An excerpt from his own book shows, however, that KHIEU Samphân used the terms "disappearance" and "arrest" interchangeably as they held equivalent meaning: "Once when a member of the Central Committee […] was arrested, the committee leadership's confidence in Pol Pot did not waver. The committee considered each disappearance as a separate case and probably, in the eyes of insiders, justified".[5500] He similarly alleges undue misrepresentation in the Trial Chamber's affirmation that he acknowledged "that 'less than half' of the Central Committee had been swept away as part of the purges, along with 'half [of] the Standing Committee'",[5501] arguing that "these numbers corresponded to the 'Vietnamese agents' who had infiltrated the ranks".[5502] Such an argument not only serves merely as an alternative interpretation to the Trial Chamber's view, but also serves to further support the finding that he was aware of arrests and executions, irrespective of whether the victims were considered Vietnamese agents, traitors, or otherwise. Such claims of distortion, as well as illogical blanket assertions that interviews held after the DK regime cannot support a finding of his awareness at the time of the events, are clearly flawed and accordingly dismissed.

1926. KHIEU Samphân also alleges several of errors specific to the Trial Chamber's findings regarding his knowledge of the arrests and executions of SUA Vasi ("Doeun"), CHAN Chakrei, SUOS Neou ("Chhouk"), KOY Thuon, KEO Meas, HU Nim, CHOU Chet ("Sy"), VORN Vet, SAO Phim, and VEUNG Chhaem ("Phuong"). These allegations mostly rely on arguments developed elsewhere in his appeal brief. For instance, in the case of Doeun's arrest and subsequent execution, KHIEU Samphân argues that the Trial Chamber could not deduce his knowledge from "his close relationship with and proximity to POL Pot and NUON Chea",[5503] and that "nothing enabled the finding that he had taken over the supervisory functions in the Commerce Committee following the purges of the Ministry's cadres".[5504] The Supreme Court Chamber has already addressed and dismissed these allegations above.[5505] As to determining his knowledge of the fate reserved for CHAN Chakrei, Chhouk, KOY Thuon, and KEO Meas,

[5498] KHIEU Samphân's Appeal Brief (F54), para. 1858, referring to Trial Judgment (E465), para. 4220.
[5499] KHIEU Samphân's Appeal Brief (F54), para. 1859.
[5500] Trial Judgment (E465), para. 4223, referring to Khieu Samphân, *Cambodia's Recent History and the Reasons Behind the Decisions I Made* (2004), E3/18, pp. 63, 64.
[5501] KHIEU Samphân's Appeal Brief (F54), para. 1860, referring to Trial Judgment (E465), para. 4222.
[5502] KHIEU Samphân's Appeal Brief (F54), para. 1860.
[5503] KHIEU Samphân's Appeal Brief (F54), para. 1862, referring to paras 1684-1686.
[5504] KHIEU Samphân's Appeal Brief (F54), para. 1863, referring to paras 1770-1798.
[5505] See *supra* Section VIII.A.4.b and VIII.A.4.c.i.

KHIEU Samphân argues that the Trial Chamber should not have relied on the testimony of Civil Party EM Oeun due to lack of credibility,[5506] nor could it rely on the content of *Revolutionary Flag* magazines openly denouncing CHAN Chakrei, Chhouk, and KEO Meas, as it was not established that he had access to the magazines or read them.[5507] The Supreme Court Chamber has already addressed and dismissed these arguments above as well.[5508] His objections to the Trial Chamber's conclusion that he knew of HU Nim's arrest and death at the time similarly refer back to previously made allegations of Civil Party CHEA Deap's lack of credibility,[5509] already dismissed above.[5510] With respect to the Trial Chamber's findings regarding HU Nim, Sy, VORN Vet, SAO Phim, and Phuong, he further reiterates flawed allegations of evidence distortion or error in relying on his post-DK statements to deduce his knowledge at the time.[5511]

1927. In any event, the Supreme Court Chamber recalls that KHIEU Samphân was neither charged nor convicted of the arrests or executions of these specific individuals, who represent only a symbolic sample of the cadres whose purges the Trial Chamber determined he was aware of, leading the Trial Chamber to conclude that he shared the intent for such purges to occur. Thus, even if errors in the finding that he was aware of the purge of one or more, or even all, of these particular high-level cadres could be found, such errors would not negate the Trial Chamber's overall conclusion that such high-level purges occurred on a regular basis and that KHIEU Samphân willingly contributed to them. As to his knowledge of lower-level purges, KHIEU Samphân's allegations of distortion and improper reliance on the out-of-scope evidence of events at Preah Vihear have been discussed and dismissed in relation to cooperatives and worksites above.[5512] He also incorrectly argues that the Trial Chamber deduced such knowledge from "a single event",[5513] thereby adopting the usual piecemeal approach to the evidence on the record, which includes his own statements demonstrating his awareness of widespread purges.[5514]

[5506] KHIEU Samphân's Appeal Brief (F54), para. 1864, referring to paras 1690-1803.
[5507] KHIEU Samphân's Appeal Brief (F54), para. 1865, referring to paras 1641-1643.
[5508] With respect to EM Oeun's credibility, see *supra* paras 1751-1755. With respect to access to or reading the *Revolutionary Flag*, see *supra* para. 1896.
[5509] KHIEU Samphân's Appeal Brief (F54), para. 1866, referring to paras 1233-1242.
[5510] See *supra* paras 1419-1423.
[5511] KHIEU Samphân's Appeal Brief (F54), paras 1866-1873.
[5512] See *supra* para. 1908.
[5513] KHIEU Samphân's Appeal Brief (F54), para. 1874.
[5514] See, *e.g.*, Trial Judgment (E465), paras 4221, referring to KHIEU Samphân Interview, 4 August 1980, E3/203, ERN (EN) 00424013 ("It was an attempt to attack on us from the inside out. Nonetheless, we fought constantly against these attempts and defeated them. Until 1977-1978, we managed to deal with those people completely"),

1928. KHIEU Samphân's allegations of error regarding his knowledge of, and intent to commit crimes in relation to security centres, execution centres, and purges, are accordingly dismissed.

e. Specific Groups

1929. KHIEU Samphân submits that the Trial Chamber erred in concluding that he was aware of and intended to commit crimes against the Cham,[5515] Vietnamese,[5516] Buddhists,[5517] and former Khmer Republic officials.[5518] A common objection he raises concerning his knowledge and intent to commit crimes against all groups is that the Trial Chamber could not rely on his participation in the JCE to show his intent,[5519] as "[t]hese are separate elements of criminal responsibility".[5520] The Supreme Court Chamber recalls its statement above that knowledge of crimes combined with continued participation in a JCE can be conclusive as to a person's intent.[5521] In the present case, the Trial Chamber relied on his participation in the JCE in conjunction with other relevant factors such as his knowledge of crimes, to infer his intent. His objection in this respect is accordingly dismissed.

1930. With respect to the Cham, KHIEU Samphân contends that there was no evidence that he was aware of, or was motivated by the required criminal intent for each of the crimes for which he was charged,[5522] and that the Trial Chamber's inference that he knew of such crimes was not the "sole reasonable finding possible".[5523] He further argues that the Trial Chamber could not reasonably deduce his intent to commit crimes against the Cham based solely on the existence of discriminatory policies against "enemies",[5524] and that the Trial Chamber's total lack of reasoning in so deducing is symptomatic of a lack of direct or indirect evidence of his intent in this respect.[5525]

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and 4231, referring to KHIEU Samphân Interview, undated, E3/4041, ERN (EN) 00790270 ("Those in charge of the bases all had their relatives and networks. […] As a result many were arrested. For each one arrested how many others were in that person's network? As I see it, there were four to ten to approximately twenty people. This is what led to a large number of arrests").
[5515] KHIEU Samphân's Appeal Brief (F54), paras 1879-1885, 2062-2074.
[5516] KHIEU Samphân's Appeal Brief (F54), paras 1886-1909, 2075-2090.
[5517] KHIEU Samphân's Appeal Brief (F54), paras 1910-1920, 2091-2098.
[5518] KHIEU Samphân's Appeal Brief (F54), paras 1921-1927, 2099-2113.
[5519] KHIEU Samphân's Appeal Brief (F54), paras 2067, 2090, 2096, 2107.
[5520] KHIEU Samphân's Appeal Brief (F54), para. 2090.
[5521] See *supra* para. 1893, referring to *Karemera & Ngirumpatse* Appeal Judgment (ICTR), para. 632.
[5522] KHIEU Samphân's Appeal Brief (F54), paras 1879, 1880, 1885, 2062, 2070, 2074.
[5523] KHIEU Samphân's Appeal Brief (F54), paras 1881, 1883, 1884.
[5524] KHIEU Samphân's Appeal Brief (F54), paras 2063-2066, 2068, 2069.
[5525] KHIEU Samphân's Appeal Brief (F54), paras 2062, 2069-2074.

1931. A review of the relevant section of the Trial Judgment shows that the Trial Chamber's expressed bases for finding that KHIEU Samphân intended the commission of crimes against the Cham were that he specifically intended to discriminate against enemies and supported the CPK's policy to identify, arrest, isolate and "smash" them, and that discriminatory policies were implemented against the Cham through the commission of crimes.[5526] The Supreme Court Chamber considers that such reasoning on its own is decidedly weak in seeking to definitively establish an element so essential as criminal intent, and agrees with KHIEU Samphân that the finding that he intended to discriminate against real or perceived enemies in general and support the commission of crimes against them does not inevitably lead to the conclusion that he must also have intended the crimes against the Cham in particular simply because such crimes in fact occurred.

1932. The Supreme Court Chamber does not agree, however, that such lack of reasoning necessarily reflects a lack of evidence capable of establishing such intent. The Trial Chamber found that KHIEU Samphân was aware of the commission of crimes against the Cham based on the combination of: the existence a CPK policy specifically targeting the Cham as an ethnic and religious group, which was implemented through the commission of crimes on a discriminatory basis in order to achieve an atheistic and homogenous society;[5527] and, his position as a senior leader with unique standing in the Party Centre which made him "privy to the implementation of policies aimed at establishing an atheistic and homogeneous Khmer society of worker-peasants".[5528] The evidence showed that the crimes against the Cham were committed on a widespread, massive scale and in a systematic, organised and deliberate manner.[5529] It further showed, *inter alia*, that: orders targeting the Cham, including orders to purge them, "came from the upper echelon";[5530] the Cham were forcibly removed, dispersed, and scattered by CPK armed forces;[5531] and the CPK imposed restrictions on Cham religious and cultural practices in various locations throughout Cambodia during the DK period.[5532] Moreover, the Trial Chamber determined that KE Pauk, a fellow JCE member who remained a trusted CPK member throughout the DK period and close to the Party Centre, adhering to the reporting structure was instrumental in the crimes committed against the Cham and did not act

[5526] Trial Judgment (E465), para. 4289.
[5527] See Trial Judgment (E465), paras 3990, 4236.
[5528] Trial Judgment (E465), para. 4236.
[5529] Trial Judgment (E465), paras 3306, 3308, 3311-3313, 3316, 3318, 3323, 3329, 3339.
[5530] Trial Judgment (E465), paras 3228, 3275, 3290, 3307.
[5531] Trial Judgment (E465), paras 3261-3286, 3322.
[5532] Trial Judgment (E465), paras 3228, 3238, 3245, 3250, 3328.

clandestinely on his own accord.[5533] Given KHIEU Samphân's CPK leadership position, the Supreme Court Chamber considers that such evidence was sufficient to lead a reasonable trier of fact to the conclusion that he knew of the crimes committed against the Cham, and that, based on such knowledge combined with his continued support for and participation in the JCE's common purpose, he shared the intent for the commission of those crimes.

1933. As to Buddhists, KHIEU Samphân similarly submits that the Trial Chamber failed to explain how an alleged policy of defrocking monks could prove his knowledge of crimes of religious persecution or intent to discriminate against Buddhists in Tram Kak, nor did it explain why this was the only reasonable finding possible or what specific crimes he was allegedly aware of.[5534] He argues that there was no evidence to support the Trial Chamber's thesis of a "masquerade of normality" or that he knew or intended that monks and Buddhists were targeted, arrested, defrocked, or otherwise discriminated against at Tram Kak.[5535]

1934. The Trial Chamber found that, throughout the indictment period, a centrally-devised policy to abolish Buddhist practices and forbid the practice of Buddhism in DK existed,[5536] that the CPK was intent on eliminating Buddhism from Cambodian society, and that the defrocking of monks was a deliberate means to achieve this aim.[5537] KHIEU Samphân's qualification of the defrocking of monks as an "alleged policy" is therefore somewhat misleading. Rather, the Trial Chamber determined that the forcible defrocking of hundreds of Buddhist monks was a consistent, widespread, and general "pattern" across Tram Kak as part of the implementation of the CPK's policy targeting Buddhists for adverse treatment.[5538] The Trial Chamber also provided detailed written reasons why it considered such defrocking, along with other discriminatory measures in Tram Kak such as the destruction of Buddhist symbols, the disappearance of former monks, the requisition of pagodas, and the banning of outward expression of Buddhist practice or belief, to amount to acts of persecution on religious grounds as a crime against humanity.[5539] These are the specific crimes that KHIEU Samphân was found to be aware of at the time of their commission.[5540]

[5533] Trial Judgment (E465), paras 1469, 2217, 3202, 3223-3224, 3272-3274, 3290, 4069.
[5534] KHIEU Samphân's Appeal Brief (F54), paras 1912-1915, 2093, 2095.
[5535] KHIEU Samphân's Appeal Brief (F54), paras 1911, 1916-1920, 2091, 2092, 2094, 2097, 2098.
[5536] Trial Judgment (E465), paras 4015-4017.
[5537] Trial Judgment (E465), paras 1093, 4240.
[5538] See, *e.g.*, Trial Judgment (E465), paras 1105, 1183, 4015.
[5539] Trial Judgment (E465), paras 1084-1109, 1183-1187.
[5540] Trial Judgment (E465), paras 4240-4243.

1935. The Trial Chamber's conclusion that he knew of the crimes against Buddhists was based primarily on its findings that: his endorsements that Buddhism would remain the state religion, as well as his tributes to monks and the *Sangha*, "proved to be little more than subterfuge aimed at shoring up the legitimacy of the interim CPK-dominated government";[5541] he "continued publicly supporting the charade of normalcy" while monks were being defrocked *en masse* across the country and "lauded the DK's Constitution's universal guarantee of the right to worship 'any religion' to the exclusion of 'reactionary religions', which in fact Buddhism was considered to be";[5542] and, following the CPK's victory, he abruptly ceased his praise of Buddhist monks, making no further mention of them in his speeches.[5543] His contention that there is no evidence whatsoever to support a thesis of a "masquerade of normality" is obviated by NUON Chea's admission in his speech to the Danish Communist Workers' Party in July 1978 of the CPK's tactic of calculated deception to achieve the Party's goals: "We even worked within the movement of Buddhist monks, making them follow us by saying we would defend the country and religion" and "[w]e used slogans opposing foreign suppression of the culture of Kampuchea. Monks then became patriotic, supporting us without being aware of it."[5544]

1936. The evidence also showed, *inter alia*, that: a CPK policy document dated 22 September 1975 stated that 90 to 95 percent of monks had already abandoned their monkhood and were working in the rice fields, noting that this special class would no longer be cause for worry;[5545] the jeopardy in which Buddhist symbols in Tram Kak were placed was widely known;[5546] the fact that Buddhism had been "entirely wiped out" and pagodas had been converted for use for non-religious purposes was evident to foreign journalists.[5547] In light of the totality of this evidence, which KHIEU Samphân's submissions ignore, and his highly prominent position within the CPK, the Supreme Court Chamber deems it was reasonable for the Trial Chamber to reject his assertion that he knew nothing about the practice of religion in DK insofar as it concerns Buddhism, and accordingly find that he was aware of the crimes committed against Buddhists during the DK period. In the Supreme Court Chamber's view, such knowledge combined with KHIEU Samphân's continued support for and participation in the JCE's

[5541] Trial Judgment (E465), para. 4240.
[5542] Trial Judgment (E465), para. 4241.
[5543] Trial Judgment (E465), para. 4242.
[5544] Trial Judgment (E465), para. 4104, and references cited therein.
[5545] Trial Judgment (E465), paras 3757, 3850, 4104.
[5546] Trial Judgment (E465), para. 1107.
[5547] Trial Judgment (E465), paras 1108, 4015.

common purpose, was sufficient to lead a reasonable trier of fact to conclude that the only reasonable inference was that he shared the intent to commit those crimes.

