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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' SUBMISSIONS ON POTENTIAL RECHARACTERISATION
OF THE CRIMES**

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I. INTRODUCTION

1. The Co-Prosecutors hereby respond to the Supreme Court Chamber's ("SCC") request for submissions on the possibility of changes to the legal characterisation of the crimes.

II. PROCEDURAL HISTORY

2. On 15 September 2010, the Co-Investigating Judges issued their Closing Order in Case 002 ("Closing Order"), indicting, *inter alios*, Nuon Chea and Khieu Samphan.¹
3. On 22 September 2011, the Trial Chamber issued a severance order pursuant to Internal Rule 89*ter*, which limited the scope of the first trial in Case 002 to factual allegations described in the Closing Order as movement of population (phases one and two) ("Population Movement (Phase I)" and "Population Movement (Phase II)") and crimes against humanity committed in their course.² The scope of Case 002/01 was subsequently expanded to include the executions of former Khmer Republic officials at Tuol Po Chrey.³ On 8 February 2013, the SCC annulled the Trial Chamber's severance order and related decisions.⁴ Following further submissions from the parties, the Trial Chamber again severed proceedings in Case 002 on 29 March 2013, limiting the scope of Case 002/01 to crimes against humanity committed during the course of Population Movements (Phases I and II), and the executions of Khmer Republic officials at Tuol Po Chrey.⁵ The Trial Chamber again identified the specific paragraphs of the Closing Order relevant to Case 002/01.⁶

¹ **D427** Closing Order, 15 September 2010 ("Closing Order").

² **E124** Severance Order Pursuant to Internal Rule 89*ter*, 22 September 2011.

³ **E163/5** Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of the Trial in Case 002/01 (E163) and Deadline for Submission of Applicable Law Portion of Closing Briefs, 8 October 2012. At the same time, the Trial Chamber notified **E124/7.3** 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 Decision on Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163), 8 October 2012 ("Annex") setting out a list of Closing Order paragraphs incorporated into Case 002/01 in consequence of the Trial Chamber's Decision.

⁴ **E163/5/1/13** Decision on Immediate Appeal of the Trial Chamber's Decision concerning the Scope of Case 002/01, 8 February 2013.

⁵ **E1/176.1** T. 29 March 2013, pp. 2-4; **E284** Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013.

⁶ The Trial Chamber did so by re-issuing **E124/7.3** Annex. See **E284** Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, p. 70.

4. On 18 January 2013, Nuon Chea and Khieu Samphan submitted their briefs regarding the law applicable to Case 002/01.⁷ On 26 September 2013, they filed their closing briefs,⁸ and between 16 and 31 October 2013, they made Closing Statements.
5. On 7 August 2014, the Trial Chamber rendered its judgment in Case 002/01.⁹ The Trial Chamber found Nuon Chea and Khieu Samphan criminally responsible for the crimes against humanity of extermination (encompassing, in relation to Population Movement Phase I, murder), political persecution and other inhumane acts (comprising forced transfer, attacks against human dignity, and in relation to Population Movement Phase II, enforced disappearances) in relation to the two Population Movements, and for the crimes against humanity of extermination (encompassing murder) and of political persecution in relation to events at Tuol Po Chrey based on the modes of responsibility of planning, ordering (Nuon Chea only), instigating, and aiding and abetting, as well as superior responsibility (Nuon Chea only).¹⁰
6. The Trial Chamber entered convictions based on joint criminal enterprise (“JCE”) only in respect of the crimes against humanity of murder (Population Movement (Phase I) only), political persecution and other inhumane acts (comprising forced transfer and attacks against human dignity) in relation to Population Movement (Phases I and II) and extermination (encompassing murder) in relation to the events at Tuol Po Chrey (“JCE convictions”). The Trial Chamber did not enter convictions for those crimes based on liability for planning, ordering, instigating or aiding and abetting,¹¹ or for any crimes in relation to superior responsibility in respect of Nuon Chea,¹² despite having found the Accused criminally responsible under those modes of responsibility.
7. For the remaining crimes (i.e. (i) extermination in relation to Population Movement (Phase I); (ii) extermination and other inhumane acts comprising enforced disappearances in relation to Population Movement (Phase II); and (iii) political persecution in relation to Tuol Po Chrey) (“Additional Crimes”), the Trial Chamber

⁷ **Nuon Chea: E163/5/11** Preliminary Submissions Concerning the Applicable Law, 18 January 2013 (“NC Applicable Law Brief”); **Khieu Samphan: E163/5/9** Submissions Regarding the Applicable Law, 18 January 2013 (“KS Applicable Law Submissions”).

⁸ **Nuon Chea: E295/6/3** Nuon Chea’s Closing Submissions in Case 002/01, 26 September 2013 (“Nuon Chea Trial Brief”); **Khieu Samphan: E295/6/4** Conclusions finales, 26 September 2013 (“KS Trial Brief”).

⁹ **E313** Case 002/01 Judgement, 7 August 2014 (“Judgment”).

¹⁰ **E313** Judgment, paras 940-942 (Nuon Chea) and 1053-1054 (Khieu Samphan).

¹¹ **E313** Judgment, paras 940 (Nuon Chea) and 1053 (Khieu Samphan).

¹² **E313** Judgment, para. 941.

entered convictions on the basis of planning, ordering (Nuon Chea only), instigating, and aiding and abetting.¹³

8. Nuon Chea and Khieu Samphan filed Notices of Appeal against the Judgment on 29 September 2014,¹⁴ followed by their Appeal Briefs on 29 December 2014.¹⁵
9. On 9 October 2015, the SCC notified the Parties that should the convictions be confirmed, it may “consider [...] chang[ing] the legal characterisation of the crime” in respect of Nuon Chea’s and Khieu Samphan’s criminal responsibility to such mode of liability as it deems appropriate, potentially including JCE liability for all crimes for which their conviction may be confirmed.¹⁶ The SCC requested the parties to submit any written submissions they may have regarding this potential change to the “legal characterisation of the crime”.¹⁷

III. APPLICABLE LAW

10. Internal Rule¹⁸ 110(2) provides that “[i]n all cases, the Chamber may change the legal characterisation of the crime adopted by the Trial Chamber. However, it shall not introduce new constitutive elements that were not submitted to the Trial Chamber.”