1937. KHIEU Samphân also argues that there was no evidence that he had contemporaneous knowledge of the commission of crimes against former Khmer Republic officials, and that the Trial Chamber erroneously used his statements and speeches prior to 17 April 1975 to wrongly infer knowledge of such crimes at the time they were committed.[5548] He argues that those statements and speeches, as well as his victory message of 21 April 1975, were confined to and made in the context of a civil war against Khmer Republic soldiers before the DK period,[5549] and the Trial Chamber erred in reaching the unfounded conclusion that he had played a decisive role in securing the CPK's victory on 17 April 1975 while recognising that he had no military role.[5550] He further contends that the murders of Khmer Republic leaders were already definitively judged on appeal in Case 002/01, and that the Trial Chamber's re-trial of the same facts in Case 002/02 thus violates the principle of *non bis in idem*.[5551]

1938. The Supreme Court Chamber recalls that the Trial Chamber may rely on evidence of KHIEU Samphân's conduct before 17 April 1975, provided such conduct formed part of a cluster of transactions and extended contributions to the implementation of the JCE's common purpose that continued after 16 April 1975 and brought to fruition the relevant crimes committed within the ECCC's temporal jurisdiction.[5552] His argument that his speeches publicly calling for the elimination of high-ranking members of the Khmer Republic administration and their subordinates were made during a civil war does not in any way preclude the conclusion that, even after the CPK's victory, KHIEU Samphân knew and intended that former Khmer Republic officials would be targeted for elimination. His submissions ignore evidence of IENG Sary's admission that, around 20 April 1975, the CPK leadership formalised a "decision to kill" remaining former Khmer Republic members in order to prevent a counter-revolution, as well as evidence that the decision was implemented methodically, including at the Tram Kak Cooperatives and Kraing Ta Chan Security Centre.[5553] The evidence also showed that, during mass rallies and political trainings in May 1975, senior CPK leaders including KHIEU Samphân spoke about the presence of enemies in the country,

[5548] KHIEU Samphân's Appeal Brief (F54), paras 1921, 1923, 1927, 2102, 2104-2106, 2108-2113.
[5549] KHIEU Samphân's Appeal Brief (F54), paras 1924-1926, 2102, 2109.
[5550] KHIEU Samphân's Appeal Brief (F54), paras 1922, 2101.
[5551] KHIEU Samphân's Appeal Brief (F54), paras 2103, 2109.
[5552] Case 002/01 Appeal Judgment (F36), paras 217, 221.
[5553] See Trial Judgment (E465), paras 4034, 4053.

including people who could have been soldiers in the previous regimes, and that Chief of General Staff SON Sen ordered the identification and arrest of former Khmer Republic soldiers.[5554] In view of KHIEU Samphân's CPK leadership position, the Supreme Court Chamber considers that, although the Trial Chamber relied on much more evidence, this evidence alone was sufficient to lead the Trial Chamber to conclude beyond reasonable doubt that he knew of the crimes committed against former Khmer Republic officials, and that, based on such knowledge combined with his continued support for and participation in the JCE's common purpose, he shared the intent to commit those crimes. Whether or not he was instrumental in ensuring the CPK's victory on 17 April 1975 has no impact on this conclusion. Moreover, the Supreme Court Chamber's consideration in Case 002/01 that "the killing of high-ranking Khmer Republic officials was part of the common purpose" was expressly limited to being "in relation to the evacuation of Phnom Penh",[5555] and not any of the charges which formed part of the scope of Case 002/02. KHIEU Samphân's submissions in respect of his knowledge and intent to commit crimes against former Khmer Republic officials are accordingly dismissed.

1939. Regarding the Vietnamese, KHIEU Samphân recalls arguments made elsewhere in his appeal brief that the Trial Chamber illegally extended the scope of the introductory submission to include new facts and events constitutive of the deportation of the Vietnamese in Tram Kak, Prey Vang and Svay Rieng, as well as of genocide and crimes against humanity against the Vietnamese outside the provinces of Prey Veng and Svay Rieng.[5556] He also refers to previous arguments that the Trial Chamber committed errors of fact that prevented it from establishing that crimes against humanity of murder, deportation, extermination, racial persecution, and the crime of genocide were committed against the Vietnamese,[5557] including at S-21.[5558] The Supreme Court Chamber has addressed and dismissed these arguments in relevant sections above.[5559]

1940. In the alternative, he submits that, even if the above-mentioned crimes against the Vietnamese were committed, there was no evidence that he was aware of them at the time they

[5554] Trial Judgment (E465), paras 4038, 4272.
[5555] Case 002/01 Appeal Judgment (F36), para. 859.
[5556] KHIEU Samphân's Appeal Brief (F54), para. 1886, referring to paras 380-385, 435-438, 520, 521.
[5557] KHIEU Samphân's Appeal Brief (F54), para. 1886, referring to paras 686-718, 748-756, 966-1097.
[5558] KHIEU Samphân's Appeal Brief (F54), paras 1904-1909, 2089, 2090, referring to paras 1650, 1651, 1704-1753.
[5559] See *supra* Sections VII.B.2., VII.D., VII.F.4., VII.H.

were committed or from which his intent for their commission could be inferred.[5560] In particular, he provides a list of facts that the Trial Chamber never specified he was aware of,[5561] and submits that the Trial Chamber "never said what crimes [committed against the Vietnamese during the DK period] he was aware of, and why and when he became aware of them."[5562] He further contends that the Trial Chamber erroneously concluded that he incited hatred against and the deportation of the ethnic Vietnamese population by distorting or misinterpreting his public statements and relying on evidence of low probative value – namely, the testimony of Witness EK Hen, the transcript of an interview with NEOU Sarem with *Voice of America*, transcriptions of foreign files such as SWB, FBIS, and French periodicals, as well as publications of the CPK between 1977 and 1979 – the content of which could not, in any event, lead a reasonable trier of fact to reach the Trial Chamber's conclusions.[5563] In particular, he contends that, even if the content of his speeches and other materials before the Trial Chamber were accurately reflected, they could not lead to the only reasonable conclusion that he carried the specific intent to destroy or discriminate against the Vietnamese group on ethnic or racial grounds, arguing that his statements were not directed against ethnic Vietnamese in general, but rather solely against Vietnamese "invaders", "annexationists", "aggressors", or "agents" in the framework of an armed hostility.[5564]

1941. At the outset, the Supreme Court Chamber rejects KHIEU Samphân's objections regarding an alleged lack of specificity, as there is no requirement for the Trial Chamber to pinpoint exactly "why" or "when" he became aware of the crimes against the Vietnamese for which he was convicted. As recalled above, to trigger JCE liability, the Trial Chamber need only determine that a JCE member intended the crimes, as charged, encompassed by a common criminal purpose, rather than every specific act or conduct of the principal perpetrators underlying those crimes. The Trial Chamber clearly found that KHIEU Samphân had contemporaneous knowledge of and shared the intent to commit the crimes against the Vietnamese for which he was convicted. It was not required to also find that he was aware of or intended all the specific facts underlying each of those crimes. The Supreme Court Chamber notes that his arguments about the probative value and interpretation of the evidence on which the Trial Chamber relied form part of the overall crux of KHIEU Samphân's arguments made

[5560] KHIEU Samphân's Appeal Brief (F54), paras 1887, 2077.
[5561] KHIEU Samphân's Appeal Brief (F54), para. 1888.
[5562] KHIEU Samphân's Appeal Brief (F54), para. 1889.
[5563] KHIEU Samphân's Appeal Brief (F54), paras 1890-1903, 2075-2080.
[5564] KHIEU Samphân's Appeal Brief (F54), paras 2081-2088.

elsewhere in his appeal brief that the Trial Chamber unduly conflated calls against the Vietnamese enemy state with the ethnic Vietnamese population of Cambodia.[5565] The Supreme Court Chamber has already addressed and dismissed these contentions above.[5566]

1942. KHIEU Samphân's allegations of error regarding his knowledge of and intent to commit crimes against specific groups, namely the Cham, Buddhists, former Khmer Republic officials and Vietnamese are accordingly dismissed.

f. Regulation of Marriage

1943. The Trial Chamber found that KHIEU Samphân knew of and intended to commit crimes as part of the CPK's nationwide policy to regulate marriage.[5567] In reaching this finding, the Trial Chamber considered that he openly advocated for the CPK's policy of rapidly increasing DK's population while concomitantly encouraging the population to divest themselves of personal sentiment toward their parents in favour of *Angkar*.[5568] It further considered that his involvement in this policy was corroborated by NORODOM Sihanouk, who recalled him describing the pairing of young women with disabled soldiers as a sacrifice to the nation.[5569] The Trial Chamber also found that, at a meeting at Wat Ounalom in late 1975, he personally instructed that all ministries were to arrange marriages so that couples could produce children for the ultimate defence of the country,[5570] and that this was indeed implemented, including in the Ministry of Commerce, over which KHIEU Samphân had direct oversight, and where monthly quotas called for a minimum of 100 couples to be married during 1977 and 1978.[5571]

1944. KHIEU Samphân submits that the Trial Chamber committed several errors in finding that he knew of and intended to commit crimes as part of a criminal policy of regulating marriage.[5572] He contends that its findings resulted from a biased assessment of the evidence, as the Trial Chamber had already pre-judged the facts in relation to an alleged forced marriage policy in Case 002/01.[5573] He further contends that the Trial Chamber relied on the isolated testimony of Civil Party CHEA Deap, which it should have dismissed for lack of credibility,

[5565] See KHIEU Samphân's Appeal Brief (F54), para. 1896, referring to paras 1058-1097, 1551-1560.
[5566] See *supra* Section VIII.B.5.a.
[5567] Trial Judgment (E465), paras 4249, 4305.
[5568] Trial Judgment (E465), paras 4248, 4304.
[5569] Trial Judgment (E465), para. 4248.
[5570] Trial Judgment (E465), paras 4247, 4304.
[5571] Trial Judgment (E465), para. 4247.
[5572] KHIEU Samphân's Appeal Brief (F54), paras 1928-1931, 2114-2118.
[5573] KHIEU Samphân's Appeal Brief (F54), paras 1928, 2115, 2116, referring to paras 1189-1280, 1341-1398.

to reach its finding on the meeting at Wat Ounalom that he supposedly chaired,[5574] and that it misinterpreted evidence about population growth, minimum quotas, and divesting personal sentiment towards *Angkar*, which had nothing to do with forced marriage.[5575] Moreover, he argues that neither his responsibilities in relation to trade nor the generic formulation of "Party Centre" or "*Angkar*" could establish a link or knowledge on his part of any forced marriage policy.[5576] In support of these contentions, which for the most part merely constitute alternative interpretations of the evidence, KHIEU Samphân relies entirely on arguments developed elsewhere in his appeal brief, which the Supreme Court Chamber has addressed and dismissed relevant sections above.[5577]

1945. KHIEU Samphân's allegations of error regarding his knowledge of and intent to commit crimes in regulating marriage are accordingly dismissed.

9. *Proprio Motu* Issue Concerning the Applicability of JCE to Crimes Committed with *Dolus Eventualis*

1946. The Supreme Court Chamber considers it necessary to address an issue of general significance to the ECCC's jurisprudence that arises from the Trial Judgment but was not advanced on appeal by any party. Although the Supreme Court Chamber's powers are exercised within the limits of the issues appealed by the parties, this Chamber, in line with the ICTR and ICTY Appeals Chamber,[5578] has held that it may exceptionally address issues *proprio motu* that would not lead to an invalidation of the judgment but are nevertheless of general significance to the tribunal's jurisprudence.[5579] The exercise of such a power is within the appellate chamber's discretion; if it declines to address an issue, the trial chamber's opinion remains the formal pronouncement on that issue and will therefore carry some weight.[5580]

1947. The issue in the case at hand pertains to the applicability of JCE liability to *dolus eventualis* crimes, *i.e.*, crimes where the perpetrator is aware of the risk that the objective elements of the crime may result from his or her actions or omissions and accepts such an

[5574] KHIEU Samphân's Appeal Brief (F54), paras 1929, 2117, referring to paras 1233-1242.
[5575] KHIEU Samphân's Appeal Brief (F54), paras 1930, 2117, referring to paras 1221-1232.
[5576] KHIEU Samphân's Appeal Brief (F54), paras 1930, 1931, referring to paras 1244-1280, 1618-1803.
[5577] See especially *supra* Section V.C.2.
[5578] *Krnojelac* Appeal Judgment (ICTY), para. 6; *Prosecutor v. Akayesu*, Appeals Chamber (ICTR), ICTR-96-4-A, Judgment, 1 June 2001 ("*Akayesu* Appeal Judgment (ICTR)"), paras 17-19.
[5579] Case 001 Appeal Judgment (F28), para. 15. See also Case 002/01 Appeal Judgment (F36), para. 1138.
[5580] See *Akayesu* Appeal Judgment (ICTR), para. 23. See also Case 002/01 Appeal Judgment (F36), para. 1139.

outcome.[5581] *Dolus eventualis* does not include a standard of negligence or gross negligence.[5582] In response to KHIEU Samphân's argument that JCE I requires proof of direct intent with respect to both the common purpose and the underlying crime,[5583] the Trial Chamber determined "that the degree of intent required under JCE I is direct intent" and that "indirect intent (*dolus eventualis*) does not suffice for a finding of JCE before the ECCC."[5584] As a result, the Trial Chamber concluded that the crime against humanity of murder committed with *dolus eventualis* fell outside the common purpose of the JCE, and accordingly analysed KHIEU Samphân's responsibility for this crime under the mode of liability of aiding and abetting instead.[5585] This Supreme Court Chamber finds that the Trial Chamber erred by ignoring that this Chamber's established jurisprudence in Case 002/01 that an accused may be held liable for crimes that are not directly intended but nevertheless encompassed by a JCE's common purpose.

1948. In Case 002/01, the Supreme Court Chamber noted that "the legal categories [of JCE] that the ICTY Appeals Chamber identified in *Tadić* appear to have been based primarily on an assessment of the facts of the underlying cases; the categories were not expressly used in the post-World War II jurisprudence nor are they sharp-contoured legal definitions free from overlap."[5586] The Supreme Court Chamber found that, in situations where the accused did not carry out the *actus reus* of the international crime charged but acted in concert with others, "criminal liability based on making a contribution to the implementation of a common criminal

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[5581] *Prosecutor v. Lubanga*, Pre-Trial Chamber I (ICC), ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, para. 352. See also *Bemba* Decision Pursuant to Article 61(7)(a) and (b) (ICC), para. 363.

[5582] See Case 002/01 Appeal Judgment (F36), paras 390-391, where the Supreme Court Chamber quoted and adopted the definition used by the *Stakić* Trial Chamber:

> The technical definition of *dolus eventualis* is the following: if the actor engages in life-endangering behaviour, his killing becomes intentional if he "reconciles himself" or "makes peace" with the likelihood of death. Thus, if the killing is committed with "manifest indifference to the value of human life", even conduct of minimal risk can qualify as intentional homicide.

[5583] KHIEU Samphân's Closing Brief (E457/6/4/1), paras 452, 459-462, 470, 498.

[5584] Trial Judgment (E465), para. 3715.

[5585] Trial Judgment (E465), para. 4311:

> Having considered all of the evidence and in light of KHIEU Samphan's role in the joint criminal enterprise, the Chamber finds that commission through a joint criminal enterprise most accurately and appropriately reflects KHIEU Samphan's responsibility for the crimes that fall within the common purpose. For these crimes, the Chamber will therefore not analyse KHIEU Samphan's responsibility under the other, additionally charged, modes of liability. Regarding the crime against humanity of murder committed with *dolus eventualis* as established at the Tram Kak Cooperatives, 1st January Dam Worksite, Trapeang Thma Dam Worksite, Kampong Chhnang Airfield Construction Site, S-21 Security Centre, Kraing Ta Chan Security Centre and Phnom Kraol Security Centre, the Chamber recalls that it does not fall within the common purpose. The Chamber will consider KHIEU Samphan's responsibility for these crimes under the mode of aiding and abetting, as the Chamber finds that this most accurately reflects KHIEU Samphan's role *vis-à-vis* these murders.

[5586] Case 002/01 Appeal Judgment (F36), para. 775.

purpose was, at the time relevant to the charges in the case at hand, limited to crimes that were actually encompassed by the common purpose",[5587] because liability under JCE for crimes that fell outside the common purpose (*i.e.*, JCE III) was not part of customary international law in 1975. In light of its conclusion that liability under JCE could therefore only arise for crimes falling *within* the common purpose, the Supreme Court Chamber explained that "the criteria for deciding which crimes are encompassed by a common purpose are of great relevance".[5588] It recalled that the common purpose could either "amount to" or "involve" the commission of crimes:[5589]

> [T]he common purpose "involves" the commission of a crime if the crime is a means to achieve an ulterior objective (which itself may not be criminal). In such a scenario, it is not necessary that those who agree on the common purpose actually desire that the crime be committed, as long as they recognise that the crime is to be committed to achieve an ulterior objective. This may include crimes that are foreseen as means to achieve a given common purpose, even if their commission is not certain. For instance, if a gang agrees to break into a house to steal and to use, if necessary, deadly force to overcome any resistance that they may encounter, it would be unconvincing to conclude that the eventual murder was not encompassed by the common purpose because it was not certain that murder would actually be committed in the course of the break-in. Rather, in such scenario, the crime of murder was a constituent element of the plan that was conceived, even if the members of the gang did not know whether it would actually be committed. Thus, if attaining the objective of the common purpose may bring about the commission of crimes, but it is agreed to pursue this objective regardless, these crimes are encompassed by the common purpose because, even though not directly intended, they are contemplated by it.[5590]

1949. The Supreme Court Chamber explained that whether a crime is contemplated by the common purpose is primarily a question of fact, but "[w]hat is of note is that the common purpose may encompass crimes in which the commission is neither desired nor certain, just as it is sufficient for the commission of certain crimes that the perpetrator acted with *dolus eventualis* and therefore neither desired that the crime be committed nor was certain that it would happen."[5591] The Supreme Court Chamber stated specifically that:

> [I]f murder is committed through a joint criminal enterprise, it has to be established that the accused had the objective to bring about the death of the victim through the implementation of the common purpose or was aware that the death would be the certain result thereof (direct intent), or *was aware that the death of the victim was a possible consequence of the implementation of the common purpose, but proceeded to implement it regardless, having accepted the possible occurrence of deaths (dolus eventualis)*.[5592]

[5587] Case 002/01 Appeal Judgment (F36), para. 807.
[5588] Case 002/01 Appeal Judgment (F36), para. 807.
[5589] Case 002/01 Appeal Judgment (F36), para. 807.
[5590] Case 002/01 Appeal Judgment (F36), para. 808.
[5591] Case 002/01 Appeal Judgment (F36), para. 808.
[5592] Case 002/01 Appeal Judgment (F36), para. 1054 (emphasis added).

1950. Indeed, in Case 002/01, the Supreme Court Chamber considered it appropriate to change the Trial Chamber's legal characterisation of certain deaths which occurred during the course of Movement of the Population Phase Two from extermination to the crime against humanity of murder committed with *dolus eventualis*, and found that these crimes were encompassed by the common purpose and that KHIEU Samphân bore JCE liability for them.[5593]

1951. The Trial Chamber did not acknowledge the Supreme Court Chamber's decision, but instead relied selectively on jurisprudence from the *ad hoc* tribunals:

> The Chamber notes that the *mens rea* requirement for JCE varies according to category and in particular depending on whether crimes are encompassed by the common purpose. While JCE I requires that crimes are encompassed by the common purpose, JCE III pertains to crimes committed outside the common purpose as a natural and foreseeable consequence of effecting that common purpose. On the basis of this distinction, international jurisprudence has held that JCE I requires direct intent while JCE III requires only that an accused was aware that these crimes were a possible consequence of the execution of the common purpose and willingly took the risk that they would be committed (*dolus eventualis*). For example, in *Stanišić and Simatović*, the ICTY Trial Chamber stated that: "[i]t follows […] that the first form of the JCE requires intent in the sense of *dolus directus*, and that recklessness or *dolus eventualis* does not suffice". In *Karemera and Ngirumpatse*, the ICTR Appeals Chamber stated that: "[t]he question of "foreseeability" relates to the extended form of joint criminal enterprise, not the basic form". The ICTY Appeals Chamber confirmed in *Šainović et al*. that the "ability to predict" is an improper *mens rea* standard under JCE I and that the Trial Chamber had correctly required that Šainović "had knowledge of, as opposed to ability to foresee, the commission of crimes and shared the intent for their commission with the other members of the JCE".
>
> The Chamber finds that the intent (*dolus eventualis*) that forms part of the definition of JCE III cannot be transposed into JCE I. As JCE III was not part of customary international law during the relevant period of the Closing Order, indirect intent (*dolus eventualis*) does not suffice for a finding of JCE before the ECCC. Accordingly, and consistent with the submissions of the KHIEU Samphan Defence, the Chamber finds that the degree of intent required under JCE I is direct intent.[5594]

1952. The Trial Chamber essentially, and incorrectly, considered that if the commission of a crime is merely foreseeable, that crime automatically falls outside the common purpose. This ignores situations where the probable commission of a crime was jointly and willingly agreed upon by all JCE participants, as in the example given by this Chamber in Case 002/01 of the gang breaking into a house and agreeing to use lethal force if necessary. In such situations, as the JCE participants share an agreement as regards the commission of a crime with *dolus eventualis* in furtherance of the common purpose, the crime is encompassed by the common purpose.

[5593] Case 002/01 Appeal Judgment (F36), paras 561-562, 868, 1088-1089.
[5594] Trial Judgment (E465), paras 3714-3715.

1953. The jurisprudence cited by the Trial Chamber rests, sometimes indirectly, on the *Tadić* Appeal Judgment. When defining the applicable *mens rea* for the three forms of JCE it defined in customary international law, the *Tadić* Appeals Chamber stated that "the *mens rea* element differs according to the category of common design under consideration. With regard to the first category, *what is required is the intent to perpetrate a certain crime* (this being the shared intent on the part of all co-perpetrators)."[5595] This is distinct from JCE III, where, according to the Appeals Chamber:

> [W]hat is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime *other than the one agreed upon in the common plan* arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.[5596]

1954. The *Tadić* case dealt with a situation where Tadić (the accused) was part of an armed group of men involved in an attack on two villages as part of an ethnic cleansing campaign to remove non-Serbs from the area.[5597] Five men were killed as a result of the attack, but the Trial Chamber was unable to determine whether Tadić himself took part in their killing,[5598] although he personally "took an active part in the brutal and violent beating" of four men as part of the attack.[5599] Killing was not found to be part of the common criminal purpose.[5600] The ICTY Appeals Chamber therefore considered whether the killings were a natural and foreseeable consequence of the attack on the villages, such that Tadić might incur liability via JCE III.

1955. As the *Tadić* Appeals Chamber was determining whether Tadić might bear responsibility for crimes *outside* the common purpose, its principal focus was not on the level of intent required for crimes *within* the common purpose. Its statement that such crimes must be perpetrated with intent (which it did not elaborate upon or explain) may be seen as the simple requirement that the JCE members share the *mens rea* required for the underlying crime.[5601]

[5595] *Tadić* Appeal Judgment (ICTY), para. 228 (emphasis added).
[5596] *Tadić* Appeal Judgment (ICTY), para. 228 (emphasis added).
[5597] *Tadić* Appeal Judgment (ICTY), paras 175, 178.
[5598] *Tadić* Appeal Judgment (ICTY), para. 179.
[5599] *Tadić* Trial Judgment (ICTY), para. 374.
[5600] *Tadić* Appeal Judgment (ICTY), para. 231.
[5601] Case 002/01 Appeal Judgment (F36), para. 1053: "In the view of the Supreme Court Chamber, for an accused to be guilty of a crime based on liability under the notion of JCE, his or her *mens rea* must cover, both the ingredients of the crime and those of the mode of liability."

1956. Indeed, some ICTY Chambers have interpreted it in this way. The *Brđanin & Talić* Trial Chamber, quoted with approval by the *Krstić* Trial Chamber,[5602] stated that:

> The state of mind of the accused to be established by the prosecution accordingly differs according to whether the crime charged:
>
> (a) was within the object of the joint criminal enterprise, or
>
> (b) went beyond the object of that enterprise, but was nevertheless a natural and foreseeable consequence of that enterprise.
>
> If the crime charged fell within the object of the joint criminal enterprise, the prosecution must establish that *the accused shared with the person who personally perpetrated the crime the state of mind required for that crime*.[5603]

1957. No chamber at the *ad hoc* tribunals has analysed whether a crime falling *within* the common purpose could be committed with *dolus eventualis*, although some, referring back to *Tadić* or to other cases that refer to *Tadić*, have stated without any actual analysis that direct intent is required.[5604]

1958. The *Tadić* Appeals Chamber did not actually state that "direct intent" was required for JCE I, but rather "the same criminal intent" or "shared intent".[5605] *Dolus eventualis* is considered to be a form of intent. As this Chamber explained in Case 002/01, "the causing of death with less than direct intent but more than mere negligence (such as *dolus eventualis* or recklessness) incurs criminal responsibility and *is considered as intentional killing*."[5606]

[5602] *Krstić* Trial Judgment (ICTY), para. 613.

[5603] *Prosecutor v. Brđanin & Talić*, Trial Chamber II (ICTY), IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 31 (emphasis added). Later jurisprudence has clarified that the physical perpetrator of the crime need not be a member of the JCE. "[W]hat matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose." *Brđanin* Appeal Judgment (ICTY), para. 410.

[5604] See *Karemera & Ngirumpatse* Appeal Judgment (ICTR), para. 564 ("The Appeals Chamber finds no merit in Karemera's contention that the Trial Chamber did not discuss whether it was foreseeable to him that the traditional weapons were purchased through the Fund with the purpose of destroying the Tutsi population. The question of 'foreseeability' relates to the extended form of joint criminal enterprise, not the basic form on the basis of which Karemera was convicted. Karemera's argument is therefore dismissed"); *Šainović et al.* Appeal Judgment (ICTY), para. 1014 ("The Appeals Chamber is concerned that, in relying on Šainović's knowledge of events which occurred in 1998, the Trial Chamber used language suggesting that it might have erred in law in relation to the *mens rea* standard for JCE I. In particular, the Trial Chamber's reference to Šainović's ability "to predict" the situation in 1999 resembles the foreseeability standard embedded in the *mens rea* for JCE III. Pursuant to JCE I, the accused must share the intent for the commission of the crimes alleged in the Indictment and not merely foresee their occurrence."); *Prosecutor v. Stanišić and Simutović*, Trial Chamber I (ICTY), IT-03-69-T, Judgement (Volume II of II), 30 May 2013, fn. 2193 ("It follows […] that the first form of the JCE requires intent in the sense of *dolus directus*, and that recklessness or *dolus eventualis* does not suffice.")

[5605] *Tadić* Appeal Judgment (ICTY), paras 196, 220.

[5606] Case 002/01 Appeal Judgment (F36), para. 409. See also *Stakić* Trial Judgment (ICTY), para. 587, explaining that "German law takes *dolus eventualis* as sufficient to constitute intentional killing" and finding that *dolus eventualis* satisfies the *mens rea* requirement for murder as a violation of the laws or customs of war. See also

1959. It would be nonsensical to require a higher *mens rea* for the form of participation than for the underlying crime. If one can incur liability for individually committing with *dolus eventualis* the crime against humanity of murder, he or she should equally be held liable for participating in a joint criminal enterprise that commits the same crime. As the *Tadić* Appeals Chamber explained, "to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act."[5607]

1960. The Supreme Court Chamber does not consider this approach to be a "fundamental reshaping of the concept of individual responsibility for collective criminal action".[5608] The threshold for liability is not lowered by considering that one could be liable for *any* crime within the common plan so long as its commission was merely foreseeable.[5609] To incur liability via JCE, the JCE participant must possess the requisite *mens rea* for the underlying crime inherent in the common plan.[5610] One could not be held liable via JCE, for example, for genocide that was foreseeable but not intended, as the crime of genocide requires direct intent.

1961. The Supreme Court Chamber recognises, however, that where the common purpose is inferred from events, it is particularly important to determine which crime(s) fall(s) within the common purpose and whether there has been a meeting of minds by the JCE participants in respect of the crime(s) where the JCE participants accept the commission of the crime either as a goal, as an inevitable consequence of the primary purpose or as an eventuality treated with indifference.[5611] This is because the outcome will be considerably different depending on

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Johan D. Van der Vyver, "The International Criminal Court and the Concept of *Mens Rea*", (2004) 12(1) *U Miami Int'l & Comp. L. Rev.* 57, pp, 61-63:

> The notion of fault is comprised of either intent (*dolus*) or negligence (*culpa*). A wrongful act is committed intentionally if the perpetrator contemplated the illegality and/or harmful consequences of the act. Negligence denotes the mental disposition of a person who commits a wrongful act, and although the person who committed the act did not intend to act illegally or to cause the harmful consequences of the act, in doing so he or she deviated from conduct expected of a reasonable person within the same circumstances. While the person who acts intentionally foresees the illegality and harmful consequences of his or her act, the person who acts negligently does not appreciate the illegality or the harmful consequences of his or her action, while a reasonable person would in the prevailing circumstances have foreseen and avoided acting illegally or bringing about the harmful consequences of the act. […] Intent can take on one of three forms, to be distinguished in view of the presence or absence of a desire to bring about the harmful consequences that emanated from the act or omission [then listing *dolus directus, dolus indirectus,* and *dolus eventualis* as those three forms].

[5607] *Tadić* Appeal Judgment (ICTY), para. 192.
[5608] See Cóman Kenny, "Jurisprudence Continues to Evolve: The ECCC's Revision of Common Purpose Liability", *in* (2018) 16 *J. Int'l Crim. Just*. 623, p. 624.
[5609] As some commentators seem to believe. See Elinor Fry and Elies van Sliedregt, "Targeted Groups, Rape and *Dolus Eventualis*", *in* (2020) 18 *J. Int'l Crim. Just*. 701, p. 719.
[5610] Case 002/01 Appeal Judgment (F36), para. 1053.
[5611] Case 002/01 Appeal Judgment (F36), para. 809.

whether the crime at issue is considered to fall within the common purpose. As explained in Case 002/01, "[w]hether a crime was contemplated by the common purpose is primarily a question of fact that – absent an express agreement – has to be assessed taking into account all relevant circumstances, including the overall objective of the common purpose and the likelihood that it may be attained only at the cost of commission of crimes."[5612] While the existence of a common purpose, the crime(s) encompassed by the common purpose, and the meeting of minds regarding the commission of the crime(s) may be implicit and inferred from the evidence, any such inferences drawn must be the only reasonable ones available on the evidence.

1962. In view of the Trial Chamber's error concerning the *mens rea* required for JCE liability, and its subsequent failure to consider KHIEU Samphân's individual responsibility for the crime against humanity of murder committed with *dolus eventualis* within the JCE, the Supreme Court Chamber will now consider whether the crime against humanity of murder committed with *dolus eventualis* fell within the common purpose. If the crime against humanity of murder committed with *dolus eventualis* is considered to have been part of the common purpose, the Supreme Court Chamber will assess KHIEU Samphân's responsibility for this crime through JCE, as the Trial Chamber has found "that commission through a joint criminal enterprise most accurately and appropriately reflects KHIEU Samphan's responsibility for the crimes that fall within the common purpose."[5613] If the Supreme Court Chamber finds that KHIEU Samphân is responsible under JCE, the Supreme Court Chamber will recharacterise KHIEU Samphân's conviction for aiding and abetting the crime against humanity of murder committed with *dolus eventualis* to commission of this crime via JCE.

1963. Rule 110(2) permits the Supreme Court Chamber to change the legal characterisation of the facts contained in the Trial Judgment to accord with a new form of liability[5614] provided that it does not go beyond those facts[5615] or violate fair trial rights. An accused's fair trial rights are not violated by recharacterisation where the accused is aware of the possibility of the legal

[5612] Case 002/01 Appeal Judgment (F36), para. 808.
[5613] Trial Judgment (E465), para. 4311.
[5614] See Case 001 Trial Judgment (E188), para. 493, where the Trial Chamber, interpreting Rule 98(2), stated:
> The Parties do not dispute that Internal Rule 98(2) permits changes to the legal characterisation of both the crimes and the forms of responsibility included in the Amended Closing Order. While comparable provisions in the Cambodian legal system do not specifically address changes to a form of responsibility, the Chamber is satisfied that this type of change is permissible under Internal Rule 98(2).

Rule 98(2) is analogous to Rule 110(2), but applies to the Trial Chamber rather than the Supreme Court Chamber.
[5615] Case 001 Trial Judgment (E188), paras 493-496.

recharacterisation and is given sufficient opportunity to defend against it.[5616] In the present case, as addressed in Section V.B above, KHIEU Samphân was charged with the crime against humanity of extermination but was on notice that the facts considered to amount to extermination could also be characterised as murder, and that this Chamber had clarified that murder as a crime against humanity may be committed with *dolus eventualis*.[5617] He was aware that this Chamber had also clarified that crimes committed with *dolus eventualis* may incur JCE liability.[5618] Accordingly, the Supreme Court Chamber considers that the proposed legal recharacterisation would not violate KHIEU Samphân's fair trial rights.

a. Whether the Common Plan Encompassed the Crime Against Humanity of Murder Committed with *Dolus Eventualis*

1964. The Supreme Court Chamber will consider whether the crime against humanity of murder committed with *dolus eventualis*, which occurred at the following locations, fell within the common purpose of the JCE: (1) Tram Kak Cooperatives; (2) 1st January Dam Worksite; (3) Trapeang Thma Dam Worksite; (4) Kampong Chhnang Airfield Construction Site; (5) S-21 Security Centre; and (6) Kraing Ta Chan Security Centre. The Trial Chamber found that the murders committed with *dolus eventualis* at these locations fell outside the common purpose because it erroneously considered that JCE liability cannot attach to crimes committed with *dolus eventualis*.[5619]

1965. These murders were found to have occurred due to the harsh working and living conditions at the cooperatives and worksites[5620] as well as the poor conditions of detention (including the methods of interrogation employed) at the security centres.[5621] The Trial Chamber found that the harsh living and working conditions at the cooperatives and worksites were implemented as a means of furthering the common purpose, as they were "essential to the

[5616] See Case 001 Trial Judgment (E188), paras 497-500, where the Trial Chamber examined Article 35 (new) of the ECCC Law, ECtHR jurisprudence, Regulation 55 of the ICC, and ICC jurisprudence and determined that an accused's fair trial rights are not violated by recharacterisation where the accused is aware of the possibility of the legal recharacterisation and is provided with sufficient opportunity to defend against it.
[5617] Case 002/01 Appeal Judgment (F36), para. 409.
[5618] See KHIEU Samphân's Closing Brief (E457/6/4/1), paras 452, 459-462, 470, 498 where this very issue was addressed.
[5619] Trial Judgment (E465), paras 3921, 3977. The Trial Chamber also found that murder with *dolus eventualis* was committed at Phnom Kraol Security Centre, but as discussed in Section VII.5.e *supra*, this finding has been overturned.
[5620] Trial Judgment (E465), paras 1145 (Tram Kak Cooperatives), 1384, 1388 (Trapeang Thma Dam Worksite), 1670, 1672 (First January Dam Worksite), and 1800, 1804 (Kampong Chhnang Airfield Construction Worksite).
[5621] Trial Judgment (E465), paras 2568 (S-21 Security Centre), 2815 (Kraing Ta Chan Security Centre), and 3116 (Phnom Kraol Security Centre).

CPK authorities' exercise of control over the workers and therefore the implementation of revolutionary objectives".[5622] The Trial Chamber also found the imposition of poor detention conditions was a means of exercising control over the prisoners and was therefore implemented as a means of furthering the common purpose.[5623] Therefore, it remains to be examined whether the JCE members, expressly or implicitly, had the shared understanding and acceptance of foreseeable deaths due to the imposition of these conditions.[5624]

1966. The Trial Chamber found that KHIEU Samphân personally held the understanding that deaths would likely result from the conditions imposed at cooperatives and worksites and at security centres.[5625] It considered that his awareness of the substantial likelihood of the commission of crimes was in part due to his proximity to the Party Centre.[5626] It also found that the Central Committee, and in particular the Standing Committee, "was fully apprised of issues affecting the livelihood of workers and peasants at bases, cooperatives and worksites including food shortages, health issues and the lack of medicine throughout the DK period."[5627] The Trial Chamber further found that NUON Chea, another member of the JCE, "was at all times aware of the elements of the crime against humanity of murder committed with *dolus eventualis* and facilitated their commission."[5628] The evidence relied on by the Trial Chamber was not unique to KHIEU Samphân and NUON Chea. It must be considered that they were not the only two JCE members who shared the understanding that deaths would likely result from the conditions imposed; rather this was a common understanding among all JCE participants. The crime against humanity of murder committed with *dolus eventualis* at Tram Kak Cooperatives, 1st January Dam Worksite, Trapeang Thma Dam Worksite, Kampong Chhnang Airfield Construction Site, S-21 Security Centre, and Kraing Ta Chan Security Centre was therefore encompassed by the common purpose of the JCE.