IV. SUBMISSIONS

i. The Law Governing Recharacterisation

a. The SCC has the power to change the legal characterisation of the crime

11. Rule 110(2) falls within Rule 110, which is headed: “Effects of the Appeal”. Rule 110(2) by its terms plainly gives the SCC power to recharacterise a crime at the appeal stage. It reflects Article 401 of the Cambodian Code of Criminal Procedure, which is in substantially similar terms: “The Court of Appeal may alter the legal qualification of

¹³ E313 Judgment, paras 942 (Nuon Chea) and 1054 (Khieu Samphan).

¹⁴ **Nuon Chea: E313/1/1** Notice of Appeal against the Judgment in Case 002/01, 29 September 2014; **Khieu Samphan: E313/2/1** Declaration d’appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01, 29 September 2014.

¹⁵ **Nuon Chea: F16** Nuon Chea’s Appeal against the Judgment in Case 002/01, 29 December 2014 (“NC Appeal Brief”); **Khieu Samphan: F17** Mr Khieu Samphân’s Defence Appeal Brief against the Judgment in Case 002/01, 29 December 2014 (“KS Appeal Brief”).

¹⁶ F30 Scheduling Order, p. 5.

¹⁷ F30 Scheduling Order, p. 5.

¹⁸ Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Revision 9, 16 January 2015 (“Internal Rules”).

the facts adopted by the Court of First Instance, but may not add any new element that was not submitted to the Court of First Instance to decide upon.” It also reflects French law.¹⁹

b. Principles governing recharacterisation

12. In exercising its Rule 110(2) power, the SCC can draw guidance from principles concerning the recharacterisation of offences and modes of liability which emerge from the jurisprudence of the European Court of Human Rights (“ECtHR”) and the International Criminal Court (“ICC”). As discussed further below, the ECtHR has found recharacterisation of an offence or a mode of liability at the final appeal stage to be compatible with the European Convention on Human Rights and Fundamental Freedoms (“European Convention”) provided the accused has had a reasonable opportunity to present a defence to the recharacterised crime or mode of liability.
13. These principles governing recharacterisation include:
 - a. The fairness of proceedings must be assessed with regard to the proceedings as a whole, including the appeal procedures.²⁰
 - b. The defendant has the right to be informed in detail not only of the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts.²¹ The provision of full, detailed information concerning the charges, and the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.²²

¹⁹ In France, the principle according to which criminal judges may recharacterize the facts of which they are seized equally applies to appeal courts, on condition that the accused be able to defend himself on the envisaged recharacterization. See *Code de Procédure Pénale*, 54th edition, 2013, p. 865, commentary on article 512 of the Code, citing Crim. 3 mars 2004: Bull. Crim. No. 56; D. 2004. IR 1213; JCP 2004. IV. 1967; Dr Pénal 2004. Comm. 138, obs. Maron.

²⁰ *Dallos v. Hungary*, no. 29082/95, Judgment, 1 March 2001 (“*Dallos*”), para. 47, citing *Miallue v. France* (no. 2), judgment of 26 September 1996, Reports 1996-IV, p. 1338, §43, and *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, pp. 13-14, § 38. *Sipavičius v. Lithuania*, no. 49093/99, Judgment, 10 July 2002 (“*Sipavičius*”), para. 30. The ICC Appeals Chamber has noted that ECtHR jurisprudence demonstrates that “changes to the legal characterisation of facts may be addressed at late stages of the proceedings, including at the appeals stage, or in review proceedings before the highest domestic courts, without necessarily causing unfairness.” See ICC, *Prosecutor v. Germain Katanga*, Judgment on the Appeal of Mr Germain Katanga Against the Decision of Trial Chamber II of 21 November 2012 Entitled “Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons”, ICC-01/04-01/07 OA 13, 27 March 2013 (“*Katanga* Recharacterisation Appeal Judgement”) para. 93.

²¹ *Pélissier and Sassi v. France*, no. 25444/94, Judgment, 25 March 1999 (“*Pélissier*”), para. 51. *Dallos*, para. 47. *Sipavičius*, para. 27.

²² *Dallos*, para. 47. *Sipavičius*, para. 28.

- c. The right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence.²³
- d. The Chamber should consider whether the defence to the recharacterised offence or mode of liability would have been different from the defence to the charged offence.²⁴
- e. The Chamber should consider whether the recharacterised offence or mode of liability contains an element intrinsic to the initial accusation known to the applicants.²⁵
- f. Where the recharacterised offence or mode of liability includes a new element, the Chamber should consider whether the accused been given the opportunity to present a defence to that new element in a practical and effective manner, and in good time.²⁶
- g. Notice of a legal recharacterisation at a late stage of the proceedings does not, in and of itself, violate the right to a fair trial.²⁷
- h. Where an accused is convicted at the appeal stage of a crime which is different in material elements to the crime with which he was charged, the accused must have been provided with a fair opportunity to present a defence in respect of those additional elements. In *Dallos*, the ECtHR upheld conviction on an offence recharacterised at the appellate stage because the accused "had the opportunity to advance before the Supreme Court [of Hungary] his defence in respect of the reformulated charge."²⁸ The Court held that, assessing the fairness of the proceedings as a whole, any defects in the proceedings before the lower court were cured before the Supreme Court of Hungary. In *Sipavičius*, the Court held that the applicant had the chance to advance before the Court of Appeal and the Supreme Court of Lithuania his defence in respect of the reformulated charge. In both *Dallos* and *Sipavičius*, the Court held that there had been no violation of the European Convention.

²³ *Pélissier*, para. 51. *Sipavičius*, para. 28.

²⁴ *Pélissier*, para. 60.

²⁵ *Pélissier* para. 61: "In the light of the foregoing, the Court also finds that aiding and abetting did not constitute an element intrinsic to the initial accusation known to the applicants from the beginning of the proceedings".

²⁶ *Block v. Hungary*, no. 56282/09, Judgment, 25 January 2011, para. 24. *Pélissier*, para. 62. *Drassich v. Italy*, no. 25575/04, Judgment, 11 December 2007, paras 34, 40. This is also reflected in Regulation 55(2) of the Regulations of the ICC: "The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change." Regulation 55(3) requires the Chamber to ensure that the accused has 'adequate time and facilities for the effective preparation of his or her defence', including if necessary the chance to recall witnesses and to present other evidence. See also *Katanga Recharacterisation Appeal Judgement*, para. 95: "Such consideration could include an assessment by the Trial Chamber of whether Mr Katanga has, in fact, been prejudiced by a re-characterisation made at this stage, including in particular whether he has been deprived of mounting the defence in relation to article 25 (3) (d) of the [ICC] Statute that he otherwise would have wished to present."

²⁷ *Katanga Recharacterisation Appeal Judgement*, para. 94.

²⁸ *Dallos*, para. 52.

c. Recharacterisation of JCE Convictions

14. The SCC's Order refers to the possibility of recharacterisation by the SCC "to such mode of liability as the SCC deems appropriate".²⁹ The SCC has discretion under Rule 110 to recharacterise the JCE convictions entered by the Trial Chamber and to enter convictions for those crimes under any other mode of responsibility.
15. In the *Duch* Appeal Judgement, the SCC referred to its Rule 110(2) power. This arose in the context of determining "whether the Trial Chamber erred in its conclusion that cumulative convictions for persecution and other underlying crimes against humanity are impermissible".³⁰ The Trial Chamber had made the findings necessary for convictions for the crimes against humanity of murder, extermination, enslavement, imprisonment, torture and other inhumane acts, but entered only a conviction for the crime against humanity of persecution. The SCC overturned the Trial Chamber's decision to subsume the individual crimes under persecution.³¹ The SCC entered, in addition to the Accused's conviction for persecution, separate convictions for each of the underlying crimes against humanity.³² In a footnote, the Appeals Chamber noted "that entering formal convictions here is in accordance with Internal Rule 110(2) and Article 401 of the 2007 Code of Criminal Procedure whereby a court of appeal may change the legal characterization of crimes without introducing new constitutive elements that were not submitted to the Trial Chamber".³³
16. In the present case, the Trial Chamber found in the Judgment that the Accused's participation in the JCE encompassed all the conduct forming the basis of the Chamber's findings on the other forms of responsibility, and so the Chamber entered a conviction for commission of these crimes only through a JCE.³⁴ The SCC has discretion to recharacterise pursuant to Rule 110 the JCE convictions and to enter convictions under other modes of responsibility.

²⁹ F30 Scheduling Order, p. 5.

³⁰ Case 001-F28 Appeal Judgement, 3 February 2012, ("Duch Appeal Judgment"), para. 88.

³¹ The SCC said that "subsuming all of the other crimes against humanity for which the Accused was found responsible within a sole conviction for persecution instead of reaching cumulative convictions fails to sufficiently address the injury to each individual societal interest represented by proscriptions constituting different crimes against humanity." Case 001-F28 Duch Appeal Judgment, para. 331.

³² Case 001-F28 Duch Appeal Judgment, para. 336.

³³ Case 001-F28 Duch Appeal Judgment, fn. 735.

³⁴ Nuon Chea: E313 Judgment, para. 940; Khieu Samphan: E313 Judgment, para. 1053.

ii. *Application of the Principles Governing Recharacterisation to the Additional Crimes*

17. Applying the principles above to the present case (and as submitted in greater detail below), it is relevant for the SCC to consider that both Accused:

- a. were provided with full, detailed information that they could be convicted under the mode of liability of JCE in respect of all crimes charged in Case 002/01 from the earliest stage of the proceedings;
- b. made extensive submissions during the trial and appeal proceedings in respect of the mode of liability of JCE and the legal and factual elements of the crimes;
- c. were given a fair opportunity during trial to advance a defence to JCE liability in respect of all crimes charged in a practical and effective manner, and in good time;
- d. did in fact conduct their defences during trial on the basis that they had been charged with JCE liability in respect of all crimes charged, including the Additional Crimes, or defended themselves in respect of JCE liability in a way which was generally applicable to all underlying offences;
- e. were notified (through the Scheduling Order) that the Chamber may consider changing the legal characterisation of the crime to such mode of liability as it deems appropriate, potentially including JCE liability for all crimes for which their conviction may be confirmed, and were provided with an opportunity to make submissions on this potential recharacterisation.³⁵

a. The Trial Chamber entered detailed findings concerning the existence of a JCE and the participation of the Accused in that JCE

18. The concerns which underlie the ECtHR jurisprudence in respect of entering a conviction on appeal on a mode of liability which is materially different from the mode of liability on which the Accused conducted their defence³⁶ do not apply here.
19. In order to convict the Accused of the Additional Crimes based on their participation in a JCE (basic form or JCE I), the SCC must find that there existed a plurality of

³⁵ F30 Scheduling Order, p. 5.