[5622] Trial Judgment (E465), para. 3926.
[5623] Trial Judgment (E465), para. 3985.
[5624] See Case 002/01 Appeal Judgment (F36), para. 809: "What deserves emphasising is that […] there is a meeting of minds – express or implicit – in respect of this crime of those who agree on the common purpose. Thus, the members of the JCE must accept the commission of the crime either as a goal, as an inevitable consequence of the primary purpose or as an eventuality treated with indifference."
[5625] Trial Judgment (E465), paras 4315, 4317. KHIEU Samphân's arguments that the Trial Chamber erred in fact in making this finding are addressed in the following section.
[5626] Trial Judgment (E465), para. 4208.
[5627] Trial Judgment (E465), para. 3913.
[5628] Trial Judgment (E465), para. 4183.

b. KHIEU Samphân's JCE Liability for the Crime Against Humanity of Murder Committed with *Dolus Eventualis*

1967. To be held liable via JCE for any crime against humanity including murder committed with *dolus eventualis*, KHIEU Samphân must have made a significant contribution to the common purpose of the JCE and he must have possessed the requisite *mens rea*, which in this case, as discussed above, entails that he was aware of the substantial likelihood of deaths occurring due to the imposition of the harsh living and working conditions at the cooperatives and worksites and the poor conditions of detention at the security centres. The Supreme Court Chamber has also upheld the Trial Chamber's determination that KHIEU Samphân made a significant contribution to the common purpose of the JCE.[5629]

1968. As previously mentioned, because the Trial Chamber erroneously excluded these murders from the common purpose, it assessed that KHIEU Samphân was culpable under aiding and abetting those murders with *dolus eventualis*. In its consideration of the *mens rea* for aiding and abetting liability, the Trial Chamber found that KHIEU Samphân was aware of the substantial likelihood of deaths occurring due to the imposition of the conditions.[5630] The Supreme Court Chamber will now consider KHIEU Samphân's challenges raised in relation to this finding.

1969. The Trial Chamber considered KHIEU Samphân's attendance and participation in various CPK meetings and his visits to cooperatives and worksites, where he "observed the abject living and working conditions of worker-peasants, including starvation, illness and disease."[5631] Relying on this and on its earlier discussion in Section 18.1.1 of the Trial Judgment concerning KHIEU Samphân's knowledge of the likelihood of other crimes, the Trial Chamber was "satisfied that KHIEU Samphân knew that deaths would likely result from the conditions imposed at cooperatives and worksites."[5632] Concerning deaths resulting from the conditions imposed at security centres, it:

> recall[ed] that KHIEU Samphan was apprised of the arrest, imprisonment, mistreatment and execution of real or perceived enemies or the CPK. As a result of his position of unique standing within the Party, KHIEU Samphan attended and supported meetings of decision-making bodies where the fates of enemies were discussed, and participated in the CPK's decision-making processes. He also openly called for the execution of those who betrayed the Party or revolution. As discussed above, KHIEU

[5629] See *supra* Section VIII.B.7.
[5630] Trial Judgment (E465), paras 4315-4317.
[5631] Trial Judgment (E465), paras 4313-4314.
[5632] Trial Judgment (E465), para. 4315.

> Samphan was generally aware of the conditions of starvation, the deprivation of adequate or effective medicine and mistreatment of real or perceived enemies of the CPK by cadres at cooperatives and worksites across DK in the absolute implementation of the Party's policies. The Chamber is satisfied that KHIEU Samphan knew of the substantial likelihood that this practice extended to security centres.[5633]

1970. In view of his knowledge about various high and low-level purges, and his shared intent to commit, through a joint criminal enterprise, the crime against humanity of murder against such persons, the Trial Chamber was satisfied that KHIEU Samphân knew that deaths would likely result from the conditions imposed at security centres.[5634]

1971. KHIEU Samphân alleges that the Trial Chamber erred in fact as there is no evidence at the required level that he was aware of the real likelihood that deaths would result from the conditions imposed at cooperatives, worksites, and security centres.[5635] He alleges that the Trial Chamber erred by relying on findings it made in Section 18.1.1 of the Trial Judgment, which were not made in relation to knowledge of deaths due to conditions imposed at cooperatives, worksites, and security centres.[5636] Concerning deaths due to the conditions imposed at security centres, he argues that the Trial Chamber erred by recalling its findings regarding his knowledge of purges.[5637] He adds that there is no evidence to support the finding that he was aware of the likelihood that deaths would result from the conditions imposed at cooperatives and worksites,[5638] or that he was aware that the practices relating to the treatment of enemies would most likely result in deaths at the security centres.[5639]

1972. The Co-Prosecutors aver that KHIEU Samphân's claims are "ill-defined and unfounded" as he "fails to advance any substantive argumentation" and does not demonstrate an error invalidating the judgment or occasioning a miscarriage of justice.[5640] The Co-Prosecutors reiterate the Trial Chamber's findings,[5641] and say that KHIEU Samphân "failed to

[5633] Trial Judgment (E465), para. 4316.
[5634] Trial Judgment (E465), paras 4316-4317.
[5635] KHIEU Samphân's Appeal Brief (F54), paras 1853, 2137, 2140.
[5636] KHIEU Samphân's Appeal Brief (F54), paras 2138, 2140.
[5637] KHIEU Samphân's Appeal Brief (F54), para. 2140.
[5638] KHIEU Samphân's Appeal Brief (F54), para. 2138, referring to paras 1808-1810.
[5639] KHIEU Samphân's Appeal Brief (F54), para. 2140, referring to paras 1808-1815. See also KHIEU Samphân's Appeal Brief (F54), para. 1853.
[5640] Co-Prosecutors' Response (F54/1), paras 1277, 1281.
[5641] Co-Prosecutors' Response (F54/1), para. 1282, fns 4690-4681, 4693, referring to Trial Judgment (E465), paras 4316-4317; Co-Prosecutors' Response (F54/1), para. 1278, referring to Trial Judgment (E465), paras 4206-4208, 4210-4211, 4212, 4214, 4216, 4258, 4313-4314.

advance an argument which establishes any error" in the Trial Chamber's finding that he possessed the relevant *mens rea*.[5642]

1973. The Supreme Court Chamber considers that KHIEU Samphân's submissions merely disagree with the Trial Chamber findings but advance no arguments why the findings are unreasonable. This Chamber recalls that it has previously held that it will apply "the standard of reasonableness in reviewing an impugned finding of fact, not whether the finding is correct."[5643] Thus, "arguments limited to disagreeing with the conclusions of the Trial Chamber […] are not sufficient to overturn factual findings".[5644]

1974. Although KHIEU Samphân is correct that the findings made in Section 18.1.1, on which the Trial Chamber relied in part, were not made in response to knowledge of deaths due to conditions imposed at cooperatives, worksites, and security centres, these findings are relevant to his knowledge of deaths. The Trial Chamber considered the evidence of KHIEU Samphân's awareness of the substantial likelihood of the commission of other crimes within the common purpose of the JCE in detail in this section. It found that he "knew of the wide-scale food shortages at cooperatives and worksites."[5645] It considered evidence that he personally observed conditions at worksites,[5646] and witnessed the abysmal conditions.[5647] By his own admission and description after the fall of the DK regime, KHIEU Samphân witnessed "starvation", "lack of medicines" and "[p]eople [who] were forced to work without food, while they could barely walk, but even so, they were made to work."[5648] The Trial Chamber held, by consequence, that he "knew of the abject working conditions at cooperatives and worksites during the DK period"[5649] and "knew of the crimes committed in the course of the policy to establish and operate cooperatives and worksites."[5650] It was on the basis of these findings, as well as KHIEU Samphân's knowledge as demonstrated by his conduct including attending at CPK Standing Committee meetings, radio-broadcast speeches, and political training of CPK

[5642] Co-Prosecutors' Response (F54/1), paras 1279, 1283.
[5643] See Case 002/01 Appeal Judgment (F36), para. 88; Case 001 Appeal Judgment (F28), para. 17.
[5644] Case 002/01 Appeal Judgment (F36), para. 90.
[5645] Trial Judgment (E465), para. 4212.
[5646] Trial Judgment (E465), para. 4213.
[5647] Trial Judgment (E465), para. 4214.
[5648] Trial Judgment (E465), para. 4214, quoting KHIEU Samphân Interview, undated, E3/4050, ERN (EN) 00789062.
[5649] Trial Judgment (E465), para. 4216.
[5650] Trial Judgment (E465), para. 4218.

cadres that the Trial Chamber concluded that "he knew that deaths would likely result from the conditions imposed at cooperatives and worksites."[5651]

1975. Concerning his knowledge of the likelihood of deaths from detention conditions, the Supreme Court Chamber agrees with KHIEU Samphân that the Trial Chamber erred in relying on his knowledge of purges to imply knowledge in security centres. The Trial Chamber did not explain how KHIEU Samphân's knowledge of the arrest, imprisonment, mistreatment, or execution of real or perceived enemies translated into an awareness that the conditions imposed in the security centres were likely to lead in death. Knowledge of deaths occurring by execution does not imply knowledge of deaths caused by poor conditions of detention. The Trial Chamber did, however, find that KHIEU Samphân knew of the substantial likelihood that the harsh conditions at the cooperatives and worksites extended to security centres.[5652] KHIEU Samphân failed to explain why this finding was unreasonable. The Supreme Court Chamber holds the view that if KHIEU Samphân was aware of the likelihood of deaths occurring in cooperatives and worksites due to the deprivation of food, medical care, and hygiene, he would have been similarly aware of the likelihood of these conditions leading to death inside the security centres. Key to all findings of knowledge by KHIEU Samphân is his role as an attendee at the highest-level meetings of the CPK where the limited minutes which exist show that all issues of interest and concern were discussed on a regular basis.

1976. For the foregoing reasons, the Supreme Court Chamber rejects KHIEU Samphân's submissions that the Trial Chamber erred in fact in finding he was aware of the substantial likelihood of deaths at Tram Kak Cooperatives, 1st January Dam Worksite, Trapeang Thma Dam Worksite, Kampong Chhnang Airfield Construction Site, S-21 Security Centre, and Kraing Ta Chan Security Centre. The Supreme Court Chamber finds that the crime against humanity of murder committed with *dolus eventualis* at the above crimes sites was included in the common purpose of the JCE and that KHIEU Samphân bears JCE liability for this crime. It recharacterises the form of liability at issue from aiding and abetting to JCE liability, which is a return to the characterisation of the facts as outlined in the Closing Order. It therefore will not consider KHIEU Samphân's remaining challenges related to aiding and abetting.

IX. SENTENCING

[5651] Trial Judgment (E465), para. 4315.
[5652] Trial Judgment (E465), para. 4316.

1977. The Supreme Court Chamber turns now to the determination of KHIEU Samphân's challenges relevant to sentencing; sentencing being the last and fundamental stage of the proceedings in this case.

1978. The Trial Chamber found that KHIEU Samphân served as the public face of the DK, first as GRUNK Deputy Prime Minister and, from early 1976, President of the State Presidium.[5653] His functional responsibility extended into the core operations of the Party and State, including oversight over the country's trade and commercial affairs, and the conduct of political education and training.[5654] The Trial Chamber found that:

> KHIEU Samphan was not only placed within a small group of well-informed CPK members as a result of his membership of the Central Committee, but was also in a position of unique standing within the Party by virtue of his attendance at Standing Committee meetings, where important matters were discussed and crucial decisions were made.[5655]

He worked and lived in close proximity to the highest figures in the CPK and survived all purges of those luminaries.[5656] He was a senior leader and co-conspirator with other CPK leaders.[5657]

1979. The Trial Chamber found KHIEU Samphân guilty as a senior leader of the CPK of committing through a joint criminal enterprise: (1) the crimes against humanity of murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political, religious and racial grounds, and other inhumane acts through attacks against human dignity, conduct characterised as enforced disappearances, forced transfer, forced marriage and rape within the context of forced marriage; (2) the crime of genocide by killing members of the Vietnamese ethnic, national and racial group; and (3) grave breaches of the Geneva Conventions of wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or a civilian the rights of a fair and regular trial and unlawful confinement of a civilian under the Geneva Conventions at S-21 Security Centre.[5658] It also found him guilty of aiding and abetting the crime against humanity of murder committed at certain cooperatives, worksites, and security centres.[5659]

[5653] Trial Judgment (E465), para. 624.
[5654] Trial Judgment (E465), para. 624.
[5655] Trial Judgment (E465), para. 624.
[5656] Trial Judgment (E465), paras 589, 603-604.
[5657] Trial Judgment (E465), paras 4306-4307.
[5658] Trial Judgment (E465), paras 4306-4307, 4326-4327.
[5659] Trial Judgment (E465), paras 4318, 4328.

1980. These crimes took place throughout the temporal jurisdiction of the ECCC from 17 April 1975 until 7 January 1979 and in the context of a repressive regime under which people were forcibly moved, put to work, and made to live their lives in accordance with the CPK's goals,[5660] and over a million people died.[5661] Were it not for the remaining documentary evidence,[5662] much of which was thought to be destroyed,[5663] there would be nothing apart from the testimonies of elderly, traumatised survivors and the bones of the dead to shed light on these crimes and on the role played by KHIEU Samphân.

1981. KHIEU Samphân is now 91 years old[5664] and has been in custody since late 2007, first during the judicial investigation and then throughout his trial in Case 002/01. He remains in custody, serving a life sentence imposed by the Trial Chamber and upheld on appeal in Case 002/01 for the crimes against humanity of murder, persecution on political grounds, and other inhumane acts in relation to the evacuation of Phnom Penh immediately after the fall of the city on 17 April 1975, and for the crime against humanity of murder with regard to the second phase of population transfers that occurred between 1975 and 1977.[5665]

1982. In Case 002/02, the Trial Chamber again sentenced KHIEU Samphân to life imprisonment, merging his sentence with his life sentence imposed in Case 002/01 into a single term of life imprisonment.[5666]

[5660] Trial Judgment (E465), para. 276, pp. 2230-2231 (Disposition).

[5661] See Trial Judgment (E465), para. 297:

> By 2008, the Documentation Center of Cambodia ('DC-Cam') had identified an estimated 1.3 million human remains in 390 mass grave sites spread throughout Cambodia. Numerous estimates of the casualties that occurred as a result of the CPK's policies and actions have been made. They range from 600,000 to three million. Experts accept estimates falling between 1.5 and two million excess deaths as the most probable. The Chamber recalls, however, its finding that the absence of relevant and reliable statistical data for the purposes of assessing a precise number of deaths attributable to the CPK leads to inherent uncertainty surrounding the use of demographic evidence.

[5662] The Trial Chamber confirmed that "[c]onsidering the significant time that has passed since the DK era, documents recorded contemporaneously with the charged events are some of the most important sources of evidence. The contemporaneous documents before the Chamber include records of meetings or communications upon which the Chamber did not hear any direct testimony." Trial Judgment (E465), para. 57.

[5663] The Trial Chamber found that "[g]iven the rapid entry of Vietnamese forces into Phnom Penh and the rapid abandonment of S-21, nothing was done with respect to the documents which remained. […] KAING Guek Eav *alias* Duch was subsequently scolded by both NUON Chea and SON Sen for not having destroyed the S-21 documents." Trial Judgment (E465), para. 2559.

[5664] KHIEU Samphân was born 27 July 1931. Trial Judgment (E465), para. 564.

[5665] Trial Judgment (E465), para. 9.

[5666] Trial Judgment (E465), para. 4402.

A. THE LAW RELEVANT TO SENTENCING SENIOR LEADERS

1983. ECCC and Cambodian law do not set out sentencing aims or purposes. The Supreme Court Chamber has previously highlighted the relevance of retribution and deterrence in sentencing at the ECCC.[5667] Many chambers at the international criminal tribunals similarly consider the primary purposes of sentencing to be retribution and deterrence.[5668]

1984. In Cases 001, 002/01, and 002/02 the Trial Chamber has also referred to the importance of reassuring the surviving victims, their families, the witnesses and the general public that the law is effectively implemented and enforced, and applies to all regardless of status or rank.[5669] This has been referred to at the ICTY as "[i]ndividual and general affirmative prevention" and its importance has been explained thus:

> One of the most important purposes of a sentence imposed by the International Tribunal is to make it abundantly clear that the international legal system is implemented and enforced. This sentencing purpose refers to the educational function of a sentence and aims at conveying the message that rules of humanitarian international law have to be obeyed under all circumstances. In doing so, the sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public.[5670]

1985. Along with retribution, deterrence, and affirmative prevention, other sentencing purposes that have been considered by the *ad hoc* tribunals include public reprobation and stigmatisation by the international community and rehabilitation.[5671]

1986. In addition to the overarching aims or purposes of sentencing, the principles of legality, equality before the law, proportionality, and individualisation of sentences must be considered in sentencing.

[5667] See Case 001 Appeal Judgment (F28), para. 380.

[5668] *Krajišnik* Appeal Judgment (ICTY), para. 775; *Nahimana et al.* Appeal Judgment (ICTR), para. 1057; *Prosecutor v. Ayyash et al.*, Trial Chamber (STL), STL-11-01/S/TC, Sentencing Judgment, 11 December 2020 ("*Ayyash et al.* Sentencing Judgment (STL)"), para. 122; *Prosecutor v. Al Mahdi*, Trial Chamber VIII (ICC), ICC-01/12/01/15, Judgment and Sentence, 27 September 2016, para. 66; *Ntaganda* Sentencing Judgment (ICC), paras 9-10.

[5669] Case 001 Trial Judgment (E188), para. 579; Case 002/01 Trial Judgment (E313), para. 1067; Trial Judgment (E465), para. 4348.

[5670] *Kordić & Čerkez* Appeal Judgment (ICTY), paras 1073, 1080. The *Nikolić* Trial Chamber similarly stated:

> One of the main purposes of a sentence imposed by an international tribunal is to influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody. 'All persons shall be equal before the courts and tribunals.' This fundamental rule fosters the internalisation of these laws and rules in the minds of legislators and the general public.

Nikolić Sentencing Trial Judgment (ICTY), para. 139, quoting ICCPR, Art. 14.

[5671] *Kordić & Čerkez* Appeal Judgment (ICTY), para. 1073; *Blaškić* Appeal Judgment (ICTY), para. 678.