³⁶ For example, the ECtHR found a violation of Article 6 where an accused was convicted at the appeal stage – with no notice of recharacterisation – for attempted fraud but had been charged with attempted bribe-taking. The ECtHR said that these crimes had “significant differences in their objective and subjective elements”: *Seliverstov v. Russia*, no. 19692/02, Judgment, 25 December 2008 (“*Seliverstov*”), para. 19.

persons;³⁷ a common purpose which amounts to or involves the commission of the Additional Crimes;³⁸ and that the Accused participated in the common purpose, and made a significant contribution.³⁹ The Accused's contribution need not be criminal but must have advanced the common purpose (not necessarily the specific crime at issue).⁴⁰ Participants in a JCE can incur liability for crimes committed by direct perpetrators who were not JCE members, provided that it can be established that the crimes can be imputed to at least one JCE member.⁴¹ As to *mens rea*, the Accused must have intended to participate in the common purpose and this intent must be shared with the other JCE participants.⁴²

20. The Trial Chamber made detailed findings on these JCE elements. The Trial Chamber entered findings that, throughout the time period relevant to Case 002/01, there existed a plurality of persons who shared a common purpose to implement rapid socialist revolution through a "great leap forward" and to defend the Party against internal and external enemies, by whatever means necessary, and that the participants included Nuon Chea and Khieu Samphan.⁴³ The Trial Chamber also found that there was a JCE to achieve the common purpose through, amongst other means, policies to forcibly displace people from cities and towns and between rural areas.⁴⁴ It found that the crimes committed in the course of Population Movements (Phases I and II) were carried out in furtherance of the Party's plans and policies.⁴⁵ The Trial Chamber found that the crimes committed during Population Movements (Phases I and II) can be imputed to participants in the JCE.⁴⁶ The Trial Chamber also found that there was a JCE to achieve the common purpose through, amongst other means, a policy to target former Khmer

³⁷ E313 Judgment, para. 692 citing Case 001-E188 Judgment, 26 July 2010 ("Duch Trial Judgment"), para. 508; *Prosecutor v. Krajišnik*, IT-00-39-A, Appeals Chamber, Judgment, 17 March 2009 ("*Krajišnik* Appeal Judgment"), para. 156. *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999 ("*Tadić* Appeal Judgment"), para. 227.

³⁸ E313 Judgment, para. 692 citing Case 001-E188 Duch Trial Judgment, para. 508; *Tadić* Appeal Judgment, para. 227.

³⁹ E313 Judgment, para. 692 citing Case 001-E188 Duch Trial Judgment, para. 508; *Prosecutor v. Brđanin*, IT-99-36-A, Appeals Chamber, Judgment, 2 April 2007, para. 430. See also *Tadić* Appeal Judgment, para. 227.

⁴⁰ E313 Judgment, para. 693, citing *Prosecutor v. Vasiljević*, IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para. 100. See also *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 229.

⁴¹ E313 Judgment, para. 693, citing *Krajišnik* Appeal Judgment, para. 225.

⁴² E313 Judgment, para. 694 citing Case 001-E188 Duch Trial Judgment, para. 509; *Prosecutor v. Kvočka et al*, IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, paras 82, 118.

⁴³ E313 Judgment, para. 777.

⁴⁴ E313 Judgment, paras 786, 804-805.

⁴⁵ E313 Judgment, paras 804-805.

⁴⁶ E313 Judgment, paras 806-810.

Republic officials.⁴⁷ It found that the murders and extermination committed at Tuol Po Chrey were carried out in furtherance of Party plans and policies, and that these crimes can be imputed to at least one member of the JCE.⁴⁸ The Chamber found that Nuon Chea and Khieu Samphan made a significant contribution to the realisation of the common plan and that they intended to further the implementation of the common purpose through their actions.⁴⁹

b. The Accused were on notice that they were charged with the Additional Crimes pursuant to a JCE

21. In the Closing Order, the Co-Investigating Judges (“CIJs”) charged the Accused with *all* crimes relevant to Case 002/01 on the basis of a JCE.
22. The form of the JCE set out in the Closing Order was reflected in the findings in the Judgment as outlined above. According to the Closing Order, “[t]he common purpose of the CPK leaders was to implement rapid socialist revolution in Cambodia through a ‘great leap forward’ and [to] defend the Party against internal and external enemies, by whatever means necessary.”⁵⁰ Whilst the CIJs concluded that this purpose was itself “not entirely criminal in nature,”⁵¹ they considered that, to achieve this purpose, the CPK leaders designed and implemented five policies,⁵² whose implementation “resulted in and/or involved” the commission of a range of crimes against humanity, grave breaches of the Geneva Convention, and genocide.⁵³ The crimes charged in the Closing Order pursuant to these five policies taken collectively include *all* crimes relevant to Case 002/01.⁵⁴ Indeed, the Closing Order specifically states that Nuon Chea and Khieu Samphan committed all the crimes listed in the Closing Order through their

⁴⁷ E313 Judgment, para. 835.

⁴⁸ E313 Judgment, paras 835-836.

⁴⁹ E313 Judgment, paras 861-877 and 960-996.

⁵⁰ D427 Closing Order, paras 156, 1524.

⁵¹ D427 Closing Order, para. 1524.

⁵² D427 Closing Order, paras 157, 1525. The five policies are (i) Repeated movements of the population from towns and cities to rural areas, as well as from one rural area to another (“Population Movement Policy”); (ii) Establishment and operation of co-operatives and worksites; (iii) Re-education of “bad elements” and killing of “enemies”, both inside and outside the Party ranks (“Re-education and Killing of Enemies Policy”); (iv) Targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families (“Targeting Policy”); (v) Regulation of marriage.

⁵³ D427 Closing Order, para. 1525.

⁵⁴ D427 Closing Order, para. 1525. The crimes relevant to Case 002/01: extermination, murder, political persecution, inhumane acts through forced transfer, enforced disappearances and attacks against human dignity, were all charged based on JCE.

membership in the JCE and their contribution to the common purpose, and shared with other members of the JCE the intent that all of the crimes charged would be committed as part of that common purpose.⁵⁵ More specifically, it is clear that in relation to the Population Movements (Phases I and II) and events at Tuol Po Chrey, the Closing Order charged the Accused with all these crimes, *including the Additional Crimes*, based upon JCE.⁵⁶

23. When the Trial Chamber severed Case 002, bringing only the Population Movements (Phases I and II) and, later, Tuol Po Chrey within the scope of Case 002/01, it directed the parties that only two of the five policies - the Population Movement Policy and the Targeting Policy - fell within the scope of Case 002/01. By way of further restriction, it appears that the Population Movement Policy applied only in respect of the Population Movements (Phases I and II only)) and the Targeting Policy applied only in respect of Tuol Po Chrey.⁵⁷ It now appears—following the Judgment—that when the Trial Chamber

⁵⁵ **D427** Closing Order, para. 1540.

⁵⁶ **Population Movements (Phases I and II):** Pursuant to **D427** Closing Order, para. 1525, through the implementation of the Population Movement Policy, the Accused were charged with murder, political persecution and other inhumane acts through attacks against human dignity and forced transfer. **D427** Closing Order, para. 209 explicitly linked the commission of a number of crimes during the population movement Phases One and Two to the implementation of the Targeting Policy, which, according to the Closing Order “resulted in and/or involved” the commission of the crimes against humanity of (i) *extermination* and (ii) other inhumane acts through *enforced disappearances*. **D427** Closing Order, paras 1381-1383, 1387-1390 confirmed that exterminations perpetrated during Populations Movements (Phases I and II) were “an integral part of the means used to achieve the common purpose of eliminating ‘enemies’. [...] [T]hey were decided upon and coordinated by the CPK leaders within the framework of the common purpose.” **D427** Closing Order, paras 1470-1478 confirmed that other inhumane acts through enforced disappearances perpetrated during Population Movement (Phase II) “formed an integral part of the means used to achieve the common purpose aimed at the elimination of “enemies”. [...] [T]hey were decided and co-ordinated by the CPK leadership within the framework of a common purpose.” **Tuol Po Chrey:** **D427** Closing Order, para. 178 explicitly linked the Tuol Po Chrey executions to the Re-education and Killing of Enemies Policy, the implementation of which, according to Closing Order, para. 1525, “resulted in and/or involved” the commission of all the crimes occurring at Tuol Po Chrey: *extermination, murder and political persecution*. **D427** Closing Order, paras 1416-1417, 1424-1425 established that political persecution at Tuol Po Chrey “was an integral part of the means used to achieve the common purpose of eliminating enemies, in that it was among the measures directed against specific groups. [...] [T]hese crimes were decided upon and coordinated by the CPK leaders in the framework of the common purpose.”

⁵⁷ See **E313** Judgment, paras 780-781 (confirming that the Trial Chamber would consider the Accused’s responsibility for crimes committed through the JCE during the Population Movements (Phases I and II) only with regard to the implementation of the Population Movement Policy, not the Targeting Policy, which applies only to crimes at Tuol Po Chrey) and 813 (confirming that, despite the connection made in the Closing Order between Tuol Po Chrey and the Re-education and Killing of Enemies Policy, the Trial Chamber would consider whether murder and extermination occurred at Tuol Po Chrey pursuant to the Targeting Policy). In **E313** Judgment, fns 2472, 2562, the Trial Chamber cites **E124/7.3** Annex, 8 October 2012. See in that regard, **E124/7.3** Annex, 8 October 2012, Section 1: “Policy as implemented – movement of the population (160-165) (all limited to population movement phases one and two) and treatment of targeted groups (205-209) (all limited to the targeting of former officials of the Khmer Republic at Tuol Po Chrey)” and Section 5: “5. Modes of responsibility (a) Joint Criminal Enterprise 1521-1525 (exclude 1525(ii) and (iii), Grave Breaches (iv) and (v)).”

applied this restriction to paragraph 1525 of the Closing Order, they considered that it placed some crimes, i.e. the Additional Crimes, outside the scope of the JCE for the purposes of Case 002/01.⁵⁸

24. However, it is also clear for a number of reasons that the Accused remained on notice at the time (and, as outlined below, acted in a manner consistent with such notice) that they could be convicted of the Additional Crimes based on JCE. First, reading Sections 4 and 5 of the Annex as a whole,⁵⁹ suggests that the Accused remained charged with *all* Case 002/01 crimes, including the Additional Crimes, pursuant to the JCE. Considering the fact that *all* the crimes relevant to the Population Movements (Phases I and II) and Tuol Po Chrey had been charged pursuant to a JCE in the Closing Order and remained charged based on the other modes of responsibility, this was a reasonable interpretation of the Annex. At no time, in decisions or the Annex, did the Trial Chamber explicitly state that JCE did not apply to the Additional Crimes.
25. Secondly, as noted above, in light of the clear link made by the CIJs between Tuol Po Chrey and the Re-education and Killing of Enemies Policy, it appears that the Trial Chamber unnecessarily restricted consideration of the killings at Tuol Po Chrey to the Targeting Policy upon severance of Case 002/01. Had it included the Re-education and Killing of Enemies Policy within the scope of Case 002/01, the Trial Chamber would have considered the Accused charged with extermination, murder *and political persecution* pursuant to the JCE, just as they were under the other modes of responsibility. Similarly, as outlined above, the restrictions imposed by the Trial Chamber at the severance stage overlooked the link made in the Closing Order between the Population Movements (Phases I and II) and the Targeting Policy.⁶⁰

⁵⁸ See **E313** Judgment, paras 779-781, 811-813, 838, 943.

⁵⁹ According to **E124/7.3** Annex, Section 4, the “Relevant underlying offences” include the Additional Crimes. See “(ii) Extermination (1381, 1387-1389 (limited to *population movement phases one and two* and Tuol Po Chrey)) (iii) Political persecution (1415-1418, 1423-1425 (limited to population movement phases one and two and *Tuol Po Chrey*)) ... (vi) Enforced Disappearances (1470-1478 (limited to *population movement phase two*))” (emphasis added). Moreover, Section 5(a) does not explain that the Targeting Policy does not apply to the Population Movements (Phases I and II).