1. The Principle of Legality

1987. The principle of legality is a part of Cambodian law today and was a part of Cambodian and international law prior to 1975-1979.[5672] It requires not only that crimes must have existed in applicable law before the relevant conduct was committed *nullum crimen sine lege*, but also that the punishment for those crimes must be known and pre-established *nulla poena sine lege*. The aim is to ensure a minimum degree of certainty with regard to punishment and to ensure that individuals can be aware of the penalty they can expect if found guilty of a particular crime. It is also required that if current law imposes a lighter penalty than that which existed at the time the offences were committed, the lighter penalty must be applied.[5673]

1988. Although genocide, crimes against humanity, and war crimes were not criminalised in domestic Cambodian law prior to 1975, they existed as crimes in international criminal law. This respects the principle of *nullum crimen sine lege*.[5674] As for the principle of *nulla poena since lege*, since these crimes did not exist in Cambodian law, there were no domestic penalties in Cambodian law specific to these crimes. However, Article 21 of the 1956 Penal Code of Cambodia, the Code that was in force in 1975,[5675] provides for the criminal penalties of death, forced labour in perpetuity, or forced labour for a determinate period for the most serious crimes. Furthermore, the Pre-Trial Chamber has previously referred to Principle II of the Nuremberg Principles stating that it is a principle of customary international law that "[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under

[5672] See 1956 Cambodian Penal Code, Art. 6; Criminal Code of Cambodia, Art. 3; ICCPR, Art. 15(1). See also UDHR, Art. 11(2); ACHR, Art. 9; ECHR, Art. 7(1); ACHPR, Art. 7(2). Article 31 of the Cambodian Constitution, as well as Article 12(2) of the ECCC Agreement and Article 33 new of the ECCC Law, requires the ECCC to exercise its jurisdiction in accordance with, *inter alia*, Article 15 of the ICCPR.
[5673] Criminal Code of Cambodia, Art. 10; ICCPR, Art. 15(1).
[5674] The Pre-Trial Chamber rejected an argument by the IENG Sary Defence that the ECCC must respect the principle of legality in domestic Cambodian law, which was more restrictive than that set out in Article 15(1) of the ICCPR and required crimes to exist in *domestic* Cambodian law prior to their commission. Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), paras 213-225.
[5675] See Case 001, Information about the 1956 Penal Code of Cambodia and Request Authentication of an Authoritative Code, dated 17 August 2009, E91/5, ERN (EN) 00365472.

international law."[5676] At the IMT, the maximum penalty for crimes against humanity and war crimes was death.[5677] There were no international prosecutions for genocide prior to 1975.

1989. Professor Schabas has explained that the ICTY and ICTR were instructed to consider sentencing practices in the former Yugoslavia and in Rwanda respectively to ensure respect for the *nulla poena* principle. He argues that:

> Such concern about the issue of retroactivity is difficult to understand given that this question was supposedly well settled at Nuremberg. Defendants in the post-World War II trials systematically argued *nullum crimen* without any success. Perhaps this was because it was widely believed, as the official commentary in the Law Reports of the Trials of the War Criminals suggests, that '[i]nternational law lays down that a war criminal may be punished with death whatever crime he may have committed.' Certainly, the idea that the *nullum crimen* argument could succeed, in spite of a blackletter text, only to stumble because no black-letter sanction was attached, is paradoxical and even absurd.[5678]

1990. Professor Schabas explains that the ECtHR has provided useful guidance in this respect in two cases dealing with English common law and the existence of an offense of spousal rape despite the absence of any legislated text. The ECtHR considered that "laws" for purposes of the *nullum crimen sine lege* principle include unwritten laws.[5679] As Professor Schabas notes:

> Significantly, while the Court addressed the existence of the offense itself, it did not even consider the appropriate sanction, assuming that if the offense was known, so was the maximum punishment. […] Thus, the [ECtHR] would have little difficulty with a sentencing provision relying on general principles of law or customary law, as was the case at Nuremberg.[5680]

1991. Professor Schabas also refers to a 1949 judgment of the Netherlands Special Appeals Court,[5681] which was cited with approval by the ICTY *Erdemović* Trial Chamber. It states:

> In so far as the appellant considers punishment unlawful because his acts, although illegal and criminal, lacked a legal sanction precisely outlined and previously prescribed, this objection also fails. The principle that no act is punishable in virtue of a legal penal provision which had preceded it, aims at creating a guarantee of legal security and individual liberty. Such legal interests would be endangered if acts as to which doubts could exist with regard to their deserving

[5676] Case 002 Decision on Closing Order Appeal (IENG Sary) (D427/1/30), para. 245, quoting International Law Commission, *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (1950), Principle II. The Co-Investigating Judges also considered the sentencing regime of the ECCC to be in accordance with the principle of *nulla poena sine lege*. See Case 002 Closing Order (D427), para. 1304.
[5677] Charter of the International Military Tribunal, appended to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 280, Art. 27.
[5678] William Schabas, "Sentencing by International Tribunals: A Human Rights Approach", (1997) 7 *Duke J. Comp. & Int'l L.* 461, 469 ("Schabas, Sentencing by International Tribunals"), quoting 15 United Nations War Commission: Law Reports of Trials of War Criminals 1, 200 (1949).
[5679] Schabas, Sentencing by International Tribunals, p. 474.
[5680] Schabas, Sentencing by International Tribunals, p. 475.
[5681] Schabas, Sentencing by International Tribunals, fn. 40.

> punishment were to be considered punishable after the event. However, there is nothing absolute in that principle. Its operation may be affected by other principles whose recognition concerns equally important interests of justice. These latter interests do not permit that extremely serious violations of generally accepted principles of international law (the criminal character of which was already established beyond doubt at the time they were committed), should not be considered punishable solely on the ground that a previous threat of punishment was absent.[5682]

1992. So, even though penalties for genocide, crimes against humanity, and war crimes were not explicitly stated in Cambodian law, the *nulla poena sine lege* principle is not violated. These were crimes in 1975-1979 and responsibility cannot be escaped by a lack of written penalty in domestic law.

1993. In Case 001, the Trial Chamber considered its obligation to ensure that "[i]f, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."[5683] It reviewed relevant international sentencing guidelines for crimes against humanity and grave breaches of the Geneva Conventions and determined that the penalties applicable before the ECCC for these crimes do not contravene Article 15(1) of the ICCPR.[5684] It did not consider the crime of genocide, as KAING Guek Eav *alias* Duch was not facing that charge, but genocide would not have attracted a lesser penalty than crimes against humanity or war crimes in 1975-1979 and at the ECCC the maximum penalty that may be applied for genocide is life imprisonment,[5685] so the application of a life sentence respects this principle.

2. The Principles of Equality Before the Law, Proportionality, and Individualisation of Sentences

1994. The principle of equality is relevant to sentencing, in that sentences should be meted out to offenders equally.[5686] Article 31 of the Cambodian Constitution provides that "[e]very Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, color, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status."

[5682] *Prosecutor v. Erdemović*, Trial Chamber (ICTY), IT-96-22-T, Sentencing Judgement, 29 November 1996, para. 38, quoting *Rauter*, Special Appeals Court, Netherlands, 12 January 1949, *ILR*, 1949, pp. 542-543.
[5683] Case 001 Trial Judgment (E188), para. 573, quoting ICCPR, Art. 15(1).
[5684] Case 001 Trial Judgment (E188), para. 573.
[5685] ECCC Law, Art. 39.
[5686] The U.N. Human Rights Committee has stated that: "The right to equality before courts and tribunals, in general terms, […] ensures that the parties to the proceedings in question are treated without any discrimination." Human Rights Committee, "General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial," UN Doc. CCPR/C/GC/32, 23 August 2007, para. 8.

1995. The principle of proportionality in sentencing, a fundamental principle in human rights law,[5687] means that the punishment imposed upon conviction following a fair trial must be proportionate to the gravity of the crime and the circumstances of the offender.[5688] With regard to international humanitarian law, Article 67 of the Fourth Geneva Convention provides that courts "shall apply only those provisions of law […] which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence."

1996. While "a sentence 'may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences'",[5689] guidance provided by sentences issued by other tribunals in other cases is very limited, as comparison may only be undertaken where the offences are the same and were committed in substantially similar circumstances and because trial chambers must tailor penalties to fit the individual circumstances of the convicted person and the gravity of the crime with due regard to the entirety of the case.[5690] "[W]hen differences are more significant than similarities or mitigating and aggravating factors differ, different sentencing might be justified."[5691] However, the sentencing practice of the tribunal in cases involving similar circumstances is one factor a chamber must consider when exercising its discretion in imposing a sentence.[5692]

1997. The principle of the individualisation of penalties requires that the individual circumstances of the convicted person be taken into account in sentencing. Article 96 of the Criminal Code of Cambodia sets out the "Principle of Individualisation of Penalties": "[I]n imposing penalties, the court shall take into account the seriousness and circumstances of the offence, the character of the accused, his or her psychological state, his or her means, expenses

[5687] According to Professor Schabas, "Article 7 [of the ICCPR] encompasses the notion of proportionality in criminal punishment." Schabas, Sentencing by International Tribunals, p. 468. Further evidencing this, Article 49 of the Charter of Fundamental Rights of the European Union similarly requires that "[t]he severity of penalties must not be disproportionate to the criminal offence." Additionally, the ECtHR, in the case of *Soering v. United Kingdom*, found that a proposed extradition could have given rise to inhuman treatment under Article 3 of the ECHR due to the existence of a "real risk" that the sentence likely to be imposed in the requesting State could, *inter alia*, be disproportionate to the gravity of the crime committed. See *Soering v. United Kingdom*, ECtHR, Application no. 14038/88, Judgment, 7 July 1989, paras 104, 111.
[5688] Silvia D'Ascoli, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (2011) ("D'Ascoli, Sentencing in International Criminal Law"), pp. 21-22.
[5689] *Nikolić* Appeal Judgment (ICTY), para. 16, quoting *Prosecutor v. Jelisić*, Appeals Chamber (ICTY), IT-95-10-A, Judgement, 5 July 2001, para. 96.
[5690] See *Nikolić* Appeal Judgment (ICTY), para. 19.
[5691] *Nikolić* Appeal Judgment (ICTY), para. 19.
[5692] See *Krstić* Appeal Judgment (ICTY), para. 248.

and motives, as well as his or her behaviour after the offence, especially towards the victim." In some national systems, this principle is considered the guiding principle in each case.[5693]

1998. The principles mentioned above inform sentencing practice at the *ad hoc* tribunals. In France, the principles of proportionality and individualisation of the sentence have constitutional status.[5694] During the drafting of the ICTY's Statute, the Committee of French jurists:

> urged respect for '[t]he fundamental principles of proportionality and individualization,' and suggested that the Tribunal could consider the gravity of the offense (intention, premeditation, motives and goals of the perpetrator, state of mind, etc.), the values safeguarded by treating the act as a serious crime (human dignity, right to life, right to physical and/or moral integrity, right to own property), the extent of harm caused (either actual or threatened, number of persons involved, value of property affected), as well as the personality of the offender, his or her background and personal situation, and his or her conduct following the offense.[5695]

1999. Trial chambers at the *ad hoc* tribunals have taken these sorts of considerations into account. Their practice was to:

> determine the sentence by considering the totality of the circumstances in each case being adjudicated, including the gravity of the crime and the individual circumstances of the accused, but without having to refer to any external and predetermined scale of penalties or to a predetermined list of aggravating and mitigating factors. This implies that—in meting out penalties—international judges are called upon to use a high degree of discretion, much greater than is normal for cases at the national level.[5696]

2000. The *Krstić* Appeals Chamber emphasised that although the jurisprudence of the ICTY and ICTR had generated a body of relevant factors to consider at sentencing, it would be "'inappropriate to set down a definitive list of sentencing guidelines for future reference', given

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[5693] D'Ascoli, Sentencing in International Criminal Law, p. 54, referring to France, Italy, and Portugal.

[5694] See Jacqueline Hodgson and Laurène Soubise, "Understanding the Sentencing Process in France", (2016) 45 *Crime & Just.* 221, 241 ("Hodgson and Soubise, Understanding the Sentencing Process in France"):

> The principle of individualization was theorized at the end of the nineteenth century by Raymond Saleilles, who argued that it was not possible to set sentences rigidly in advance, since they should be adapted to individual circumstances rather than defined in a purely abstract law, ignoring the diversity of cases and individuals (Ottenhof 2001). The principle was strengthened throughout the twentieth century, in particular, with the consideration of the age of the offender and the creation of a separate regime for juveniles, culminating with the new Code Pénal, which came into force in 1994. Minimum sentences were removed entirely, and a whole new section was dedicated to 'the personalization of sentences.' The Conseil Constitutionnel (French Constitutional Court) granted constitutional status to the principle of individualization, inferring this from the principles of proportionality and necessity found in article 8 DDHC [Déclaration des Droits de l'Homme et du Citoyen (DDHC—Declaration of the Rights of Man and of Citizens)], which has been part of the French Constitution since 1958 (decision no. 2005-520 DC of 22 July 2005, para. 3).

[5695] Schabas, Sentencing by International Tribunals, p. 486, quoting Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, U.N. SCOR, paras 129-131, U.N. Doc. S/25266 (1993).

[5696] D'Ascoli, Sentencing in International Criminal Law, p. 13.

that the imposition of a sentence is a discretionary decision."[5697] This is unlike the situation in the United Kingdom, where a Sentencing Council has been established to promote greater consistency in sentencing.[5698] It issues guidelines that specify the range of sentence appropriate for each offence. Each offence is divided into categories reflecting a varying degree of seriousness and the sentencing range is split up by category. There is also a starting point within each category, from which to begin the sentence calculation, which will then be made based upon aggravating and mitigating factors and previous convictions.[5699] Instead, the practice at the *ad hoc* tribunals has been more like the practice in France, where judges do not use set sentencing guidelines.[5700] They are relatively unfettered in their choice of the quantum of the sentence and do not need to give reasons for their sentencing decisions.[5701]

2001. Although judges at the *ad hoc* tribunals have a wide degree of discretion, according to one former ICTY Judge, a consistent sentencing pattern emerged at the tribunals that leaves little doubt that the judges shared a common perception of the levels of appropriate sentencing. Judge Harhoff concluded that there was a division into three to four different levels of sentencing:

> – The lowest level ranges from 3 to 6–8 years of imprisonment and covers single or small scale criminal conduct in which genocide is not included (i.e. only violations of the laws and customs of war and of the Geneva Conventions (war crimes proper), and crimes against humanity), and where (a) the number of victims as well as (b) the temporal and territorial scope of the crimes is limited and where (c) the perpetrator has not acted with any degree of cruelty towards his victims.
> – The next level of sentencing ranges from 8 to 20–22 years of imprisonment and covers the lower half of the middle sentencing category. Crimes at this level would ordinarily still not include genocide, but this level of sentencing will be relevant to offences featuring a higher number of victims, some extended temporal or territorial scope and involvement of brutality, cruelty or recklessness.
> – The third sentencing level ranges from 22 to about 35 years of imprisonment and constitutes the upper half of the middle category. Criminal conduct on this level may include genocide and will be relevant to offences committed against a large number of victims over an extended period of time in a wider geographical area and with a high degree of brutality, cruelty or recklessness.

[5697] *Krstić* Appeal Judgment (ICTY), para. 242.
[5698] Information about the Sentencing Council is available at https://www.sentencingcouncil.org.uk/.
[5699] Crown Prosecution Service, "Sentencing – Overview, General Principles and Mandatory Custodial Sentences", updated 12 July 2022, available at https://www.cps.gov.uk/legal-guidance/sentencing-overview.
[5700] See Hodgson and Soubise, Understanding the Sentencing Process in France, pp. 241-242, stating that some in France had argued for the introduction of Anglo-Saxon sentencing guidelines, which others believed this would constrain the principle of individualization of the sentence and could contribute to prison overcrowding.
[5701] The Cour de Cassation has stated that as long as they remain within the boundaries of the law, judges have an absolute discretion in sentencing decisions for which they cannot be made accountable. Case 89-84.987 (1991), unpublished (Cour de Cassation, Chambre Criminelle, France). See also Hodgson and Soubise, Understanding the Sentencing Process in France, pp. 224, 235.

> – The fourth sentencing level ranges from about 35 years to life imprisonment and covers all criminal conduct for which the gravity exceeds the third level.[5702]

2002. Judge Harhoff also noted a tendency to impose harsher sentences on lower and higher ranked perpetrators as opposed to mid-level offenders. He considered this to be a result of the authority of the person in question along with direct personal involvement in the crimes and notes that mode of liability is also a relevant factor.[5703]

2003. While sentences must always be individualised considering the particulars of the case, and it certainly cannot be said that conviction of a particular international crime will result in a life sentence *per se*, it is relevant to consider that all those convicted of committing genocide at the ICTY received life sentences.[5704] This can be explained by the fact that genocide, as well-put by the *Krstić* Appeals Chamber,

> is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.[5705]

2004. At the ECCC, the Supreme Court Chamber has previously affirmed that the primary factor to be weighed at sentencing is the gravity of the convicted person's crimes, and that in

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[5702] Frederik Harhoff, "Sense and Sensibility in Sentencing – Taking Stock of International Criminal Punishment", *in* Ola Engdahl and Pål Wrange (eds.), *Law at War: The Law as it Was and the Law as it Should Be* (2008) ("Harhoff, Sense and Sensibility in Sentencing"), pp. 134-135.
[5703] Harhoff, Sense and Sensibility in Sentencing, pp. 135-137.
[5704] These are Vujadin Popović, Ljubiša Beara, Zdravko Tolimir, Ratko Mladić, and Radovan Karadžić. Radislav Krstić and Drago Nikolić, who aided and abetted genocide and did not themselves possess genocidal intent, received 35-year sentences. At the ICTR, where there have been many more genocide convictions, sentencing has varied. Many convicted of genocide have received life sentences, including Jean Kambanda, Édouard Karemera, Clément Kayishema, Matthieu Nigirumpatse, Eliézer Niyitegeka, Callixte Nzabonimana, Jean-Paul Akayesu, Ildephonse Hategekimana, Jean de Dieu Kamuhanda, Alfred Musema, Athanase Seromba, Emmanuel Ndindabahizi, and Georges Rutaganda.