⁶⁰ The Co-Prosecutors note in that regard **E313** Judgment, para. 813, in which the Trial Chamber noted that it was not bound by the CIJs factual analysis in the Closing Order which explicitly links a specific JCE policy to the relevant charged crimes, *citing* **F28** Duch Appeal Judgment, paras 128, 163.

26. Moreover, there is a factual overlap between the policies, which a narrow interpretation of the restrictions imposed by the Trial Chamber overlooks.⁶¹ Indeed, it was clear from decisions made by the Trial Chamber that all five policies remained relevant and that the parties were permitted to lead evidence in relation to all of them.⁶² As the Trial Chamber explained: “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).”⁶³ (At the time of this Response, the Trial Chamber had not yet added Tuol Po Chrey to the scope of Case 002/01). As the crimes of extermination and enforced disappearances were part of the implementation of policies which pertained to the forced movement of the population, it would have been reasonable for the parties to believe that, regardless of the Trial Chamber’s severance decisions generally limiting the scope of Case 002/01 to only two of the five policies, the Closing Order’s allegation that all of the crimes charged were part of the JCE remained in effect and that this mode of responsibility applied to the Additional Crimes.

**c. The Accused would not be unfairly prejudiced by the proposed
recharacterisation**

27. From the submissions made by both Accused after the Trial Chamber had severed Case 002, it is apparent that each either still believed that he had been charged with all Case 002/01 crimes, including the Additional Crimes, pursuant to JCE, or at the very least conducted a defence to the JCE charges that was applicable irrespective of the underlying crimes charged.

⁶¹ As the Trial Chamber itself pointed out in the Judgment, “both the Targeting Policy and the [Re-education and Killing of Enemies Policy] [...] had a common purpose which was either to “eliminate enemies” or “the killing of enemies”. See **E313** Judgment, para. 813.

⁶² See e.g. **E141** 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 (“TC Response to Issues Raised by Parties”), p. 2. See **E313** Judgment, fn. 287.

⁶³ **E141** TC Response to Issues Raised by Parties, p. 2. The Trial Chamber’s confirmation that “the inclusion within the scope of Case 002/01 of the alleged population movement and executions committed at Tuol Po Chrey, and associated crimes against humanity, enable examination of two of the five main *themes* of the Case 002 Closing Order, i.e. forced movement and execution of purported enemies of the regime [...] and enable the Co-Prosecutors to place these offences within the broader context of the joint criminal enterprise in which all Accused are alleged to have participated” is also consistent with this view. See **E284** Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013, para. 118 (emphasis added).

Nuon Chea

28. In the section of his Applicable Law Brief dealing with JCE, Nuon Chea expressly stated that, whilst he was aware that “only two of the[] five ‘policies’ come[] within the scope of Case 002/01, namely, the policies of forced population movement and the treatment of targeted groups”,⁶⁴ he considered himself “charged with (i) murder; (ii) extermination; (iii) persecution on political grounds; and (iv) other inhumane acts through attacks against human dignity, forced transfer and enforced disappearance” in respect of these policies.⁶⁵ It is clear from the citation that this statement encompasses the Additional Crimes.⁶⁶ This position is repeated in his Trial Brief, in which Nuon Chea made numerous assertions consistent with the belief that he was charged, pursuant to a JCE, with the Additional Crimes.⁶⁷

⁶⁴ **E163/5/11** NC Applicable Law Brief, para. 31 *citing* **E124/7.3** Annex, 8 October 2012, ERN: 00852356-00852358, p. 3 (Section 5(a)).

⁶⁵ **E163/5/11** NC Applicable Law Brief, para. 31 *citing* **E124/7.3** Annex, 8 October 2012, ERN: 00852356-00852358, p. 2 (Section 4).

⁶⁶ Section 4 referred to by Nuon Chea states, in relevant part, “(ii) Extermination (1381, 1387-1389 (limited to *population movement phases one and two* and *Tuol Po Chrey*)) (iii) Political persecution (1415-1418, 1423-1425 (limited to *population movement phases one and two* and *Tuol Po Chrey*)) ... (vi) Enforced Disappearances (1470-1478 (limited to *population movement phase two*))” (emphasis added). Moreover, reference to enforced disappearances, which are charged pursuant to the JCE only in relation to Population Movement (Phase II), makes clear that Nuon Chea considered himself charged with the Additional Crimes.

⁶⁷ **Population Movement (Phase I): Extermination: E295/6/3** Nuon Chea Trial Brief, Heading V.G.ii, para. 310 (“*ii – Nuon Chea is not criminally responsible through participation in a JCE* 310. Nuon Chea did not agree to the material elements of [...] extermination [...]. Nuon Chea did not have the requisite intent in relation to ... extermination. Accordingly, he may not be found guilty through participation in a joint criminal enterprise for any such crime which the Chamber determines took place in the course of the evacuation of Phnom Penh.”); **Population Movement (Phase II): (i) Extermination: E295/6/3** Nuon Chea Trial Brief, Heading VI.A.iii, para. 332 (“*iii – No agreement, plan, order or instigation to exterminate* 332. The Co-Prosecutors have presented no evidence that Nuon Chea participated in a common purpose ... to inflict conditions of life calculated to bring about the death of a large number of people. As already noted, there is no direct evidence that the Standing Committee even agreed ... to initiate the alleged population movement itself. Finally, there is no evidence of any kind of the Committee intent in relation to the conditions of the transfer, and still less, the large-scale death of the alleged evacuees”). See also **E1/233.1** Nuon Chea Closing Statements, T. 24 October 2013, p. 90 (“With no direct evidence to establish mass death in connection with the second population movement, it is impossible to conclude that such a crime occurred, let alone find that any policy or intent on behalf of the CPK existed to exterminate mass numbers of evacuees”); 91 (With reference to extermination during the second population movement, “With no evidence presented that Nuon Chea or the Standing Committee participated in a common purpose, designed any plan, issued any order or instigated any person to inflict conditions of life calculated to bring about the death of a large number of people, Nuon Chea must be found not guilty of this charge.”); **(ii) Enforced Disappearances: E295/6/3** Nuon Chea Trial Brief, para. 358 (with heading) (“*iii – No agreement, plan, order, instigation or encouragement* 358. [...] there is no evidence of the material elements of Nuon Chea’s individual responsibility for enforced disappearance through any form of commission. No direct evidence exists of a directive or agreement emanating from the Party center, nor is there any evidence of a pattern of conduct probative of such a policy.”). See also **E1/233.1** Nuon Chea Closing Statements, T. 24 October 2013, p. 100 (“there is no evidence of the material elements of Nuon Chea’s responsibility for enforced disappearance through any form of commission”); **Tuol Po Chrey: Political Persecution: E295/6/3** Nuon Chea Trial Brief, Headings VII C., VII C. ii. and