> As most of the crimes tried at the ICTR were very serious and often entailed the deaths of hundreds or thousands of victims—and as all would have likely resulted in the severest sentences in domestic jurisdictions—the ICTR judges seemed to differentiate between serious criminal acts and even more serious criminal acts. This differentiation was primarily conducted by applying the principle of gradation, which involved the evaluation of the defendants' culpability as manifested by their position in the state hierarchy and the role that they played in particular crimes. The severest sentence of life imprisonment was consequently reserved for the most serious offenders, such as those who planned, led, or ordered atrocities and those who committed crimes with particular zeal or sadism. Accordingly, judges often reiterated that offenders receiving the most severe sentences previously held senior positions of authority, such as ministers in the government.

Barbora Hola and Hollie Nyseth Brehm, "Punishing Genocide: A Comparative Empirical Analysis of Sentencing Laws and Practices at the International Criminal Tribunal for Rwanda (ICTR), Rwandan Domestic Courts, and Gacaca Courts", (2016) 10(3) *Genocide Stud. & Prev.* 59, 68.
[5705] *Krstić* Appeal Judgment (ICTY), para. 36.

assessing the gravity of the crime, the particular circumstances of the case together with the form and degree of participation of the convicted person must be considered.[5706] Factors to be considered in this regard include "the number and the vulnerability of victims, the impact of the crimes upon them and their relatives, the discriminatory intent of the convicted person when it is not already an element of the crime, the scale and brutality of the offen[c]es, and the role played by the convicted person."[5707] The Supreme Court Chamber has also affirmed that aggravating and mitigating circumstances must be considered, and that life imprisonment may stand in spite of mitigating factors where the gravity of the crime so dictates.[5708] In Case 002/01, the Trial Chamber adopted the ICC's guidelines regarding aggravating and mitigating factors, set out in Rules 145(2)(b) and 145(2)(a) of the ICC's Rules of Procedure and Evidence.[5709]

2005. Rule 145(2) of the ICC's Rules of Procedure and Evidence states:

> In addition to the factors mentioned above,[5710] the Court shall take into account, as appropriate:
>
> (a) Mitigating circumstances such as:
> (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
> (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;
>
> (b) As aggravating circumstances:
> (i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;
> (ii) Abuse of power or official capacity;
> (iii) Commission of the crime where the victim is particularly defenceless;
> (iv) Commission of the crime with particular cruelty or where there were multiple victims;
> (v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;
> (vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

[5706] Case 001 Appeal Judgment (F28), para. 375.
[5707] Case 001 Appeal Judgment (F28), para. 375.
[5708] Case 001 Appeal Judgment (F28), paras 372, 375.
[5709] Case 002/01 Trial Judgment (E313), paras 1069-1070.
[5710] These factors are set out in Rule 145(1), which requires that the Court shall:
(a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person; (b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime; (c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

2006. At the *ad hoc* tribunals, where the Rules of Procedure and Evidence do not specify aggravating and mitigating circumstances, factors considered in aggravation have included:

> the level of involvement of the accused as a direct perpetrator under Article 7(1) [or] as a collaborator or an aider or abettor; his voluntary, willing or enthusiastic role in the commission of the crimes; his rank or position; the number and vulnerability of the victims and the impact of the crimes upon them; the scale and duration of his criminal conduct; the recklessness, cruelty or depravity of the crimes; the degree of premeditation of the offences; and the discriminatory intent with which the accused perpetrated the crimes.[5711]

2007. Factors considered in mitigation have included:

> the good conduct of the accused during the commission of the crimes (e.g. if he tried to prevent the crimes but was forced to participate, or if he provided assistance to the victims); his good conduct in the UN Detention Unit; his voluntary surrender (as opposed to his hiding out to abscond from justice); his prior criminal record relevant to the international war crimes charges; his substantial co-operation with the Prosecution; his age and health condition; his expression of remorse; his guilty plea and his willingness to tell the truth (if indeed he pleaded guilty); his time spent in pretrial detention (unless he deliberately dragged it out); and his family situation.[5712]

2008. In domestic cases, a significant passage of time since the offence is sometimes considered to be a mitigating circumstance where the accused has lived a law-abiding life since the crime occurred, yet it has been argued that this should not apply to mitigation in cases of serious human rights violations.[5713]

2009. Although international standards of justice have changed since the time of the IMT at Nuremberg,[5714] it is still instructive to review its sentencing practice, as it was the only international tribunal dealing with serious international crimes committed on a massive scale prior to 1975. The IMT's Charter does not set out sentencing guidelines, with Article 27 stating

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[5711] Harhoff, Sense and Sensibility in Sentencing, p. 137.
[5712] Harhoff, Sense and Sensibility in Sentencing, pp. 137-138.
[5713] See Julian V. Roberts, "The Time of Punishment: Proportionality and the Sentencing of Historical Crimes", *in* Michael Tonry (ed.), *Of One-eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (2019), p. 176:

> [W]hen the crime is most egregious (intentional homicide), pleas in mitigation become less credible. For example, first-offender mitigation is more plausible when there is some ambiguity about the harm inflicted or about the full impact of the crime on the victim. No such ambiguity can reasonably be claimed in the context of murder. Citizens do not need to be arrested, charged, prosecuted, and punished before they fully appreciate the wrongfulness of this crime. The same diminished-mitigation argument should apply to historical offenses, and this may suggest that offenders convicted of offenses such as homicide may be exempt from passage-of time-mitigation. This may be why war-crimes prosecutions should generally be exempt from passage-of-time mitigation. I would also exclude such offenders on the view that the exceptional seriousness of mass human-rights violations removes these cases from a proportionality sentencing framework devised for more conventional crimes. Let's face it, can a court really calibrate a proportional sentence in response to the murder of thousands of people?

[5714] For example, none of the modern international or "internationalized" criminal tribunals impose the death penalty, which has been abolished in many parts of the world, including in Cambodia (see Cambodian Constitution, Art. 32) and the right to have one's conviction and sentence reviewed by a higher tribunal according to law is now enshrined in the ICCPR (Art. 14(5)), among other international instruments.

simply that "[t]he Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just." The sentencing portion of the IMT Judgment does not give reasons for the sentences each convicted person received.[5715] However, the portion of the Judgment setting out the convictions in some cases listed factors that were considered in mitigation. The IMT did not address aggravating factors and appears to have considered that guilt for the offences charged was justification for the death penalty, absent any mitigating factors.[5716]

2010. At the IMT, there were 19 convictions. Twelve convicted persons were sentenced to death.[5717] Three were sentenced to life imprisonment,[5718] two were sentenced to 20 years of imprisonment,[5719] one was sentenced to 15 years of imprisonment,[5720] and another was sentenced to ten years of imprisonment.[5721]

2011. There were four counts charged by the IMT: Count One was participation in a common plan or conspiracy to commit, or which involved the commission of, crimes against peace, war crimes, and crimes against humanity; Count Two was crimes against peace; Count Three was war crimes; and Count Four was crimes against humanity.[5722] The particular charges or the number of charges of which the convicted persons were found guilty does not appear to have been determinative of the sentence. Of the 12 persons sentenced to death, seven of them were found not guilty of some of the charges of which they had been indicted.[5723] The convicted person who received the second lightest sentence (15 years of imprisonment) was convicted of all four counts.[5724]

[5715] Schabas, Sentencing by International Tribunals, p. 484.
[5716] Schabas, Sentencing by International Tribunals, p. 484.
[5717] Hermann Wilhelm Goering, Joachim von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Fritz Sauckel, Alfred Jodl, Arthur Seyss-Inquart, and Martin Bormann.
[5718] Rudolf Hess, Walther Funk, and Erich Raeder.
[5719] Baldur von Schirach and Albert Speer.
[5720] Konstantin von Neurath.
[5721] Karl Doenitz.
[5722] *United States of America et al. v. Goering et al.*, Indictment (IMT), 6 October 1945, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (1947), Vol. I, pp. 27-67.
[5723] Kaltenbrunner was found not guilty of Count One, Frank was found not guilty of Count One, Frick was found not guilty of Count One, Streicher was found not guilty of Count One, Sauckel was found not guilty of counts 1 and 2, Seyss-Inquart was found not guilty of count 1, and Bormann was found not guilty of count 1.
[5724] Von Neurath.

2012. Of the three who received life sentences, Rudolf Hess was found guilty of Counts One and Two, but not guilty of Counts Three and Four;[5725] Walther Funk was found guilty of Counts Two, Three, and Four, but not guilty of Count One;[5726] and Erich Raeder was found guilty of Counts One, Two, and Three. He had not been charged with Count Four.[5727] The Judgment does not explain why Hess received a life sentence. He may have received a life sentence rather than death because he flew to Scotland to attempt to negotiate peace with England, although the Tribunal noted that "after his arrival in England Hess wholeheartedly supported all Germany's aggressive actions up to that time, and attempted to justify Germany's action in connection with Austria, Czechoslovakia, Poland, Norway, Denmark, Belgium and the Netherlands."[5728] His life sentence could also have been due to the fact that there were concerns as to his mental health throughout the proceedings, even though he had been determined fit to stand trial.[5729]

2013. As for Funk, the Tribunal stated, "[I]n spite of the fact that he occupied important official positions, Funk was never a dominant figure in the various programmes in which he participated. This is a mitigating fact, of which the Tribunal takes notice."[5730] Funk denied any prior knowledge of the crimes charged, but testified that he was filled with "deep shame" upon purportedly learning about the crimes at trial.[5731] As for Raeder, the Tribunal did not explain specifically whether it considered any mitigating circumstances, but it noted that Raeder, who was chief of the naval command, "accept[ed] full responsibility until retirement in 1943", "admit[ted] the Navy violated the Versailles Treaty, insisting it was 'a matter of honour for every man' to do so, and allege[d] that the violations were for the most part minor, and

[5725] IMT Judgment, p. 285 (Hess).
[5726] IMT Judgment, p. 307 (Funk).
[5727] IMT Judgment, p. 317 (Raeder).
[5728] IMT Judgment, p. 284 (Hess).
[5729] Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1993) ("Taylor, The Anatomy of the Nuremberg Trials"), pp. 150, 177-180, 268, 560. As one former Nuremberg prosecutor mused, "Why did not Biddle [the American judge] and Lawrence [the British judge] join Nikitchenko [the Soviet judge] for a death sentence? The records do not shed light. But after watching the crazy behavior of a man plainly unable to defend himself, it would take an ice-cold judge to send him to the gallows." Taylor, The Anatomy of the Nuremberg Trials, p. 560.
[5730] IMT Judgment, p. 306 (Funk). About this life sentence, one Nuremberg prosecutor later wrote: "I could not be sorry that anyone had escaped the gallows, but I saw no basis for Funk's 'mitigating facts' which spared his life. Certainly Funk's range of crimes was far wider than Streicher's, and it was annoying to see Funk profiting by his own cowardice when others were facing death bravely." Taylor, The Anatomy of the Nuremberg Trials, p. 599.
[5731] *United States of America et al. v. Goering et al.*, Proceedings (IMT), 31 August 1946, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (1948), Vol. XXII, p. 387.

Germany built less than her allowable strength."[5732] The Tribunal also noted that Raeder endeavoured to dissuade Hitler from embarking upon the invasion of the USSR.[5733]

2014. The Judgment does not explain why Baldur von Schirach, who was convicted of Count Four, received a 20-year sentence. Perhaps he received a shorter sentence because he was convicted only under Count Four; however, Julius Streicher was also convicted only of Count Four and received a death sentence. Albert Speer, who received a 20-year sentence, was convicted of Counts Three and Four. The Judgment states:

> In mitigation it must be recognised that Speer's establishment of blocked industries did keep many labourers in their homes and that in the closing stages of the war he was one of the few men who had the courage to tell Hitler that the war was lost and to take steps to prevent the senseless destruction of production facilities, both in occupied territories and in Germany. He carried out his opposition to Hitler's scorched earth programme in some of the Western countries and in Germany by deliberately sabotaging it at considerable personal risk.[5734]

2015. Konstantin Von Neurath was convicted of all four counts. He received a 15-year sentence. The Tribunal noted:

> In mitigation it must be remembered that Von Neurath did intervene with the Security Police and SD for the release of many of the Czechoslovaks who were arrested on 1st September, 1939, and for the release of students arrested later in the fall. On 23rd September, 1941, he was summoned before Hitler and told that he was not being harsh enough and that Heydrich was being sent to the Protectorate to combat the Czechoslovakian resistance groups. Von Neurath attempted to dissuade Hitler from sending Heydrich, but in vain, and when he was not successful offered to resign. When his resignation was not accepted he went on leave, on 27th September, 1941, and refused to act as Protector after that date. His resignation was formally accepted in August, 1943.[5735]

2016. Von Neurath asserted and provided evidence to suggest that he was never anti-Semitic and opposed all measures of violence against Jews and fought against the racial policy of the National Socialist Party.[5736]

[5732] IMT Judgment, p. 315 (Raeder).
[5733] IMT Judgment, p. 315 (Raeder). Raeder was "distressed by his escape from the gallows and made it clear that he would have preferred a death sentence to imprisonment for life." Taylor, The Anatomy of the Nuremberg Trials, p. 599. He "requested the Control Council 'to commute this sentence to death by shooting, by way of mercy.'" Taylor, The Anatomy of the Nuremberg Trials, p. 602.
[5734] IMT Judgment, p. 333 (Speer).
[5735] IMT Judgment, p. 336 (Von Neurath).
[5736] *United States of America et al. v. Goering et al.*, Proceedings (IMT), 22 June 1946, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (1948), Vol. XVI, pp. 596-598.

2017. It is notable that Speer and Von Neurath opposed certain of Hitler's policies and acted against them at personal risk.[5737]

B. CLARIFICATION CONCERNING THE SECOND SENTENCE IMPOSED ON KHIEU SAMPHÂN

2018. Before turning to the challenges related to sentencing, the Supreme Court Chamber considers it necessary to clarify a matter concerning KHIEU Samphân's sentence: whether he now serves a single life sentence or two concurrent life sentences. This issue arises because, due to its breadth, Case 002 was severed by the charges into Cases 002/01 and 002/02 in the interests of trial management,[5738] something that has not occurred previously at the ECCC or in international criminal jurisprudence[5739] and is not foreseen under Cambodian law.

2019. Rule 89*ter* provides:

> When the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate.

2020. ECCC Law does not address sentencing in severed cases.

2021. In Case 002/01, the Trial Chamber sentenced KHIEU Samphân to a single sentence of life imprisonment after finding him guilty of the crimes against humanity of extermination encompassing murder, persecution on political grounds, and other inhumane acts comprising forced transfer, enforced disappearances and attacks against human dignity.[5740]

2022. In issuing a single, global sentence, rather than a sentence per crime,[5741] the Trial Chamber followed its practice from Case 001, in which it had determined that where an accused

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[5737] Similarly, a factor that was considered in granting requests for clemency by those convicted in the post-World War II trials was if a defendant "had the courage to resist criminal orders at personal risk". Schabas, Sentencing by International Tribunals, pp. 485-486, quoting *Statement of the High Commissioner for Germany, 31 January 1951, Upon Announcing His Final Decisions Concerning Requests for Clemency for War Criminals Convicted at Nuremberg*, 15 T.W.C. 1176, 1177 (1948).

[5738] See, *e.g.*, Case 002 Decision on Co-Prosecutors' Request (E124/7), para. 5: "[Rule 89*ter*] was intended to grant the Trial Chamber, where the interests of justice so require, a discretionary trial management mechanism enabling it on its own motion to separate proceedings and to examine in different trials different parts of the Indictment."

[5739] See Case 002, Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013, E284/4/8, para. 40.

[5740] Case 002/01 Trial Judgment (E313), Disposition, p. 622.

[5741] At the ICC, trial chambers must pronounce a sentence for each crime as well as a joint sentence. See Rome Statute, Art. 78(3):

> When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than

is convicted of multiple offences, issuing a single sentence reflecting the totality of criminal conduct would be most appropriate.[5742]

2023. In Case 002/02, the Trial Chamber noted the fact that KHIEU Samphân is already serving a life sentence for the criminal convictions in Case 002/01 and that such sentence is the maximum penalty foreseen by the ECCC's legal framework so it considered "whether it must impose a separate sentence for the Accused's convictions in Case 002/02."[5743] It noted that there are no provisions in the ECCC Law, ECCC Agreement, or Internal Rules applicable to this situation and that "sentencing guidelines at the international level concerning this specific matter are limited", so it then considered the relevant provisions of Cambodian law.[5744]

2024. Article 138 of the Criminal Code of Cambodia provides, in relevant part:

> If, in the course of separate prosecutions, the accused is found guilty of several concurrent offences, the sentences imposed shall run cumulatively to the extent of the highest maximum penalty allowed by law. However, the last court dealing with the matters may order that all or part of the sentences of a similar nature shall run concurrently.
> For the purposes of this Article, if an accused is liable to life imprisonment, the highest maximum sentence of imprisonment allowed by law shall be thirty years if the accused has not been sentenced to life imprisonment.

2025. The Trial Chamber explained that this entails that:

> [w]here the highest maximum penalty of life imprisonment has already been imposed in one proceeding, particularly when that proceeding is final following the completion of any appeal process, in practice any subsequent penalty of the same nature imposed in later trials in relation to offences concurrent to those adjudicated in the initial proceeding is automatically aggregated or combined with the previous sentence. Accordingly, the convicted person will serve a single sentence. In such circumstances, French law refers to a situation of *confusion automatique des peines*. This concept of *confusion des peines* has been imported into Cambodian law, but it can also in effect be reconciled with the common law notion of 'concurrent sentence', which refers to a sentence served at the same time as one another. In both cases, the results are similar as the highest maximum penalty allowed by law must be served.[5745]

> the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

At the STL, trial chambers have the discretion to issue a sentence for each count or a single sentence. See Special Tribunal for Lebanon, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.11, December 2020, Rule 171(D):

> The Trial Chamber shall impose a sentence in respect of each count in the indictment upon which the accused has been convicted and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.

[5742] See Case 001 Trial Judgment (E188), paras 586-590.
[5743] Trial Judgment (E465), para. 4357.
[5744] Trial Judgment (E465), para. 4358.
[5745] Trial Judgment (E465), para. 4359.

2026. The Trial Chamber determined that the crimes within the scope of Cases 002/01 and 002/02 are "concurrent offences" in the sense of Cambodian law and that as KHIEU Samphân was already sentenced to life imprisonment in Case 002/01, "the imposition of any further prison sentence in Case 002/02 would lead to the imposition of a concurrent sentence of up to life imprisonment."[5746] After considering the gravity of the crimes and aggravating and mitigating factors, the Trial Chamber "decide[d] to impose a sentence of life imprisonment on KHIEU Samphan". "Taking into consideration the life sentence imposed on KHIEU Samphan in Case 002/01, the Chamber merge[d] the two sentences into a single term of life imprisonment."[5747]

2027. The Supreme Court Chamber considers that imposing a life sentence and merging it with the life sentence imposed in Case 002/01 such that they form a *single* sentence covering the totality of KHIEU Samphân's criminal conduct in both Case 002/01 and Case 002/02 was the appropriate course of action.

2028. This Chamber notes that had Case 002 not been severed into two separate trials, KHIEU Samphân would not have been sentenced twice. An additional life sentence to run cumulatively or concurrently could not, in the interests of justice, be imposed merely because Case 002 was severed in the interest of trial management. In addition to the stigma or perhaps opprobrium of an additional life sentence, serving two concurrent life sentences rather than a single sentence could affect the notion of hope in a very elderly man and perhaps affect any opportunity for an eventual conditional release.[5748]

2029. While the Trial Chamber had to impose a sentence following its finding of guilt in Case 002/02,[5749] it confused matters by referring to concurrent sentences, or two sentences served at

[5746] Trial Judgment (E465), para. 4360.
[5747] Trial Judgment (E465), para. 4402. The Trial Chamber repeated this in its Disposition: "PURSUANT TO Article 39 (new) of the ECCC Law, the Chamber sentences the Accused, KHIEU Samphan, to LIFE IMPRISONMENT. Taking into consideration the life sentence imposed on KHIEU Samphan in Case 002/01, the Chamber merges the two sentences into a single term of life imprisonment." Trial Judgment (E465), pp. 2231-2232.
[5748] Article 513 of the Criminal Procedure Code of Cambodia provides that a convicted person sentenced to life imprisonment who has served the sentence for at least 20 years may receive conditional release. See Case 001 Appeal Judgment (F28), paras 385-388, explaining that the ECCC does not have competence to deal with such matters, which should be decided according to procedures in force at the time when parole is to be considered for a particular convicted person.
[5749] According to Article 39 of the ECCC Law, "[t]hose who have committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 *shall* be sentenced to a prison term from five years to life imprisonment" (emphasis added). According to Rule 98(5) of the Internal Rules, "[i]f the Accused is found guilty, the Chamber *shall* sentence him or her in accordance with the Agreement, the ECCC Law and these [Internal Rules]" (emphasis added).

the same time as one another, and by equating the situation before it with the situation addressed in domestic Cambodian law by Article 138 of the Criminal Code of Cambodia. As noted above, Cambodian law does not provide for severance of charges, and therefore cannot be applied to this situation.

2030. As the Supreme Court Chamber has previously explained, severance denotes a separation or split of the proceedings, consequent to which there are two or more criminal cases rather than one.[5750] In Case 002, however, there was a single Introductory Submission, a single investigation, and a single Closing Order (Indictment). The charges were tried separately merely in the interests of trial management. This does not equate to the "separate prosecutions" referred to in Article 138 of the Criminal Code of Cambodia.

2031. It more closely resembles the single prosecution referred to by Article 137:

> If, in the course of a single prosecution, the accused is found guilty of several concurrent offences, each of the penalties incurred may be imposed. However, if several penalties of a similar nature are incurred, only one such penalty not exceeding the highest maximum penalty allowed by law shall be imposed. Each penalty imposed shall be deemed to be common to the concurrent offences to the extent of the maximum penalty allowed by law that is applicable to each offence.

2032. Nonetheless, merging the two sentences into a single life sentence allowed the Trial Chamber to avoid the unfairness that would result by imposing separate concurrent sentences while also ensuring that the single sentence reflected KHIEU Samphân's total criminal conduct.

2033. Merging KHIEU Samphân's life sentence in Case 002/02 with his life sentence in Case 002/01 such that he serves a single sentence in no way detracts from the severity of the crimes of which he was convicted in each case. Genocide, crimes against humanity, and grave breaches of the Geneva Conventions are the most heinous crimes known to humankind. Indeed, as the Trial Chamber rightly noted, "[t]he gravity of genocide cannot be overstated."[5751] Rather, the single sentence reflects the fact that when an accused is convicted of multiple crimes arising from distinct criminal conduct in a case, a single, global sentence is imposed[5752] and a life sentence is the maximum penalty allowed by law at the ECCC.[5753]

[5750] Case 002 Additional Severance Appeal Decision (E301/9/1/1/3), para. 42.
[5751] Trial Judgment (E465), para. 4370.
[5752] Trial Judgment (E465), para. 4357: "[W]here an accused is convicted of multiple offences, a single sentence which reflects the totality of the criminal conduct must be imposed." See also Case 001 Trial Judgment (E188), paras 586-590.
[5753] ECCC Law, Art. 39.

2034. The Supreme Court Chamber clarifies that KHIEU Samphân now serves a single sentence of life imprisonment covering the totality of his criminal responsibility for the crimes of which he was convicted in Cases 002/01 and 002/02. He does not serve two concurrent life sentences. His single life sentence, the maximum sentence allowed by law, demonstrates the seriousness with which Cambodia and the entire international community regard violations of international law.

C. THE STANDARD OF APPELLATE REVIEW FOR SENTENCING

2035. Article 39 of the ECCC Law, Article 10 of the ECCC Agreement, and Rule 98 set out the law applicable to sentencing. In addition, Rule 104 is applicable to appeals against the sentence.

2036. As regards the standard of review for appeals against the sentence, the Supreme Court Chamber in its Case 001 and Case 002/01 Appeal Judgments cited with approval and applied the standard of review set out by the ICTY Appeals Chamber in *D. Milošević*:

> Due to their obligation to individualise the penalties to fit the circumstance of an accused and the gravity of the crime, Trial Chambers are vested with broad discretion in determining the appropriate sentence, including the determination of the weight given to mitigating or aggravating circumstances. As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law. It is for the appellant to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[5754]

2037. The Supreme Court Chamber will apply this standard in deciding KHIEU Samphân's challenges related to sentencing.

D. ALLEGED ERRORS RELATED TO SENTENCING

2038. KHIEU Samphân raises four main arguments against the fairness of his sentence which are summarised as follows. First, he submits that the Trial Chamber was in error in stating that the primary objective of the sentence was to reassure victims witnesses and the public that the law was being effectively implemented and applied to all regardless of their status.[5755] He

[5754] Case 001 Appeal Judgment (F28), para. 354; Case 002/01 Appeal Judgment (F36), para. 1107, quoting *Milošević* Appeal Judgment (ICTY), para. 297.
[5755] KHIEU Samphân's Appeal Brief (F54), paras 2145-2148.

argues that this was a secondary objective of punishment and demonstrates bias, and that the sentence imposed was thus excessive and exemplary.[5756]

2039. Second, KHIEU Samphân argues that the Trial Chamber committed errors of fact and law in its assessment of the gravity of the crimes as it took into consideration crimes of which he was not charged or convicted.[5757] Specifically, the Trial Chamber considered the rape of prisoners in security centres.[5758] As only the matters proved beyond reasonable doubt are considered against an accused at the sentencing stage the Trial Chamber violated the principle of sentencing.[5759] KHIEU Samphân further argues that the Trial Chamber failed to consider the indirect and limited nature and extent of his participation in the crimes when assessing the gravity of the crimes thereby disrespecting the sentencing practice of international tribunals where secondary or indirect participation usually leads to lighter sentences.[5760]

2040. Third, KHIEU Samphân submits that the Trial Chamber committed factual and legal errors in its assessment of two aggravating factors: (1) The Trial Chamber considered the abuse of his position of authority and influence as an aggravating factor which is in contradiction to its findings that he did not have sufficient authority to directly order the perpetration of the crimes, and his position of authority had already been taken into account for the gravity of the crimes assessment;[5761] and (2) the Trial Chamber failed to demonstrate the relevance and correlation of his level of education as an aggravating factor.[5762]

2041. Fourth, KHIEU Samphân argues that the Trial Chamber committed factual and legal errors in its assessment of mitigating factors. (1) The Trial Chamber failed to give due consideration to his cooperation with the ECCC including his active participation at trial, his exemplary attitude throughout detention, and his acknowledgment of the suffering endured by civil parties.[5763] (2) The Trial Chamber failed to accord sufficient weight to his age and state of health and his inability to withstand long-term imprisonment.[5764] (3) The Trial Chamber erred by not conducting a new assessment of the value to be given to his character witnesses

[5756] KHIEU Samphân's Appeal Brief (F54), paras 2146-2148.
[5757] KHIEU Samphân's Appeal Brief (F54), paras 2149-2151.
[5758] KHIEU Samphân's Appeal Brief (F54), paras 2149-2150.
[5759] KHIEU Samphân's Appeal Brief (F54), para. 2151.
[5760] KHIEU Samphân's Appeal Brief (F54), paras 2152-2157.
[5761] KHIEU Samphân's Appeal Brief (F54), paras 2158-2162.
[5762] KHIEU Samphân's Appeal Brief (F54), paras 2163-2167.
[5763] KHIEU Samphân's Appeal Brief (F54), paras 2168-2171.
[5764] KHIEU Samphân's Appeal Brief (F54), paras 2172-2177.

and by failing to take account of all the elements of his personality and in ignoring the unanimously laudatory accounts.[5765]

2042. In conclusion, KHIEU Samphân submits that these errors invalidate the Trial Chamber's decision on his sentence, which he argues should be reduced to a prison sentence with a time limit.[5766]

2043. The Co-Prosecutors respond that:

a. the Supreme Court Chamber previously considered the Trial Chamber's articulation of the law concerning the purposes of sentencing and held it to be proper and found that there was no indication it amounted to an expression of bias against the accused.[5767] KHIEU Samphân is incorrect that the sentence is excessive and exemplary; the Trial Chamber clearly referred to an individualised sentence reflecting his culpability.[5768]

b. the Trial Chamber considered the evidence of sexual assault only in relation to the conditions at the Kraing Ta Chan security centre and therefore properly limited its sentencing considerations to matters proved beyond reasonable doubt.[5769] Even if the Trial Chamber erred, KHIEU Samphân has failed to show that a different finding concerning the gravity of the crimes would have been reached without consideration of this evidence, as "there is still plenty of other evidence that shows the extreme gravity of the crimes."[5770] KHIEU Samphân attempted to minimise his role in the JCE and ignored substantial findings on his participation therein.[5771]

c. KHIEU Samphân has misrepresented the authority he actually exercised.[5772] Although the Trial Chamber's "phrasing is imperfect", it may properly consider different aspects of an individual's acts and conduct in assessing the gravity of the totality of culpable conduct without impermissibly double counting the same

[5765] KHIEU Samphân's Appeal Brief (F54), paras 2178-2183.
[5766] KHIEU Samphân's Appeal Brief (F54), paras 2184-2185.
[5767] Co-Prosecutors' Response (F54/1), para. 1286, referring to Case 002/01 Appeal Judgment (F36), para. 1110.
[5768] Co-Prosecutors' Response (F54/1), para. 1287.
[5769] Co-Prosecutors' Response (F54/1), para. 1290.
[5770] T. 18 August 2021, F1/11.1, p. 94. See also Co-Prosecutors' Response (F54/1), para. 1290.
[5771] Co-Prosecutors' Response (F54/1), para. 1291.
[5772] Co-Prosecutors' Response (F54/1), para. 1294.

factor when assessing aggravating circumstances.[5773] Even if this factor was double-counted, this had a limited impact on the determination of the sentence for the totality of the crimes committed.[5774] Additionally, a high level of education can be considered an aggravating factor and the Trial Chamber justified the relevance of KHIEU Samphân's education.[5775]

d. the Trial Chamber correctly found that KHIEU Samphân's cooperation with the ECCC did not exceed the legally required minimum participation in court hearings and he merely disagrees with the Trial Chamber's assessment.[5776] KHIEU Samphân fails to consider that his acknowledgement of the sufferings of the civil parties was accompanied in each instance by his ostensible justification for their suffering.[5777] KHIEU Samphân's claim that the Trial Chamber erred by failing to give reasons in its assessment of his age as a mitigating factor is baseless[5778] and the Trial Chamber correctly noted that ill-health is a mitigating factor only in exceptional circumstances.[5779] The fact that the Trial Chamber did not change its prior assessment of the weight to assign to character witnesses does not constitute error and KHIEU Samphân mischaracterises the character evidence on which he seeks to rely.[5780]

2044. In conclusion the Co-Prosecutors submit that the challenges relating to sentencing should be dismissed.[5781]

2045. The Lead Co-Lawyers submit that they have standing to respond to submissions concerning sentencing[5782] and respond to KHIEU Samphân's argument that the Trial Chamber erred concerning the objectives of sentencing and his argument that the Trial Chamber erred in failing to consider KHIEU Samphân's sympathy for victims as a mitigating circumstance.[5783] They argue that the Trial Chamber's statement on the purpose of sentencing follows established law at the ECCC and the caselaw of the ICTY Appeals Chamber[5784] and that the Trial Chamber

[5773] Co-Prosecutors' Response (F54/1), para. 1296.
[5774] Co-Prosecutors' Response (F54/1), para. 1297.
[5775] Co-Prosecutors' Response (F54/1), para. 1298.
[5776] Co-Prosecutors' Response (F54/1), para. 1300.
[5777] Co-Prosecutors' Response (F54/1), para. 1300.
[5778] Co-Prosecutors' Response (F54/1), para. 1301.
[5779] Co-Prosecutors' Response (F54/1), para. 1302.
[5780] Co-Prosecutors' Response (F54/1), paras 1304-1306.
[5781] Co-Prosecutors' Response (F54/1), paras 1285, 1288, 1293, 1299, 1303, 1307.
[5782] Lead Co-Lawyers' Response (F54/2), paras 845-865.
[5783] Lead Co-Lawyers' Response (F54/2), paras 867-885.
[5784] Lead Co-Lawyers' Response (F54/2), para. 871.

was required to consider the objective of reassuring victims and the community about the fair and equal application of the law.[5785] Concerning mitigation, they submit that KHIEU Samphân showed neither remorse nor sympathy and instead attempted to shift blame from himself without genuinely responding to civil party questions.[5786] The Supreme Court Chamber finds it unnecessary to consider the issue of the Lead Co-Lawyers' standing to make submissions on sentencing issues, as it will not consider these arguments made by KHIEU Samphân, as explained below.

2046. The Supreme Court Chamber will not consider the alleged error regarding the purposes of sentencing. As it previously held regarding the Trial Chamber's identical statement concerning the purposes of sentencing in Case 002/01[5787] and KHIEU Samphân's allegation that it demonstrated bias,[5788] "[t]here is […] no indication that the Trial Chamber's statement is an expression of bias against him."[5789] KHIEU Samphân has not demonstrated any bias in favour of the civil parties, nor has he demonstrated that the Trial Chamber misapplied sentencing principles or sentenced him beyond his level of criminal responsibility.

2047. This Chamber will not consider the alleged error in the Trial Chamber's gravity analysis regarding form and degree of participation. It is nothing more than an attempt to revisit the conviction of a senior leader. The Trial Chamber's findings that KHIEU Samphân was a "key actor responsible for the formulation of Party policies", that he knew that crimes would be committed and was involved in the common purpose of the joint criminal enterprise from its inception and throughout the period involved in Case 002/02, and that "he implemented key economic aspects of the common purpose", "disregarding the human cost of their implementation"[5790] demonstrate that it did consider KHIEU Samphân's form and degree of participation in its gravity analysis.[5791]

2048. This Chamber will not consider the alleged error regarding consideration of level of education as an aggravating factor. A sentencing court is entitled to look at a person's education and background, his privileges and disadvantages as relevant factors. A person educated to a doctoral standard is expected to have insight into the consequences of policies and actions. The

[5785] Lead Co-Lawyers' Response (F54/2), paras 872-875.
[5786] Lead Co-Lawyers' Response (F54/2), paras 879-885.
[5787] Case 002/01 Trial Judgment (E313), para. 1067.
[5788] Case 002/01 KHIEU Samphân's Appeal Brief (F17), paras 647-648.
[5789] Case 002/01 Appeal Judgment (F36), para. 1110.
[5790] Trial Judgment (E465), para. 4382.
[5791] See Trial Judgment (E465), para. 4349.

Trial Chamber correctly, in the view of this Chamber, explained the relevance of KHIEU Samphân's education: because of his education, he was "well equipped to know the import and consequences of his actions."[5792]

2049. This Chamber will not consider the alleged errors regarding the Trial Chamber's refusal to consider cooperation with the ECCC, conduct in detention, expression of sympathy to victims, age, state of health, or moral character as mitigating factors. KHIEU Samphân's cooperation with the ECCC did not amount to the substantial cooperation[5793] necessary to warrant mitigation in sentencing; he put forward no evidence regarding his conduct in detention; his expression of sympathy was extremely qualified and was devoid of remorse; advanced age does not necessitate mitigation in sentencing; ill-health is only considered a mitigating factor in exceptional circumstances,[5794] which KHIEU Samphân has failed to demonstrate; and KHIEU Samphân did not request the Trial Chamber, through either his Closing Brief or Closing Statement, to conduct a new assessment of the value to be given to the Case 002/01 character witnesses. It was within the Trial Chamber's discretion not to assess the Case 002/01 character evidence again, particularly when it already determined that it was of limited weight.[5795] These arguments are unmeritorious.