29. Moreover, some JCE arguments put forth by Nuon Chea were generally applicable to all crimes. For example, Nuon Chea argued in the context of Population Movement (Phase I) that he did not “participate[] in a joint criminal enterprise with [...] the perpetrators of these crimes because [...] they were either independent actors, or were under the command of zone leaders beyond Nuon Chea’s control”.⁶⁸ He made similar arguments with respect to both the Population Movement (Phase II)⁶⁹ and Tuol Po Chrey.⁷⁰
30. In any event, Nuon Chea defended every material element of JCE in respect of each of these Additional Crimes. With respect to each, he made submissions with regard to the applicable law of each underlying crime,⁷¹ and challenged the factual crime base.⁷² Specifically with regard to JCE liability in respect of these Additional Crimes, he argued that he was party to no agreement, plan or common purpose to commit any of these crimes,⁷³ and that he did not intend these crimes.⁷⁴

Khieu Samphan

31. Having been afforded the opportunity to present a defence to the application of JCE liability, Khieu Samphan conducted a defence which did not distinguish between the underlying crimes charged. As such, that defence was not dependent upon whether he

paras 416-417 (“C. Nuon Chea is not Guilty of Crimes Alleged at Tuol Po Chrey by Virtue of His Participation in a Joint Criminal Enterprise [...] ii – Nuon Chea did not agree to execute Lon Nol soldiers or officials [...] 416. [...] These facts alone are sufficient to acquit Nuon Chea of responsibility through participation in a joint criminal enterprise for the crimes allegedly committed at Tuol Po Chrey. [...] 417. [...] No evidence exists that persecution, still less execution, of Lon Nol officials, was discussed.”)

⁶⁸ E295/6/3 Nuon Chea Trial Brief, para. 305. For the full articulation of this argument, see E295/6/3 Nuon Chea Trial Brief, paras 306-309, 311-312.

⁶⁹ E295/6/3 Nuon Chea Trial Brief, paras 318-319.

⁷⁰ E295/6/3 Nuon Chea Trial Brief, paras 403, 407, 413.

⁷¹ **Extermination:** E295/6/3 Nuon Chea Trial Brief, paras 215-219; **Enforced Disappearances:** E295/6/3 Nuon Chea Trial Brief, paras 227-229; **Political Persecution:** E295/6/3 Nuon Chea Trial Brief, paras 220-226.

⁷² **Population Movement (Phase I): Extermination:** E295/6/3 Nuon Chea Trial Brief, paras 234, 259-268; **Population Movement (Phase II): (i) Extermination:** E295/6/3 Nuon Chea Trial Brief, paras 321-328; **(ii) Enforced Disappearances:** E295/6/3 Nuon Chea Trial Brief, paras 353-356, 359; **Tuol Po Chrey: Political Persecution:** E295/6/3 Nuon Chea Trial Brief, paras 422-426.

⁷³ See *supra*, fn 67.

⁷⁴ **Population Movement (Phase I): Extermination:** E295/6/3 Nuon Chea Trial Brief, paras 234, 262-268; **Population Movement (Phase II): (i) Extermination:** E295/6/3 Nuon Chea Trial Brief, paras 328-331; **(ii) Enforced Disappearances:** E295/6/3 Nuon Chea Trial Brief, para. 357; **Tuol Po Chrey: Political Persecution:** E295/6/3 Nuon Chea Trial Brief, paras 414, 417, 442. See also E1/232.I Nuon Chea Closing Statements, T. 22 October 2013, p. 38 (“With regard to Tuol Po Chrey, Heng Samrin is the only known witness in possession of direct evidence of our client’s intent in regard to the treatment of Lon Nol soldiers and officials [...] he told Ben Kiernan that our client specifically instructed cadres not to kill former Khmer Republic soldiers and officials”).

had been charged with the Additional Crimes based on JCE. Khieu Samphan denied any participation in any crimes and contested the allegations *en masse*, focusing on his lack of any decision-making power. In written submissions which expressly address JCE liability, Khieu Samphan argued at trial that:

- a. he did not have any real power within the DK bodies to make any decision regarding population movements or criminal measures against former Khmer Republic officials and did not contribute to the criminal conduct of local cadres.⁷⁵
- b. his presence in meetings was merely passive and was never connected to a criminal enterprise.⁷⁶
- c. failure to prevent or punish a crime does not engage responsibility under JCE.⁷⁷
- d. he did not possess the requisite criminal intent for the purposes of JCE since intellectual support for the “ultimate goal” does not suffice.⁷⁸ Only significant contribution to the means used to secure the “ultimate goal”, which he asserted had not been demonstrated,⁷⁹ would satisfy the legal requirements of JCE.
- e. nothing in his behaviour or role, as described by witnesses, permits the conclusion that he was aware of crimes being committed or that he intended to encourage the

⁷⁵ **E295/6/4** KS Trial Brief, para. 316: «KHIEU Samphân n’était pas en position de pouvoir réel au sein des organes du KD qui ont pris la décision des déplacements de population ou de prétendues mesures criminelles à l’encontre des ex-RK. Ses fonctions au sein du KD n’ont pas non plus contribué aux agissements criminels des cadres locaux dans les régions à l’arrivée des déplacés. »

⁷⁶ **E295/6/4** KS Trial Brief, para. 317: «Par ailleurs, les documents relatifs aux réunions auxquelles il aurait assisté démontrent que sa présence y était passive et toujours en lien avec des rôles sans rapport avec un projet criminel.»