2050. The Supreme Court Chamber will now consider KHIEU Samphân's remaining arguments in turn.

1. Alleged Error Regarding Consideration of Rape in Security Centres

2051. In assessing the gravity of the crimes, the Trial Chamber considered, *inter alia*, the "[n]umber and vulnerability of victims, [and] scale and brutality of crimes".[5796] It stated that:

> conditions at security centres were appalling as detainees were constantly shackled, were rarely able to wash, and were forced to excrete into a small, shared container. They were provided with very little thin gruel, were forced to remain silent and were regularly beaten; *some were raped*.[5797]

[5792] Trial Judgment (E465), para. 4390.
[5793] The Supreme Court Chamber has previously noted substantial cooperation may be an element warranting mitigation in sentence and that international tribunals have given consideration to the following types of conduct: "clarifying areas of investigative doubt, including crimes previously unknown to the prosecutor; admitting facts; helping organise operations which led to the arrest of other suspects; and agreeing to testify as a witness in other proceedings." See Case 001 Appeal Judgment (F28), paras 366-368.
[5794] Case 002/01 Trial Judgment (E313), para. 1095; *Galić* Appeal Judgment (ICTY), para. 436; *Blaškić* Appeal Judgment (ICTY), para. 696; *Prosecutor v. Simić*, Trial Chamber II (ICTY), IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para. 98.
[5795] See *supra* paras 335-347.
[5796] Trial Judgment (E465), Section 20.2.5.1.
[5797] Trial Judgment (E465), para. 4365 (emphasis added).

To support its finding that "some were raped", the Trial Chamber referred to a paragraph of the Judgment where it made a finding of a single sexual assault, which it considered reflective of the conditions at Kraing Ta Chan security centre.[5798]

2052. The gravity of the crime committed is the primary factor to be weighed when determining a sentence and requires consideration of the particular circumstances of the case together with the form and degree of participation of the convicted person.[5799]

2053. KHIEU Samphân was not charged with rape outside the context of forced marriage and the Trial Chamber expressly stated that "evidence of rape in Security Centres (outside the context of forced marriage) will not be considered in support of the elements of any criminal charge in this case."[5800] However, KHIEU Samphân was charged and was found guilty of the crime against humanity of other inhumane acts through attacks on human dignity due to the conditions at Kraing Ta Chan.[5801] The Supreme Court Chamber considers that the sexual assault that occurred at Kraing Ta Chan could have relevance to the gravity of the other inhumane act of attacks on human dignity and could properly have been considered by the Trial Chamber in that regard.

2054. Because the Trial Chamber did not consider the gravity of the crimes individually, but as a whole, it is unclear whether the Trial Chamber considered the sexual assault in regards to the gravity of the crime against humanity of other inhumane acts through attacks on human dignity. It is notable that the Trial Chamber did not refer to this finding of sexual assault when making its legal findings concerning the other inhumane act of attacks on human dignity.[5802] The Supreme Court Chamber cannot conclude that the Trial Chamber appropriately considered this sexual assault as only of relevance to the crime against humanity of other inhumane acts through attacks on human dignity due to conditions at Kraing Ta Chan when conducting its gravity analysis.

[5798] Trial Judgment (E465), para. 4365, referring, *inter alia*, to para. 2738, in which the Trial Chamber stated: "The Chamber finds that KIM Nova, NOP Nem and their young children were killed at Kraing Ta Chan, and that KIM Nova was sexually assaulted by Ta An before she was killed, and this is reflective of aspects of the conditions in Kraing Ta Chan."
[5799] Case 001 Appeal Judgment (F28), para. 375.
[5800] Trial Judgment (E465), para. 188. See also Trial Judgment (E465), para. 2641: "[A]lthough the Closing Order did not find the Accused to be criminally responsible for rapes committed at Kraing Ta Chan, such rapes (or indeed other sexual violations) may be relevant to its examination of the general context of the conditions at Kraing Ta Chan".
[5801] Trial Judgment (E465), paras 2848-2851.
[5802] Trial Judgment (E465), paras 2848-2851.

2055. In the Trial Chamber's lengthy consideration of the gravity of the crimes,[5803] sexual assault was referred to only once.[5804] The Supreme Court Chamber is of the view that there was ample other evidence relied upon by the Trial Chamber to support a conclusion that the gravity of the crimes warranted a life sentence. The error was not, on the facts of this case, one that vitiated the lawfulness of the sentence.

2. Alleged Error Regarding Double Counting of Abuse of Position of Authority and Influence

2056. In considering aggravating factors, the Trial Chamber found:

> KHIEU Samphan's contribution to the crimes, including through his participation in the JCE, was undertaken in his official capacities, including as a member of the Central Committee, a member of Office 870, President of the State Presidium, and highest official in GRUNK. This constitutes an abuse of his position of authority and influence and thus aggravates his culpability.[5805]

2057. While official position itself will not generally constitute an aggravating circumstance, abuse of such position may be considered such.[5806]

2058. There is no indication that the Trial Chamber contradicted its previous findings that KHIEU Samphân did not have sufficient authority to directly order the perpetration of the crimes. The Trial Chamber's focus does not appear to have been on KHIEU Samphân's *de facto* authority, but on his abuse of his official position to support and legitimise criminal policies. Indeed, the Trial Chamber considered, albeit in the section of the Judgment pertaining to the gravity of the crimes, that KHIEU Samphân "used his position of influence to support and therefore legitimise the implementation of CPK policies."[5807]

[5803] Trial Judgment (E465), paras 4362-4376, 4382-4385.
[5804] Trial Judgment (E465), para. 4365: "[S]ome were raped.".
[5805] Trial Judgment (E465), para. 4389.
[5806] Case 002/01 Appeal Judgment (F36), para. 1113:
> According to the jurisprudence of the ICTY, a senior political or military rank or position of authority in the leadership does not *per se* constitute an aggravating circumstance. Nevertheless, a trial chamber has 'the discretion to take into account, as an aggravating circumstance, the seniority, position of authority, or high position of leadership held by a person'.

See also *Lubanga* Appeal Judgment against Sentence Decision (ICC), para. 82; *Hadžihasanović & Kubura* Appeal Judgment (ICTY), para. 320; *Milošević* Appeal Judgment (ICTY), para. 302.
[5807] Trial Judgment (E465), para. 4383.

2059. However, factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances.[5808] Where established, such "double-counting" amounts to legal error.[5809]

2060. In *Nikolić*, the ICTY Appeals Chamber considered whether the Trial Chamber had improperly double-counted Nikolić's role in the commission of the crime as an element of gravity and as an aggravating circumstance.[5810] The Appeals Chamber determined that the Trial Chamber took Nikolić's active role in the crime into account in its assessment of the gravity of the offence, and his position of authority and the role he played in the crime as a separate aggravating circumstance.[5811] It considered that taking his role into account when assessing gravity and in assessing aggravating factors amounted to impermissible double counting and explained that "[d]ouble-counting the Appellant's role in the crimes is impermissible as doing so allows the same factor to detrimentally influence the Appellant's sentence twice."[5812] The Appeals Chamber also determined, however, that the Trial Chamber's reference to Nikolić's "position of authority" did not amount to double counting as his abuse of position of authority was distinct from his role in the crimes.[5813]

2061. In *D. Milošević*, the ICTY Appeals Chamber observed that language in the Trial Judgment could have indicated that the Trial Chamber took certain factors into account twice, in its assessment of the gravity of crimes and as aggravating circumstances.[5814] It decided to address the matter *proprio motu* and requested that the parties make submissions.[5815] The Prosecution argued that the Trial Chamber relied on different aspects under gravity and aggravating factors, rather than counting the same factors twice.[5816] The Appeals Chamber stated that it was not convinced by the Prosecution's argument that relying on different aspects of the same fact is permissible, explaining that, "[i]n weighing a fact, […] the Trial Chamber

[5808] *Prosecutor v. Ntaganda*, Appeals Chamber (ICC), ICC-01/04-02/06, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of November 2019 entitled 'Sentencing judgment', 30 March 2021, para. 123; *Milošević* Appeal Judgment (ICTY), para. 306; *AFRC* Appeal Judgment (SCSL), para. 317; *Prosecutor v. Momir Nikolić*, Appeals Chamber (ICTY), IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006 ("*Momir Nikolić* Sentencing Appeal Judgment (ICTY)"), para. 58; *Prosecutor v. Deronjić*, Appeals Chamber (ICTY), IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005, para. 106; *Ayyash et al.* Sentencing Judgment (STL), para. 181; *Prosecutor v. Lubanga*, Trial Chamber I (ICC), ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, para. 35.
[5809] *Milošević* Appeal Judgment (ICTY), para. 306.
[5810] *Momir Nikolić* Sentencing Appeal Judgment (ICTY), paras 59-63.
[5811] *Momir Nikolić* Sentencing Appeal Judgment (ICTY), para. 61.
[5812] *Momir Nikolić* Sentencing Appeal Judgment (ICTY), para. 61.
[5813] *Momir Nikolić* Sentencing Appeal Judgment (ICTY), para. 61.
[5814] *Milošević* Appeal Judgment (ICTY), para. 306.
[5815] *Milošević* Appeal Judgment (ICTY), para. 306.
[5816] *Milošević* Appeal Judgment (ICTY), para. 306.

is required to consider and account all of its aspects and implications on the sentence in order to ensure that no double-counting occurs."[5817]

2062. Here, in assessing gravity of the crimes, the Trial Chamber considered that "[a]s a Central Committee member and an attendee at Standing Committee meetings, KHIEU Samphan was privy to important matters and crucial decisions, and thus enjoyed elevated standing within the party"[5818] and that he "used his position of influence to support and therefore legitimise the implementation of CPK policies."[5819]

2063. In assessing aggravating circumstances, the Trial Chamber found that KHIEU Samphân's contribution to the crimes, including through his participation in the JCE, was undertaken in his official capacities, which constitutes an abuse of his position of authority and influence and thus aggravates his culpability.[5820]

2064. The Supreme Court Chamber concludes that the Trial Chamber erred in its application of law by allowing KHIEU Samphân's abuse of a position of authority to be used in its assessment of gravity as well as its assessment of aggravating factors. This resulted in impermissible double-counting. The Supreme Court Chamber agrees with the *D. Milošević* Appeals Chamber that in weighing a fact, a trial chamber is required to consider all of its aspects and implications on the sentence in order to ensure that no double-counting occurs. It cannot consider different aspects of the same fact in assessing gravity and aggravating circumstances without impermissibly double counting that fact.

2065. The Supreme Court Chamber will address the impact of this conclusion, if any, on the sentence below.

E. IMPACT OF THE SUPREME COURT CHAMBER'S FINDINGS ON THE SENTENCE

2066. The Supreme Court Chamber recalls that it has upheld KHIEU Samphân's convictions for: (1) the crimes against humanity of murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political, religious, and racial grounds, and other inhumane acts through attacks against human dignity, conduct characterised as enforced disappearances, forced transfer, forced marriage, and rape within the context of forced

[5817] *Milošević* Appeal Judgment (ICTY), para. 309.
[5818] Trial Judgment (E465), para. 4382.
[5819] Trial Judgment (E465), para. 4383.
[5820] Trial Judgment (E465), para. 4389.

marriage; (2) the crime of genocide by killing members of the Vietnamese ethnic, national, and racial group; and (3) grave breaches of the Geneva Conventions of wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or a civilian the rights of a fair and regular trial, and unlawful confinement of a civilian under the Geneva Conventions at S-21 Security Centre, changing his form of liability for murders committed with *dolus eventualis* from aiding and abetting liability to JCE liability.[5821] It has reversed the finding of political persecution of New People at the 1st January Dam Worksite, considering that the Trial Chamber erred in finding that a fundamental right to equal treatment had been infringed or violated by the treatment of New People at that worksite.[5822] It has also reversed the finding of murder as a crime against humanity at Phnom Kraol Security Centre, which was based on two discrete murders, findings that the murders could not be established beyond reasonable doubt based on the available evidence.[5823] His overall convictions for persecution on political grounds and murder as crimes against humanity stand, as they were based on multiple acts of political persecution and multiple murders at other locations.[5824] The Supreme Court Chamber has also granted the Co-Prosecutors' Appeal, entering a conviction for the crime against humanity of other inhumane acts through conduct characterised as rape in the context of forced marriage with regard to male victims.[5825] The Supreme Court Chamber also recalls that it found that the Trial Chamber erred in double counting KHIEU Samphân's position of authority and influence when considering the gravity of the crimes and also when considering aggravating circumstances.[5826]

2067. The Supreme Court Chamber notes that, as explained above,[5827] KHIEU Samphân is serving a life sentence, the maximum sentence permitted at the ECCC, which was imposed by the Trial Chamber for his convictions in Cases 002/01 and upheld by the Supreme Court Chamber on appeal. Case 002/01 and 002/02 were prosecuted separately but originated from a single indictment that was severed in the interests of trial management and in light of the frail health and advance age of all the Accused. Although the two cases are thus related, they deal with different facts that were adjudicated in two trials that produced separate dispositions, each of which requires the imposition of a separate sentence after finding of guilt. For this reason,

[5821] See *supra* Section VIII.B.9.b.
[5822] See *supra* Section VII.F.2.b.4.
[5823] See *supra* Section VII.A.5.e.
[5824] See *supra* Sections VII.A, VII.F.2.
[5825] See *supra* Section VII.G.3.c.iii.
[5826] See *supra* Section IX.D.2.
[5827] See *supra* Section IX.B.

the Trial Chamber sentenced KHIEU Samphân to life imprisonment for the crimes of which he was convicted in in Case 002/02 and this Chamber affirms that sentence.

2068. The Supreme Court Chamber considers the life sentence that was imposed in Case 002/02 to be appropriate in light of all the circumstances, including the tragic nature of the underlying crimes and the extent of harm caused by KHIEU Samphân. In the circumstances, however, in addition to affirming the life sentence in this case, this Chamber affirms the decision of the Trial Chamber to have the sentence run concurrently with the one imposed in Case 002/01 s permitted by Article 138 of the Cambodian Criminal Code.

2069. Nonetheless, this Chamber concludes that the Trial Chamber's finding that a life sentence was appropriate for the crimes at issue in Case 002/02 would not be appreciably altered by the Supreme Court Chamber's recharacterisation of aiding and abetting liability to JCE liability, its reversal of the crime against humanity of political persecution of New People at the 1st January Dam Worksite or the crime against humanity of murder at Phnom Kraol, its entering a conviction for the crime against humanity of other inhumane acts through conduct characterised as rape in the context of forced marriage with regard to male victims, or its finding that the Trial Chamber erred in double counting KHIEU Samphân's position of authority and influence as an aggravating factor as to the gravity of the crimes; and finally that the Trial Chamber erred in assessing mitigating factors. The Supreme Court has thoroughly considered each of these assertions and considers them without merit. The sole exception is the claim that the Trial Chamber erred in assessing the gravity of the crimes committed by including a crimes of which KHIEU Samphân was not charged and impermissibly double counting his position of authority and influence. Although, the Supreme Court Chamber decides that doing so constituted error, it also concludes that in the circumstances of this case their consideration does not render the ultimate sentence inappropriate or unfair in any way.

2070. Participation in a JCE is considered a higher form of liability than aiding and abetting and tends to attract a higher sentence.[5828] As noted above, KHIEU Samphân already serves the highest sentence permitted by ECCC law, this recharacterisation has no effect on his sentence, nor does the conviction with regard to male victims of rape in the context of forced marriage. The reversal of the finding of political persecution at the 1st January Dam Worksite affected

[5828] See, *e.g.*, *Mrkšić et al.* Appeal Judgment (ICTY), para. 407; *Simić et al.* Appeal Judgment (ICTY), para. 265. Empirical research on sentencing at the ICTY and ICTR confirms that aiding and abetting attracts a lower sentence. Elies van Sliedregt, "The Curious Case of International Criminal Liability", (2012) 10 *J. Int'l Crim. Just*. 1171, p. 1177.

only one group of "real or perceived enemies" persecuted at the 1st January Dam Worksite and does not affect the multiple other findings of political persecution elsewhere throughout Cambodia. The reversal of the finding of murder at Phnom Kraol Security Centre relates only to two deaths, and as this is only a small fraction of the overall deaths at issue, it is insufficient to affect the sentence. Consequently, KHIEU Samphân's position of authority and influence was only one of many factors the Trial Chamber considered in its gravity analysis, and there is no question that a life sentence would be appropriate considering the gravity of the crimes without having inappropriately considered this an aggravating factor.

X. DISPOSITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GRANTS the Co-Prosecutors' Appeal; and **ENTERS** a conviction for the crime against humanity of other inhumane acts through conduct characterised as forced marriage and additionally categorized as crime against humanity of other inhumane acts in the form of sexual violence, understood to constitute forced sexual intercourse in the context of forced marriage with regard to male victims;

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

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

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

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

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

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

Done in Khmer and English.
Dated this 23rd day of December 2022
At Phnom Penh,
Cambodia

Greffiers

Peace MALLENI SEA Mao PHAN Theoun

Judge KONG Srim
President

Judge Chandra Nihal JAYASINGHE

Judge SOM Sereyvuth

Judge Florence Ndepele MWACHANDE-MUMBA

Judge MONG Monichariya

Judge Phillip RAPOZA

Judge YA Narin

XI. ANNEX I: GLOSSARY AND ABBREVIATIONS

CPK	Communist Party of Kampuchea
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Court of Cambodia
ECtHR	European Court of Human Rights
GRUNK	Royal Government of National Union of Kampuchea
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMT	International Military Tribunal
IRMCT	International Residual Mechanism for Criminal Tribunals
KSC	Kosovo Specialist Chambers
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration of Human Rights

XII. ANNEX II: TABLE OF AUTHORITIES

ECCC DOCUMENTS

ECCC Agreement	Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, *entered into force* 29 April 2005, 2329 U.N.T.S. 117
ECCC Law	Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea, 10 August 2001, NS/RKM/1004/006
Internal Rules	Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev.9), as revised 16 January 2015
Case 002 Introductory Submission (D3)	Case 002, Introductory Submission, 18 July 2007, D3
Co-Prosecutors' Appeal (F50)	Co-Prosecutors' Appeal against the Case 002/02 Trial Judgment, 20 August 2019, F50
KHIEU Samphân's Response (F50/1)	KHIEU Samphân's Response to the Prosecution's Appeal in Case 002/02, 23 September 2019, F50/1
	Civil Party Lead Co-Lawyers' Submissions relating to KHIEU Samphân's Response to the Co-Prosecutors' Appeal, 7 October 2019, F50/1/1
KHIEU Samphân's Appeal Brief (F54)	Case 002/02 KHIEU Samphân's Appeal Brief, 27 February 2020, F54
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