⁷⁷ **E295/6/4** KS Trial Brief, para. 313: «Il est également important de préciser que le fait de ne pas empêcher ou punir un crime ne permet pas d’engager la responsabilité d’un accusé au titre de l’ECC» (*Le Procureur c. Mpambara*, Affaire. No. ICTR-01-65-T, Jugement, 12 septembre 2006, para. 39)

⁷⁸ **E295/6/4** KS Trial Brief, para. 313: «Or, comme la Défense l’a développé dans le cadre de son mémoire sur le droit applicable et conformément à la jurisprudence internationale: "(...) *il existe clairement une distinction entre « l’objectif ultime » et le but criminel commun à proprement parler. Ce n’est pas l’adhésion intellectuelle au but ultime qui permet de déduire l’intention criminelle du participant à l’ECC mais une participation significative aux moyens criminels utilisés pour y parvenir*" » «Dans le cadre, du procès 002/01, il n’a pas été prouvé en quoi KHIEU Samphân aurait participé de façon significative aux moyens criminels utilisés dans le cadre de la politique des déplacements de la population et en quoi KHIEU Samphân aurait participé de façon significative aux événements de Tuol Po Chrey.»

⁷⁹ Specifically, with regard to the Population Movements, Khieu Samphan argued that his speeches regarding forced displacements discussed only economic policy and that his activities in relation to commerce and distribution of basic supplies demonstrate his wish to help the population rather than his contribution to crimes. See **E295/6/4** KS Trial Brief, para. 313: «Sur les déplacements de population, les discours qu’il aurait prononcés comme Vice-Premier ministre ou président du Présidium évoquent uniquement la politique économique socialiste prônée par les KR. Par ailleurs, ses activités en relation avec le commerce et dans le cadre de la distribution de matériel dans les zones, loin de démontrer une contribution aux crimes, manifestent au contraire une volonté d’assistance à la population.» With regard to Tuol Po Chrey, Khieu Samphan simply argued that nothing connected him to the site - neither his duties in April 1975, nor his speeches made in wartime. See **E295/6/4** KS Trial Brief, para. 314: «Sur les événements de Tuol Po Chrey, rien ne permet de relier KHIEU Samphân au site de Tuol Po Chrey, ni dans le cadre de ses fonctions en avril 1975, ni dans les discours préalables prononcés en temps de guerre.»

commission of crimes during the Population Movements (Phases I and II) or at Tuol Po Chrey.⁸⁰

32. Having been charged with the commission of other crimes through participation in a JCE, as well as each of the Additional Crimes under other modes of responsibility, Khieu Samphan had the opportunity to, and did, present submissions regarding the applicable law and factual crime base of the underlying crimes. He presented submissions on the law pertaining to political persecution and other inhumane acts through enforced disappearances,⁸¹ and the occurrence of executions at Tuol Po Chrey.⁸² In addition, he made extensive submissions regarding his contributions to both Population Movements⁸³ and the policy that led to an attack on former Khmer Republic officials.⁸⁴ In summary, he was afforded every opportunity to defend himself on the mode of responsibility of JCE and the Additional Crimes, and he took that opportunity.

V. CONCLUSION

33. For the reasons set out above, the Co-Prosecutors submit that, provided the SCC is satisfied on the basis of the Trial Chamber's findings or on the evidence before the Chambers that it has been established beyond reasonable doubt that Nuon Chea and Khieu Samphan participated in a JCE in respect of the Additional Crimes, it may pursuant to Rule 110 recharacterise the convictions for the Additional Crimes and enter convictions under JCE against both Accused.

⁸⁰ **E295/6/4** KS Trial Brief, para. 317: «Enfin, rien dans son comportement ni dans son rôle tel qu'il a été décrit par les différents témoins ne permet de conclure qu'il était au courant de la commission de crimes ou avait l'intention d'encourager la commission de crimes à l'encontre de la population, que ce soit lors des 1^{er} et 2^{ème} déplacements ou au moment des faits prétendument commis en avril 1975 à Tuol Po Chrey. »

⁸¹ **Enforced Disappearances: E163/5/9** KS Applicable Law Submissions, paras 4, 29-32; **Political Persecution: E163/5/9** KS Applicable Law Submissions, paras 4, 24-26.

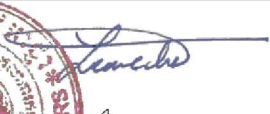
⁸² **E295/6/4** KS Trial Brief, paras 86-93.

⁸³ **Population Movement (Phase I): E295/6/4** KS Trial Brief, paras 287-296; **Population Movement (Phase II): E295/6/4** KS Trial Brief, paras 297-300.

⁸⁴ **E295/6/4** KS Trial Brief, paras 301-306.

34. The Chamber also enjoys the discretion to recharacterise pursuant to Rule 110 the JCE convictions and to enter convictions under other modes of responsibility. Neither recharaterisation would infringe upon the rights of the Accused.

Respectfully submitted,

Date	Name	Place	Signature
6 November 2015	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		